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Eversheds' news
Welcome to the second issue of Instep for the 2015-16 academic year. This issue comes out as government initiatives in relation to schools and colleges are getting into their stride. Shortages of school teachers and the ever increasing need for effective school leaders are constantly making headlines.

We are therefore delighted to have been able to interview the recently appointed Chair of NCTL, Roger Pope, on how NCTL will work with the teaching profession to address these issues. We are grateful to the DfE for making this interview possible.

One feature of good governance that is becoming more prominent, for example in government guidance and inspection reports, is the adequacy of governance information provided on institutions’ websites. We give an overview of the legal and regulatory requirements applicable to academies and colleges.

Further legal issues arise in relation to the disposal of land and buildings by colleges, which is occurring now more often as the result of area based reviews or colleges’ need to realise assets. In this edition we look at the governance problems that may emerge. In a later edition we will focus on the charity law aspects, which can get overlooked.

The mirror image of transparency and freedom of (non-personal) information is the need to respect the privacy of personal information. We consider recent cases on privacy of personal information on members of staff and the extent to which employers can monitor the use of IT by staff members.

I hope you find the magazine interesting and useful. As always we value your comments and suggestions for topics to be covered in future issues.

Diane
An interview with...

Roger Pope, Chair, National College for Teaching and Leadership

Mr Pope, you are the principal of an outstanding secondary academy in a delightful part of the world, the South Hams area of South Devon. What were your reasons for wanting to become Chair of the National College for Teaching and Leadership (NCTL) at a time of substantial change in primary and secondary education?

Being located in a geographically remote area, my school, Kingsbridge Community College, has always wanted to encourage pupils and staff to have high aspirations and broad vision. The school’s leaders have always believed that it is important that we should be involved in the national educational picture. Kingsbridge was one of the first National Teaching Schools and one of the first 30 providers of the NCTL School Leadership Programme. We also run a SCITT (school-centred initial teacher training) so that we can train new teachers. When the opportunity to get involved with the NCTL came up it was therefore too good to miss. I felt it was important for schools in areas like the South Hams to know what was going on elsewhere in the country. That is why Kingsbridge is involved with Challenge Partners, a school improvement network.

Experience shows that when good schools get involved with schools that are under-performing they not only improve those schools but improve themselves as well.

Readers of Instep will be aware that there have been changes in the leadership and management of NCTL but may not be aware of the policy decisions that lie behind those changes, and how the NCTL is now operating. Could you please elucidate?

Historically NCTL merged with the Teaching Agency in 2013. This signalled a new direction, towards a school-led system, moving away from the idea that ‘government knows best’ to the situation where schools have more freedom but also greater accountability. The challenge for NCTL is to identify how it can help schools help improve themselves, with the lead being taken by schools on the ground, for example through the work of Teaching Schools. More recently, my appointment was also a chance to draw breath on how far NCTL has come with its current agenda. Much has been done, around 700 Teaching Schools are now in place and there are more than 1,100 National Leaders of Education. Over half of teacher training schemes are now school-led through SCITTs and School Direct.

I feel it is very encouraging that the Department for Education wanted to appoint a serving school leader as chair of NCTL and that this confirms the government’s commitment to a school-led system of school improvement.
There seems to be considerable disagreement, at least between government and the teaching unions, as to whether there is a recruitment crisis in the teaching profession. To what extent will current recruitment issues drive NCTL’s agenda over the next few years?

Current recruitment difficulties will be high on NCTL’s agenda, although teaching is still a brilliant profession to be in. Despite the much publicised concerns there are 5,000 more teachers in post this year than last year and more are returning to teaching – 17,000 in 2015 compared with 14,000 in 2011. But although there are good signs of health the teaching profession faces challenges. There is a strong demand for teachers of the EBacc subjects (science and modern languages in particular). NCTL is working on those areas, for example there are now tax-free bursaries of £30,000 available for teachers of maths and physics and schemes to encourage teachers to move to areas facing particular recruitment problems. The National Teaching Service will see 1,500 of the country’s top teaching talent go to the schools that need them most by 2020. NCTL is asking schools to consider how they can best work to encourage people into teaching and, if already trained, to return to the profession. For example, those who might be considering a career change can be encouraged to spend time in a school to find out what teaching involves.

At a time of major change in schools, strengthening school leadership would seem to be a priority if schools are to increase their resilience and ability not only to survive but to thrive. How would you respond to the suggestion that able leaders will always be in short supply? And how can you ensure that able heads and senior teachers are employed in the schools most needing improvement?

School leadership is already generally good – Ofsted reports 85% of schools’ leadership and management is at this level and the vacancy rate for heads is only 0.2%. However, further improvement is needed. NCTL believes that people can be helped to become good leaders. The National Professional Qualifications for heads and middle leaders have in the last three years been led by schools. Twenty-seven thousand leaders have been trained and many schools are doing their own succession planning. In relation to helping schools which struggle to recruit able leaders, NCTL has developed its Talented Leaders programme which offers a relocation allowance to able leaders moving to a school needing support, a £50,000 staff development budget for the school and access by the new head to a more experienced mentor. I recently visited a school in Birmingham involved with this programme and found what was happening to be truly inspirational. Our programmes for senior and middle leaders with high potential follow similar strategies. In addition, the National Teaching Service has just announced a pilot programme in the North West and once this has proved itself the programme will be rolled out nationally. The Leadership Targeted Support Fund will also support the piloting of potential solutions to leadership issues – solutions which have been identified by schools themselves. One such issue is diversity in leadership, where we need to see an increase in the proportion of leaders from black and minority ethnic groups and in the proportion of women – the latter make up only 37% of school leaders but 75% of all teachers.

“... around 700 Teaching Schools are now in place and there are more than 1,100 National Leaders of Education...”
How can school leaders and potential leaders best be equipped to run their schools as academies, with the increased freedoms and responsibilities that academy status brings?

We are currently revising the National Professional Qualifications to ensure they keep pace with what leaders need, both in relation to the business side of academies as well as teaching and attainment. For instance, we’re working on a professional qualification in leading a multi-academy trust (MAT). MATs provide opportunities for developing leadership that you wouldn’t have in a standalone school, for example new and aspiring leaders can learn their craft under the supervision and mentoring of the executive head, making a move into leadership less daunting because of the support on hand. In fact, groups of schools provide opportunities for developing teachers at all levels, from their beginnings in the profession right through to middle and ultimately senior management. An example at my own school occurred recently when a new head had to be found at short notice for the Dartmouth Academy, which we sponsor. I was able to arrange for the Kingsbridge Assistant Principal to act on an interim basis and ultimately she was appointed to the permanent post.

A steady stream of members of the teaching profession appear before NCTL’s panels to answer questions concerning fitness to practise. How can teachers’ integrity best be preserved and enhanced at a time when opportunities for teachers to make errors of judgement (for example as a result of misuse of social media) constantly increase?

I would agree that the exposure to social media creates new risks for teachers. However, we all expect teachers to abide by the highest professional standards. Accordingly NCTL seeks to ensure that all teachers know the boundaries of professional behaviour and the risks they run in certain situations and that we police these boundaries rigorously. If a teacher steps over the boundaries we ensure they get a fair hearing and that effective action is taken where appropriate. This is important both for public confidence and for fairness to the vast majority of teachers who respect the rules.

Where would you hope NCTL will be in five years’ time?

I am currently looking at the policies NCTL will be required to implement by 2020 and the operational structure needed to implement those policies. I am privileged to be in a position where I am able to offer policy advice to government Ministers – like everyone else I want to see educational excellence in all parts of the country and schools taking the lead in school improvement. The challenge of the next few years is putting in place the arrangements needed to ensure this happens, embedding capacity to make the system sustainable.

Roger Pope, thank you very much.
Is your website compliant?

Every academy and college is required to publish specific information on its website. The rules come from various sources including legislation, constitutional documents, funding agreements and funding rules. However, academies and colleges may wish to consider broadcasting information that it is not compulsory to publish in the interests of engaging with stakeholders and ensuring transparency. This wider approach could have a very positive effect on the institution and its community.

What information must be published on websites?

Academies

Academy trusts are established as companies limited by guarantee and under company law are required to disclose on their website the academy trust’s registered name, registered address and company number. As an exempt charity it is also required to publish its charitable status on its website.

Education institutions that are set up as companies limited by guarantee will often be exempt from using the word ‘limited’ in their company name. If an education institution does choose not to include the word ‘limited’ in its company name, as most do, then the fact that the institution is a limited company must be displayed on its website. See our Academies briefing Autumn 2015 accessible here: eversheds.com/global/en/what/articles/index.page?ArticleID=en/Education/EDU_Academies_Autumn_15.

Academies are required by their funding agreements and the Academies Financial Handbook to publish various other information on their websites. The Academy’s key constitutional documents - the Memorandum and Articles of Association, a copy of the funding agreement, and the trust’s annual audited accounts - must feature, as well as detailed information regarding the trust’s educational provision and performance.

For example:

- Key stage 2 and 4 results;
- Information about where and how the school’s performance tables can be accessed on the DfE website;
- Curriculum details, including the content and the school’s approach to the curriculum, together with names of phonics or reading schemes used in key stage 1, a list of courses available at key stage 4 and how parents or members of the public can find out more about the curriculum the school is following;
- Information about where and how the school’s most recent Ofsted report can be accessed;
- Details of how the school spends its pupil premium.

Detailed governance information must be published including:-

- the structure and remit of the trust membership, board of trustees, its committees and local governing bodies and the full names of each chair;
- the names and terms of office of all members, trustees and (in the case of multi academy trusts) local governing body members who have served in the last 12 months, together with any relevant business or pecuniary interests and their attendance record at board/committee meetings.
Many of these requirements derive from the Academies Financial Handbook, which is updated annually. Academy trusts need to be aware of the developing requirements as new versions of the Handbook are published (or new versions of the academy funding agreement are adopted).

**Colleges**
Further education colleges and sixth form colleges are required by their Instrument and Articles of Government, funding agreement and funding rules to publish various information on their websites, albeit the list of required disclosures is not quite as long as that for academies. The requirements include:
- Audited financial statements and accounts;
- Complaint handling procedures;
- Policy of attendance at corporation committee meetings by non-members;
- Minutes of committee meetings;
- Information as to where and by what means the most recent Ofsted reports and DfE performance tables can be accessed;
- Their supply-chain fees and charges policy for subcontracting arrangements.

**What additional information could be published on websites?**

**Charity information** - Academies, further education colleges and sixth form colleges are exempt charities. Certain information, such as annual accounts, must be made available to the public in accordance with charity law or Charity Commission regulation.

**Corporate information** – Academies and any other education institutions that are companies are required to make certain information available to the public on request, such as the register of members and the register of directors. Further, copies of colleges’ Instruments and Articles of Government and other rules such as Standing Orders are required to be given to any person who requires a copy and must be available for inspection upon request.

If academies and colleges must make this information available for inspection to the public, why should they not host this information on their websites? Interested parties will profit from the simple and immediate access to this information. Colleges should also consider publishing specific details of their governance arrangements to promote transparency (as academies must publish such information).

**Freedom of information requests** - All public authorities, including academies and state funded colleges, are required by the Freedom of Information Act 2000 (“FOIA”) to maintain a publication scheme. This sets out their commitment to make certain classes of information routinely available to the public. The Information Commissioner’s Office has published definition documents to help public authorities produce their publication schemes. The definition document for colleges is accessible here:


and that for schools is accessible here:


Where the nature of the information is such that an institution cannot reasonably refuse to respond to an FOIA request, it is possible for the institution to discharge its FOIA obligations by making this information available on line by providing a link to the information via its website. This will reduce the administrative burden on institutions, particularly if the same information request is frequently made by multiple individuals.

Eversheds can guide institutions through their detailed publication requirements to ensure they meet their legal and funding obligations. Another tick in the box in an increasingly “tick boxing” approach to educational regulation.

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Rationalisation of college estates – governance considerations

Introduction
Colleges have always had to have a clear estates strategy. However, until fairly recently many colleges were able to focus on new developments and acquisitions. The increasing financial pressures on the FE sector have forced colleges to ensure that they obtain best value from their land and buildings and with the advent of area based reviews and the prospect of an increasing number of mergers and collaborations short of merger the possibility of significant disposals by some colleges is becoming more common. Decisions to dispose of significant parts of college estates are likely to be controversial and so subject to possible legal challenge. This article considers one area of possible legal vulnerability when making decisions to dispose of college estate, namely governance, and suggests ways of minimising the risk of successful challenge. A future article will consider charity law issues.

In this article we will consider four issues:
- obligations to the funding body
- consultation with stakeholders
- authorisation of the disposal
- documentation of the disposal – what documents will need to be drafted and how they should be completed (“executed” in legal language).

The article assumes that the land and buildings belong to the institution and not, for example, to a supporting foundation or trust. If there is such an external body the legal ownership of the land should be checked as the consent of the external body will be needed.
Obligations to the funding body

Since April 2012 there has been no statutory requirement that college corporations obtain the consent of the SFA or EFA to dispose of land or buildings. However, under the SFA financial memorandum and EFA funding agreement corporations are required to manage their property with regard to good practice in the FE sector. Further, the funding bodies will expect to be informed of intended disposals where the land or buildings were acquired or enhanced with the support of funds provided by the funding bodies or their predecessors. This is to ensure that the Exchequer Interest in the land to be disposed of is protected and the funding repaid where appropriate. However, if the public funding was provided many years ago the Exchequer Interest may be written down or written off completely. It is also possible that the funding body may agree to the college retaining disposal proceeds, on the basis that they will be re-invested in more appropriate delivery systems (perhaps digital delivery). However, Peter Lauener has indicated that that would only be the case where it was consistent with the recommendations of an area review. In any event the funding body should be asked to confirm the position.

Consultation with stakeholders

A disposal may be part of a wider proposal to change the operating model of the college, for example by ceasing provision at a particular site and transferring provision elsewhere. BIS expects FE colleges intending to make such changes to undertake consultation with stakeholders in accordance with the guidance in New Challenges, New Chances. This guidance is intended to help colleges reduce the risk of legal challenge, for example on the ground that they have made their decision to dispose of the property unfairly without giving those likely to be affected a say about the proposal. There is now extensive case law as to how public bodies (including colleges in this context) should undertake consultations to ensure they are genuine, not token gestures. Where the disposal of a whole college site is being considered legal advice on the nature of the consultation required should be obtained.
Authorisation of the disposal

While corporations have the power under the Further and Higher Education Act 1992 to dispose of land and property that power must be exercised in the way required by the corporation’s Instrument and Articles of Government, Standing Orders and other relevant rules such as its financial regulations. The usual requirements are:

– the corporation should approve the principles of any major scheme of acquisition, development or disposal of the college estate and associated borrowing, professional appointments etc.

– it should delegate to a named committee or individual members the approval of the details and who should sign the documentation needed to effect the transaction(s)

– minutes of the corporation’s decisions should be taken by the clerk and certified copies made available to those who need them (e.g. a bank or other funder)

Failure to do so may result in the transaction being legally void and ineffective.

Documentation of the disposal

The most common query we receive on our college governance helpline relates to the use of the corporation seal. There seems to be a belief in some colleges that the seal is an archaic device that is no longer needed and that transfers of land can be accomplished by simply signing the transfer documents. This is incorrect and may lead to such transfers not being registered at the Land Registry.

Two issues need to be considered:

– does the transaction need to be effected by deed? This is a matter of land law which the lawyers advising on the transaction should be able to confirm. All transfers of freehold title and leases exceeding three years, whatever the amount of the sale price or rent, need to be effected by use of a deed; a written document signed but not executed with the formalities needed for deeds is not sufficient.

– if so, how does a college corporation execute a deed? College corporations are statutory corporations, not companies, so have to execute deeds by affixing to them their corporation seal. The option of signing them “as a deed” without use of the seal, provided to companies by the Companies Act 2006, is not open to college corporations. Further, the affixation of the seal must be witnessed in the way provided for in the corporation’s Instrument and Articles of Government. In the 2008 Instrument, as modified in 2012, affixation of the seal must be witnessed by the chair, or some other member authorised either generally or specifically for the transaction, plus one other member. It is good practice for the persons who are to witness the affixation of the seal to be identified in the corporation resolution authorising the transaction. The clerk to corporation should have custody of the seal and supervise its use to ensure that the formalities are followed correctly. If they are not the deed will have to be executed again if the validity of the transaction is not to be put in jeopardy.

Conclusion

Properly undertaken a disposal of college land can make a valuable addition to a college’s funds, which may be used to better effect in taking forward its mission. However, major disposals require as careful consideration as major acquisitions if the possibility of challenge by regulators or affected individuals is to be avoided.

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Privacy at work – where do the boundaries lie?

Given the widespread use of information technology in academies and colleges, there are many reasons why institutions may consider it necessary to monitor the use of IT by staff. These will include managing the risk of reputational harm through comments on social media and investigating whether the conduct of staff complies with IT acceptable use policies.

However, there is an inherent tension between the need for employers to conduct monitoring of this kind (and potentially to interfere with employees’ use of these resources) and employees’ rights to ‘privacy’. These issues are making headlines again following a widely reported recent decision of the European Court of Human Rights and the forthcoming EU data protection reforms. In this article we consider some of the competing legal rights in this area, including the recent ECHR decision, and where the boundaries lie between the rights of institutions and of employees in this context.

What is the legal framework?

Article 8 of the European Convention of Human Rights provides that ‘everyone has a right to respect for his private life, his home and his correspondence’. This right is incorporated into UK law by the Human Rights Act 1998 and extends to the use by individuals of electronic communications, including in the workplace. However, the right to privacy is not absolute. A public authority can interfere with the right, provided that it ‘is in accordance with the law and is necessary in a democratic society’ (Article 8(2)).

Other domestic legislation, including the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, restrict an employer’s ability to monitor electronic communications and offer further protection to employees. This legislation is supplemented by relevant guidance, including the Employment Practices Code (published by the Information Commissioners’ Office). The Code provides that the purpose(s) behind any monitoring of staff must be identified and communicated to those being monitored, with consideration given to any likely adverse impact of monitoring, whether any less intrusive alternatives are available, whether obligations such as notifying workers of monitoring arrangements have been fulfilled and whether the monitoring is justified.

Employers must also have regard to their duties deriving from the express and implied terms of the employment relationship, including the duty of trust and confidence and the extent to which they can take action in relation to the use of IT and social media by their employees without breaching these duties.

The approach of the courts and tribunals

On a number of occasions the European Court of Human Rights has been asked to consider the extent to which the monitoring of employees’ use of IT and social media has constituted a breach of Article 8. In an important ruling in 2007 (Copland v United Kingdom), the Court held that monitoring of an individual’s telephone, email and internet usage by their employer, a further education college,
was a breach of Article 8. Relevant factors in this case included the fact that there was no IT policy in place at the college and that the employee was not told that they might be monitored in this way. In these circumstances, the employee was found to have a “reasonable expectation of privacy” in such communications.

More recently, in the 2015 case of Barbulescu v Romania, the European Court of Human Rights considered the Article 8 rights of a Romanian worker, Mr Barbulescu, an engineer for a heating company. At his employer’s request, Mr Barbulescu had set up a Yahoo Messenger account to deal with client enquiries. Later, his employer notified him that it had monitored the communications in that account over the course of a week and that it considered he had used it for personal purposes in contravention of the employer’s internal rules. Mr Barbulescu maintained that he had only used it for professional purposes. The employer subsequently produced a transcript of the communications which showed a number of personal messages that had been sent using the account. Mr Barbulescu was subsequently dismissed for unauthorised personal use of the internet.

Before the European Court, Mr Barbulescu claimed that his right to privacy had been infringed by the employer. The court concluded that a fair balance had been struck between the employer’s interests and respect for the employee’s private life. They found, on these facts, that it was not unreasonable for the employer to want to verify that its employee was working during working hours, even where it was not alleged that the employee’s actions had caused any actual damage. It was also found that in monitoring the Messenger account, the employer had not looked at any other data or documents on the employee’s computer. The monitoring was therefore found to be proportionate and lawful.

This case has attracted much media attention, some of it potentially misleading. It has for example been reported that the effect of the Court’s decision is that employers can read workers’ private messages sent via ‘chat’ software and webmail accounts during working hours. Whilst this may have been

the conclusion of the Court on these facts, the case should not be read as establishing this as a general principle – each case of monitoring will turn on its own facts and will have to be capable of justification by the employer by reference to the particular circumstances in which that monitoring took place.

There is also a growing body of employment tribunal case law considering dismissals arising from the alleged misuse by employees of IT and social media. These cases indicate that tribunals will expect employers taking action in these circumstances to have in place, and to have applied appropriately, policies setting out the expected standards of conduct in relation to the use of IT and social media. Again, these cases will turn on their facts.

For example, in Grant and another v Mitie Property Services UK Ltd (2009), the tribunal held that the dismissal of two employees due to excessive internet use was unfair, given that the employer’s policy permitted personal use of the internet ‘outside core working hours’, which was considered to be unclear. In contrast, in McKinley v Secretary of State for Defence (2004), the tribunal found that an employee’s personal internet use, which represented 10-15% of their working time, was excessive (and justified the action taken by the employer). In that case, the tribunal had also taken into account that the employee was in a senior position and also in charge of the employer’s IT policy.
Other cases have considered the extent to which employers can take action against an employee for use of social media outside the workplace, where this is deemed to relate to their employment. In *Whittam v Club 24 Ltd t/a Ventura (2010)*, a tribunal held that the dismissal of an employee for making derogatory comments outside work via Facebook was not reasonable in the circumstances, given that the comments were relatively minor and that there was nothing to suggest that the employer’s relationship with any key clients had been affected.

**Challenges for institutions**

With greater use of smart phones, tablets and ‘bring your own devices’ policies, reliance upon electronic communications and other IT resources is only likely to increase. At the same time, employees have an increasing awareness of their ‘privacy’ rights. It is therefore vital that institutions are clear about when, and under what circumstances, they can interfere in that use in order to protect their interests.

As a minimum, institutions should ensure that they have in place clear policies relating to their employees’ use of these resources and that those policies are properly communicated to staff and managers and applied consistently. It is also important to ensure that any monitoring, or other interference, is proportionate (in that it is limited to protecting the institution’s legitimate objective(s)) and does not infringe the individual’s right to privacy any more than is necessary.

In every case, institutions should carefully consider where the boundary lies between these potentially conflicting rights.

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Eversheds’ news

College governance service — 2015-16 service
It is three years since colleges were given freedom under the Education Act 2011 to change governance arrangements. With additional freedom corporations have also had to shoulder greater responsibility. The role of governors has become increasingly complex so the need for clear and practical legal advice on governance is greater than ever. Eversheds’ unique service meets the needs of Clerks to General FE and Sixth Form Colleges in England. This service is headed by Diane Gilhooley, Head of the Eversheds Education Sector Group. Diane is supported by a panel of governance experts who are on hand to deal with queries 24 hours a day.

Recognising that many colleges now sponsor academies, this year we are able to offer Plus level subscribers to College Govern@nce discounted access to Academy Govern@nce — a brand new and comprehensive service dedicated to academy governance.

Our sample governance extranet site will give you a feel for what both Plus and Standard subscribers receive as part of the service. Please contact Adriana Pulo at adrianapulo@eversheds.com to be given access to the sample site.

The Education Act 2011 Toolkit
In order to assist colleges making complex choices following the implementation of the Education Act 2011 Eversheds have established a Toolkit Service for reviewing colleges’ instruments and articles of government. Details are available at: www.eversheds.com/global/en/where/europe/uk/sectors/education/education-act-2011-toolkit.page

Academy Govern@nce
24/7 governance support
The transition from a system of maintained schools under the auspices of Local Authorities to a landscape comprising charitable companies of various sizes continues to present significant challenges for those charged with implementing good governance in academies. We know from experience that fixed cost early access to legal support is an effective way of managing governance risks. Plus members of the College Governance Service are entitled to access this service at a discounted rate of £250 plus VAT per year. Please contact Adriana Pulo at adrianapulo@eversheds.com for more information on costs.

Training Programme 2015-2016
Please visit our training page on Eversheds.com for details of the 2015-16 training - www.eversheds.com/global/en/where/europe/uk/sectors/education/landing.page