What next?
Discussing Brexit and other challenges for FE and Academies
Contents
Introduction
Introduction by Diane Gilhooley, Head of Education Sector Group

Brexit - how will it affect the sector?

Education in China
Challenges and opportunities

Rationalisation of college estates
Charity law considerations

Judicial review – recent lessons

Bullying and harassment
It’s not just downwards

Eversheds support and offices
Introduction

By Diane Gilhooley, Partner, Head of Eversheds’ UK and International Education Practice

Welcome to the latest issue of our InStep magazine, which comes out at a time of heightened uncertainty and change for the sector.

The ramifications of the result of the EU referendum in June are still being assessed by the education sector. As doubt remains about the timescale for the UK’s withdrawal and what arrangements will be put in place following exit from the EU, we look at key issues for the sector and what institutions should be considering at this point.

Concerns about the fallout from Brexit may make institutions consider their international strategy. In this issue experts in our Shanghai office look at the key consideration for institutions who have, or are thinking of establishing, a presence in China. Whilst up until now the vast majority of UK institutions looking at China are those in the HE sector, there are already a number of colleges and independent schools with a presence there and this may well increase in the future.

In our last issue we highlighted the governance issues that can arise in relation to the disposal of land and buildings by colleges, which is occurring now more often as a result of area based reviews or colleges’ need to realise assets. In this issue we consider the charity law aspects which can sometimes be overlooked on disposal.

Finally, even during this period of change for the sector, life goes on for institutions dealing with disputes and complaints and we look at the important topic of judicial review, including the outcome of recent changes to the process, and the difficult area of bullying and harassment with particular focus on the complicated area of upwards bullying.

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
Brexit - how will it affect the sector?

The ramifications for the education sector, following the vote on 24 June 2016 in favour of leaving the EU, are many and, at this stage, it is difficult and perhaps foolish to make any firm predictions. Nevertheless there are a number of key issues which the sector needs to be aware of and we highlight these below.

**Timeframe**

An important factor is that the UK remains a Member State of the EU until the end of the Article 50 process has been concluded. In order to leave the EU the UK needs to give notice under Article 50 of the Treaty on European Union, which states that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements and that a Member State which decides to withdraw shall notify the European Council of its intention. That notice has not yet been given and current indications are that notice will not be given until next year.

Once notice is given Article 50 envisages a two year process unless the UK and the other Member States agree to extend this timeframe. Until the process has been concluded the UK will remain an EU member with all the rights and obligations attached to that membership, including freedom of movement. Once any withdrawal takes effect then much will depend on the trade deals which the UK is able to negotiate with the EU (or its individual Member States) as well as with the rest of the world.

**Staff mobility**

A key issue for institutions, and their EEA nationals, will be where the outcome of the referendum leaves them. On 12 July 2016 the Government stated that when the UK leaves the EU “we fully expect that the legal status of EU nationals living in the UK and that of UK nationals in EU Member States will be properly protected”. That depends, however, on what agreements are reached. This having been said there has been no change to the right of EEA nationals to reside and work in the UK.

It is worth noting that EEA nationals who have lived continuously and lawfully in the UK for at least five years automatically have a permanent right to reside in the UK. Although there is no requirement to register for documentation to confirm the status, EEA staff may consider whether they wish to do that and make an application for permanent residency. EEA nationals who have lived continuously and lawfully for at least six years are eligible to apply for British citizenship.

The position in relation to staff once the UK leaves the EU, is less clear cut. Whether EEA staff working in the UK at the time of exit will be allowed to continue to work without any restrictions or such rights will only apply to those who have obtained permanent residency by that time remains to be seen. Even if such staff are allowed to remain in the UK without restriction one possibility is that any EEA nationals who are not working in the UK at the point the UK leaves the EU will only be able to come and work in the UK if they are sponsored by the institution under a system which may replicate or be similar to the current sponsorship system for non-EEA staff. This will all depend, however, on any agreements which the UK enters into. Interestingly, Theresa May, in her comments at the G20 summit on 5 September 2016, appeared to reject a points-based system as the best way of controlling EU migration. Therefore uncertainty remains.

A requirement to sponsor EEA staff would certainly involve additional costs for institutions as well as the individuals concerned and is likely to involve compliance requirements that currently exist for non-EEA staff. A survey carried out shortly before the referendum concluded that only 12% of the current 1.6 million EEA workers in the UK would qualify under the rules currently applying to non-EEA workers. Whilst the impact on the further education sector may not be as high as this nevertheless clearly there will be an impact on the ability for institutions to recruit from the EEA.
Additionally, of course, EEA nationals may be less inclined to come to the UK to work or to remain here. An area that institutions will be considering is the degree to which they can provide advice and support to existing EEA staff which balances the need to be supportive whilst at the same time avoiding making promises which may prove difficult to keep depending on the outcome of negotiations.

**Students**

In terms of student mobility, there may be the introduction of a sponsorship management system similar to that which currently applies under Tier 4 to non-EEA students, but again that is unclear. Such a system would not necessarily make it much more difficult for such students to come and study in the UK but there would be additional costs involved for the institution and students as well as the extra compliance requirements on the institution. Furthermore the UK may be seen by EEA student nationals as a less welcoming place to study. In a survey of students carried out shortly before the referendum, 82% of those surveyed who were from the EEA said that Brexit would make the UK a less attractive place to study.

In a post-referendum survey of 875 overseas students not already registered at a UK institution, 7% said they definitely would not come as result of the referendum result and 34% said they were now less likely to do so. However, 51% said that Brexit would make no difference and 8% that they were more likely to come as a result of the result. It is relevant, however, that the vast majority of respondents were from non-EU countries.

Another area to consider in relation to students will be the impact on “home fees” for EU students and the ability of institutions to charge more for fee paying EU nationals. It has been suggested that a reduction in EU students paying home fees would not necessarily be such a bad thing as any reduction in numbers could be offset by higher fees.

In relation to student loans and grants it has been confirmed that for existing EU nationals or family members who are currently in receipt of loans or grants, this will continue until the individuals finish the course they are on and that those who have applied for a place from August 2016 will similarly be covered. It is less clear, however, what the position will be moving further ahead.

**Work-based learning and employability**

One of the possible consequences of the Brexit vote is a potential delay to the introduction of other pieces of legislation, one of which could be the apprenticeship levy. There is some speculation as to whether this will be delayed anyway beyond its intended implementation date April 2017, with a number of organisations, such as the CBI, calling for the date to be postponed anyway following the Government restructure. However, the Association of Employment and Learning Providers has said that the date should not delayed because, if anything, the referendum result means that a skilled British workforce will be needed more than ever. At the moment the Government has stated that it is still working towards April 2017.

Another area of concern for institutions will be money pledged for training via the European Social Fund. Whilst this funding should be safe in the short term the potential loss as a result of the UK’s EU exit will be of concern to institutions. According to allocations from the Skills Funding Agency in 2014/15 107 different providers, including colleges, received a combined total of just in excess of £305 million in ESF money.

**Financial insecurity**

The sector is also affected by general financial insecurity flowing from the outcome of the vote. There have also been concerns expressed that institutions may have to consider restructuring/redundancies, property disposals (particularly in relation to student accommodation) and other savings that may need to be made.

**Conclusion**

Whilst much is still unknown it is important that institutions consider what steps they could and should be taking at this stage and in the months ahead, including having a communication strategy for their staff and students and carrying out an audit to analyse how the EU exit is likely to impact upon their staff, students, funding and contracts. Institutions may also be considering whether the impact of the UK’s exit from the EU may be lessened by closer links with education institutions in the EU or by exploring the possibility of setting up their own campuses in other EU Member States.

The vote to leave the EU has given rise to a number of difficult issues and to help you understand what happens next, the exit process, and the issues you should be considering now, Eversheds has assembled a broad range of guidance notes, as well as updates on developments on our Brexit hub.

**For further information please contact:**

**Diane Gilhooley**  
Partner, Head of Eversheds’ UK and International Education Practice  
T: +44 161 831 8151  
dianegilhooley@eversheds.com

**David O’Hara**  
Principal Associate  
T: +44 161 831 8541  
davido’hora@eversheds.com
The Chinese market for education is lucrative and expanding, filled with opportunities for profitable and rewarding transnational education ventures. However, the regulatory, cultural and logistical problems faced by UK institutions in establishing themselves in China, normally though partnering arrangements with Chinese institutions, and the often murky waters of Chinese Transnational Education Legislation (TNL) make this a very difficult market to capitalise on. Successfully establishing a transnational education venture in China requires the right advice and needs an in-depth understanding of the cultural differences in approaches to regulation and education.

The regulatory environment

TNL is by no means clear or straightforward in China. In fact, transnational education is governed by a web of interrelated legislation and policies on both a national and local level which is often difficult to interpret and subject to vast amounts of discretion when being applied at a local level. Chinese institutions, who frequently deal with their local regulators, often have a very good appreciation for the quirks of their local education bureau, but may struggle to communicate this to Western partners due to cultural difficulties.

In general, there are several key principles to Chinese TNL which Western institutions should be aware of:

- programmes intended to be degree granting cannot be wholly foreign owned and must operate in cooperation with a Chinese institution
- the primary objective of any programme cannot be profit
- western institutions cannot directly engage in student recruitment activities in China
- the UK institution must be accredited by the relevant body for the parallel programme in their own country

The “one-third” rule

Generally speaking, the “one-third” rule will be taken into consideration when local education bureaus review applications to approve transnational education ventures and this is something which the UK institution will need to bear in mind when considering the feasibility of a joint programme with a Chinese institution. In addition, as ever with Chinese local authority approval, the discretion of the authorities means that they may require more than the basic one-third principle and the local authority may liaise with the local or UK institution to request additional information or to impose further requirements.

The basics of the one third principle state the following:

- foreign (expatriate) teachers should form at least one third of the teaching faculty
- foreign (expatriate) teaching time should form at least one third of the teaching time in the curriculum
- the “foreign” element in the curriculum must make up at least one third of the total curriculum

Practically speaking, advice should be sought to ensure that all the details of the one third rule are complied with before any application is made to the local education bureau and UK institutions often find local advice helpful at the negotiation stage, as the Chinese partners can find it culturally easier to communicate some information to a local representative rather than directly to the UK institution.

The right partner

Often, the success of a transnational education venture in China hinges on finding the right partner to offer the programme with in the first place. The complexities of local policy and legislation means some aspects are often best navigated by the local partner and, in practice, the local partner will often be responsible for providing the bulk of the facilities, including student accommodation, office and teaching facilities and student and staff cafeterias.
In choosing the right Chinese partner, the following factors should be taken into consideration:

- **reputation of the Chinese institution** – the local reputation is extremely important as this will determine the existing appeal of the institution to local students and the ease with which student recruitment can take place.

- **geographic location of the Chinese institution** – this determines which local education bureau will have jurisdiction and therefore which set of local rules and policies will be applied to the transnational venture. In addition, the appeal of the geographic location and the wealth of the locality should be considered with a view to being able to recruit students who can afford the programme.

- **management style** – Chinese institutions are often subject to very top-down hierarchical management of a very different style to UK institutions. The UK institution should take into account compatibility of management styles and the flexibility of management in relation to accommodating Western teaching styles when selecting a partner.

As the UK institution will have very little direct oversight of the operation of the programme in China, thought should also be given to how much control it will need over the programme and the best way to maintain overall control, especially over the academic components of the programme in order to protect regulatory approvals and reputation.

### Other considerations

In addition to the structure and style of the programme, the following, more practical, factors should be taken into consideration:

- logistical issues and staff willingness to commit to living in China
- vast cultural differences in UK and Chinese teaching styles and how to introduce a Westernised style to Chinese students (e.g., Chinese education often favours learning by rote whereas UK education favours how to apply knowledge and this is something which is very difficult for students to understand and accept)
- building solid relationships with partners – this can be difficult in practice due to language barriers and cultural differences, but open communications and face to face meetings can help

### Conclusion

The demand for transnational education in China is huge and this is a market which presents opportunities for UK institutions. Education is highly valued and the chance for students to gain a greater understanding of the UK and “Western” culture is highly appealing for many. This sector is unlikely to be saturated for some time to come and the rewards for a UK institution able to capitalise on their strengths in the Chinese market are limitless.

### For further information please contact:

**Jack Cai**  
Managing Partner of Eversheds  
Shanghai Office  
T: +86 2161 371007  
jackcai@eversheds.com

**Sam Chen**  
Associate  
T: +86 2161 371004  
samchen@eversheds.com
Rationalisation of college estates

Charity law considerations

Property and charity law

In the current environment many colleges may be thinking about rationalising their estate holdings to free up capital and to give them a degree of flexibility when it comes to meeting future challenges. When considering property matters, and particularly disposals, college governors should have their duties as charity law trustees at the forefront of their minds.

By way of example, whilst a property disposal may seem a good idea in the short term because of the funds that will be released, college governors also need to be thinking about the long term consequences because, as charity law trustees, they are obligated to act in the best interests of current and future learners. They need to consider whether a property sale now would disadvantage future learners.

The key issue is that any property disposal must be clearly in the college’s best interests. The college governors must act prudently and safeguard the college’s assets. If there is to be a sale of property they need to ensure that they secure the best possible price for it.
Factors to consider when disposing of property

If college governors consider selling property they should think carefully about whether they will need that property in the future. Is the college likely to grow in size or have a need for the particular property going forward? Is there sufficient space elsewhere?

The Charity Commission (although not a college’s principal regulator for charity law purposes) has published detailed guidance on the disposal of land by charities and key factors that charity trustees (including college governors) need to consider. The Commission recognises that there are a number of reasons why a charity may want to dispose of property including to release cash. Any such rationale should be documented and should clearly set out why the sale is in the college’s best interests.

College governors should also consider who will be affected by any property sale. The key people to consider are stakeholders including the learners and the general public. It is considered good practice to carry out consultation on a proposed disposal and, at the very least, the opinions of interested stakeholders should be sought.

Professional advice

Whilst registered charities are obliged to seek the advice of a surveyor in advance of disposing of charity property by the Charities Act 2011 the same obligation is not imposed on exempt charities such as colleges. Although not subject to the same rules for significant disposals college governors should, however, strongly consider seeking professional advice from a surveyor about a disposal including the sale price. This is particularly the case if none of the college governors have expertise in the property sector.

In terms of choosing a surveyor, college governors should chose one who is familiar with the geographical area and the type of property being disposed of. The surveyor should be a fellow of the Royal Institute of Chartered Surveyors or the Incorporated Society of Valuers and Auctioneers.

The obligations imposed on registered charities when disposing of property are a useful starting point for college governors. Although it may not be necessary for a surveyor’s report to cover all the matters that must be covered in a report prepared for a registered charity, the key issues should be dealt with including the following:

- a description of the property and its location including details of its current use
- whether or not any buildings on the property are in good repair and advice as to whether it would be in the college’s best interests to carry out repairs before any proposed disposal
- whether it would be in the college’s best interests to alter any property before the disposal
- advice as to how the property could be disposed of to achieve the best terms that can reasonably be obtained for the charity
- advice about value added tax, whether it applies and its likely impact upon the valuation (you may take advice from your auditors on this point)
- the surveyor’s view on the property value and whether they would recommend making the disposal

Taking professional advice in advance of a property disposal is one way in which college governors can seek to discharge their duty of care and a surveyor should be involved at an early stage in the process.

For further information please contact:

Stephen O’Reilly
Principal Associate
T: +44 122 443 805
stepheno’reilly@eversheds.com
Judicial review – recent lessons

One of the pitfalls which any educational institution needs to bear in mind is the possibility that some of its decisions could be challenged through judicial review proceedings (JR). Not every decision is at risk of JR but many will be, particularly those which go to the heart of the education provision, such as decisions concerning admissions, exclusions and fitness to practice.

For any institution, JR is a two way street as the decisions of education regulators and funding bodies are (albeit as a last resort) capable of being challenged by JR.

Although hopefully an infrequent occurrence for colleges, academies and schools, if a JR happens, it has the potential to overturn the decision making process and, regardless of outcome, can mean cost, uncertainty and delays in implementing change.

The JR process has been the focus of considerable Government attention in recent years. Back in 2012 the Government declared that unmeritorious JR claims were too often being used as a spoiling tactic, creating delays and adding to the cost of public services. What was needed, said the government, was reform.

Reform
Following consultation a series of changes were implemented in 2 stages – the first in July 2013 and the second in February 2015.

The reforms introduced four main changes.

– the time limits for JR challenges to planning and procurement decisions were reduced to six weeks and one month respectively. The time limit for other challenges remains three months from the date of the decision

– a new court fee of £215 was introduced for any claimant wishing to renew their application for permission at an oral hearing (having been initially turned down on paper)

– a provision was introduced allowing a court to determine, that the initial paper application for permission was "totally without merit". In those circumstances the claimant is deprived of an ability to pursue the claim any further

– a provision was also introduced allowing the court to come to the conclusion that the decision maker would have made substantially the same decision even if the unlawful act complained of had not been committed. In other words even if the decision-making process is found to be unlawful it made no difference

These changes, the Government argued, would weed out unmeritorious applications early - freeing up the court's time and resource to focus on more appropriate cases.

Recent experience
So more than a year on, is there any evidence that these reforms have deterred unmeritorious claims or speeded up the process?

As far as numbers are concerned, Government statistics issued by the Ministry of Justice in September 2016 suggest that the numbers of civil JR proceedings (of the sort which colleges, academies and schools would deal with) over the period between 2000 and 2016 actually varied very little at around 2,000 per year. The figure dropped slightly in 2015 (1,749 cases) but is on track to be consistent in 2016. Furthermore the peak in 2013 was only marginally higher at 2,192.

There is however some early evidence that the average time taken to progress a civil JR claim is now improving.

Just before the reforms were implemented in 2013 the average time taken to progress a case from issue to final hearing was 374 days. In 2014 it fell to 254 days. Of the (admittedly smaller pool) of cases which have closed in 2015 the mean time has fallen again to 209 days. The same picture is replicated in relation to timescales for getting a case to permission stage.
In Gerber the court also helpfully observed that it was in the interests of justice that any potential challenger should move with speed to challenge – particularly in circumstances where the decision under challenge had been relied upon – sometimes at considerable expense.

One explanation for the speeding up of cases is simply that JR cases relating to asylum have now been hived off to a separate tribunal – reducing the administrative courts caseload markedly. Nevertheless the early signs must be good news for any educational institution facing the uncertainty of judicial review proceedings.

Beyond this though, is there any evidence that the Government’s stated aim of minimising the impact of unmeritorious claims has heralded any change in approach to the way the process is working in practice.

It’s early days but there have been a couple of recent cases which have reinforced the mantra (which arguably always existed) that if the deadline for bringing a JR claim is missed, the court’s discretion to entertain the application out of time is likely to be used sparingly.

In R (Keegan and another) v the Secretary of State for the Home Department (2015), the applicant failed twice to meet court deadlines – but only by a matter of days. Conversely in Gerber v Wiltshire Council (2016) the deadline for issue was missed by 14 months. What emerges from both cases however is a clear indication from the courts that reliance upon legal advice or waiting for legal funding were not reasons to excuse a failure to meet the deadline for issue.

What of weeding out cases which are said to be "totally without merits"? Here the implications of reform have yet to fully emerge. The recent case of Wasif v Secretary of State for the Home Department (2016) suggests however that the provision will be used sparingly. There the Court of Appeal said that the threshold was that the case was “bound to fail” not that it had “no reasonable prospect of success”. Perhaps a fine line. Definitely a high hurdle. The September 2016 Government statistics indicate that 20% of cases reaching permission stage were found to be “totally without merit”.

**Conclusion**

So where does all this leave us? The statistics suggest that while the number of civil JR cases may not in reality have fallen much, they are going through the courts quicker than they were. Reduced timescales for bringing some types of JR claims and close judicial scrutiny of cases which miss the deadline ought to assist in achieving earlier certainty. As to whether the judicial framework is now more likely to weed out unmeritorious claims, the jury is out but the early signs are that judges will be slow to shut the door on weak cases except in very clear circumstances.

Judicial review, therefore, remains a real risk area for education institutions. It is one that can be managed by careful, robust decision making which ought to dissuade proceedings from being issued. If proceedings are issued however, the prospects of a significant period of uncertainty remains.

Careful thought should therefore be given to tactics which can be adopted to provide the best prospect of defending claims quickly and successfully. The recent reforms may provide some additional options in that regard but in the end early and proactive management of the case is likely to be the key to success.

---

For further information please contact:

**Alison Oldfield**

Partner

T: +44 113 200 4660
alisonoldfield@eversheds.com
Bullying and harassment

It’s not just downwards

The terms bullying and harassment are often used synonymously, although harassment has a legal definition whereas bullying does not. Harassment involves unwanted conduct related to a relevant protected characteristic and therefore constitutes an act of discrimination. Bullying, however, is a much wider concept in that it is inappropriate behaviour which does not need to be based upon a person’s protected characteristic. For the remainder of this article we will use the term bullying to encompass both concepts.

Bullying remains a very topical issue and an ACAS study published in November 2015 concluded that workplace bullying was growing in Britain and although anti-bullying policies are widespread they have fallen short in reducing the overall prevalence of bullying.

So what do we mean by bullying? Bullying incidents can be complex and multi-faceted at the best of times, but the traditional perception that bullying must involve inappropriate behaviour by more senior colleagues to junior staff no longer holds good. Institutions need to be alive to the various forms of bullying, whether that is by more senior members of staff (downwards bullying), by colleagues (peer to peer) or by more junior members against managers (upwards bullying) and we are finding an increasing number of the questions we are receiving from institutions about bullying concern peer to peer and upwards bullying allegations.

This experience is reflected in a recent survey published by the CIPD. Of the 2,195 UK employees surveyed 750 said they had experienced an isolated dispute or incident of conflict and/or an ongoing difficult relationship at work in the previous 12 months. 36% of these involved a line manager or other superior; 36% other colleagues within the organisation (either in the same team or elsewhere in the organisation); 18% someone outside the organisation (such as customers or suppliers) and 10% concerned the behaviour of those being directly or indirectly line managed by the employee.

Upwards bullying

Whilst institutions will have detailed procedures to deal with bullying and harassment, upwards bullying tends not to be dealt with explicitly in most of these, nor is it often addressed in the training provided to staff. This is because the concept of upwards bullying has only relatively recently become a recognised phenomenon. In the last few years, however, there have been a number of legal claims brought involving upwards bullying and increased research into the area.

An interesting case involved a claim of direct sex discrimination and sexual harassment brought by a female manager who successful argued that she had been bullied by a group of male subordinates who were not used to being managed by a woman. The manager claimed that she had been bullied and harassed by five male employees in the team of 13 employees she was managing (12 of whom were male) over a period of just under 12 months from the date of her appointment.

The Employment Tribunal upheld 11 of the 12 allegations, rejecting the employer’s arguments that the employee could not have been subjected to bullying because she was a line manager of those who were alleged to have bullied her and that the challenges to her authority were not related to sex but were as a result of her weak management style. The Tribunal concluded that the manager had been directly discriminated against on the grounds of her sex as she had been treated less favourably than a hypothetical male comparator at the same grade and position as she would have been treated. The Tribunal also upheld the manager’s sexual harassment claim, concluding that the conduct was unwanted and related to her sex as she was the only female manager in a predominantly male environment.

She was awarded £15,300 for injury to feeling and 80% of the loss of earnings she had suffered due to her subsequent sickness absence from work for a five month period. The Tribunal also made a recommendation that a senior person...
from the employer’s HR department interviewed the named employees who had perpetrated the acts of discrimination and discussed with each of them the Tribunal’s decision on liability. The employer was required to inform the Tribunal by a specified date whether or not it had complied with the recommendation.

Peer to peer bullying

Claims can also be brought in the High Court for personal injury and an illustration of this in a peer to peer situation is a claim brought by a company secretary assistant working at a commercial bank. She argued that over a period of nine months, from commencement of her taking up her post, she was subjected to a campaign of harassment and bullying by a group of four women with whom she worked in close proximity. This behaviour ceased when three of the four women left the department but at that time she began experiencing difficulties with one of her fellow company secretary assistants who she claimed had conducted a sustained campaign against her in an attempt to raise his own profile as against hers. Two years later she was admitted to hospital and diagnosed as suffering from a major depressive disorder and although she did relatively briefly return to work she was off ill again and subsequently was dismissed.

She won her claim for personal injury for psychiatric injury, successfully arguing that the bank were vicariously liable for the bullying which had been carried out by her fellow employees and that the bank had been negligent in failing to take adequate steps to protect her from this bullying behaviour. The Court also concluded that the behaviour of the employees amounted to harassment within the meaning of the Protection from Harassment Act 1997 and that the bank was vicariously liable for these actions. In reaching this conclusion the Court accepted that the behaviour had constituted harassment within the meaning of the Act as there had been conduct occurring on at least two occasions, which was targeted at the individual, was calculated to cause distress and was oppressive and unreasonable. The individual was awarded just over £850,000.

Managing concerns

Even leaving aside the risks of legal claims such as constructive dismissal, discrimination and personal injury, instances of bullying can have significant effects on the productivity of the individuals concerned and also give rise to sickness absences, sometimes on a long-term basis. Individuals who are not being bullied directly but witness such behaviour can also be affected detrimentally.

So clearly it is important for institutions to ensure its staff are aware and feel able to raise any complaints around bullying. However, this may be more difficult for managers who believe they are being bullied by their staff, as they may be concerned that a report of upwards bullying may not be taken seriously, as it does not fall within the traditional concept of bullying, or that such a complaint, particularly if it is about several individuals, may suggest that the manager does not have the authority to control their team and is an ineffective manager. The reluctance by managers to raise such issues means their concerns could go unaddressed and result in the institution losing valuable management staff that it would much rather retain.

How then should institutions address this? It is important to create a culture of dignity in the workplace and encourage acceptable behaviours by actively promoting positive working relationships, encouraging colleagues (at all levels) to treat each other with dignity and respect and ensuring that everyone has a clear understanding of what constitutes unacceptable behaviour – including upwards bullying.

Managers must be able to feel able to raise concerns in an appropriate way, whether that be through informal or formal processes, and that doing so will not have a detrimental effect on the perception of them as managers within the institution. Where concerns are raised, it is important to ensure that appropriate support is available to individuals who are concerned about bullying (whatever level that individual is at within the institution’s structure). So managers are entitled to support just as much as more junior members of staff, even if the institution has tended in the past to think junior members of staff are more in need of support than managers who may be perceived as being more experienced and self-reliant.

Institutions also need to be alive to the fact that staff may raise grievances against their manager as a result of being taken through a perfectly appropriate process by their manager (whether informal or formal), where there are concerns about conduct, performance or sickness absence – indeed the failure by a manger to have a discussion with employees about such issues may cause problems to mount up unaddressed. It is also the case that employees going through a restructuring or redundancy exercise may, as a defensive measure, raise a grievance against their manager. None of this means of course that such grievances should not be fully and properly investigated, but where such grievances are found to be malicious then that in itself could amount to a form of bullying against the manager.

Downwards and peer to peer bullying does take place and needs to be properly dealt with but it is also important that institutions effectively manage what has until recently been the overlooked area of upwards bullying.

For further information please contact:

Diane Gilhooley
Partner, Head of Eversheds’ UK and International Education Practice
T: +44 161 831 8151
dianegilhooley@eversheds.com

David O’Hara
Principal Associate
T: +44 161 831 8541
davido’hara@eversheds.com
Eversheds has unrivalled experience in the education sector for the provision of legal advice both within the UK and internationally. Details of our offices are set out below but if you do have any questions arising from this issue of InStep, or you would like to talk to us to explore how we can help you with your requirements, please do contact me.

Diane Gilhooley  
Partner, Head of Eversheds’ UK and International Education Practice  
T: +44 161 831 8151  
dianegilhooley@eversheds.com

Africa  
Mauritius  
South Africa  
Tunisia

Asia  
China  
Hong Kong  
Singapore

Central and Eastern Europe  
Estonia  
Hungary  
Latvia  
Lithuania  
Poland  
Romania

Middle East  
Iraq  
Jordan  
Qatar  
Saudi Arabia  
UAE

Western Europe  
Austria  
Belgium  
Finland  
France  
Germany  
Ireland  
Italy  
Netherlands  
Spain  
Sweden  
Switzerland  
United Kingdom