

Moving on from COVID: Legal considerations in a Post-Pandemic World

There are several considerations for senior leaders and governors/trustees of schools to keep in mind as we go forward.

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Whilst the world continues to emerge from the COVID pandemic, there are several considerations for schools to keep in mind as we go forward. In this article, the education experts at Browne Jacobson LLP cover some of these across a number of different disciplines and discuss how senior leaders and governors/trustees can best meet the needs of their communities.

Governance and Catch Up

The pandemic has had an unequal effect on pupils within schools, with the Education Policy Institute's report on education recovery estimating that without significant catch up funding, a minimum of £78bn of lifetime earnings will be lost by current pupils before any other affects are even considered.

Whilst there may be questions for government about their catch-up proposals, there is also a role for governors and trustees to consider how resources are used in school going forward to ensure that these are being spent in the best way possible to try and overcome some of the disadvantage that has been caused. Aligning the spending of the school/trust with the strategic priorities is incredibly important and something that will need reviewing by schools as we come out of the pandemic, but this will also lead to considerations about the curriculum and the educational provision that the school is providing. Whilst there may be some elements of pandemic education provision that schools will be glad to see the back of, are there some elements that worked well?

In addition, there is evidence that the pandemic has caused a national increase in the number of pupils reporting mental health concerns, from lower level anxiety to support that requires the input from CAMHS. Schools will need to consider what support they can offer within school and how their provision can best enable pupils to overcome barriers to education that might persist. CAMHS waiting lists are often long with the threshold for intervention steeper than it should be and whilst schools are not set up to provide mental health provision, many schools have considered what provisions or support they can provide pupils access too.

Employment and Disability

In April 2021, the Office for National Statistics (ONS) reported that: "Over the four-week period ending 6 March 2021, an estimated 1.1 million people in private households in the UK reported experiencing long COVID (symptoms persisting more than four weeks after the first suspected coronavirus (COVID-19) episode that are not explained by something else)."

Over the course of the pandemic, "Long COVID" has presented us with many queries from schools and academies who have been perplexed about just how to deal with this new and bewildering condition which affects people in many different ways. The NHS states in its June 2021 Long COVID plan that the condition is "highly debilitating for many sufferers" and "Long COVID is an increasingly widespread, multi-system condition. Regardless of the severity of their initial illness, it appears that anyone of any age – including children - can experience Long COVID."

Following a survey of approximately 3,500 workers (with over 3 quarters of respondents identifying themselves as key workers in either education or health and social care), the TUC Union has urgently called for Long COVID to be recognised automatically under the Equality Act 2010 as a disability.

There is the potential that Long COVID may be considered to be a disability under the Equality Act 2010 if it is deemed to meet the criteria of a 'physical or mental impairment' that has a 'substantial' and 'long-term' negative effect on an individual's ability to do normal daily activities. The meaning of long-term within this definition is that the impairment has lasted (or is expected to last) for more than 12 months. At this stage of the pandemic, there will be some employees who now already meet this criteria and our advice remains that employers need to be mindful of treating employees in a non-discriminatory way, as well as making reasonable adjustments where possible as otherwise there may be the risk of discrimination claims further down the line. This may include adjusting the sickness absence triggers as a reasonable adjustment as you may do with other disabilities that impact on attendance.

Currently, any legal argument about whether or not Long COVID would be defined as a disability would be determined by an Employment Tribunal and is very much down to each individual and would be considered on a case-by-case basis. The TUC are seeking to get an amendment to legislation to grant an automatic recognition of long COVID as a disability, and therefore avoid employees having to argue their case at tribunal.

What about ill-health retirement?

Aside from the question of whether long COVID can be considered a disability, for many of those who suffer with the condition it can have wide ranging and debilitating symptoms. Common symptoms such as fatigue, joint and muscle pain and breathlessness can have a huge impact on staff within an education setting.

The NAHT has put forward their concerns around provisions for ill-health retirement as a result of long COVID due to the fact that "Long COVID" is a new and emerging condition, and it is therefore harder to make a judgment that incapacity will be permanent under the scheme regulations."

Further, the NHS states that "for many individuals, Long COVID presents as relapses of a range of symptoms whilst others struggle with a single symptom. At this early stage, the long-term impacts of COVID-19 are not fully understood; particularly for cases of severe COVID-19 illness. Further research is required to better understand the impacts and treatment options."

Therefore, when considering ill health retirement as an option – the water is indeed cloudy!

As we know, there are two separate pensions providers within education, with teaching staff being covered under the Teachers' Pensions Scheme (TPS) and support staff under the Local Government Pension Scheme (LGPS). The TPS provides for two tiers of benefits and eligibility is decided entirely by TPS medical advisors:

1. Tier 1 – permanently unable to teach but capable of undertaking other gainful employment. Pension based on accrued service at retirement (no actuarial reduction)
2. Tier 2 – permanently unable to teach or undertake any other gainful employment. Pension enhanced by 50% of service or pension that would have been accrued between date of retirement and normal pension age.

These strict parameters and the fact that a teacher must be assessed as "permanently unable to teach" will undoubtedly make the process more difficult due to the uncertainty around Long COVID and whether employees are likely to recover in the future.

The LGPS scheme by comparison is more likely to provide some provision due to its wider three-tier benefits and any decisions on eligibility being made by the employer based on the opinion of an independent Occupational Health physician:

1. Tier 1 – Permanently unfit for job and unlikely to be capable of any gainful employment before normal pension age.
2. Tier 2 – Permanently unfit for job and unlikely to be capable of gainful employment within 3 years of retirement but likely to be capable of gainful employment before normal pension age.
3. Tier 3 – Permanently unfit for job but likely to be capable of gainful employment within 3 years of retirement.

Contracts – Key considerations in a post-pandemic world

Throughout the COVID-19 pandemic, schools have become more frequently embroiled in contractual disputes, especially involving school trips. A key trigger for these disputes has been the government-imposed lockdown restrictions including those relating to travel. These disputes give rise to many legal issues including: (i) the school's exposure surrounding deposit refunds and cancellation fees; (ii) the effect of force majeure clauses; and (iii) debates with insurers over coverage.

Although the Government has now abolished the traffic light system in England resulting in an easing in travel restrictions, this easing has not been applied everywhere and it is possible that the tectonic plates will shift again in the future. This is particularly so given the impending winter, which will bring additional challenges. It is important for schools to remember that, despite the recent return to normality, lessons from the past are not forgotten.

As the pandemic has progressed, trip providers have taken a tougher stance against schools to avoid financial ruin. A classic example of a dispute at this time is trip providers insisting that schools pay cancellation fees when a trip could no longer go ahead. In some cases, the force majeure provision (if one exists) does not provide the schools with adequate protection. Some schools are unclear as to the best approach to take to avoid and/or challenge the imposition of such cancellation fees.

We set out some top tips below to enable schools to navigate these issues along with some practical solutions.

Contractual provisions

It is vital to review the booking terms and conditions in detail before signing up to the trip to understand a school's exposure if the trip cannot go ahead for reasons outside of its control. For instance: (i) whether you are entitled to a refund; (ii) whether there is a termination fee; (iii) how the trip can be cancelled; and (iv) whether the trip can be postponed. Force majeure clauses are of particular importance as these can provide respite for schools in difficult contractual situations due to the pandemic.

Keep and maintain records

Once you have signed up to a trip, it is important to keep copies of your contract and accompanying terms and conditions. If an issue arises with a trip provider and records of the terms agreed have not been kept this potentially opens up schools to avoidable contractual disputes. We advise schools to conclude all contracts in writing.

Postpone the trip

If any travel restrictions apply in the future, schools may seek to postpone their trips and offset retained deposits against new bookings. It may be possible to arrange this – but only at the discretion of the trip provider, as most travel terms and conditions set out financial penalties for significant amendments to bookings. Therefore, a detailed review of the terms and conditions is required in order to ascertain if this is a viable option for the school.

Work collaboratively with suppliers – prevention is better than cure

Always bear in mind that, in the event of a supplier issue, it is possible to attempt to re-negotiate the terms of a contract and work more collaboratively to resolve issues. Although sometimes unavoidable, issues do not always need to turn into disputes.

We have worked closely with clients (not just during the pandemic) preparing variations to contracts so that they become workable for both parties. Sometimes, varying a contract is actually the better option and is worth considering. Schools can exercise their commercial judgement as to the contractual terms that may need to be varied, e.g. amending the delivery date or contractual deadlines.

Variations must be mutually agreed between the school and the supplier. They must also be carried out in compliance with the contract itself as contracts can often include mandatory variation procedures, e.g. only specific people being able to sign off variations. In the absence of any variation terms, ensure that you keep a written record of any changes that have been agreed.

Package Travel Regulations

There may be scope within the Package Travel and Linked Travel Arrangements Regulations 2018 to negotiate a full refund and refute liability for cancellation fees. Regulations 12 and 13 relate to unavoidable and extraordinary circumstances and set out the conditions in which travellers can cancel a trip without liability for cancellation fees and seek full refunds for monies paid. This is fact-specific and might not always apply.

Association of British Travel Agents (ABTA)

Establish whether the trip provider is a member of the ABTA early on as guidance issued by ABTA may affect trip bookings.

Credit Card Providers

Schools should check whether it is possible to obtain a refund from a credit card company in the event of a cancelled trip which is paid by credit card.

Conclusion

The terms and conditions and circumstances can differ quite dramatically when dealing with these issues and there is no 'one size fits all' approach. It is important for schools to remember that prevention is better than cure.

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