NATIONAL EDUCATION FRAMEWORK

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NEWSLETTER

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College mergers & pensions

The government's post 16 area review programme required colleges to consider their future, with increasing encouragement to merge. As a result, the first college to college merger occurred in 2015. This was followed by 11 mergers in 2016 and 29 mergers in 2017. Six mergers have so far occurred in 2018, with a further 8 planned to take effect in August. An additional 2 university-college mergers are also planned for August. There are numerous considerations that colleges (and universities) have to take into account before merging, many of which will be very obvious to those considering a merger. However, we have seen increasing issues arising in more unlikely areas, such as pensions.




In a college to college 'Type B' merger (where one existing corporation continues and the other is dissolved), pensions should be reasonably straight forward. In terms of the staff, the transferring employees from the dissolving corporation are automatically entitled (subject to the eligibility requirements of the scheme) to continued to participate in the Teachers' Pension Scheme (TPS) and the Local Government Pension Scheme (LGPS) (as applicable) on transfer. However, a number of LGPS funding issues can arise.

Currently there are no clear rules about what happens if a college runs out of money. Instead central government (via various funding agencies) has ended up being the funder of last resort. As a result, LGPS Funds have historically classified colleges as 'lower risk' employers. However with the DfE consultation on the introduction of a college insolvency regime (which would mean that in the future it would be possible for an insolvent college to be dealt with in a similar way to an insolvent company), LGPS Funds have increasingly been re-categorising colleges as 'higher risk' employers. As a result, LGPS Funds have been looking for accelerated funding from colleges, so much shorter recovery periods in terms of past services deficits, and/or some form of security, such as a guarantee, bond or security over assets.

In a number of LGPS Funds, funding discussions with colleges

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have been ongoing since the outcome of the last valuation (which took effect on 1st April 2017). However, once LGPS Funds become aware of a proposed merger, this has then been used as leverage to try and obtain accelerated funding and/or security. Therefore, if considering as college merger it is important to engage with the relevant LGPS Fund early in the process to allow time for negotiations on the pension contributions and/or security that will be required from the newly merged college. Such discussions can become even more complicated if the colleges participate in different LGPS Funds, as there will need to be an actual transfer of assets from one LGPS Fund to another, which again will take time to negotiate.

In university-college mergers pension matters can be further complicated. Universities often want the merging college to be transferred to a separate legal entity to the university. This is because the college's staff are often on different pay scales and terms and conditions of employment to university staff, and harmonising such things can be difficult. Also, clients are mindful of potential future de-mergers. As well as LGPS funding issues there can be an additional complication in terms of the transferring teaching staff. The TPS only allows teachers to participate in the scheme if they are employed by the governing body of an institution in the higher education sector to which grants are made by the Secretary of State. If a college is transferred to a new entity set up by and separate from the university, then the transferring teaching staff are not usually automatically eligible for membership of the TPS as the entity is not in direct receipt of the funding grants. As a result, most university-college mergers have been structured so that the college's teaching staff are transferred directly into the post-1992 university. However, for a number of clients considering a university-college merger this structure is far from ideal.

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Proposals for ending sexual harassment at work

A change in workplace culture, greater transparency about incidents of harassment and new laws to strengthen protection for victims are recommendations recently announced by the Equality and Human Rights Commission (EHRC) to tackle the problem of sexual harassment at work.

The EHRC found that the most common complaint was harassment by a senior colleague and that many individuals had not reported the harassment, which is of concern. The barriers for reporting were concerns that the employer did not take the issue seriously, a belief that alleged perpetrators (particularly senior staff) would be protected, a fear of victimisation and a lack of appropriate reporting procedures. According to the EHRC, "Corrosive working cultures have silenced the voices of victims and normalised sexual harassment".

In its report, 'Turning the tables - Ending sexual harassment at work' (published on 27 March) the EHRC made a number of recommendations to better protect people at work:

A change in workplace culture

- A new mandatory duty for employers to take reasonable steps to protect workers from harassment and victimisation in the workplace (as opposed to the current duty of care).
- A statutory Code of Practice requiring all employers to take effective steps to prevent and respond to sexual harassment with an uplift of up to 25% in Employment Tribunal awards for breach of the Code.
- Targeted sexual harassment training for managers and staff and workplace sexual harassment champions developed by ACAS to help employers comply with the Code.
- A confidential online tool for employees to report instances of sexual harassment.

Greater transparency

- Data should be collected by the Government every three years to determine the prevalence and nature of sexual harassment with the data broken down by protected characteristic and the measures taken to tackle the problem since previous reports.
- Employers should publish their sexual harassment policies and steps taken to implement and evaluate them in an easily accessible part of their external website.
- The Government should introduce legislation to make any contractual clauses which prevent disclosure of future acts of discrimination, harassment and victimisation void.
- The Code should set out the circumstances in which

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confidentiality clauses preventing disclosure of past acts of harassment will be void.

- Confidentiality clauses in settlement agreements should only be used at the employee's request, save in exceptional circumstances.

Strengthening protection

- Increasing the time limit for harassment claims from three to six months from the latest date of the act of harassment, or the last in a series of incidents or the end of any internal grievance procedure.
- Introducing 'interim relief' provisions for harassment and victimisation claims for those dismissed following a sexual harassment allegation (which protect the position of the claimant whilst the main claim is decided).
- Reintroducing an amended version of the statutory questionnaire procedure for sexual harassment cases and of Employment Tribunal's power to make wider recommendations in sexual harassment cases.
- Restoring the repealed 'third party harassment provisions' in section 40 of the Equality Act 2010 but amended to remove the requirement for there to have been two or more instances of harassment.

Employers are vicariously liable for their employees' acts of harassment which take place during the course of employment (including conduct at work social events) whether or not the actions were done with the employer's approval or knowledge. A harassment claim can be defended however if the employer can show that it took all reasonable steps to prevent the employee from carrying out the acts. This includes, for instance, taking a zero-tolerance approach to sexual harassment, having effective policies and procedures in place, providing training where required and responding appropriately to complaints. The good news for employers is that extensive guidance published over the past few months by ACAS, the EHRC and the TUC will help employers understand their obligations in regard to sexual harassment and what to do if a complaint is made.

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Does an Employer have to enhance shared parental Pay?

The answer is still uncertain....

The recent decision by the Employment Appeal Tribunal (EAT) in Capita Customer Management Limited v Ali provided welcome clarity on shared parental leave pay ("ShPP") and whether it is directly discriminatory not to pay men enhanced ShPP in line with any enhanced maternity pay offered to women.

However, recent comments by the EAT in Hextall v Chief Constable of Leicestershire Police have muddied the waters on this issue again, as there now appears to be a risk that to not pay men enhanced ShPP in line with enhanced maternity pay may be indirectly discriminatory.

Employers have been faced with conflicting messages from the judgments so far on these two cases. In Ali, the Employment Tribunal found that it was directly discriminatory for Capita not to enhance ShPP when it did enhance maternity pay. However, this decision was overturned by the EAT. Later, in Hextall, the Employment Tribunal concluded that such a practice was not indirectly discriminatory either, since both men and women receiving ShPP were treated in the same way. However, following the EAT's comments on the Hextall case, where it allowed the appeal on the grounds of the disparate impact that fathers have no choice but to take Shared Parental Leave (SPL) whereas mothers have the option of maternity leave at full pay, it seems likely this decision may go the other way after being remitted back to the Employment Tribunal.

To recap on the facts of the Ali case:

- Following the birth of his daughter, Mr Ali indicated that he wished to take SPL. Capita confirmed Mr Ali was eligible for SPL but that he would only be entitled to statutory ShPP;
- Mr Ali argued that he should receive the same enhanced pay as a female employee who was entitled to 14 weeks enhanced maternity pay following the birth of their child;
- Mr Ali brought claims against Capita for direct and indirect sex discrimination and victimisation for failure to pay enhanced ShPP. In the first instance decision, the Employment Tribunal upheld Mr Ali's claim of direct sex discrimination;
- Capita appealed the Employment Tribunal's decision and were successful in doing so.

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The EAT concluded that Mr Ali should not be able to compare himself to a woman on maternity leave and found that the correct comparator was not a female employee on maternity leave but a female employee on SPL. As a result, Mr Ali could not be directly discriminated against because he was a man, as both men and women would be treated the same for the purposes of SPL.

In coming to its decision on the Ali case, the EAT considered European legislation (the Pregnant Workers Directive) which requires member states to provide a minimum of 14 weeks paid maternity leave for the health and wellbeing of the pregnant and birth mother. Conversely, European legislation (the Parental Leave Directive) makes no such provision of pay for parental leave which instead focuses on the care of the child.

However, it is interesting to note that the EAT did comment that the purpose of maternity leave for women may change after 26 weeks in that the focus of leave from that point onwards is less on their health and recovery after birth and more on the care of the child. In that regard, it may at least be possible after this point to draw a comparison between a father on SPL and a mother on maternity leave.

The argument in Hextall is being run on different grounds. Rather than claiming direct discrimination, Mr Hextall is claiming that the Leicestershire Police's policy of enhancing maternity pay for the first 18 weeks but only paying ShPP for the same period amounts to indirect discrimination. Mr Hextall is arguing that the policy puts men at particular disadvantage as, unlike women, men do not have the option to take maternity leave to care for their child. If this argument succeeds, Leicestershire Police will need to be able to justify why they do not pay enhanced ShPP. At this point, it is likely that the argument put forward in Ali on the health and wellbeing of mothers in the early days of their maternity leave, will form a key part of this justification.

What does this mean for employers?

The Ali decision has been welcomed by employers, due to the beneficial financial implications of not having to offer enhanced ShPP to employees. However, the Hextall case has again created uncertainty for employers on this issue, as there may be a different route for employees to prove discrimination.

That said, this may be of little impact in practice as take up of SPL remains extremely low. According to statistics published earlier this year, even though 285,000 couples are eligible for SPL, the Department for Business, Innovations and Skills has indicated that uptake may be as low as 2%. Further, is it unlikely that this figure will increase especially if employers are ultimately not obliged to offer any enhanced financial scheme to encourage men to take SPL.

While we await the Hextall decision and further clarity from the Employment Tribunal, one thing these cases have achieved is to raise questions about whether the law as it currently stands is achieving its purpose of encouraging men to spend more time with their family.

SHOOSMITHS

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