A new era of CLASSROOM CLAIMS?

A delay in whiplash reform and the COVID-19 emergency may precipitate new in-school education claims.

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It is hardly a secret that whiplash reforms have been significantly delayed. On the assumption that the reforms will arrive in 2021, (in a largely undiluted format) the claimant fraternity has been turning its ever-creative attention to the search for claims in different spheres. Education-related claims could offer them diversification; especially in these COVID-19 times.

This is perhaps unsurprising. October 2019 figures suggest there are over half a million full-time teachers in the United Kingdom, including independent and

special schools, in addition to non-teaching staff. School staff can be exposed on a daily basis to situations which can be unpredictable and, at worst, violent or dangerous.

There has been a marked increase in claims brought by teachers arising out of pupil actions, or when intervening, for example, to break up a fight. Stress claims borne out of an increasing education workload are ever present and could increase with COVID-19 pressures. In addition, there are potential claims from staff compelled to care for children during the pandemic as classroom teaching starts for all pupils from August (Scotland) and September (England, Wales and Northern Ireland).

It is unrealistic to expect the school experience of each pupil to be perfect all the time. There will always be occasions when a pupil or parent believes (sometimes correctly) the school could have done more to prevent an incident or to support a pupil. Potentially over 10 million young people come into contact with that risk in schools, roughly a third of the number of UK drivers on the roads.

Limitation

A clear vulnerability for education authorities is the limitation period, resulting in the evidence trail going stale.

One example involved a 15-year-old pupil who alleged she was physically pulled out of a classroom, pushed against a corridor wall and slapped by a language teacher. No claim was intimated until after County Court proceedings were issued, on the eve of the Claimant's 21st birthday. Fortunately, the teacher involved recalled the incident as being no more than a telling off for insolent behaviour. The Court accepted her account and dismissed the claim.

The first notification was during the teacher's final half term before retirement and the opportunity to obtain witness evidence was nearly lost. Other witnesses, including the investigating head teacher had moved on and could not be contacted (or refused to assist). It would be tempting to conclude that the claim was brought as late as possible to take advantage of any difficulties securing evidence.

While injury claims are a risk, the education sphere offers the opportunity for legal action on both sides of the same coin. Consider, by way of example, poorly behaved pupil one who punches pupil two in the playground. The head teacher investigates and decides to take action to sanction the behaviour. The head teacher has several options, ranging from telling off pupil one, through to permanent exclusion. The school faces a potential claim from pupil two, particularly if that child's parents are outraged because the sanction imposed on pupil one is not perceived as sufficiently severe.

10 million

There are in excess of 10 million school pupils in Great Britain, so it is unrealistic to expect the school experience of each pupil to be perfect all the time.

Special educational needs

The other side of the coin is that pupil one's parents take action as they dispute that an assault took place, or consider the sanction is too severe. They could even blame pupil one's behaviour on a failing by the school to provide him with sufficient support and assistance as he has a disability and behavioural issues. The school has to tread a fine line in responding and has significant special educational needs (SEN) duties.

What if the parents of pupil one want to take further action? They have the option to commence an appeal to the Special Educational Needs and Disability Tribunal (SENDT), on the basis that the school failed properly to assess his educational, health and care needs, and take action in response to such an assessment. In this instance the parents would be in the minority.

Parents can appeal to the SENDT to review an education authority decision, or even to force action such as an assessment. However it is estimated fewer than one-in-fifty (who are entitled to do so) will appeal. Of those that do, approximately nine-in-ten succeed to some degree, typically forcing an education authority to provide more support for a child. Austerity, (likely to tighten further) has resulted in education budgets coming under extreme pressure. Gaps appear frequently, despite the best efforts of those working on behalf of children.

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Reading too much into these figures has its own pitfalls: not all appeals will be on this precise issue. It is by no means a foregone conclusion that the proportion of successful

appeals would remain constant, were all those who are entitled to appeal do so. The tribunal system can however provide often unnoticed risks.

Secondly, the parents are likely to have legal representation, or if that is not available or unaffordable, there are charities that help prepare an appeal and provide the advocacy. In contrast, tribunal claims are often defended by the education department and employees specialising in special educational needs, or former teachers, typically without legal advice. The risk is they are not fully conversant with how to prepare the defence and not aware of the potentially wide implications of their actions.

What if the tribunal finds that further action should have been taken by the school? For example, it may find that an assessment(s) should have been carried out by appropriate experts such as an educational psychologist. Perhaps the school should have realised the child would benefit from speech and language therapy or occupational therapy? It may be that the child's placement is unsuitable. More, or even less, specialist provision would have suited the child's needs better. There are a wide range of potential findings.

An adverse tribunal finding could leave the education authority open to a claim for failure to educate the child, effectively on the basis that the child's potential has been harmed. Such claims typically involve a lot of speculation but are time consuming, difficult and expensive to defend. The family and their solicitor are likely to be emboldened by the tribunal decision, which will doubtless be paraded in front of the county court judge, who may be reluctant to make a different finding, even if not bound by it. The insurer may not know about the tribunal finding at appeal and will not have opportunity for input until the claim is intimated.

In the year to March 2019, there were fewer than 20 appeals registered a day. Three years previously, the figure was fewer than ten. Even if solicitors eager to drum up business in this field persuaded one-in-three of those entitled to appeal to do so, the daily number would rise to over 300. Not only would that overwhelm the departments who respond to these appeals, but it is easy to see how a substantial increase in appeals could lead to a consequent increase in failure to educate claims.

As ever, the mantra is to maintain communication with the appropriate department and ensure knowledge of the potential for a claim if an appeal is lost. Risk and insurance staff (and their solicitors) have extremely useful skills and experience acutely relevant in SENDT proceedings. It would be a shame if these were not harnessed to help defeat appeals in appropriate circumstances and, if necessary, to advise on where an appropriate compromise should be made. ●

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