

THE ACADEMIES BILL: GOVERNANCE, PROPERTY, STAFF AND PROCUREMENT

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1. Peter Oldham has given an overview of the Academies Bill in his paper. In this paper I deal with a miscellany of issues raised by Academies including:
 - (1) Governance
 - (2) Money and other property
 - (3) Land
 - (4) Staff
 - (5) Procurement issues

Governance

2. Section 482 of the Education Act 1996 (which provides the current statutory basis for the creation of Academies) does not make any provision as to the governance arrangements for Academies.
3. The 'old' Model Funding Agreement ("old MFA"), however, did contain provision stipulating that the Academy would be governed by a governing body who would be the directors of the company constituted under the Memorandum and Articles ("M&A") of the Academy Trust. The 'old' model M&A requires the Academy to have at least 3 Governors, one of whom has to be a member of the local authority (appointed by the local authority) and one of whom has to be a parent (elected by the parents of registered pupils). Other Governors can be appointed by the sponsoring body.
4. The old model M&A also gives the SoS power to appoint additional governors if the SoS has previously issued the Governors with a warning notice (a notice that the Academy is performing poorly either in terms of academic performance or in terms of management or governance) and the Governors have failed to secure the necessary improvement in standards stipulated in that notice.
5. The old MFA stipulates that the M&A cannot be amended without the consent of the Secretary of State ("SoS").

6. Under the Academies Bill, clause 12 provides that Academies are to be charities and limited companies. There is nothing else in the Bill about the governance arrangements for Academies. These will again be set out in a 'new' model M&A. This document is supposed to be available on the DFE website, but at present the link is to an incomplete document. The 'FAQ' on the DFE site includes the following:

Will academy governing bodies continue in their current form? Academies have replaced governors, particularly parents, with unelected corporate and business sponsors.

There is no requirement for outstanding schools converting to an academy to have an external sponsor. We value the role of parental engagement in schools. The current model articles of association say that academies must have one local authority governor and at least one parent governor; however, no decisions have yet been taken on the composition of future academy governing bodies.

7. The new draft MFA provides (at clause 103) for the SoS to appoint Governors in the event of a 'Special Measures Termination Event' occurring. In essence, this means where OFSTED has placed the Academy in special measures and it has failed to comply with OFSTED's requirements.

Money and other property

8. The Bill contains a number of complicated-looking provisions dealing with the transfer of the property of existing maintained schools to new Academies.
9. Clause 7 of the Bill is relatively straightforward. It makes provision for the local authority to pay to the new Academy any surplus that the school has accumulated from monies allocated to it by the local authority. Where a school is in deficit, however, there is no corollary. It appears from the 'FAQ' on the DFE site that where a school is in deficit it may be allowed to become an Academy anyway (although if the deficit is significant the decision about Academy status may be postponed) and the school will not have to repay any money to the local authority.
10. Clause 8 of the Bill makes provision in respect of the transfer of other property, rights or liabilities of the school. Clause 8 does not deal with the transfer of land. This is dealt with separately in Schedule 1 to the Bill (see below).

11. Clause 8 enables the SoS to make a “property transfer scheme” transferring any property, rights or liabilities held for the purposes of the school by a local authority or the school’s governing body to the proprietor of the Academy. The power is extremely broad. A property transfer scheme may “create rights, or impose liabilities, in relation to property, rights or liabilities transferred by virtue of the scheme” and “provide for anything done by or in relation to the current owner in connection with any property, rights or liabilities transferred by the scheme to be treated as done, or to be continued, by or in relation to the transferee” (sub-section (5)). It may “apportion property, rights and liabilities” and “make provision about the continuation of legal proceedings” (sub-section (5)). It may have the effect of transferring property, rights and liabilities that “could not otherwise be transferred” and even property acquired, and rights and liabilities arising, after the making of the scheme (sub-section (6)). A transfer made by virtue of a property transfer scheme is binding on everyone even if, apart from the Bill, it would have required that individual’s consent (sub-section (10)).

12. The effect of this Clause is thus to enable, but not compel, the transfer of personal property (chairs, tables, etc.) and also contracts and other rights and liabilities of the existing maintained school. In this way, for example, cleaning and catering contracts may be transferred to the new Academy without the need for any express novation of those contracts. On the other hand, if the new Academy proprietor does not want any particular existing contract or property of the existing maintained school, this may in principle be omitted from the transfer arrangements. Of course, any such omission will not usually mean that the employment of any employees providing services to the school pursuant to such contracts will cease. In many cases, even if the contract pursuant to which they were working is terminated at the time of transfer (or frustrated by the fact that the contracting party – the current maintained school – has ceased to exist), the employment of the employees will transfer to the new Academy or to any new contractor appointed by virtue of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (“TUPE”) (as to which, see further below).

Land

13. The provisions in relation to the transfer of land are set out in Schedule 1 to the Bill. In summary, what Schedule 1 provides is as follows.

14. The Schedule enables the SoS to make 'a scheme in relation to land' (i.e. to make mandatory directions in relation to the transfer of land) where an Academy is created or discontinued. The scope of this power is very wide. The SoS is permitted to make such a scheme where:

- (1) The land in question is 'owned' (freehold or leasehold) by a local authority and the land has at any time within the last 8 years been used wholly or mainly for the purposes of a maintained school but is either no longer being used for those purposes or is about to cease being used for those purposes (para 1 of Sch 1). There is no requirement to consult the local authority in relation to a transfer of land in these circumstances. (This provision is primarily directed at the situation where a maintained school becomes an Academy. However, it would also enable the transfer of land where a maintained school has previously occupied the land and has closed or has ceased to occupy it but not become an Academy. In principle, it also allows the transfer of land where land has ceased being used for the purposes of a school and is now being used for other purposes, although it is likely that the SoS would refuse to exercise his discretion to make a scheme in those circumstances.)

- (2) The land in question is 'owned' (freehold or leasehold) by a local authority and, although it may not have previously been used for the purposes of a maintained school, it has been specified in a notice published under s 7 of the Education and Inspections Act 2006 ("EIA 2006") as a possible site for a new school (para 2 of Sch 1). Para 3(1)(e) provides that this provision only applies where "the Academy [has] been the subject of proposals published under section 7 of the EIA 2006". The Bill does not, however, restrict the making of a scheme to the situation where the Academy has in fact been selected (by the local authority or the schools adjudicator) as the 'winner' of the competition. The SoS thus in principle has the power to thwart or frustrate any competition for a new school arranged by a local authority under the EIA 2006 by 'grabbing' the land for any Academy that has entered the competition. The extraordinary nature of this provision is tempered only by the fact that in these circumstances there is an express requirement to 'consult' the local authority.

- (3) A foundation or voluntary school is made the subject of an Academy order and the land in question is held by the governing body or trustees of that school.
 - (4) An Academy ceases to be an Academy.
- 15. Where land is to be transferred from a local authority to a new Academy under a transfer scheme, the scheme has to specify whether the transfer is to be a transfer of the leasehold or freehold interest in the land, or whether the local authority is simply to grant a lease to the Academy (para 3(1)(a) and (b)). Where land is to be transferred under a scheme, any right or liability held by the local authority must also be transferred (para 3(1)(f)), excluding any liability in respect of the principal or interest on a loan (para 3(2)(b)).
- 16. Where the land in question is owned by the governing body, foundation body or trustees of a foundation or voluntary school, the SoS has the option either to transfer the land to the new Academy or to transfer it to the local authority (para 4(3)). If the land is transferred to the local authority, the SoS may require the local authority to pay an 'appropriate' sum for the land. The SoS also has power under this paragraph to require the governing body, foundation body or trustees to pay either the SoS or the local authority the whole or part of the value of the land. If no transfer scheme is made before the Academy is formed and the old governing body is dissolved then all publicly funded land held by the governing body for the purposes of the school will vest in the local authority (para 5(3)), unless provision has been made for the governing body to pay for that land under para 4(3).
- 17. That said, para 5(4)(b) says that there will be no automatic reversion of the land to the local authority where the 'land ... is held by the governing body on trust for the purposes of the school'. It is somewhat hard to see what land the governing body will hold that is not held on trust for the purposes of the school. Moreover, by virtue of para 5(5) a governing body that is to be dissolved may (unless the SoS otherwise directs and unless there are other trustees who also hold land on trust for the school¹) transfer any land that is held by them on trust for the purposes of the school 'to any person to hold such land on trust for

¹ In which latter case, the land in question will vest in 'the other trustees' (para 5(7) and (8)), presumably thus removing it from the use of the Academy altogether. These provisions are very confusing: mercifully para 5(9) provides that if there is any doubt about to whom the land should belong at the end of the day, this can be resolved by direction of the SoS.

purposes connected with the provision of education in schools'. Could this in principle extend to the private sector? Answer: yes, in my view.

18. It will be noted that one significant difference between the provisions dealing with transfers of land from local authorities to Academies and the provisions dealing with transfers from governing/foundation bodies/trustees is that there is no provision for a local authority to be paid for that transfer of land. While the transfer of land for nil consideration where a school was becoming a foundation school (for eg) seems palatable, some may find it less palatable where, technically, the land is being transferred out of the 'public' sector to an 'independent' Academy. However, the effects of this are somewhat tempered by the provisions in para 6 on what happens to land when an Academy either ceases to be an Academy (whether or not it continues to function as a school) or ceases to use any land that was transferred to it (by any means) for use for the purposes of the Academy. In such circumstances, the SoS may make a scheme for the transfer of such land back to the authority who originally held the land.
19. Where land was previously transferred from a governing/foundation body/trustees to an Academy, para 7 enables the SoS to direct that land that ceases to be used for the purposes of an Academy be transferred either to the local authority or back to the governing/foundation body/trustees, in either case on payment of such sum of money as the SoS considers appropriate. The SoS may also allow the proprietor of the Academy to retain the land on the payment of such sum of value for the land as the SoS considers fit.
20. Transfers of local authority land to Academies (and from Academies back to local authorities) pursuant to schemes are expressly stated to be effective whether or not a person's consent to the transfer would otherwise have been required (para 3(7) and 6(12)). There is no similar express provision for land held by governing/foundation bodies/trustees, but it appears as if such schemes too would be effective without consent.
21. The SoS's power to make transfer schemes does not absolve the parties of the need to execute proper conveyancing documents: para 8 requires the parties to execute such documents as they would need to execute were the transfer a 'private' sale or grant of lease. Para 10 also disapplies certain restrictions that would normally apply to disposals of local authority land, such as the restrictions in s 77(1) of the School Standards and Frameworks Act 1998 ("SSFA 1998") on disposal of school playing fields.

22. The provisions on transfer of land potentially raise issues in relation to Article 1 of Protocol 1 to the European Convention on Human Rights (“A1/P1”). This has been recognized by the Government and the Explanatory Notes to the Bill provide the further (unusually full) explanation as to why the “appropriate Minister” has concluded that transfer schemes under the Bill will not give rise to breaches of A1/P1:

“53. Schedule 1 ... of the Bill, makes provision for the transfer of land from maintained schools which are converting into Academies so as to be available for use by the Academy on the conversion date. ‘Conversion date’ is defined in clause 5(2). The Minister has considered whether the property rights of a private landowner under [A1/P1] might be engaged by the provisions in this Schedule.

54. The Minister considers that to the extent the property, rights or interests of any person might be engaged by the provisions of the Schedule, the Schedule provides for adequate compensation and therefore [A1/P1] is not breached. This is because the Schedule proceeds on the basis that in relation to such land held by private entities, or in which a private entity may have an interest, the private entity would be compensated for any deprivation of property or interest, by compensation from the local authority, to the extent that any transfer was made a requirement of a scheme or direction. This is the effect of the powers in paragraph 4(3) of the Schedule and which are largely a reproduction of powers that already exist in Schedule 22 to the [SSFA 1998].

55. Wholly privately-owned land, where there has been no public enhancement at all, falls outside the remit of the Schedule and would not fall to be subject to any scheme or transfer under it. Any land or other property transfers in those situations will occur on the basis of a consensual arrangement between the private owner and the Academy school, such that no issue of engagement of [A1/P1] arises.

56. To the extent that [A1/P1] is engaged by the Bill therefore, the Minister is satisfied that any provisions that might require the transfer of property will also provide for any owner of that property to be compensated adequately, and that any such transfer scheme or direction would be solely for the purpose of an existing school continuing on the site in a different legal form. The powers are framed, and would be utilized, only to protect land originating in public hands or on which public money has been spent, to prevent its benefit being lost to the public sector.”

23. The Government’s assessment is probably correct, although it is worth noting that the legality of transfer schemes where they involve the transfer of land

held by persons other than local authorities², will depend in many cases on the SoS exercising his discretion to require compensation to be paid for that land. If the SoS does not exercise that discretion then there will be a risk of a breach of A1/P1 since, although A1/P1 does not state in express terms that compensation must be paid when someone is deprived of their possessions³, the ECtHR has said that “the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances” (*James v UK* (1986) 8 EHRR 123, [54]). Further, normally, full compensation will be required, although the ECtHR has recognized that “Legitimate objectives in the ‘public interest’, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value” (*Scordino v Italy (No 1)* (2006) 45 EHRR 207). The sorts of situations likely to arise in relation to the creation and discontinuance of Academies may well be situations where less than full value will be required. The SoS will need to look carefully at the facts of each case to determine what (if any) amount of compensation would be proportionate in each case so as to avoid any breach of A1/P1.

Staff

24. Academies have certainly not been a general ‘hit’ with teachers. All the teaching unions are opposed to the Bill. An NUT letter of 13 July 2010 indicates that the NUT’s main concerns are: the minimal requirements for consultation with interested parties prior to the creation of Academies; the difficulty that small schools, and particularly primary schools and special schools, may have in sustaining Academy status; the possibility for ‘selection by the back door’ in the using ‘banding arrangements’ in Academy admissions; and the possibility of governing bodies not being sufficiently accountable or interested because they may contain only 1 parent governor and no staff governors. Notably, the NUT does not list among its principal concerns the likely impact on staff jobs and terms and conditions. However, the Anti Academies Alliance (www.antiacademies.org.uk) (“AAA”) certainly takes a

² Local authorities cannot, of course, complain of a breach of A1/P1 as they cannot be “victims” for the purposes of Article 34 of the Convention and s 7(4) of the HRA 1998: a “victim” has to be “any person, non-governmental organisation or group of individuals ...”.

³ A1/P1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

more pessimistic view about the effects on staff of the creation of Academies. I draw on some of the AAA's examples below.

25. What, however, are the legal obligations in relation to the staffing of Academies?

Provisions of the MFA

26. First, in terms of who may be employed by Academies, there is prescription in the draft MFA. Clause 18 mimics the requirements placed on maintained schools by stipulating that Academies cannot employ anyone to “carry out planning and preparing lessons and courses for pupils, delivering lessons to pupils, assessing the development, progress and attainment of pupils, and reporting on the development, progress and attainment of pupils (“specified work”)” who is not either (a) a qualified teacher or (b) otherwise eligible to do specified work under the *Education (Specified Work and Registration) (England) Regulations 2003* (SI 2003/1663).
27. Clause 18 does not, however, apply where the employee's employment transferred to the Academy Trust by virtue of *TUPE* and that employee was, despite not being a qualified teacher or otherwise eligible to do specified work, nonetheless employed to do specified work. In such cases the Academy must use its best endeavours to ensure that any such member of staff meets such requirements as soon as possible.
28. Clause 20 of the draft MFA stipulates that the Academy Trust must ensure that all teachers employed at the Academy have access to the Teachers Pension Scheme (“TPS”) and that they comply with the statutory provisions underlying the scheme.
29. Clause 21 requires the Academy Trust to ensure that all employees at the Academy other than teachers have access to the Local Government Pension Scheme (“LGPS”).
30. Within those limits, however, (together with any others that may be inserted into the MFA), Academies are, as independent schools, in principle entitled to set their own terms and conditions for staff. However, in most cases there will be a significant fetter on that discretion in the form of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (“TUPE”).

TUPE

31. Where TUPE applies it:
 - (a) Automatically transfers the employment of any employee of the transferor to the transferee (reg 4);
 - (b) Prohibits the dismissal of an employee by reason of the transfer save for an 'economic, technical or organizational reason entailing changes in the workforce' (an 'ETO reason') (reg 7);
 - (c) Prohibits any change to the employee's terms and conditions of employment by reason of the transfer unless the transferor is insolvent (reg 9) or the reason for the change is an ETO reason (reg 4(4));
 - (d) Deems any collective agreement between the transferor and a recognized trade union to have effect *in its application in relation to the employee* as between the transferee and the union (reg 5) (i.e. reg 5 to continue to give effect to a collective agreement in respect of any employees newly joining);
 - (e) Requires the transferee to continue to recognize any trade union recognized by the transferor in respect of the employees who have transferred, but only if the employees transferred maintain after the transfer 'an identity distinct from the remainder of the transferee's undertaking' (reg 6 – save where the Academy is run by an existing organization with wider interests, it is therefore unlikely that that this provision will apply where Academies are created since the employees transferred will not maintain a distinct identity after the transfer);
 - (f) Requires employee representatives to be consulted about the transfer a reasonable period in advance (reg 13 – there are specific requirements as to what representatives need to be told);
 - (g) Requires the transferor to notify the transferee of certain employee liability information in advance of the transfer (regs 11 and 12).

32. TUPE applies wherever there is a 'relevant transfer' of (1) an 'undertaking' or (2) a 'service provision change' within the meaning of reg 3 of TUPE.

33. There will be a transfer of an undertaking where there is a transfer of a 'economic entity which retains its identity' (reg 3(1)(a)). A 'transfer' of an 'economic entity' does not require any form of transaction between the

outgoing and incoming operator⁴, nor does the operation need to be run with a view to profit⁵. Whether there has been a ‘transfer of an economic entity’ which has ‘retained its identity’ in different hands depends on an overall evaluation of all the relevant factors⁶ including (but not limited to):

- (a) the extent (if at all) to which the relevant assets pass from the alleged transferor to the alleged transferee;
- (b) the extent (if it all) to which relevant intangible property rights pass from the alleged transferor to the alleged transferee;
- (c) whether the staff, the majority or “major part” of the staff pass from the employment of the alleged transferor into the employment of the alleged transferee;
- (d) whether the transferor’s customers or clients are taken over by the alleged transferee;
- (e) whether the transferor’s organization and operating methods are taken over by the alleged transferee;
- (f) whether there is an interruption in the provision of the operation;
- (g) the similarity or otherwise of the activities.

34. The importance to be attributed to any particular factor depends on the nature of the operation. So in an operation which is heavily dependent on equipment it will be important to see whether the ownership or use of the equipment⁷ has been taken over. Conversely, if the gist of the business is the skill or labour of the employees it will be important to see whether the workforce or a major part of it has been taken over.

⁴ See *Merckx v Ford Motors* [ECJ] [1996] IRLR 467; *Sanchez Hidalgo v AdSA* (ECJ) [1999] IRLR 156.

⁵ See *Dr Sophie Redmond v Bartol* [1992] IRLR 366. Although a company that merely holds shares and undertakes no activity itself will not be an economic entity, cf *Polysar Investments v IIAA* [1993] STC 222.

⁶ This is established by a long line of cases beginning with *Spijkers v GBA* (ECJ) [1986] ECR 1119. See esp. *Süzen* below.

⁷ E.g. *Oy Likenne v Liskojarvi* [2001] IRLR 171 (no transfer of a bus service, where no buses were transferred); *Betts v Brintel* [1997] ICR 792 (transfer of helicopters essential to transfer helicopter service business). As indicated above, the *use* of assets by the new operator may be important: see e.g. *Abler v Sodhexo* [2004] IRLR 168 where the fact that cooks would continue to use the same cookers was significant in the European Court’s conclusion that a transfer of an in-house catering service had taken place.

35. In *Süzen v Zehnacker* [1997] ICR 662 the ECJ has stressed that the mere transfer of a function or is not enough: an entity cannot be equated simply with the activity it runs. (“An entity cannot be reduced to the activity entrusted to it” – ECJ para. 15 at p.671).
36. The key question in relation to the creation of any new Academy will therefore be whether it has taken over the identity of an existing school or schools or, even, part of a school, since a transfer will be caught even where only part of an undertaking is transferred, or where an entity becomes part of a larger whole, provided it is still identifiable. Thus the fact that an existing maintained primary and secondary school becomes a single all-age Academy will not mean that there has not been a TUPE transfer – all other things being equal, there will have been a TUPE transfer from both schools.
37. In many cases it will be straightforward to determine whether or not a new Academy constitutes the transfer of an undertaking from an existing maintained school. If a maintained school closes and its staff and pupils transfer to a new Academy there will plainly have been a relevant transfer for the purposes of TUPE even if a different site is used. In contrast, if an Academy opens on a new site and starts ‘from scratch’ taking only pupils from Year 7, while an old maintained school is ‘run down’, the situation may be less clear. If teachers and equipment move across between the schools so that, by the end of 7 years, most of the staff have transferred, it is possible that this would still constitute a transfer⁸. However, if most of the staff do not transfer and no equipment does then it is more likely that there will not have been a relevant transfer.
38. It should be noted that the creation of a new Academy that involves a relevant transfer of an undertaking may also involve relevant TUPE transfers of the second sort – ‘service provision changes’. A ‘service provision change’ occurs where (reg 3(1)(b)):
- (i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”) (**contracting out/out-sourcing**);
 - (j) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the

⁸ A transfer may take place over a period of time: see *Celtec Ltd v Astley* C-478/03 [2005] ICR 1409.

client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf (**change of contractor**); or
(k) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf (**contracting in/in-sourcing**).

39. Thus where an Academy takes over from a maintained school, but seeks to appoint new companies to undertake the catering and cleaning contracts, it is likely that TUPE will apply to transfer the catering and cleaning staff to the employment of the new contractors. If, however, the SoS chooses to direct the transfer of the maintained school’s previous catering and cleaning contracts to the new Academy, there will have been no TUPE transfer – the staff will remain employed by the existing contractors, but the contractors’ relationship will now be with the new Academy rather than the old maintained school.
40. If TUPE applies, then all existing staff must transfer to the new Academy, on their existing terms and conditions. They can only be dismissed, or their terms and conditions varied, for a reason connected with the transfer if that reason is an ‘ETO’ reason. There is remarkably little case law on what constitutes an ETO reason. It certainly encompasses redundancy situations (changes in number or kind of employees required): see *Whitehouse v Blatchford & Sons Ltd* [2000] ICR 542. The key point is that, in order to qualify, the reason has to ‘entail changes in the workforce’.
41. It should also be the transferee (i.e. the Academy) who takes the decision about dismissals and/or changes to terms and conditions since the reason has to relate to the ongoing conduct of the business (see eg *Wheeler v Patel* [1987] ICR 631). The transferor (i.e. the ‘old’ foundation/voluntary school or the LEA), who is no longer going to be running the business, cannot therefore rely on an ETO reason for dismissal in advance of a transfer: see *Hynd v Armstrong* [2007] IRLR 338.
42. The ‘FAQ’ on the DFE website suggests that, post-transfer, an Academy ‘may consult with staff and their union representatives on changes to ... terms and conditions, for example to enable the academy to operate over different term times or change the length of the school day’. It is questionable whether such changes would be ‘ETO’ changes. Certainly, it could be said that changes in term times or length of the school day might require additional employees to

be employed (i.e. may entail changes in the workforce). However, the purpose of changing employees' terms and conditions would presumably be in order to *avoid* taking on additional employees (i.e. to *avoid* changes in the workforce), which would evidently not fall within the scope of an ETO reason.

43. The AAA website identifies other changes that new Academies might want to make, such as cutting costs by reducing the number of senior teaching roles, or reductions in staff numbers where two existing schools combine to become one Academy. These sorts of changes are likely to constitute 'ETO' reasons and therefore dismissals in those circumstances are likely to be lawful (although redundancy payments will have to be paid).

Equal pay

44. For a claim to be made under s 1 of the EqPA, a comparator must be in the "same employment" as the claimant. "Same employment" is defined in s 1(6) as follows:

(6) Subject to the following subsections, for purposes of this section—

(c) Two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control,

and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.

45. An Academy and a local authority will not be the "same employer" within the meaning of s 1(6) (compare the position for voluntary-aided schools: see *Hasley v Fair Employment Agency* [1989] IRLR 106, *Gardiner v LB of Merton* [1980] IRLR 472, *Governors of Blessed Edward Jones High School v Rawlinson* (EAT/0776/02/DM) and *Dolphin v Hartlepool Borough Council* (EAT/0559/05/LA⁹).
46. However, that does not necessarily mean that an equal pay claim will fail. For claims brought directly under Art 157 of the Lisbon Treaty (formerly Art 141), an employee may compare herself with someone employed by a different employer where there is a 'single source' (or entity) who is responsible for the

⁹ In *Scullard v Knowles and Southern Regional Council for Education and Training* [1996] ICR 399 the EAT indicated that a wider interpretation of 'associated employers' was required to be given to s 1(6) in order to give proper effect to rights under art 157 (ex art 141) of the Treaty. However, the EAT in *North Cumbria Acute Hospitals NHS Trust v Potter* [2009] IRLR 176 has now made clear that this is not necessary since claimants can rely directly on art 157.

continuing inequality in pay and has the power to restore equal treatment: see *Lawrence v Regent Office Care Ltd* (C-320/00) [2002] IRLR 822, ECJ and *North Cumbria Acute Hospitals NHS Trust v Potter* [2009] IRLR 176, EAT.

47. The classic example of a 'single source' situation given in the *Lawrence* case¹⁰ was where the employees' terms and conditions are governed by a single collective agreement.
48. In the aforementioned *Blessed Edward Jones* and *Dolphin* cases the EAT considered the situation of VA school employees whose contracts of employment were based on 'Green Book' terms (i.e. on the same terms as local authority staff). Although it was acknowledged that it was the general practice of VA schools to use model local authority contracts in the employment of their staff, the EAT found that there was not a 'single source' responsible for the differences in pay between the claimants and their local authority comparators. Essentially this was because the EAT concluded that the governing body was responsible for setting terms and conditions for its own staff and the fact that it happened to choose to set them in accordance with Green Book terms did not mean that it became a 'single source' responsible for the inequality in treatment. The governing bodies were not also responsible for setting the terms and conditions of the comparator local authority employees.
49. In *Potter v North Cumbria*, the EAT further clarified that it did not matter (where, e.g., two NHS Trusts had merged) that the new employer was not responsible for having created the inequality in the first place, or for the decision to incorporate the terms of a collective agreement into contracts of employment/to designate a particular body to determine for its staff. Provided the employer had the power to change the situation (and 'power' here seems to be taken in *Potter* to mean ability to change terms and conditions following consultation, etc), that would suffice.
50. The same result would be likely to apply in relation to Academies where transferring staff have contracts based on local authority contracts or incorporating collective agreements. In such cases, staff may have an argument that they could continue to claim equal pay with former local authority colleagues on the basis of a 'single source' for the purposes of Art

¹⁰ And also in the earlier ECJ decision in *Defrenne v Sabena* (Case 43/75) [1976] ICR 547.

157. However, on the present state of the case law, such a claim would be unlikely to succeed.

Procurement

51. There are now three routes by which an Academy proposal may arise:

- (1) An existing maintained school may itself apply for academy status (or the SoS may require a school to do so if it has been in special measures for a year);
- (2) A 'private' promoter may directly approach the SoS; or
- (3) An academy proposal may emerge from a competition organised by the local authority under the EIA 2006.

52. Whether or not EU procurement law applies to route (2) (or a variant of it¹¹) was considered by the Court of Appeal last year in *R (Chandler) v Secretary of State for Schools, Families and Children* [2009] EWCA Civ 1011, [2010] ELR 192. The Court of Appeal held that it did not because:

- (1) A contract for an Academy under which the independent operator is merely reimbursed by the SoS for the costs of running the school and itself makes no profit is not a "public services contract" within the meaning of the EU Directive 2004/18 or within the meaning of the *Public Contracts Regulations 2006* ("the PC Regs").
- (2) A person who offers to run an Academy pursuant to such a contract with no view as to profit will not be offering their services "on the market" and therefore will not fall within the definition of "service provider" in the Directive or the PC Regs. The same would be true whether the person making the offer is "an industrial concern that offers to sponsor an academy as an adjunct to its entrepreneurial activities in some other field" or even if it is currently running an independent fee-paying

¹¹ In that case the local authority, Camden, had in fact decided to 'support' UCL's academy proposals and had itself engaged in local consultation on the decision (although there had been no EIA 2006 competition organised). In the High Court it was held that Camden was lawfully entitled to lend its support without holding a competition, and that Camden did not have to comply with EU procurement rules because it was not Camden, but the SoS who would ultimately be awarding the contract (i.e. entering into the funding agreement).

school since “the business of running an independent school and the business of providing expertise to run a maintained school are separate markets”.

- (3) In principle there would probably (despite a. and b. above) still be a requirement be an obligation to conform to the requirements of transparency, equal treatment and non-discrimination equivalent to the those laid down in the PC Regs and the Directive, notwithstanding that that legislation is not strictly applicable. (The CA referred to *Telaustria* [2000] ECR I-10745, *Commission v Ireland* [2007] ECR I-9777 and *R (Law Society) v Legal Services Commission* [2008] 2 WLR 803. See now also *Serrantoni Srl v Comune di Milano*, Case C-376/08, judgment 23 January 2010.) However, as a matter of fact in that case the Court concluded that there had been ‘no realistic prospect of cross-border interest’ such that the EU requirements of transparency and non-discrimination did not apply¹².

53. The reasoning of the CA in *Chandler* means that the procurement regime in its strict sense will not apply to any of the routes by which an Academy may be proposed. However, were there in any particular case to be real interest in running an Academy from a provider based in another Member State, then the SoS might be required to comply with the general EU requirements of transparency and non-discrimination before he could enter into an agreement with an Academy provider.

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¹² In *Chandler* there had at one point been interest in the contract from a Swedish provider, but their interest had lapsed and so the Court was able to conclude that there was ‘no realistic prospect’.