

education news

Issue 1

Suspension is a neutral act – true or false?

A recent High Court decision casts doubt over the use of suspension in disciplinary proceedings.

Contact:

For further information or advice please contact Lupton Fawcett's **Louise Connacher** Partner, on **01904 561411** or louise.connacher@luptonfawcett.law

More about Louise online: <https://www.luptonfawcett.com/our-people/louise-connacher/>

A teacher with 15 years' experience started work for a primary school. Five weeks later, she was suspended following her treatment of two children in her class who had behavioural difficulties. On two occasions she dragged a child along the floor, and on another she picked up a child and carried him kicking and screaming out of the class room in front of the other pupils.

The teacher was suspended on full pay. The letter of suspension stated: *"The suspension is a neutral action and is not a disciplinary sanction. The purpose of the suspension is to allow the investigation to be conducted fairly."*

The judge took the view that the suspension was not a neutral act. He quoted an earlier case on suspension:

"Suspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence."

He also criticised the manner of the suspension as being a "knee-jerk" reaction. He noted that no attempt was made to ascertain the teacher's version of events, that no consideration appeared to have been given to an alternative to suspension, and that the letter did not explain why the investigation could not be conducted fairly without the need for suspension. In those circumstances, the judge considered that the suspension was sufficient to breach the implied term in the contract of employment relating to trust and confidence. This meant that the teacher could resign in response to that breach and claim constructive dismissal.

The judge also observed that the protection of the children was not the reason given for the suspension. If it had been thought necessary to suspend the teacher for child protection reasons, then the outcome of this case may well have been different.

Employers must now think carefully before suspending an employee in a misconduct situation. In particular, consideration should be given to why the suspension is necessary, and whether the employee could instead be moved into a different role temporarily whilst the investigation is completed.

Operating a school minibus – are you compliant?

A minibus can be a very practical and cost effective asset for schools and colleges. However the regulations and law surrounding their use can throw up some very complex issues. These issues should not be ignored - failing to comply with the regulations could have serious consequences. Your school as well your drivers could be prosecuted, your vehicles could be impounded, and your insurance policies voided.

Our Regulatory and Corporate Defence lawyers are often asked to advise upon the requirements which are always dependant on the particular circumstances of your establishment, your drivers, the nature of the different type of journeys undertaken, as well as how they are funded.

We have set out some of the regulatory issues you should consider below but you should always seek advice to make sure you are on the right side of the law.

What is a minibus?

A minibus is a motor vehicle with between 9 and 16 passenger seats (excluding the driver). This is described as a category D1 vehicle by the DVLA.

Who can drive a minibus?

Firstly, you must be 21 or over.

Drivers who hold a full and unrestricted driving licence including category D or D1 can drive a minibus whether for hire and reward or not.

Drivers without D or D1 who obtained their normal Category B driving licence before 1 January 1997 have 'grandfather' rights and can drive a minibus but not for hire or reward.

Drivers without D or D1 who obtained their normal Category B driving licence after 1 January 1997 can drive a minibus under a section 19 permit, in very limited circumstances.

Drivers without D or D1 who hold a normal Category B licence may, if they comply with certain requirements, drive a minibus that is not being used for hire or reward, without the need for a PCV licence.

What is considered for 'hire or reward'?

A vehicle is classed as being used 'for hire or reward' where a payment is made, even if that payment is made indirectly (e.g. the cost of the minibus use is included as part of the cost of a trip or in school fees generally), and even if no profit is made.

A minibus is NOT being used for hire or reward in the following circumstances:

- The pupils are not obliged to pay (whether directly or indirectly) in exchange for the right to be passengers

- A minibus is being used by an independent school with charitable status, a free school or an academy provided the use of the minibus is not for a passenger service on a commercial basis, but to take pupils off site for trips within the school day or as an extracurricular activity, where the pupils do not pay in any way for the transport.

What can our school do to ensure that we are compliant?

If you are unsure as to whether your school's minibus use is deemed to be for 'hire or reward' then you can ensure that you are protected by applying for a s.19 permit or by having a PSV Operator's licence in place.

s.19 Permit

Under *s.19 Transport Act 1985* a permit can be obtained by certain organisations to allow a minibuses to be driven for hire or reward (for a charge to be made), without the need for PSV Operators licence to be in place.

Your school should have a s.19 permit in place if the minibus journeys are to any extent funded by outside sources such as parents.

A s.19 Permit is usually issued to non-profit making bodies (including schools) that run transport services which benefit the community. Commercial organisations, including privately owned schools, are not eligible for a permit.

Standard permits can be obtained for vehicles that carry between 9 and 16 passengers. Large bus permits are also available.

s.19 Permits do not apply to non-charitable schools, and charitable schools who use their vehicles for trading activities, as their use will be considered to be 'with a view to profit', even if no fee is charged or profit made. These schools must instead apply for a PSV Operator's licence.

A permit may not be used to carry members of the general public, or with a view to profit or incidental to an activity carried on with a view to profit.

PSV Operator's Licences

All schools (both charitable and non-charitable) can apply for a restricted PSV licence (for up to 2 vehicles of up to 16 passengers each) or a full licence (for any number and for larger vehicles). International licences are also available for travel within the EU. A separate licence is required for each traffic area from which you operate. A PSV licence must be renewed every five years.

To obtain a PSV licence, a school must be of good repute and of sufficient financial standing, have good facilities for maintaining its vehicles, and be capable of ensuring that it and its staff are capable of obeying all the rules. These requirements are much more onerous than a section 19 permit.

What else does our school need to consider?

Health and Safety

The school or college has responsibilities Health and Safety legislation to ensure the safety and road worthiness of the vehicle, to risk assess the driver and each journey undertaken as well as to ensure in so far as is practicable the safety and well-being of drivers, of passengers and of other road users.

Vehicle Requirements

All vehicles should be regularly serviced and must meet requirements (eg. for seat belts) applicable to their age, size and use. The Driver and Vehicle Standards Agency carries out spot checks and may revoke licences and permits if vehicles are not roadworthy.

Minibus driver training

Whilst there are no qualifications which drivers have to obtain before driving a minibus, it is best practice for schools to ensure that drivers complete further driving courses, such as the Minibus Driver Awareness Scheme. Failure to do so could have consequences if there is an accident and a subsequent claim that drivers were not fully trained, making the school more likely to be found negligent and liable for any loss. Many insurance companies will require such training as a condition of cover.

Drivers' responsibilities

Drivers should be aware that in addition to the responsibilities of the school detailed above, they are also personally responsible for the road worthiness of a vehicle. Drivers could be prosecuted for any vehicle defects and would be prosecuted personally for any road traffic offences that are committed.

Where can I find some useful links?

<https://www.gov.uk/driving-a-minibus>

<https://www.gov.uk/government/publications/application-for-a-standard-or-large-bus-permit-psv372>

Who can I contact if I have any queries?

Please contact **Jeremy Scott** or **Meghan Waldron** in the Regulatory & Corporate Defence Department at Lupton Fawcett on **07971 520407** (24/7 number) or **0113 280 2125**. They will be happy to give you some free initial advice and to discuss how they can help you to keep on the right side of the law.

More about Jeremy online: <https://www.luptonfawcett.com/our-people/jeremy-scott1/>

More about Meghan online: <https://www.luptonfawcett.com/our-people/meghan-waldron/>

The Condition Improvement Fund (CIF) – An Overview

CIF is capital funding from the Education and Skills Funding Agency (ESFA) and is available to all Academies and Sixth Form Colleges.

The main priority of CIF is to improve the condition of buildings and to ensure that buildings provide a safe environment for learning. A smaller proportion of funding is allocated to the expansion of buildings.

Who Can Apply?

- All open Academies and Sixth Form Colleges
- Academies in Multi-Academy Trusts with less than 5 Academies and less than 3000 pupils.
- Schools with signed Academy orders

What Types of Projects Are Eligible?

There are three categories of CIF projects:

- Condition
- Condition with Expansion
- Expansion

Approximately 80% of the total CIF funding is allocated to Condition projects each year.

Project Thresholds

CIF projects must aim to improve capital assets held in freehold or in long lease, which are used for educational provision for pupils between the ages of 2-19. CIF cannot be used to purchase land.

The following thresholds are applied;

School Type	Minimum Project Threshold	Maximum Project Threshold
Primary and Special Schools	£20,000	£4,000,000
Secondary, All-Through and Sixth Form Colleges	£50,000	£4,000,000

Which Condition Projects Have Priority?

The ESFA have prioritised projects as follows with the highest priority projects most likely to receive funding.

Highest – Asbestos removal, gas and electrical safety, lift safety, legionella, fire safety, safeguarding

High – Building fabric (weather tightness), Mechanical and Electrical systems (heating and water supply)

Medium – Building fabric (internal refurbishment, toilets, kitchens, classrooms),

Mechanical and Electrical systems (not heating and water supply)

Low – Energy efficiency improvements (insulation, lighting)

Lowest – Access improvements (DDA), non-teaching building fabric, non-teaching Mechanical and Electrical

Expansion Projects

CIF will only fund expansion projects where demonstrable growth is clear. Evidence must include existing building floor areas and how this relates to any shortcomings against recommended areas in Building Bulletin 103 & 104, the numbers of pupils on roll, published admission number, numbers of 1st and 2nd choice applications and total admission numbers.

Over-crowding of teaching space must be clearly identifiable along with demonstrable high pupil demand.

Schools which are Ofsted Outstanding are prioritised for expansion as are those with a high proportion of pupils from disadvantaged backgrounds.

Condition With Expansion Projects

These are to improve the condition of buildings where the floor area of the new block is less than 10% of the existing block. This is primarily to address significant condition need and valid reasons for expansion will be required, in line with the above.

Making An Application

All applications are made online via the CIF portal and new applicants need to register on the portal in the first instance, when log in details will be provided.

Each Academy or Sixth Form College can submit up to two applications but only one expansion bid may be made. Bids are assessed separately and independently.

Condition based bids must be supported by relevant condition survey data with reference made to the Property Data Survey (PDS) for the school/college. Independent specialist building or mechanical and electrical surveys, targeted to the specific condition need, should be included.

Each application is evaluated using three main criteria with the following weightings applied:

Project Need (evidence of poor condition) **70%**

Project Planning (ability to deliver to project) **15%**

Project Cost (appropriate cost range /value for money) **15%**

Recommended supporting information would include, condition surveys, asbestos reports, planning applications (where required), budget costs with supporting contractor quotes/tenders, programmes, risk registers and considered option appraisals.

Supporting Loans

Whereas there is no obligation to take out a loan as part of any bid, the ESFA do score additional points, under the Project Cost criteria, where loans are taken as part of the bid process. There are two types of loan available to applicants under CIF;

- Energy Efficiency Salix Loans (0% interest, payable back over 8 years via realised energy savings -projects would include; boiler replacement, window, curtain walling, wall cladding and roof replacement)
- CIF loans (variable interest rates depending on duration of loan)

It is important that Academies satisfy themselves that they can afford any loan repayment prior to committing.

Healthy Pupils Capital Fund (HPCF)

In the latest CIF round, the ESFA supplemented the overall CIF fund with additional funding taken from the recent Soft Drinks Levy. This funding is specifically included to improve the physical and mental health of young people by improving access to, and use of, relevant facilities such as kitchens, dining rooms, changing rooms, playgrounds and sports facilities. This additional funding is likely to be continued in future funding rounds and is applied for in the same manner as a CIF bid.

Important Dates

(Taken from previous funding rounds)

CIF information released and online application open	October
Registration deadline	November
Closure of CIF portal for applications	December
ESFA notification of bid success/failure	April

Conclusion

All previous CIF rounds have been heavily oversubscribed. Only applications which demonstrate high project need, supported with evidence, and which align with the priorities of CIF are likely to be successful. Not all good applications are funded, simply due to the scale of demand.

Useful links:

<https://www.gov.uk/guidance/condition-improvement-fund>

<https://www.salixfinance.co.uk/loans>

Business Desk - Surveillance Cameras and Privacy at Work

Two recent cases of the European Court of Human Rights on the issue of video surveillance of employees at work serve to show how employers with legitimate intentions, can easily fall foul of Data Protection requirements.

The General Data Protection Regulations (GDPR) are due to come into force in the UK in May 2018. The penalty for a breach of the GDPR is up to 20 million euros or 4% of worldwide turnover of the business involved. The stakes for such a breach have now got significantly higher.

In the case of *Antovic and Mirkovic v Montenegro*, the Dean of the School of Mathematics installed video surveillance in a lecture theatre at Montenegro University. The reason given was to protect the safety of property, people and students. The video footage could only be viewed via the insertion of a code held solely by the Dean and was destroyed after one year. It was therefore limited in time and access. In recording the lecture theatre, the video also recorded the teaching of the tutors in it. Two tutors, unhappy at this, claimed that the surveillance breached Article 8 of the European Convention on Human Rights – their right to respect for private and family life. The domestic courts concluded there was no breach. The European Court of Human Rights disagreed. They concluded that the right to private life includes business and professional activities. The cameras were installed with no legitimate aim as there was no evidence to suggest that safety was an issue.

In the second case, *Lopez Ribalda & Others v Spain*, a supermarket installed CCTV cameras after suspecting theft was occurring. There were discrepancies over the stock sold compared to recorded levels. They had a legitimate aim to discover the culprit. Visible and hidden cameras were installed. Staff were notified of the visible cameras only. The footage revealed staff ringing in purchases and then voiding them, allowing stock to be taken. When confronted about the footage the staff admitted the thefts. They went on to bring claims for compensation alleging their rights under Article 8 had been breached. Whilst the European Court on Human Rights accepted that the store had a legitimate reason for installing the cameras, they concluded the employees' rights had been breached. They had not been 'explicitly, precisely and unambiguously' informed of the fact that there would be covert cameras, or the purpose for them in advance. The surveillance was of all employees, not just those suspected. It covered all working hours and had no limitation in time. The employees were awarded 4,000 euros each, despite having admitted the thefts.

These decisions may seem rather harsh, given the employer in each case had genuine business reasons for their actions. However, the way in which they were implemented caused the problem. In the UK, the Information Commissioner currently requires employers who use such recordings to carry out a risk analysis (or privacy impact assessment) and to use less intrusive methods of addressing any concerns where possible. Where used, access to the footage should be limited to key individuals. Employees should usually be notified in advance that the area is subject to monitoring and notified of the reason for surveillance and what it shall be used for. Footage should be used solely for the purpose communicated and retained only for so long as is genuinely needed.

If you have not yet reviewed your systems in light of these cases and the new GDPR requirements, you may wish to do so before May!

Contact:

For further help or advice,
please contact Lupton Fawcett's
Angela Gorton
Partner, Employment
on **0113 280 2026** or
angela.gorton@luptonfawcett.law

More about Angela online:

<https://www.luptonfawcett.com/our-people/angela-gorton/>

https://twitter.com/LF_Law <http://www.linkedin.com/company/lupton-fawcett>

www.luptonfawcett.law

Lupton Fawcett LLP

Yorkshire House East Parade Leeds LS1 5BD
DX 730000 Leeds 70 T +44(0)113 280 2000 F +44(0)113 245 6782

Belgrave House 47 Bank Street Sheffield S1 2DR
DX 312601 Sheffield 47 T +44(0)114 276 6607 F +44(0)114 276 6608

Stamford House Piccadilly York YO1 9PP
DX 65206 York-6 T +44(0)1904 611 411 F +44(0)1904 646 972

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