Guidance on Contract and Employment Issues in the Education Sector arising from COVID\_19

**Background:**

There are a number of organisations in the education and skills sector who, in addition to receiving funding directly from the Department of Education and Skills (DES), are also in receipt of DES funding indirectly through DES aegis bodies (e.g. SOLAS, HEA). They may also receive funding from other Departments and/or EU funding as well as undertaking self-financing projects and other fund raising activities. The variety of areas in which these organisations operate means that there are likely to be complexities to the staffing and contractual arrangements entered into over the years.

**Purpose of this Note:**

This note sets out some guiding principles to address contractual and employment issues in the education sector arising due to COVID-19.

It also sets out some of the challenges which have been identified with a framework for possible solutions that can be implemented in a manner which allows for consistency of practice across the sector. By working closely with employers/management bodies it allows the Department to fully understand and explore the financial, contractual and IR implications of any decisions which may be taken in the sector.

The issues can be broken into two distinct groups:

1. Implications for contracts for service;
2. Implications for contracts of service, especially in relation to employees of public sector bodies (incl. schools and HEIs) who, for various reasons, are not categorised as public servants.

The options identified below may not provide answers in all cases as they arise in the sector but they form a template for identifying how to manage issues as they are brought to the attention of the Department.

Employers/management bodies are therefore reminded to liaise with the relevant line sections of the Department for guidance on complex issues.

It is important that employers/management bodies seek appropriate legal advice for complex cases and that any decisions taken which have a funding impact should also be communicated and/or agreed with other funding partners, as appropriate.

1. **Contracts for service**[[1]](#footnote-1)

The key issue here is whether or not the contractor is providing the contracted service and whether or not the contracting authority can avail of the service in line with the contract. The following applicable points should be considered.

* Continued compliance with public financial procedures and, in particular, DPER *Circular 13/2014 Management of and Accountability for Grants from Exchequer Funds*.
* If a contractor for service can make the service (e.g. training) available and if the recipients (e.g. trainees) can continue to use that service, albeit remotely or in a format that is different than was intended but is still working, the contracting authority should continue to pay the contractor.
* If it is not possible for the contractor to provide the service as was intended and the contracting authority continues to require that service (or part thereof) it should engage with the contractor to determine, the extent if any, the contractor can provide some of the service. If this is possible the contracting authority should work to agree with the contractor an appropriate payment for that reduced service.
* If it is not possible for the contractor to provide the service or not possible for the contracting authority to avail of the service (e.g. cleaning in schools which are closed or catering company in training centres), the contracting authority needs to consider what business continuity arrangements need to be put in place (if any), which would allow the service to be available when restrictions are lifted (e.g. school transport contractors). This will require the contracting authority to engage with the contractor and with approval of the DES, it may be possible to contribute to costs so that the service can become available, if required, including at short notice.
* The status of grant aided non-government organisations and the type of services they provide to DES is an additional factor to be considered in assessing the business continuity arrangements required, which may need to differ from commercial contract arrangements.
* If no payment is necessary to support business continuity the general principle is that the contracting authority should not pay for a service from a contractor which it is not getting, unless there is overall exchequer cost implications and/or the contract is such that it is not possible to discontinue payment without encountering significant legal difficulties. It is, therefore, important that contracting authorities should take legal advice on these matters and should weigh up the legal consequences of breaking (even temporarily) contracts with contractors and the financial implications of continuing to pay for a service which they are not receiving, while taking into account any force majeure clause and/or doctrine of frustration legal principles.

Therefore, subject to the above caveats, the contracting authority should look to end:

* Non-performing contracts that have a force majeure clause;
* Non-performing contracts that were concluded at the end of the recent term (Easter);
* Contracts by mutual consent where the contractor is in agreement, as it may suit them to have the contract terminated.

In addition to the issues outlined above, DPER has indicated that as a general principle, there should be no double state funding of services so that it is not possible for a contractor, or an employee of the contractor, to obtain COVID-19 financial supports in cases where the contractor is still being paid the full pay allocation under their publicly funded grant from the contracting authority. This is to ensure that no employer or employee is paid more than 100% of the employee wages from the various state funding arrangements (COVID-19 financial supports + public grant payment should be =or< 100%).

In the case of a contractor availing of the COVID-19 Wage Subsidy Scheme (WSS), who had a publicly funded contract with a contracting authority, the contracting authority would need to be informed if the contractor availed of the WSS for the employees who provided the service to the contracting authority. If so, the contracting authority should reduce its public grant funding accordingly to the contractor. For example, a contract is in place to pay a contractor €10,000 pw made up of €6,000 for pay related and €4,000 for non-pay related costs/services. If the contractor receives €4,200 pw (70% of €6,000) for the pay costs relating to employees working on this contract then the contract payments should be reduced to a maximum of €5,800 pw (€1,800 pay and €4,000 non-pay).

It is envisaged that initial controls in this area this would be in the form of a self-declaration by the contractor that could be subject to audit at a later date.

1. **Contracts of Service**

There are four main categories of employees:

* 1. Public servant employees;
  2. Non-public servant employee’s salary fully funded from Exchequer sources
  3. Non-public servant employee’s salary fully funded by non-Exchequer sources;
  4. Non-public servant employee’s salary partially by Exchequer and non-Exchequer sources.
  5. Public servant employees:

While a number of exceptions exist across the education and skill sectors, an employee is generally categorised as a public servant if that employee is part of a public service pension scheme.

A large number of employees across the sector will fall into this category i.e. they have public servant status. These employees will continue to be paid as normal subject to any central Government decision on public sector pay arising, and should be identified for temporary redeployment within the public sector if applicable (DES Circular 0027/2020).

The funding for public servant employees is usually direct from Exchequer sources. In instances where the public servant salary is partially or fully funded from non-Exchequer sources[[2]](#footnote-2), the public sector body should continue to carry the cost of these salaries. While there will be funding shortfalls in such circumstances, there may also be other savings (COVID-19 or otherwise) in areas which may be utilised to offset the funding shortfalls. However, if they are unable to generate sufficient savings, it will present funding challenges and could result in creating/increasing deficits and cash flow difficulties for public sector bodies. Like all unexpected costs which can arise in any financial year, the DES would then engage with the individual public sector body or sector in general on the basis of those who are experiencing particular challenges and manage them as best as possible within the resources available.

* 1. Non-public servant employee’s salary fully funded from Exchequer sources,
  2. Non-public servant employee’s salary is fully funded by non-exchequer sources &
  3. Non-public servant employee’s salary is partially funded by exchequer and non-exchequer sources

In the case where the employees of public sector bodies can continue with the service for which they were employed, they should continue to be paid as normal from Exchequer funds, non-Exchequer funds or a combination of both. An exception to this arises where the COVID-19 financial supports from the exchequer has been provided (more details below).

In the case where the employees of public sector bodies are unable to continue with the service for which they were employed, the following applicable points should be considered.

* Public sector bodies should look at each category of employee who are partially or fully funded by the Exchequer or those who are fully funded from non-Exchequer sources. The Department’s current position is that it intends to continue to pay existing grant commitments to public sector bodies but these payments will be subject to review if a situation arises where actual savings over additional costs occur due to the health crisis. Therefore, Exchequer funding for partially or fully funded posts will continue to be provided at this stage. However, DES does not have any additional expenditure available for grant payments to support the non-exchequer costs of partially exchequer or fully non-exchequer funded posts.
* Public sector bodies should review the contracts of employment with employees who are partially exchequer or fully non-exchequer funded as this is likely to determine the options available along with taking into consideration the overall exchequer cost implications of each option. Public sector bodies are advised to take legal advice to support good decision making in this complex area, including justifications required to support any approach to differential treatment of employees.
* The arrangements that are made for those individuals when they are not in a permanent contract of service should also be considered. For example, employees who would not otherwise have a contract of employment at the end of the school year and would be eligible for Job Seekers benefit during each school break, then it may be possible to arrange to temporarily lay off those staff so that they could avail of either normal DEASP unemployment benefits or COVID-19 payments as appropriate, with overall exchequer cost implications also taken into consideration in such circumstances. Alternatively consideration of offering a 3 day week or other reduced work pattern to a number of affected employees which would assist to better manage the financial circumstances in the public sector body but also retain a link with the individual employees such that, if the restriction were lifted, these employees would be available more immediately to support business needs, especially if circumstances arise where certain employees may be needed to work non-standard periods (e.g. schools operating in summer break months).
* If the employment contracts are such that the public sector body cannot make an arrangement to reduce pay (in line with the grant funding available), by reducing work to a level that can be afforded such as a 3 day week or otherwise arrange a temporary layoff, the public sector body may need to continue to carry the cost of these salaries. While there will be funding shortfalls in such circumstances, there may also be other savings (COVID-19 or otherwise) in areas which may be utilised to offset the funding shortfalls. However, if unable to generate sufficient savings, it will present funding challenges and could result in creating/increasing deficits and cash flow difficulties for public sector bodies.
* For example, two caretakers employed by a school, and their salaries are funded partially by DES grants and partially by income from having the school open to outside organisations in the evening. The income stream provided by outside organisations for use of the school premises no longer exists. Therefore, if the employment contracts don’t clearly identify one of the caretakers as having their salary funded by this source, the school is likely to have to continue to pay both caretakers. This could give rise to financial difficulty in some cases where offsetting savings have not materialised.
* Like all unexpected costs which can arise in any financial year, the DES would then engage with the individual public sector body or sector in general on the basis of those who are experiencing particular challenges and manage them as best as possible within the resources available. [[3]](#footnote-3)

As outlined earlier under the contract for services section, DPER has indicated that as a general principle, there should be no double state funding of services so that it is not possible for a public sector body to obtain payment under the COVID-19 financial supports and still be paid the full pay allocation under their publicly funded grant. This is to ensure that no employer or employee is paid more than 100% of the employee wages from the various state funding arrangements (COVID-19 financial supports + public grant payment should be =or< 100%).

In the case of a public sector body availing of the WSS scheme, the granting body would need to be informed if the body availed of the WSS for the employees if grant funded. If so, the granting body should reduce its public grant funding accordingly to the public sector body, in a similar manner to the example already provided under the Contract for Service section above.

It is envisaged that initial controls in this area would be in the form of a self-declaration by the public sector body that could be subject to audit at a later date.

1. The issues and applicable points outlined for contract for service should also be considered in terms of funding grant aided non-government organisations. It is also worth noting that Public Private Partnership (PPP) contracts are not fully deemed contracts for service and such contracts should be considered separately. [↑](#footnote-ref-1)
2. Examples of public and non-public servant employees in public sector funded bodies that are partially or fully funded from non-exchequer sources include (i) caretakers employed by schools funded from income from having the school open to outside organisations in the evening, (ii) tutors employed by ETBs funded from income from fee charging night classes, and, (iii) researchers employed by HEIs funded from income from research grants or teaching self-financing programmes. [↑](#footnote-ref-2)
3. Relating to specific research contracts the Department will continue to engage with the relevant Departments, Higher Education Providers and key funding agencies to work both individually and on a collective basis when appropriate to ensure a coherent, flexible, pragmatic and case-by-case approach regarding research projects and staff which are impacted by the current circumstances. [↑](#footnote-ref-3)