

01/07

GUIDANCE FOR COLLEGES
ON THE APPOINTMENT OF COLLEGE
BOARD MEMBERS UNDER THE
FURTHER AND HIGHER EDUCATION
(SCOTLAND) ACT 1992

Introduction

The purpose of this Guidance is to clarify the legal requirements of eligibility for the appointment of individuals to Boards of Management for Colleges of Further Education under the Further and Higher Education (Scotland) Act 1992 ("the 1992 Act").

1. How should the 1992 Act be interpreted in relation to the eligibility of individuals aged seventy years and over for appointment as a member of a Board of Management of a College?

- 1.1 Under Schedule 2 of the 1992 Act (Constitution and Proceedings of Boards of Management), at Paragraph 6(1) (a) it is provided that a person shall not be eligible for appointment as a member of a Board of Management for a College at any time when he/she is over the age of seventy. A person who obtains the age of seventy during his/her appointment shall be entitled to remain in office until his/her term of office expires.
- 1.2 Where an individual is seventy years of age or over at the time that he/she is being considered for appointment to the Board of Management of the College, the person will not be eligible for appointment as a member of the Board of Management of the College. By appointing someone who is seventy years of age or over, a College would be therefore be acting outwith its statutory powers. Only persons who have not yet reached the age of seventy shall be eligible to be appointed as Board Members.
- 1.3 An individual who is exactly seventy years of age will also, strictly speaking, be considered as being "over the age of seventy" at that time under the terms of the 1992 Act. There is previous legal authority from a High Court case, where it was held that the meaning of the words "over the age of sixty-five years" did not extend to someone who was aged sixty-five years and seven months. In other words, someone who had attained seventy-five years of age was excluded.¹
- 1.4 The same conclusion on interpretation would therefore follow from the wording of the 1992 Act. Paragraph 6(1) (a) goes on to state, by way of qualification to the exclusion of those over the age of seventy:-
"...but a person who attains the age of seventy during his appointment shall be entitled to remain in office until his term of office otherwise expires in accordance with this Schedule."
- 1.5 If it were envisaged that a person aged seventy years could be eligible for appointment in the first place, then the qualification should logically have read "a person who attains the age of seventy-one during his appointment."
- 1.6 It should therefore be clear that an individual aged seventy years or over should not be appointed to a College Board of Management having regard to the wording of the relevant part of the 1992 Act. A College Board of Management has no power to appoint an individual aged seventy years or over and any such appointment would therefore be considered null and void.

¹ Lloyds Bank Ltd. V Eagle Star Insurance Co. Ltd. [1951] 1 All ER 914.

2. Do the provisions of the Employment Equality (Age) Regulations 2006 apply to appointments to a Board of Management of a College?

- 2.1 It has also been considered whether the provisions of the Employment Equality (Age) Regulations 2006 ("the Regulations"), which came into force on 1 October 2006, may be applicable in the circumstances. The Regulations make it unlawful for a relevant person (in relation to the appointment to an office or post to which the Regulations apply) to discriminate against a person in the arrangements for the purpose of determining to whom appointments should be offered.
- 2.2 The Regulations extend to the prohibition of age-based discrimination in relation to certain office-holders. However, it is considered that appointments to College Boards of Management are not within the scope of the Regulations.
- 2.3 Only certain offices are covered by the Regulations. The relevant wording is found in Regulation 12(8) (a) of the Regulations, which refers to:-
"...any office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration."
- 2.4 Persons appointed as College Board Members do not satisfy these criteria. An individual who is a College Board Member is not discharging functions "personally under the direction of another person." Neither does appointment as a Board Member carry with it any entitlement to "remuneration". All that is payable, in terms of Paragraph 12(5) of Section 2 of the 1992 Act, is "allowances and "expenses". This would not be sufficient to count as "remuneration" as required by Regulation 12(8) (a) of the Regulations.
- 2.5 An individual who is a College Board Member is not in any sense an employee or a worker for the College. Therefore, the relationship he or she has with the College is not within the scope of "employment" (even giving the term a broad meaning). Therefore, the Regulations do not apply to regulate the appointment of members of College Boards of Management.

3. Conclusions

- 3.1 It can therefore be concluded that any appointment as a College Board Member of an individual who is over the age of seventy at the time of his/her appointment would be outwith the statutory powers of the College Board of Management. Since a College Board of Management would not have the statutory power to make such an appointment, any such appointment would be considered null and void and a fresh appointment would require to be made where appropriate.
- 3.2 All College Boards of Management should bear in mind that any decision of a College Board of Management which contains someone who has been wrongly appointed (by virtue of the person having been over the age of seventy at the time of his/her appointment) is open to challenge on the basis that the College Board of Management has not been properly constituted.

Status of Guidance

This Guidance relates only to specific obligations applicable to the individual members of Boards of Management of Colleges of Further Education as a result of the implementation of the 2005 Act (as outlined above), and does not cover other legal obligations which may apply to Colleges under this and any other legislation referred to in this Guidance or otherwise.

Thorntons Law LLP on behalf of ASC August 2007



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