

Trends in Higher Education

2016/17



Introduction

Welcome to VVW's annual compilation of articles on key HR trends and issues in higher education.

We are delighted to be sponsoring and contributing to UHR's 2017 annual conference - *All things to all people: what are universities for?*

A Time of Change

Universities are adept at reacting to change but the last 12 months has seen a pace of change that has not been experienced by the higher education (HE) sector since the early 1990s, and that seems set to continue for the foreseeable future. Many of these changes, including Brexit, the introduction of the Teaching Excellence Framework, the proposed reforms to the Research Excellence Framework and the proposals set out in the Higher Education and Reform Bill, will have (and indeed are already having) significant implications from an HR perspective.

“ The last 12 months has seen a pace of change that has not been experienced by the sector since the early 1990s. ”

Workshop Sessions

During our workshop sessions we will be looking at *Building resilience in turbulent times - can competing institutional and employee objectives ever be reconciled?* This session will consider some of the issues that keep senior managers and employees awake at night, the changing demands on employees and how HR can facilitate building resilience so that everyone in the institution is working towards the same goals.



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Bettina Rigg, who is an employment Partner at VVW and leads our HE team, is a former member of the Council of the University of Exeter. She will consider the employment law implications and will deliver this session jointly with Jacqui Marshall, HR Director of the University of Exeter, who will look at these issues from a strategic HR perspective.

Legal Session

In our legal session we will be focussing on *The changing nature of academic contracts - can academics be all things to all people?* We will consider whether the introduction of the TEF and proposed changes to the REF have brought into question whether the traditional three-legged contract remains suitable for all academics or whether alternative contracts and career paths should become more common. We will look at some of the legal issues surrounding academic contracts, including teaching only contracts, the use of probationary periods, more focussed and metrics based performance management, rewarding high performers, promotion criteria and the challenges raised by more flexible working arrangements.

I will deliver this session jointly with my colleague Joanne Oliver.

We hope that you will have the opportunity to visit our stand during the conference.

To keep up to date with legal changes and subscribe to our Higher Education Law Brief and our weekly Employment Law Brief, please visit vww.co.uk/news-and-events/subscribe

You can also follow us on Twitter: @VVVHigherEd

The Author...

Jane has been advising HE clients on employment law and HR matters for over 20 years. She specialises in strategic HR projects, including internal disputes, senior recruitments and terminations, restructurings, collaborations and mergers, and in complex employment litigation.

Chambers & Partners praises her for “*having a lovely way of getting across complex issues [and] describing the legal nuances in a very down-to-earth way which is easy to understand*”.



Future-proofing HR in a Millennial Workforce World and Beyond

Did you know that by 2025 millennials (essentially those born between 1980 and 1999) will form 75% of the global workforce according to research undertaken by Deloitte in its 2016 Millennial Survey? They will be more numerous than the soon-to-retire baby boomer generation.

The Deloitte research also found that two in three millennials expect to leave their current job to join a new organisation or do something different by the end of 2020.

The impact of millennials in the workplace is being felt right now and organisations, including higher education institutions (HEIs), should be considering how to deal with this very different workforce, how their policies and processes need to change and the legal issues that may arise.

At last year's UHR conference, we explored the challenges that a millennial workforce will bring and the risks which HEIs need to identify and mitigate. This article brings together some of the themes that came out of those sessions.

How are the expectations of millennials likely to impact on the working environment and workforces of HEIs?

Whilst millennials are, of course, all individuals, research shows that there are some significant differences between this generation and those preceding it which are likely to have a significant impact on their workplace and career expectations.

Expect Instant Access to Information

Millennials have never known a world without the internet, broadband, smartphones and social media being the norm. They prefer to communicate electronically, use their own devices/software and avoid face time.

“ There is likely to be increased competition between universities for both staff and students. ”

Motivated by a Sense of Purpose

Millennials want to do something that feels worthwhile and contributes something to the world and are more likely to work for an employer who shares their values.

Desire to Keep Learning and to Achieve

Millennials want structure, clear objectives, regular feedback and praise for a job well done. They are likely to move on if they cannot move up.

Greater Flexibility

Millennials have a strong appetite for working

abroad. They may want to work remotely or more flexibly and they are more likely to want a portfolio career working for more than one employer or a combination of work, travel and volunteering.

So how can HR help institutions to respond to these expectations?

HR has a key role to play in identifying areas for change and in implementing and embedding that change.

Current leadership values are unlikely to chime with most millennials and the starting point may be an analysis of what leadership values will need to look like and a clear understanding of the steps to get there. The skill set required for the leaders of the future is likely to look very different. Who are the academic superstars that will inspire this new generation and who and what will they relate to? How will this work where there is inter-disciplinary leadership? How can you ensure that the new leadership values are embedded at all levels including local leadership at school level?

“ It will be vital to manage inter-generational tension. ”

The war for talent will increase and it will be those HEIs which have a creative and flexible approach to attracting and retaining staff that will succeed. This will include getting the deal right with mixed incentive packages, a flexible approach to contracts, hours and location and finding imaginative ways to allow staff to pursue portfolio careers. Many HEIs already strive to give regular feedback but

the traditional annual PDR process will not support the need for frequent, meaningful feedback and there will need to be more emphasis on a constant conversation. The current career progression structures are also unlikely to satisfy expectations of rapid career progression.

Communication and interaction in the workplace will look very different and policies and processes will need to be re-modelled to reflect this. Much more interaction with colleagues and students will be electronic and involve greater use of social media. It will be vital to manage inter-generational tension given that many of those baby boomers currently in the workplace will work well beyond traditional retirement age and will still be in the workplace as the number of millennials increases.

What legal issues are likely to arise?

Many legal issues arise and we have selected just a few of these.

A Greater Risk of Discrimination/Equal Pay Claims

A more tailored and flexible approach to the pay and benefits package (including the need to offer more flexible contractual arrangements) and a more rapid career progression structure increases the potential for discrimination against those with protected characteristics, especially those with caring responsibilities, as well as the risk of equal pay claims. The HE sector is making slow progress towards achieving greater representation of women at senior levels (79.9% of Vice-Chancellors, 69.5% of PVCs and 78.3% of professors are male) and whilst more flexibility should give greater opportunity for women, there is a real risk if processes for career progression and organisational culture do not change significantly and quickly.



Unconscious Bias

The workplace space will be occupied by two very different types of employees whilst the baby boomers and the millennials co-exist. As well as the inter-generational tension we have already referred to, this co-existence could lead to unconscious bias favouring or disadvantaging one or other of the groups. Even if this does not amount to discrimination (most likely on the basis of age), the operation of unconscious bias in the workplace will undermine the effectiveness of the institution.

Contracts With More Than One Employer

The desire of millennials for a portfolio career is likely to result in them working for more than one employer at the same time (including for employers based overseas) and will mean that the model of a single employer coupled with say secondment or honorary contract arrangements, will need to change. The problems with an employee having more than one employer at the same time include practical issues such as which employer's policies (e.g. disciplinary policies) will prevail, how conflicts of interest can be managed, which jurisdiction applies and what happens to intellectual property rights. New contractual arrangements will need to develop to manage these practical issues if HEIs want to attract and retain the brightest and the best.



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Health & Safety

The remote working aspirations of millennials bring challenges for HEIs in how they discharge their obligations to ensure the health and safety of employees who are working remotely. HEIs need to consider how they will monitor and control the health and safety of those employees, what changes need to be made to their risk assessments and how institutional policies need to change to reflect these new arrangements.

Social Media & Bring your own devices

Millennials are heavy users of social media but most social media policies do not reflect this and are too constraining. Similarly, what may have previously been regarded as misconduct for the purposes of disciplinary proceedings is likely to change in line with new established norms of usage. Millennials also want to bring their own devices/software into the workplace which will bring with it issues for HEIs in terms of their data protection responsibilities and a need to constantly update their IT usage policies

The Future is Now

The landscape for HEIs is already changing and the way in which HEIs respond to the challenges of attracting and retaining millennials will be a real differentiator of success and is a key aspect of any future-proofing strategy.

The Author...

Bettina has been advising higher education clients on all aspects of employment law and on student issues for many years. She has a special interest in equality and diversity issues and regularly provides training to Governing Bodies and to senior management teams.

Chambers & Partners recommends Bettina as “a key individual in the national further and higher education sector [who] is recognised for impressing clients with her client management skills and for always inspiring total confidence”.

What is Brexit likely to mean for UK employment law?

Following the UK's vote to leave the EU, we have entered into a period of uncertainty and it is going to be some time before we know what a future outside the EU will look like.

A significant proportion of the UK's employment law comes from the EU. Although changes to employment law are unlikely to be a priority in the medium term and any changes could take a number of years, there has been speculation as to the likely targets for change.

Discrimination

Much of the UK's discrimination law, including that on equal pay, sex, race and disability discrimination, has developed without interference from the EU and in fact preceded EU obligations. It seems unlikely that it would be a target for repeal and therefore is almost certainly here to stay. However, there could be some tinkering around the edges, perhaps the re-introduction of a cap on compensation for discrimination, introducing positive discrimination in favour of unrepresented groups or perhaps re-introducing a default retirement age.

Many of the UK's family friendly rights, such as maternity leave and pay, exceed the minimum standards required by the EU and some of them, such as shared parental leave and the right to request flexible working, are purely domestic. However, possible targets for reform could be the right of a woman on maternity leave to first refusal of alternative employment in a redundancy situation and the right to accrue annual leave during maternity leave.

Working Time and Agency Workers

The Working Time Regulations and the Agency Workers Regulations have come in for criticism over the years and could in due course be a target for

reform. The removal of the right to carry over annual leave when on sick leave and a return to calculating holiday pay using basic pay rather than including overtime and commission are two possible changes which could prove popular with employers. Likewise, the removal of the requirement for pay parity between employees and agency workers after 12 weeks.

Transfer of Undertakings

Although TUPE derives from Europe, it has been around for so long that it is now incorporated and priced into most commercial outsourcing agreements. Repealing it would create uncertainty and could lead to significant redundancy costs that were not anticipated when agreements were entered into. However, being able to harmonise terms and conditions of employment post-transfer more easily could be a change that will be considered. In the meantime, when entering into out-sourcing arrangements it would be prudent to consider whether the possible repeal of TUPE should be covered off in the contract.

What should you be doing now?

The terms of the UK's exit from the UK will be negotiated over the next two years. In the meantime, the status quo will continue. In order to maintain an ongoing trade relationship with the EU, the UK may find that it has to retain some or all of the EU's employment law in any event but even if it doesn't, any employment law reform is likely to be piecemeal and a number of years off.



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All Change at Number 10

Following the recent tumultuous events at Westminster, we have a new Prime Minister. Theresa May has become the second female Prime Minister at a time of great change and uncertainty following the UK's vote to leave the EU.

Whilst it will be some time before we know the detail of the changes she will introduce, here we reflect on the significance of her appointment, what we know so far about her intentions for corporate governance, and whether they have any relevance to the voluntary and higher education sectors.

Glass Ceiling or Glass Cliff?

Theresa May takes office at what has been described as the most difficult time for the UK since the second world war. Is that just coincidence?

There has been much written about the glass ceiling and Theresa May has been at the forefront of encouraging women to enter Parliament and progress to senior positions. Her appointment will no doubt be seen as an example of breaking (or at least cracking) the glass ceiling but is that too simplistic?

Research undertaken by Professor Michelle Ryan, University of Exeter, and Professor Alex Haslam, formerly of University of Exeter and now University of Queensland Australia, introduced the concept of 'the glass cliff'. They investigated the context in which women and other minorities are appointed into leadership positions and researched what happens when those from minority groups take on leadership roles. Extending the metaphor of the glass ceiling, 'the glass cliff' describes the phenomenon whereby individuals belonging to particular groups are more likely to be found in leadership positions that are associated with a greater risk of failure and criticism. In other words, think crisis think female!

Changes to Corporate Governance

Theresa May made clear in her speech on 11 July 2016 that she wants more transparency (including disclosure of bonus targets and the publication of 'pay multiple data', forcing companies to reveal how much more their bosses earn than the average company worker), and employees to be represented on company boards. So is this just something for corporate business or will it have a wider reach?

At this stage, there is no indication as to the intended scope of any changes and specifically if they would apply to the higher education sector or just to 'business'. There is an expectation, often enshrined within the constitutional documents of higher education institutions (HEIs), that governing

bodies will contain staff (and student members) and encourage their full and active participation.

In relation to remuneration, the HE sector has a strong track record when it comes to equal pay auditing and reporting, and HEIs are used to providing regular staff employment data to organisations such as HESA.

The draft Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 were published on 23 January 2017 and are expected to be the final version. They are due to come into force on 31 March 2017 and aim to facilitate increased performance of the Public Sector Equality Duty. The Regulations include mandatory gender pay gap reporting for employers with at least 250 employees, with six reports on gender pay gap information to be collated and published using a 'snapshot' date of 31 March.

Given that the reports are fairly blunt tools, focusing on the gender pay gap in the workforce as a whole, rather than between staff on the same grade of the pay framework, HEIs may want to consider publishing a narrative and further information to explain the context.

What should you be doing now?

Remuneration committees should keep up to date with developments in this area as the intentions of the government become clearer but in the meantime it would be good practice to bear in mind the initial pledges of Theresa May particularly when setting bonus targets.



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Brexit - What are the implications for your international staff and students?

Much of the discussion following the UK's referendum on leaving the EU has been about how Brexit will be implemented. This has been much debated in the press, by Parliament, within the institutions of the EU itself and even by the UK's Supreme Court.

But leaving aside the actual process for leaving the EU, more relevant questions for those involved in the long-term strategic planning of their institutions are: what will happen to the rules and regulations which are currently derived from the EU and what are the implications likely to be in terms of staff and students?

Immigration - A Key Negotiating Issue

Immigration was one of the key issues in the debates which preceded the referendum, with campaigners on the leave side insisting that leaving the EU would allow the UK to “take back control” of its borders. Like many of the arguments coming from both side of the debate, this was slightly duplicitous: the UK is already able to opt-out of European laws relating to immigration from outside the EU, which is why the UK is not part of the Schengen Area.

However, the UK has far less control over citizens of other EU members states coming to the UK to exercise a right of free movement under the EU

treaties. Whilst an EU national is exercising a right of free movement (as a worker, self-employed person, student or self-sufficient person) in another member state, they and their dependant family members are automatically entitled to remain there. After five years of exercising a free movement right in that member state EU nationals acquire the status of permanent residence. (Free movement rights actually extend to citizens of the wider European Economic Area - EEA - and Switzerland so references to EU nationals here should be read as also applying the EEA and Switzerland.)

There are three main questions that arise:

- What controls will be placed upon EU nationals who come to the UK, eg. to work or study?
- What will happen to the estimated 3 million EU nationals who are already in the UK?
- Will there be any changes to the UK's immigration controls for non-EU nationals as a result?

At present we have no way of knowing the answers to any of those questions, but we can still make educated guesses piecing together the small bits of information which have emerged so far.

UK Immigration After Brexit

Various suggestions have been made as to what an immigration scheme for EU nationals would look like:

- Perhaps EU nationals would simply have to fit in with the existing immigration rules for non-EU nationals.
- There may be schemes for different categories of EU nationals, with those who are deemed to be of 'high value' (eg. highly qualified and skilled workers) having something akin to free movement, work permission for those with job offers and full restrictions for everyone else.
- Free movement continuing as it does now (eg. if the UK continues as a member of the EEA).

“ Unfettered free movement from the EU is highly unlikely to continue. ”

What seems quite clear is that immigration will form a central part of the government's Brexit strategy. During the Conservative party's conference in October, the two topics were raised almost interchangeably and the Home Secretary, Amber Rudd, reconfirmed the government's commitment to reducing net migration to the tens of thousands. Whilst some ministers, including Philip Hammond and Boris Johnson, appear to be open to removing students from that target, the Prime Minister seems committed to both the target and how it is calculated.

More recent comments from Ms Rudd have suggested that free movement which does not

require any form of registration is not an option. So it seems likely at this stage that EU nationals wishing to live, work or study in the UK will need some form of residence documentation. On that basis, unfettered free movement from the EU is highly unlikely to continue and that will be coupled with further restrictions on some non-EU immigration categories, like students.

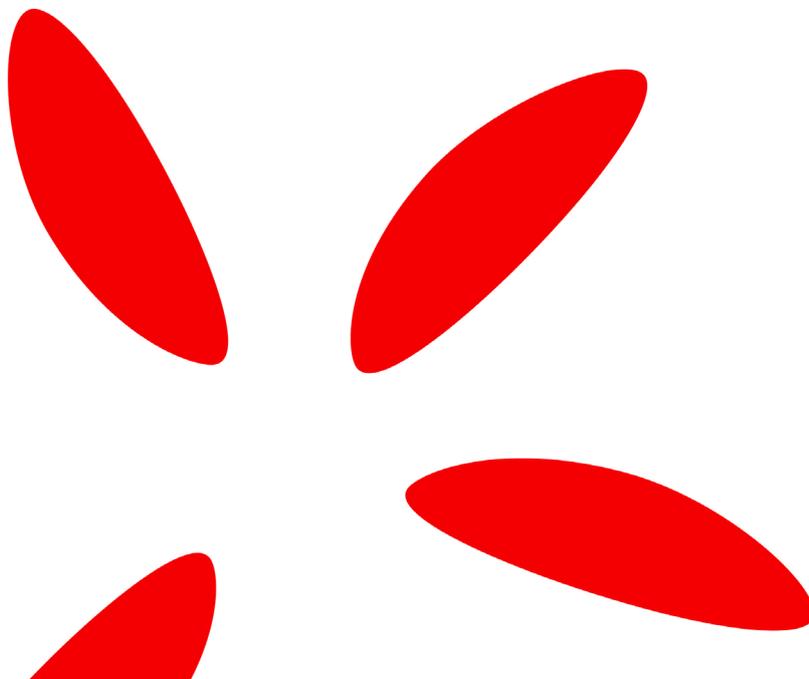
It also seems unlikely that EU nationals would be required to comply with the same rules that non-EU nationals are currently subject to, as this would surely cause a great deal of upset and make negotiations even more difficult. A hybrid scheme for EU nationals which sits independently of existing immigration controls appears to be the most likely route. Whether such a scheme would automatically permit work following registration, or an additional application for work permission would then be required, remains to be seen.

One might hope that reducing the number of EU nationals coming to the UK might lead to the liberalisation of immigration routes for non-EU nationals. However, the government's commitment to its net migration target brings such hopes further out of reach every quarter when the Office for National Statistics publishes its estimates of the net migration figures. The immigration rules never remain stable for very long though, so regular tinkering with those rules is likely to continue, perhaps more so in reaction to movements from the EU.

What steps should be taken now?

As for the situation for EU nationals already in the UK, nothing has yet changed for them as far as their rights to live, work or study in the UK are concerned. However, many will now be concerned about their future.

The government's negotiations with the EU about its departure from the EU will focus on EU nationals already in the UK and UK nationals living in other parts of the EU. It is reasonable to assume that



transitional arrangements will be put in place for EU nationals who are already here but those people may wish to apply for documentation in order to confirm their status. Such an application only attracts an application fee of £65 per applicant and although the backlog is now reportedly in excess of 100,000, it might help to have this documentation if an EU national wishes to assert their rights to live here post Brexit.

The documentation which an EU national can obtain depends on whether or not they have acquired permanent residence. If they have been exercising free movement rights in the UK for five years, then they can consider applying for a document certifying permanent residence. If the individual has not yet acquired permanent residence then they can apply for a registration certificate as confirmation that they are in the UK and exercising one of the free movement rights.

Family members of EU nationals (both EU nationals themselves and non-EU national family members) can also apply for documentation to evidence their right to live and work or study in the UK.

Finally, EU nationals and their family members who have acquired permanent residence may wish to consider applying to naturalise as British citizens. Even holders of permanent residence documentation may not be guaranteed any right of residence in the UK post-Brexit, but those who have been naturalised as British citizens should have no such concerns.

A couple of things to note about this though:

- Firstly, applications to naturalise from EU nationals and their family members can only be made after permanent residence documentation has been issued
- Secondly, while the UK permits a British citizen to have more than one nationality, some EU countries do not, so acquisition of British citizenship could lead to the loss of other citizenships in which case individuals would need to decide for themselves which citizenship is more important to them.

It looks unlikely that there will be any clarity on post Brexit immigration for some months. In the meantime, there are steps that EU students and staff can take which may provide them with some reassurance in these uncertain times and hopefully put them in a stronger position when the a new immigration scheme for EU nationals is implemented.



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Tom assists clients with sponsor licence applications, sponsorship of migrant workers under Tier 2 of the Points-Based System and visa and leave to remain applications under all immigration categories



New Guidance on Tackling Harassment and Hate Crimes - What does it mean for universities?

On 20 October 2016, Universities UK published its long awaited report *Changing the Culture* based on the findings of a taskforce established in 2015 to examine violence against women, harassment and hate crime affecting students.

Commissioned with government backing, the report emphasises the negative impact of these issues on student well-being and institutional reputation. It reflects on a rise in 'lad' culture, a general lack of awareness amongst students of policies tackling unwelcome sexual advances and a tendency by institutions to expect victims to use complaints and disciplinary procedures inappropriate for that purpose.

The situation has not been helped by the fact that the (non-statutory) 'Zellick' guidance for universities on managing student behaviour where it may constitute a criminal offence has not been reviewed since it was issued in 1994. Amongst the more significant legislative developments since that time is the implementation of both the Human Rights Act 1998 and the Equality Act 2010.

The Report

As expected, many of the recommendations reject the Zellick guidance, saying it focused too much on protecting institutions at the expense of victims

reporting incidents. The report also acknowledges issues not previously considered - that the university-student relationship is both contractual and subject to consumer legislation. New guidelines addressing these issues have now been issued.

The advice that universities should not investigate or invoke internal disciplinary procedures in cases potentially involving criminal behaviour which are not reported to the police, is rejected in view of the risk of total inaction in some of the most serious circumstances. Instead, institutions are advised that they have the right under their contractual disciplinary regulations to both investigate and, if appropriate, sanction students even if the victim does not report the behaviour to the police. Similarly, in circumstances where the police have investigated but the CPS either declines to prosecute or proceedings result in an acquittal, institutions are now advised to investigate and dispose of the matter themselves as a breach of discipline.

What do you need to do now?

The upshot of these changes is the need for universities to ensure:

- they publish clear codes of conduct setting out unacceptable behaviour and the consequences of breach, including the range of sanctions that may be imposed
- accusing students understand that they may decide whether to report the matter to the police or request that the university deals with it internally instead. Only in the most exceptional circumstances should a university report a possible crime to the police against the wishes of the alleged victim and reasons for this approach must be given.

Where alleged victims do report an incident to the police, the advice is consistent with what would be expected - that universities should suspend their own internal response until the case is completed. During that suspension period, universities should also recognise the duty of care owed to both the accuser and the accused, treating them consistently and fairly, avoiding presumptions, and taking steps to minimise disruption and detriment to the full extent possible. If the investigation results in no further action, universities may then commence their own internal response as determined by their published procedures.

Even where a police investigation and/or legal proceedings are underway, it would be possible for a university to commence disciplinary action in respect of other aspects of the case provided doing so would not prejudice the criminal process.



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Best Practice

At a wider level, it is recommended that universities should tackle and help prevent violence against women, harassment and hate crime by:

- working with their student unions to develop an institution-wide approach and carry out regular impact assessments of their approach
- embedding a zero-tolerance culture supported through publication of clear behavioural expectations
- implementing a clear and accessible response procedure and centralised reporting system
- developing and maintaining partnerships with key external agencies such as the police and the NHS

The Future

In addition, it has been recommended that UUK should:

- hold an annual conference for the next three years to facilitate the sharing of good practice in these areas
- work with relevant bodies such as the NUS, JISC and Reclaim the Internet to assess what further support may be needed to tackle these issues

Whilst a call for the sector to do more has generally been welcomed, the report is not without its detractors. In particular, there are those who question how university administrators can be expected to investigate a disciplinary incident involving sexual misconduct without specialist training. Others are critical of the focus on incidents between students rather than between staff and students.

The Author...

Kris is a specialist education lawyer with more than 10 years' experience of advising schools, colleges and universities.

His cases usually involve students, inspectors and regulators and encompass admissions, complaints, exclusions, safeguarding, information sharing, discrimination and the resolution of disputes in contract and negligence.



Interesting Times

These are tumultuous times, to say the least, for students starting or returning to university in the UK. The sense of impending sector change created by the publication of the HE White Paper in May 2016 was compounded over the summer by uncertainty arising from the outcome of the European referendum in June and a new Prime Minister and cabinet in July.

This has left the HE sector trying to make sense of an uncharted political landscape with students and academics alike left wondering what will happen next.

Legislative Change

The last significant piece of primary legislation to impact on the sector was the Higher Education Act 2004, which increased tuition fees, facilitated student loans and introduced both the Office of the Independent Adjudicator and the Director for Fair Access. It also relaxed the requirements for degree awarding powers and gaining university title, leading to the creation of 48 new universities. Prior to that was the Higher and Further Education Act 1992, progenitor of HEFCE and the post-1992 universities.

The Higher Education and Research Bill, currently making its way through Parliament, is considered by some to be long overdue. The government's White Paper - *Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice* - was published on 16 May 2016, two days before the Queen's Speech and three days before the Bill received its first reading in Parliament. The date of the second reading, when MPs have the chance to debate the Bill's content, was announced at very short notice to be 19 July during the final week before MPs' summer break, prompting the swift organisation of an emergency protest in Parliament Square.

Even before the outcome of the referendum was known, there were calls for further pre-legislative scrutiny from those unconvinced about the proposals (which include a new Office for Students to replace HEFCE and OFFA and the introduction of the Teaching Excellence Framework). With Brexit firmly on the horizon, there have been calls from many for new legislation to be delayed until the effects on the UK HE sector of leaving the EU are better understood.

“ The more cordial the negotiations, the more likely that EU/UK collaboration will find new forms not dissimilar to the existing ones. ”

It is perhaps not surprising that concerns about the UK's international position and outlook are acting as a distraction from the established preoccupation with domestic opportunity, choice and competition. In reality, however, the two are linked and have the same ultimate objective of preserving and enhancing the HE sector on the world stage with all of its associated economic, cultural and scientific benefits.



Impact on Student Issues

No one knows exactly how the Brexit vote will impact on UK universities in the long term. Much depends on when Article 50 is triggered and the UK actually leaves the EU, a process rather than an event and one that is likely to be measured in months or even years. Another important issue is how acrimonious the eventual departure becomes. The more cordial the negotiations, the more likely that EU/UK collaboration in HE will find new forms not dissimilar to the existing ones.

The UK HE sector is not eurosceptic. The referendum campaign confirmed general support for 'remain' at all levels, which can be attributed to the inherently international nature of academic activity and its reticence towards anything that inhibits the transmission of funding, the flow of people and the sustenance of cross-border networks.

Funding

The UK traditionally receives a disproportionately high level of EU funding for its size. Between 2007-13, more than €7bn was awarded to UK institutions under the Seventh Framework Programme (FP7), around 15.5% of the total amount allocated (second only to Germany, which received 16.1%). During 2014/15 under the Horizon 2020 programme, UK universities received more than £836m in grants and contracts, representing over 14% of all UK research income.

Concern about losing this income has already led the Commissioner for Research, Carlos Moedas, to reassure UK researchers rattled by the initial reaction of some European collaborators to Brexit that their entitlement to make Horizon 2020 applications remains unchanged: *"the referendum, as such, doesn't change anything regarding their eligibility for funding under Horizon 2020, the world's biggest research and innovation funding programme."*

Staff

So, whilst Britain remains a member of the EU there will be no change in terms of the right of UK universities to access EU funding or take part in pan-European research projects. There will also be no immediate changes to UK policies for university staff coming to the UK from the EU or remaining here, which is good news for those fearing for their own position or the impact of sudden staff departures on research projects, reputation and students.

However, in the longer term, change is inevitable and perceptions matter. Almost immediately after the referendum outcome was known, there were anecdotal reports of a loss of confidence by some foreign academics in UK-led research (and UK researchers) and an impression that the UK is becoming a less secure and therefore less attractive place to work. This is important not only because of the risk of losing or failing to recruit staff from EU countries, but because of the possibility that high quality academics from further afield who would previously have moved to the UK now choose to go elsewhere. The message from Jo Johnston was not to panic: *"It is business as usual for Horizon 2020. I would be concerned about any discrimination against UK participants and am in close touch with Commissioner Moedas on these issues."*

Students

If it is accepted that perceptions about the reliability of funding streams will impact on the recruitment of academics, so too is it likely to inhibit the recruitment of students. The UK has four universities in the world top 100 and is the second most popular destination for international students, with a 10% share of a global market predicted to grow to around 8 million students by 2025. There is a lot to lose. Maintaining this position will require investment, not only to create capacity within the

HE system, but also to ensure that the reasons people want to study in the UK do not diminish to the advantage of our competitors. Where the money for this might come from is not yet clear.

Nearly half a million international students are enrolled at UK universities, with around 125,000 of them coming from the EU. The referendum result itself may have no effect on the immigration status of those students who are either already here or about to start a course, but consequent change seems inevitable from 2017/18 onwards. The precise position will of course be contingent on the outcome of negotiations and whether or not EU students will be able to study in the UK on the same or similar terms as before.

Fee levels will also stay the same for the foreseeable future and EU students enrolled at universities in England and Wales remain eligible to receive funding from the Student Loans Company. For those EU students enrolled in Scotland, entitlement to free tuition will continue until at least the end of the current academic year. The clear concern however is that fee levels for EU students will then rise dramatically, leading to a decline in undergraduate numbers. Some commentators have played down the potential financial consequences of diminishing EU student numbers, pointing out that fears of a numbers collapse when non-EU students stopped being subsidised by UK tax payers in the 1980s

never came to pass. Instead, institutions became better at recruiting international students who paid considerably more to study here. It should also be remembered that significant numbers of international students come to the UK from countries outside the EU, notably China, India, Nigeria, the US and Malaysia.

Even so, complacency would be unwise and it may be that a new Higher Education and Research Act that, amongst other things, places a greater focus on teaching standards and student choice through data transparency, will help to raise standards to the benefit of all. On the other hand, these are only some of the changes proposed and perhaps there is now too much uncertainty for the sector to cope with the impact of Brexit and a new legislative regime at the same time.

In the absence of sector reform it will be for institutions to decide how best to respond. Lobbying for the continuation of free movement and access to the single market whilst prioritising the maintenance of international relationships is likely. Whether or not there will also be a move towards other ways of promoting confidence, such as the implementation of a standardised student contract, remains to be seen.



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Disability Discrimination - A Warning for Employers

Two recent Employment Appeal Tribunal (EAT) decisions on the application of the disability discrimination legislation have reached somewhat surprising conclusions and could have far-reaching implications for universities as employers.

Pay Protection - A Reasonable Adjustment?

In *G4S Cash Solutions (UK) Ltd v Powell*, the EAT considered whether continuing to pay a disabled employee at his existing rate of pay, in a lesser role, was a reasonable adjustment.

There is established case law to the effect that an employer does not usually need to continue to pay a disabled employee who is on sick leave for any longer than it would pay a non-disabled employee who is off sick, unless the absence is due to a failure to make reasonable adjustments. There is also case law to the effect that reducing pay during a phased return to work is not a failure to make a reasonable adjustment.

“ This decision demonstrates that pay protection may be a reasonable adjustment. ”

Mr Powell was employed as a maintenance engineer. He suffered with back pain and it was accepted he was disabled. When he returned to work, he was given a newly created, less skilled, role as a ‘key runner’ but retained his original salary. Mr Powell was led to believe that this role and his protected pay were long term adjustments. G4S later proposed to reduce Mr Powell’s pay by 10%

and dismissed him when he refused to accept this reduction.

The Employment Tribunal found that the dismissal was discriminatory and unfair and that the reasonable adjustments required extended to maintaining Mr Powell’s original pay in his new role. G4S appealed against the reasonable adjustment finding.

The EAT dismissed the appeal and held that although it will not be an “everyday event”, protecting an employee’s existing level of pay may be a reasonable adjustment, as part of a package of reasonable adjustments, to get a disabled employee back to, or keep him in, work.

Practical Implications

This decision demonstrates that pay protection may be a reasonable adjustment. Determining what is reasonable is assessed on a case-by-case basis and will come down to the particular factual circumstances. What the employee has been told by his employer in terms of the duration of any pay protection will be highly relevant.

In this case, G4S had not indicated that the protection was temporary and gave the impression that it was permanent. Therefore, if the intention is for pay protection to be an interim measure, perhaps as part of a phased return, it is essential that this is made clear when the adjustment is proposed.

Subsequent Medical Evidence

In *City of York Council v Grosset*, the EAT held that when considering whether an employee suffered discrimination arising from disability, a tribunal was permitted to take into account medical evidence that was not available to the employer at the time of dismissal.

A claim for discrimination arising from disability will be established where:

- A treats B unfavourably because of something arising in consequence of B's disability
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim

An employer is not liable where it did not know, and could not have been expected to know, that the employee was disabled.

Mr Grosset was a teacher. The Council knew that he had cystic fibrosis and conceded that he was disabled. As a result of his condition, Mr Grosset needed to spend up to three hours per day undertaking physical exercise to clear his lungs. When his workload increased following a change in head teacher, he struggled to cope and suffered stress which exacerbated his condition.

During this time, Mr Grosset showed the 18-rated film *Halloween* to a class of 15 and 16 year olds. When the head teacher discovered this, he was suspended and subsequently dismissed for gross misconduct. The medical evidence available at the time of dismissal did not demonstrate a causal link between the misconduct and the disability.

Mr Grosset brought various claims including for unfair dismissal and disability discrimination. The medical evidence presented at Tribunal showed a link between the misconduct and the disability. The Tribunal dismissed the unfair dismissal claim, applying the band of reasonable responses test and taking into account the medical evidence available at the time of dismissal. However, it upheld the claim of discrimination arising from disability, taking into account the medical evidence provided to the Tribunal.

The Council appealed to the EAT on this point, on the basis that at the time of dismissal it was not aware that there was a link between Mr Grosset's misconduct and his disability.

The EAT held that the reason for Mr Grosset's dismissal was misconduct, (i.e. the showing of the film) and that based on the medical evidence before the Tribunal, the misconduct had arisen in consequence of Mr Grosset's disability. It was not necessary to decide whether the Council knew there was a link between the misconduct and the disability. An employer's knowledge is only relevant to determining whether it knew the employee was disabled at all.

The Council is seeking leave to appeal to the Court of Appeal.

Best Practice

This case demonstrates that discrimination arising from disability can occur even where an employer formed a reasonable conclusion (based on the evidence available to it at the time) that an employee's misconduct was not caused by his disability.

In cases where a link is established between the employee's actions and a disability, an employer will only avoid liability where it did not know, and could not reasonably have been expected to know, that the employee had a disability or where its actions can be objectively justified. On the basis of this judgment an employer will not escape liability simply because the evidence available at the time of its decision did not establish a link between the behaviour in question and the employee's disability.



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