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Contents

No platform for those setting limits on freedom of speech?

In a blog last year, I observed that the vernacular is infused with terms such as "twitchunt", "language police" and "no-platform", a fact from which it is tempting to conclude that we are in a period where freedom of speech and freedom of expression are under pressure. Over the last few weeks, we have heard of other reports of no-platforming; for example, Dr Adam Perkins, an academic whose research concluded that the welfare state is eroding the economic and social prospects of the nation by increasing the proportion of individuals in the population who possess the employment-resistant personality profile; and a student who refused to share a platform with Peter Tatchell because he had signed an open letter critical of "no platforming" (which, as the letter indicated, meant that that "the mere presence of anyone said to hold [particular] views is a threat to a protected minority group's safety". The letter went on to say that a person "does not have to agree with the views that are being silenced to find these tactics illiberal and undemocratic". Nevertheless, by signing the letter, Peter Tatchell was accused of supporting the incitement of violence against transgender people).

The pressure to ban or cancel speakers has been felt on many campuses, with various student groups stridently asserting that the speakers' publicly proclaimed views or the likely content of the lectures are offensive to them. While most vice chancellors unequivocally affirm their commitment to freedom of speech and expression in the face of such opposition, their confidence can be undermined by the threat of proceedings for harassment on one or more of the protected grounds e.g. race, sexual orientation or gender reassignment.

"Harassment" under the Equality Act 2010 has been carefully drafted to limit the scope of its application. A person (A) harasses another (B) if:

- A engages in unwanted conduct related to a relevant protected characteristic (e.g. gender reassignment); and
- the conduct has the purpose or effect of:
  - violating B's dignity;
  - or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In deciding whether conduct has the effect outlined above, each of the following must be taken into account:

- the perception of B;
- the other circumstances of the case; and
- whether it is reasonable for the conduct to have the stated effect.

There is therefore both a subjective and objective test, the latter imposing reasonable limits on the extent of the protection afforded. The purpose of the objective test is to ensure that the words "intimidating", hostile, "degrading" and "dehumanising" are not trivialised or diminished in significance.

The requirement for reasonableness also requires the court to have regard to interests that are wider than those of the immediate parties. Consequently, the context within which the alleged harassment occurs is crucial in determining whether a claim will be successful.

Universities are places which test received wisdom and push back the frontiers of knowledge. Further, universities have a legal duty to take positive steps to protect freedom of expression, which the courts have acknowledged constitutes one of the essential foundations of a democratic society. Freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb.

Targeting particular individuals or cohorts with particular protected characteristics and inciting violence or hatred of them, however, cannot be justified and will not be protected by the limits placed on harassment under the Equality Act.

Clearly, the views of those who have been the subject of recent no-platform motions could not reasonably have been construed as intending, or having the effect of, incitement to violence or hatred. Arguably, they were promoting the values of a pluralist society. The courts too have acknowledged the value of pluralism as an element of democracy, which requires the protection of the right to freedom of expression and is therefore one of the broader interests to be considered by the objective test of harassment as described above. Pluralism requires members of society to tolerate the dissemination of information and views which they believe to be wrong. That can be difficult for many students to grasp, especially if the issue is one about which they feel passionately; they may be so convinced of the rightness of their views that they believe that any different view can only be the result of prejudice. The law on harassment does not offer protection in those circumstances.

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Judicial review – the importance of discretion

With the introduction of exorbitant court fees for those bringing claims in the County and High Courts, coupled with the snail's pace at which those claims proceed, student litigants are seeking faster and cheaper ways of exercising their legal rights. The result seems to be an increasing trend of students commencing applications for judicial review – a cheaper and arguably more straightforward way of challenging an unpopular decision by their university.

Whilst the court is generally unwilling to interfere with matters of academic judgment, HE providers make numerous decisions every day regarding disciplinary/fitness to practise or study matters, sponsorship of international students, admissions, suspensions, exclusions that might not fall within this category. These decisions often fall within the ambit of what may be challenged by judicial review.

Following a policy

When a university makes any decision, quite sensibly its first point of reference is the relevant internal policy or procedure, which ensures consistency and fairness. However, public law requires those exercising a public function not to blindly apply their policies without considering whether "exceptional circumstances" exist that should lead them to depart from the letter of their policy. Lord Justice Sedley summed this up neatly when he declared: "a policy is precisely not a rule: it is required by law to be applied without rigidity, and to be used and adapted in the interests of fairness and good sense".

When are circumstances "exceptional"?

What circumstances amount to "exceptional" will clearly vary from case to case. However, examples may include serious illness/bereavement leading to a particular deadline being missed. It may be that a failing on the part of the student could be attributed to fault on the part of the university or a third party (UKVI, SFE, even the Post Office), or that circumstances outside the student's control have led them to act – or not to act - in a particular way.

To depart or not to depart...and how to prove it

So how can a university avoid being accused of being overly strict in their application of policy, and how can it prove that it has taken account of all the circumstances of a case should it become necessary to persuade the court it has done so? Our tips include:

- The policy itself does not have to contain a list of what circumstances are "exceptional" enough to persuade the provider to depart from it. However, it may be helpful to include such a list to assist those applying it, although this should not be exhaustive.
- Where a university is making a decision, it should consider whether there are any exceptional circumstances that should be borne in mind when following a policy. It is advisable to keep a contemporaneous note of the fact that those circumstances have been considered and why the university has or has not decided to depart from the policy.
- Where members of staff meet to discuss the surrounding circumstances that are relevant in arriving at a decision, ensure they keep a contemporaneous note of the meeting.
- When writing to a student to confirm a decision, record whether any wider circumstances have been taken into account in arriving at the decision. If they are not sufficiently exceptional to require a departure from the relevant policy, this should be stated.

If universities are able to demonstrate in evidence that wider circumstances have been considered at the decision-making stage – whether they affect the outcome of the decision or not – any claim that the university has "fettered its discretion" will be more easily resisted.

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Terms and conditions of lettings and the Consumer Rights Act

Do you let your facilities out for client events? If you hire out your premises as a wedding or other venue, then you need to be aware that the Competition & Markets Authority (CMA) has recently completed a relevant investigation. Their report serves as a timely reminder to revisit the contracts you use in some detail.

The CMA found that many contracts for the hire of premises do not comply with the new provisions of the Consumer Rights Act 2015. If you use your facilities for non core business purposes, such as venue hire, it is worth looking again at the terms and conditions of the contracts you use; in particular at the exclusion, deposits and cancellation clauses they contain.

To ensure compliance with the CMA guidelines:

- You should make sure that your clients don't lose large advance payments that they've paid up-front if they cancel.
- You should alter the contractual provisions so that it is clear that when a client cancels, you only seek to recover losses that you have reasonably incurred; the sum must reflect a genuine estimate of what you will lose directly because of your client's cancellation. Retaining a client's advance payments/deposit if they cancel when you are not at fault, even though you could reasonably mitigate your losses, for example by re-selling what they have ordered and paid for, will be unfair.
- If you make any substantial advance payments or deposits non-refundable, regardless of the client's reason for cancelling, with the inclusion of terms such as "If you cancel your event, we cannot provide a refund in any circumstances", you run the risk the term could be found to be unfair.

It is definitely worth looking again at your contracts and terms and conditions to make sure they are very clear, balanced and above all fair. Chances are they may need to be changed. Having clear and fair terms in your contracts will ultimately save you time, help prevent disputes and damage to your reputation and will protect your business should something go wrong.

Your clients will remember how you treat them!

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State Aids: A practical guide for the education sector

We find that we are increasingly asked to advise university clients on projects and new developments for the creation of education infrastructure which is jointly funded, particularly through the Regional Growth Fund or European Regional Development Fund grants.

The provision of this funding is often subject to conditions which include match-funding with private sector partners from industry. These projects range from investment in teaching blocks for STEM subjects to sophisticated research infrastructure for industrial applications. One of the ambitions of the 2011 Higher Education White Paper was to consider how to make the UK a world leader in university–industry collaboration.

The challenge is handling the commercial negotiations between public sector funders, industry sponsors and universities which sit, increasingly, somewhere in the middle. The tension arises because collaborative projects are often seen differently by the participants.

Inevitably, the mentality of an industry sponsor is usually a commercial approach, similar to the way they view their purchase of goods or services - as the project is funded by them, the project and its use should be treated as theirs. From the point of view of a public funder, by contrast, the project should be treated as creating a public resource.

The Association for University Research and Industry Links (AURIL) and PraxisUnico have produced a Guide for Universities on the application of state aids law on common types of industry collaboration, which range from the establishment of research infrastructure through to the provision of funded consultancy advice for SMEs.

The Guide is a helpful introduction to navigating the complex state aids considerations in commercial projects and is available at the following websites:

http://www.auril.org.uk/NewsandEvents/tabid/1251/articleType/ArticleView/articleId/6766/State-Aid-in-Research-Development-and-Innovation-A-Guide-for-Universities.aspx

https://www.praxisunico.org.uk/news-policy/news/state-aid-research-development-innovation-guide-universities

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Changes to court fees

Further to a government consultation which ran from 22 July 2015 to 15 September 2015, the government has concluded that for the time being there shall be no further increase to court issue fees for money claims – which is good news.

However, there will be a general rise of 10% in fees for all post-issue matters. Accordingly, the new proposals will affect lease renewals and possession claims. The fee will increase from £280 to £355, or if lodged online through PCOL an increase from £250 to £325.

The government has now presented the statutory instruments for the majority of the proposals and the fee increases are likely to be approved this month, although the exact date remains unknown.

It is often the case that a party is forced to resort to court action as a result of one party failing to communicate/progress matters. It is therefore important for parties to engage in purposeful negotiations from the outset of a matter to avoid the need to initiate the court process and incur higher costs that may not be recoverable from the other side.

The government announced its intention to proceed with these changes in a consultation response document published in July 2015 which can be viewed **here.**

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The Bribery Act – first corporate conviction

Accompanying the introduction of the Bribery Act 2010 was the stark warning to commercial organisations of penalties for failures to prevent bribery.

Last month we saw the first conviction under section 7 of the Act when construction and professional services company Sweett Group was sentenced and ordered to pay £2.25m. This followed their conviction arising from a Serious Fraud Office (SFO) investigation into their activities in the United Arab Emirates.

The company had pleaded guilty in December 2015 to a charge of failing to prevent an act of bribery intended to secure and retain the contract with an insurance company. The investigation into Sweett Group uncovered that one of its subsidiary companies had made corrupt payments to secure the award of a contract for the building of a hotel in Abu Dhabi. The offence was described as a systems failure, with comments that the offending acts had patently been committed over a period of time.

The Director of the SFO, David Green QC, said that the conviction and punishment "send a strong message that UK companies must take full responsibility for the actions of their employees and in their commercial activities act in accordance with the law".

What should universities be doing?

- Ensure that you have a robust and clear anti-bribery policy and that it is implemented. Encourage a culture where high ethical standards are expected and corruption is not tolerated.
- Ensure all employees are aware and trained in the implications of this and how it applies to them individually and to the university. Also make clear to those with whom you do business that you operate a zero tolerance policy to bribery.
- Analyse and document your risk in terms of the key bribery risks faced by the university.
- Ensure the university's current policies on gifts, entertainment, charity, donations and facilitation payments are both implemented and regularly reviewed to ensure that exposure to risk is minimal. Record any gifts or hospitality, and ensure anything excessive is not accepted.
- Regularly review (ideally at least on an annual basis) how the university complies with its duties under your policy and the anti-bribery legislation.
- Identify with whom you do business (agents, suppliers and other third parties) – carry out appropriate due diligence on them and ensure this is documented. Where concerns are identified do not be afraid to turn business away.
- Where bribery is suspected by an employee or by a third party with whom you have a business relationship don't ignore this. Ensure your policies are up to date and that employees are aware of how and to whom they can raise concerns.

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The final piece in the holiday pay jigsaw?

In the case of Lock v British Gas (UKEAT/0189/15/BA) the Employment Appeal Tribunal has upheld the decision of the Leicester employment tribunal that commission payments should be taken into account when calculating holiday pay.

Facts

In 2012, Mr Lock brought a claim for unlawful deduction from wages. He was the lead claimant for a large number of tribunal claims lodged in Leicester and other regions.

When Mr Lock took holiday, he was entitled to basic pay and continued to receive commission based on his earlier sales. However, his commission payments were lower during the months that followed because he had been unable to generate sales while on holiday. Mr Lock successfully argued that holiday pay should reflect the income that a worker would usually receive had he/she been working, and therefore that these future payments should be enhanced to reflect the commission that he would otherwise have earned during his annual leave.

British Gas appealed. The EAT this week dismissed British Gas's appeal.

What does this mean for employers?

Unfortunately the story does not end here. British Gas has already confirmed its intention to appeal the EAT's decision. If its application is successful then it may be some months again before we have a final decision on the issue and employers can be clear on whether or not commission payments should be included when calculating holiday pay, although it is likely that this will be the case.

If leave to appeal is refused, the case will be resubmitted to the original tribunal in order to establish on the specific facts whether Mr Lock did in fact suffer an unlawful deduction from wages.

If you regularly pay commission payments and you have not already done so, we recommend that you review your current practices in order to alleviate the risk of unlawful deduction from wages claims arising and in order to assess potential liability.

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