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Contents

Charities & litigation

Earlier this month the Charity Commission published a guide to highlight the key considerations for trustees who are thinking about taking or defending legal action on behalf of a charity. Most universities are caught by the guidance, and in today's litigious climate need to ensure that their processes for dealing with litigation reflect the principles set out in the guidance.

General principles

It is a well-known principle that charity trustees have a general duty to act in the best interests of the charity. However, the Charity Commission's guidance provides further detail as to how this principle applies to trustees making decisions about litigation. In broad terms:

- Trustees have a duty to protect the charity's assets and (where appropriate) recover those assets.
- A decision to engage in litigation must be made exclusively in the interests of the charity, and alternative courses of action – such as alternative dispute resolution - should be considered.
- In making their decision, trustees should obtain legal advice, consider and assess the economic prospects of success or failure, consider whether their intended action is proportionate and bear in mind any reputational risk to the charity.
- Trustees should carefully record the reason behind any decision to initiate or defend litigation in order to ensure that any decision is taken transparently.

Compliance with these principles is important. Failure to do so can lead to individual trustees being personally held to account for any losses incurred and, in extreme cases, a statutory inquiry being commenced.

Could this be a problem?

The problem from a university's perspective is that, more often than not, the individuals who take decisions in relation to litigation are not the trustees/governing body, but senior managers or the in-house legal team. However, in light of the new guidance, the governing body may need to pay closer attention to decisions that are taken where litigation is concerned.

This is particularly the case where universities find themselves embroiled in litigation on an expensive point of principle, which may not necessarily be in the best interests of the institution. In those circumstances, the governing body should consider intervening to ensure that decisions being taken in relation to litigation are proportionate and reflective of the merits of the legal position.

What can you do?

In order to satisfy the Charity Commission/HEFCE that the trustees/governing body are adhering to the principles set out in the guidance, here are some practical tips to follow:

- Before deciding how to approach litigation, legal advice as to the merits of the claim and the likely costs should be obtained and shared with the governing body.
- Where the governing body is not directly involved with making day-to-day decisions about the conduct of any ongoing litigation, a reporting system should be put in place so the trustees receive regular updates and cost information.
- The governing body should review ongoing litigation at regular intervals and any significant decisions (particularly a decision to issue a claim) should be taken at this level. The reasons behind those decisions should be recorded in writing, or minuted (if discussed at a meeting).
- Where litigation is contemplated, alternative avenues of settlement should be explored – a round table confidential meeting or a more formal mediation may avoid the need for litigation altogether.
- Appropriate legal expenses insurance should be in place at all times and the insurers should be notified as soon as the threat of litigation arises.
- The institution should consider whether any public relations advice is required to limit any possible harm to the institution's reputation.

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What does Brexit mean for your European R&D collaboration agreements?

It is estimated that UK universities attracted more than £836 million in research grants and contracts from EU sources in 2014-15. UK research has not only become financially reliant upon EU funding, but it is also acknowledged that cross border R&D across the EU can improve research data, innovation, and provides access to a wider talent pool of researchers and experts.

While we cannot say with certainty whether the UK will continue to be able to access European funding streams post Brexit, the Treasury did provide some reassurance last week by committing to guarantee funds for any European research bids, even when such projects continue post-Brexit.

The good news is access to EU funding in the medium term looks to be retained. The effects of Brexit are likely to change the relationship between UK institutions and their European counterparts.

Now would be a good time to review contracting arrangements for existing and future participation in EU funded R&D, to ensure they are adapted and provide adequate flexibility to pre-empt the changes in the relationship between the UK and Europe as a result of Brexit.

We set out below some of the key contractual provisions to consider:

Termination triggers
What will happen if a UK participant ceases to be eligible for EU funding or participation in the project? Should this give rise to automatic rights of withdrawal or exclusion from the project? What will be the effect to the contracting arrangements if the UK government takes on responsibility for the gap in funding?

What would happen to the licensing of IP rights between the UK and European institutions in the event of a UK participant's withdrawal in such circumstances? The collaborative parties could seek to rely on material adverse change or force majeure provisions to provide sufficient ground for termination, but this will depend upon the drafting and interpretation of the relevant clause.

Export of personal data outside the EEA
The Data Protection Act, and the incoming General Data Protection Regulations, prevent the transfer of personal data outside of the EEA unless one of a number of limited conditions are satisfied. Whilst is likely that the UK will continue to adopt the principles of European data protection regulations, if there are contractual provisions in place which prevent the transfer of personal data outside of the EEA entirely, how will this affect the working relationship with UK participants?

Territorial scope
Consider the territorial scope of any rights granted under the agreement that refer to the European Union or the EEA, and the implications of the UK falling outside such a defined territory.

UK divergence from European Regulations
Law that regulates scientific research is primarily derived from the EU, and although it is not envisaged that the UK will substantially diverge from European regulations, the government may modify or redact certain provisions which it does not favour. Universities should consider the practical implications of having to comply with different regulations from their European counterparts when undertaking R&D, and how this is to be dealt with in the agreement. Existing collaborative agreements

will most likely require UK participants to comply with applicable European regulations, but UK participants may also require that any R&D is carried out in accordance with any amended UK regulations.

Pricing and payment mechanisms
We have already seen a significant drop in the value of sterling against the euro. There will no doubt be further currency fluctuations as Brexit negotiations continue. Pricing and payment mechanisms should be drafted to provide flexibility which take account of currency fluctuations and potential tariffs which could be imposed.

Governing law and enforcement
Rome I and Rome II Regulations standardised the rules across the EU for determining the applicable law that governed an agreement. Where there is an express choice of law clause in an agreement this is still likely to be followed for contractual disputes, as the English common law approach is similar to Rome I which deals with the law for contractual disputes. However, if the governing law clause has been omitted it is not clear to what extent the Rome Regulations will continue to be applied in the UK. Even where there is an express governing law clause, this may not be effective for non-contractual disputes (for example a negligence claim) as English common law has substantial differences to the Rome II Regulations which deal with the law for non-contractual disputes. Furthermore, if Rome I and Rome II cease to apply to the UK, parties involved in litigation in Europe may be subject to local rules that dictate the governing law that applies, as courts in other jurisdictions will not be bound by them.

Intellectual Property registration and enforceability
Where registrable IP arises as part of an R&D project, those responsible for its commercialisation and exploitation need to ensure that the coverage of any registration will continue to be maintained as envisaged at the time of executing the licence. For example, a party may need to make a new filing of a UK trade mark if the rights currently under licence are only in relation to EU trade marks.

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10 things landowners need to know about Pokémon Go

Pokémon Go has become hugely popular and has already amassed over 100 million downloads worldwide, and has driven large groups of people to congregate in specified locations, in the pursuit of rare Pokémon, Pokéstops or Gyms.

Although we expect the 'Pokémon hype' to be short-lived, the creation of similar augmented reality games is likely to continue and universities may wish to take action to protect themselves and their property from trespass.

Trespass

1. **Why are Pokémon Go users on my land?**
   If your land or premises are targeted as a Pokéstop or Gym you may find you are inundated with Pokémon Go users.

2. **Can I stop Pokémon Go users from entering my land?**
   Landowners can remove individuals' right to enter private property to play Pokémon Go by displaying a clear notice that prohibits users' entry. This should be sufficient to provide the university with the means to then take court action to prevent mass trespass should this occur.

3. **My land is private; do I still have to worry?**
   This applies to both private landowners and public bodies (provided the public body can demonstrate that the issue relates to management of land from which its public duties are being exercised).

4. **There is a Pokéstop/Gym on my land, how can I legally stop masses of people coming onto my land?**
   In extreme cases, landowners should consider seeking a court order excluding game players from visiting their land altogether. However, this may be hard to enforce, as Pokémon Go users are difficult to distinguish from other individuals using their mobile phone for other purposes.

5. **If I seek a court order to stop Pokémon Go users from entering my land, can they oppose it?**
   As Pokémon Go users are able play the game elsewhere, without trespassing, they will not be able to rely on the Human Rights Act – and their rights to freedom of association and assembly – as it does not apply where they are trespassing on private land.

Safeguarding visitors

6. **As the landowner, am I liable if people are entering my land?**
   Universities must be aware of their obligation to safeguard visitors while on their property regardless of whether they are invited or not (Occupiers' Liability Act).

7. **Am I still liable if people visit my land without my consent?**
   Signs prohibiting entry to gamers or court orders identifying this category of visitors as

trespassers will not negate landowners' statutory duty to protect Pokémon Go users from harm.

8. **How can I protect myself if a Pokémon Go user gets injured while on my land?**
   Any potential hazards on the land must be clearly identified to limit injury and provide protection should an injury arise.

9. **What hazards do I need to identify?**
   Examples of hazards include marking out ponds, steep drops, railway lines. This is all the more important in areas which have been designated as Pokéstops or Gyms by the game's creators as they are more likely to experience a higher footfall of players.

10. **What is the law surrounding trespassing?**
    The law states that landowners have a duty of care to warn trespassers of risk of injury due to the state and condition of their premises, or relating to any activity being undertaken on their land which makes it more dangerous. This said, there is unlikely to be a duty to protect trespassers against any obvious risks (e.g. ponds), provided that the hazard has been clearly marked.

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Fair dismissal must reflect wording of university's statutes

Does a dismissal for "conduct of an immoral, scandalous or disgraceful nature" in line with a university's statutes equate to the general concept of gross misconduct? Not according to the EAT in the recent case of *Dronsfield v University of Reading* ([2016] UKEAT 0200_15_2107).

The details

Dr Dronsfield was an Associate Professor at the University of Reading. He was dismissed for gross misconduct following allegations that he had failed to report a sexual relationship with a student who he was responsible for supervising. Under the University's statutes, the University had to have "good cause" for dismissal, for reasons including "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment".

General concept of gross misconduct

At first instance, the Employment Tribunal found that the reasons provided in the relevant statute equated to the general concept of gross misconduct, finding that the language, which was written in 1926, was to describe what in modern language is gross misconduct. However, on appeal the Employment Appeal Tribunal held that this was an incorrect interpretation, and that the fairness of Dr Dronsfield's dismissal should have been considered on the basis of the specific wording of the University's statutes, namely whether there had been "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment".

On this basis, it held that the Tribunal should have considered whether it was reasonable for the University to have found Dr Dronsfield guilty of the conduct identified by the statutes. The EAT added that whether or not this wording might in certain circumstances provide for greater protection for an academic member of staff than the general concept of gross misconduct was irrelevant.

What does this mean?

It is well known that universities' statutes often differ from "normal" employment contracts, which generally do not define the circumstances in which dismissal is permitted. This is usually the purpose of the non-contractual disciplinary procedure, which only provides a non-exhaustive list of examples of gross misconduct. This case emphasises that in the university context, adherence to the definition of circumstances in which an employee may be dismissed will be relevant to the fairness of the dismissal, and it will not be sufficient to morph this into the general concept of gross misconduct.

There were also questions raised as to HR's input into the investigation report in this case, emphasising the fact that HR's advice and input should be limited to matters of law and procedure.

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Helping to defeat modern slavery

It is estimated that there are between 10,000 and 13,000 modern slavery victims in the UK and around 45 million such victims worldwide. In 2015 the government introduced the Modern Slavery Act 2015, which applies to all organisations with a global turnover of £36m or more and which therefore applies to most universities.

The new Prime Minister recently announced a new UK cabinet taskforce to help tackle the issue of modern slavery. The announcement was timed to coincide with the first anniversary of the Modern Slavery Act 2015.

Institutions to lead the way?

No-one expects the UK's universities themselves to be hotbeds of modern slavery, but it is expected that our institutions will lead the way in the moral crusade to rid the UK and the world of modern slavery. Each institution reaching the turnover threshold is required to publish a Modern Slavery Statement on their website, every financial year, illustrating the steps they have taken to ensure their business and supply chains are slavery free, or alternatively, the fact that they have taken no such steps.

As it stands a failure to prepare and publish such a statement will not lead to criminal sanctions. However, an organisation can be ordered by a court to publish a statement if it has failed to do so. There is also the risk of reputational damage for universities, both in attracting students and funding and in retaining academic talent.

Universities therefore need to think now about:

- Updating terms and conditions of business with suppliers to ensure compliance with the Act;
- Carrying out an audit of supply chains;
- Introducing a Code of Practice to present to suppliers;
- Drafting relevant policies to prevent, detect and eradicate slavery.

We have assisted a number of our clients to meet their obligations under the Act and can assist any university in taking the above steps and preparing a Modern Slavery Statement.

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