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New rights for people to opt-out of contact from charities

People's ability to control how they are contacted by charities is the primary concern underlying the Fundraising Regulator's (FR) effort to develop a Fundraising Preference Service (FPS). Although people already have the option to register their preference as to how they would like to be contacted (or not contacted) by mail and by phone, with the existing Telephone Preference System (TPS) and Mail Preference System (MPS), a review of fundraising regulation concluded that more needs to be done in this regard.

A FPS would enable members of the public to register their preferences more easily with charities, and any charity engaged in fundraising would be required to check its contact list with the FPS list before sending out any communication.

The FR has published a series of proposals setting out a model for a FPS. It is proposed that it will apply to any charity which spends more than £100,000 per year on fundraising, which will probably catch most if not all universities.

The discussion paper lists 19 core propositions which the working group entrusted with determining how the FPS should work recommends should form the basis of the FPS.

The key proposals include:

- There should be a simple 're-set' option for users to indicate that they no longer wish to receive fundraising communications. There should be an additional option for users to indicate only specific fundraisers instead of prohibiting all fundraisers from communicating with them.
- If the re-set option is selected, fundraisers having an existing relationship with the user should have an opportunity to contact and 'check in' with that user in order to clarify whether the user intended to prohibit communications from them as well. Only organisations which have received a donation from a user in the previous 24 months should be allowed to check in with that user.
- The FPS should focus on communications by telephone, mail, texting and email, and not social media or door-knocking. Nevertheless the FPS should provide guidance on door-knocking.
- The FPS should not be considered to override the MPS and FPS, and charities must continue to respect any preferences already indicated using these services. Moreover the FPS should direct users to such services if they specifically seek to stop nuisance calls or junk mail.
- FPS registration should be effective for a limited period of two years, following which users will need to renew their registration. A reminder that renewal is required should be sent to users three months prior to the expiry of their registration.

A number of the proposals are intended to balance the primary goal of enabling users to easily 're-set' their preferences, with the interest of fundraisers to ensure that users do not mistakenly prohibit communications from organisations which they are interested in. This is described in the discussion paper as being the main challenge posed by the re-set option mechanism. The possibility of a post-registration 'check in' is aimed to help achieve such balance, however in the absence of clear parameters such 'check in' could undermine the effectiveness of the FPS. Such parameters include ensuring that the relationship between the user and the fundraiser entitled to 'check in' is sufficiently robust, which can be ascertained by looking at when the user last made a donation to the particular fundraiser.

A possible criticism is that because it is proposed that the FPS will not absorb the MPS and TPS, this will create complexity and disparity in the times when the registration becomes effective in relation to different means of communication. As a result of the retention of the TPS and MPS arrangements, the registration will only be recognised and will take effect 28 days afterwards for phone calls and four months afterwards for mail, as opposed to taking effect immediately or, at least, simultaneously for all forms of communication. A possible suggestion could be to allow users to select from a list of means of communication how they would not like to be contacted. Similarly, users could be enabled to select categories of, or specific causes which they are interested in.

The FPS also gives rise to some data protection issues. The consent of users for the information to be shared with fundraisers for the purpose of enforcing the FPS will need to be obtained during the registration process. Users will also need to understand which data needs be shared in order for FPS to be effective. The more difficult question is how to make sure that the information is only given to those who have a direct and legitimate interest in the information, especially if a fundraiser is not a registered charity. The discussion paper proposes that the FR will validate such entities and confirm when a subscription for the FPS file can go ahead.

The discussion paper can be found **here** and is essential reading for university Alumni Relations teams and others responsible for fundraising within universities. The public is invited to give its feedback on the proposals by 30 September 2016, and it is intended to launch the FPS in 2017.

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Procurement update

The summer break was characterised by the fall-out from Brexit. Now that the summer is over it is obvious that Parliament is only just beginning to get to grips with the size and scale of the task of disentangling EU law throughout all aspects of British law and politics. For a useful introduction to the issues, the House of Parliament Library has published a research briefing "Brexit: The Impact on Policy Areas". It is fair to say that this is a rather more thorough document than the government's pre-referendum leaflet: "Why the Government believes that voting to remain in the European Union is the best decision for the UK".

On procurement, the briefing note highlights that the reality of cross-border trade is still fairly minimal. My experience is that the cross-border impact is limited to certain sectors, such as construction firms from the Republic of Ireland and high-value technical equipment from Germany.

The procurement rules prevent "Buy British" policies, but do, on the other hand, offer opportunities for businesses to sell throughout the rest of the EU. The note provides alternatives which might be proposed in order for other countries to offer non-discriminatory access, whether under individual trade agreements or participation in the World Trade Organisation Government Procurement Agreement (which might be little better than the current rules).

A second and much more detailed point of interest is on education. Although the EU does not have a formal legal competence in education policy, the policy discussion focuses on two main areas: the impact on students, and the impact on research. The potential impact on students is speculative, and access to the Erasmus programme could be affected. The paper notes that it has been suggested that the UK may lose access to EU research funding and access to staff.

You can find the report **here**.

On the subject of EU rules, it was quite cheering to read that the Court of Justice of the European Union has had its knuckles rapped by the European Ombudsman. The CJEU went out to market for translation services into Portuguese. The CJEU indicated that the results of the test translation for a bidder did not meet the required standard. That bidder challenged the procurement exercise.

The European Ombudsman is an EU institution which investigates complaints about maladministration by EU institutions. The Ombudsman is not a court and did not find that the CJEU had breached any legal requirements. While it was not guilty of maladministration, the Ombudsman indicated that the CJEU should improve its processes, which could be seen as indicators of good practice. It should:

- require internal evaluators to sign and date the evaluation sheets of tests;
- set up an internal review mechanism for dealing with complaints by unsuccessful applicants;
- anonymise the tests of tenderers for the purposes of the assessment made by the internal evaluators during the evaluation process.

The most interesting of these is the requirement to have an internal administrative review mechanism. This might be an indicator of good administration, but does not seem, in most cases, compatible with the short standstill period to challenge procurement decisions which reflects the need to get on with commercial life.

You can find out more **here.**

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Electronic signatures – are they valid?

The use of a "wet ink" signature is commonly acknowledged as providing clear evidence of a party's acceptance of the terms of a contract. However, given the size of higher education institutions and the scale of their business operations, it can sometimes be difficult to obtain "wet ink" signatures from an authorised signatory in a timely manner.

Save for some exceptions, there is no particular form required for a legally binding contract to come into force. In addition, there are no definite statutory or common law rules to deal with the validity of electronic signatures when entering into a commercial contract. In fact, provided there is an offer and acceptance, adequate consideration, certainty of terms and an intention to be legally bound, a contract does not necessarily need to be made in writing at all. It can be entered into verbally, through e-mail correspondence and by using an electronic signature. However there has been some reluctance in the business community to use electronic signatures when completing agreements.

The Law Society recently published a very detailed practice note which reinforces current thinking about what acceptable use is and the validity of electronic signatures. The practice note is specific to the execution of commercial contracts entered into between businesses (including universities). Whilst the note is non-binding and cannot be relied upon as formal legal advice, it has been approved by a QC as good practice.

Electronic signatures can take many different forms including:

a) typing a name into a contract or including the terms of a contract in an e-mail

b) an electronic signature 'image' pasted into the relevant signature block

c) the clicking of a button, such as 'I accept'

d) the use of touchscreen to write the signatory details

e) a certificated e-signature where the signatory can be verified by a password key

In the practice note leading counsel has advised that "if the authenticity of a document signed using an electronic signature were to be challenged, an English court would accept the document bearing the electronic signature as prima facie evidence that the document was authentic and, unless the opponent adduced some evidence to the contrary, that would be sufficient to deal with the challenge. These are the same principles that an English court would apply in relation to wet-ink signatures."

The note goes on to say that even a document signed as a deed should also be capable of being signed electronically, by both the signatory and the witness.

To ensure a comparable level of authenticity with "wet ink" signatures, e-signatures should be able to unambiguously identify the named signatory, be under the signatory's control, and ensure that it is clear which version of the document has been agreed to. These are essentially evidential points and there is already a variety of commercial software products that can be used in order to ensure that these points are covered.

Exceptions

UK universities are increasingly focused on their international reach and collaboration with partners overseas. Where a contract is governed by English law and subject to the English courts, the use of electronic signatures should be valid, provided it complies with the usual contractual requirements under English law. However, where a contract is governed by English law but court proceedings are undertaken in a foreign jurisdiction, local advice may be required in order to ensure the enforceability of an electronic signature. Similarly, where a contract is governed by a law other than English law, the validity of electronic signatures will depend on the applicable foreign law.

Universities should also check their constitutional documents or standing orders to ensure that the use of electronic signatures is not restricted in any way. Where they are silent on this point, it should not be necessary to include specific reference to allow contracts to be signed using an e-signature.

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Brexit: the legal implications for the UK's construction sector

Despite the fact that sterling was hit in the initial wake of the referendum result, a lack of negative longevity in the UK's currency market has been proven as the pound has now stabilised. As such, given that the UK's market is now recovering as the shock of the decision subsides, it seems a prudent time to consider the long-term implications of Brexit on the construction industry as a whole.

From a construction perspective, while the UK remains a member of the European Union the law relating to construction remains the same. In terms of the long term legal implications of Brexit, it is not until Article 50 is triggered that the UK parliament will have to decide which, if any, aspects of construction law that derive from the EU it wishes to change. It is however worth noting that construction-specific EU law is minimal in any event, the most significant being the CDM regulations and certain energy performance requirements.

The economic implications

In terms of the economic implications for the industry, there has been significant speculation about which sectors will be affected most strongly. In the private sector initial indications are that existing projects will continue and smaller schemes will be less affected.

For the public sector, there is speculation that there is likely to be a short term hiatus while the new government gets to grips with the implications of Brexit and key departmental resources are reallocated to deal with EU exit negotiations. However, initial indications are that in the medium to long term the need for infrastructure investment will be greater than ever. This is to show that the UK remains an attractive investment option and because any loss of EU funding will be outweighed by the saving of the UK's contributions to the EU, part of which could instead be directed towards such projects. As such, the longer term impact could be neutral or even positive on the industry.

In terms of labour within the construction industry, although the industry presently relies heavily on European labour which is facilitated by the principles of the free movement of people, as enshrined in EU law, it will be impossible to say whether the availability of skilled labour within construction will be restricted until such time as the UK decides on the replacement mechanism to be put in place. However, in the meantime, the government and industry is aiming to boost the number of apprentices and female construction workers which could have the potential of alleviating any concerns. In addition, the government's plans to create three million apprenticeships by 2020 by imposing a compulsory apprenticeship levy on all UK companies in 2017 to fund an expansion in training and apprenticeships will undoubtedly have the effect of lessening the UK's reliance on European labour within the construction industry in the long term.

What can be done now to lessen the impact of any potential future implications?

At present, it is impossible to predict with any degree of certainty how construction contracts will need to be drafted to deal with a post-EU world. Much will depend on the EU exit terms yet to be negotiated. In the meantime, all parties to construction contracts should consider how best to allocate the risks generated by the current uncertainty and, ultimately, life outside the EU. This will include a review of contract terms dealing with changes of law, potential lack of skilled labour, increases in material prices, import duties and the possible application of force majeure provisions. In addition, funders may choose to demand greater performance security to offset a greater threat of supply chain insolvency.

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Long term pay protection a potential reasonable adjustment

Universities will be aware of their obligation to make reasonable adjustments in order to assist disabled employees to remain in work. Universities are likely to be used to using pay protection for periods of time when redeploying disabled employees for capability reasons to lower grade roles. However, in G4S Cash Solutions (UK) Ltd v Powell ([2016] UKEAT 0243/15), the Employment Appeal Tribunal (EAT) now suggests that a reasonable adjustment could include maintaining the previously paid higher rate of pay on a long term basis.

The facts

The employee had been moved from a physically demanding engineering role maintaining cash machines to a less skilled and less physically demanding 'key runner' role, due to his back problems, which were sufficiently serious for him to be classed as disabled. His pay was maintained for an initial period of time. However, the following year the employer said that the role was not a permanent change and it was only prepared to employ him in this role at a reduced rate of pay. The employee refused to accept these changes and was dismissed.

The EAT found that it was reasonable for the employer to ring fence pay long term in the interests of securing continued employment. Whilst this will have increased costs for the employer, the EAT found these to be relatively small in the long term given the resources of the employer.

What does this mean for universities?

The case highlights the extent to which universities are required to consider a range of adjustments to keep disabled staff at work. Each case will depend on its own facts and what is deemed to be "reasonable". However, given the size and resources of universities G4S Cash Solutions (UK) Ltd suggests it might be a reasonable adjustment to maintain a previously enjoyed higher rate of pay, even beyond a pay protection period, if an employee is moved to a more junior role. Given existing budgetary constraints, this news is unlikely to be particularly welcome, but we would therefore strongly advise universities to seek specific legal advice when considering medical redeployment of disabled employees.

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Territorial scope of UK statutory employment rights

Universities frequently employ individuals to work in various corners of the globe and often require the individual's employment contract to be governed by English law.

With this in mind it is important to consider whether such workers would be entitled to bring statutory based employment claims in the UK. This would include claims under the Employment Rights Act 1996 and the Equality Act 2010.

Jeffery v The British Council

The recent case of *Jeffery v The British Council* ([2016] UKEAT 0036/16) considered this very situation. The claimant was an employee of the British Council managing a teaching centre in Bangladesh. The teaching centre was managed locally and relied on its own fee income.

The claimant's employment contract expressly incorporated English law, entitled him to a civil service pension and made a notional deduction for UK tax. The claimant was a UK citizen, recruited in the UK, but he had almost always worked abroad within teaching centres. He resigned and sought to bring claims against his employer.

The case was decided on appeal, with HHJ Richardson finding that the claimant had established "an overwhelmingly closer connection with Great Britain and with British employment law than any other system". Consequently, territorial jurisdiction had been established and the claimant was entitled to bring his claims before the Employment Tribunal.

Pause for thought

The fundamental principle, that an employee who is working or based abroad at the time of their dismissal is excluded from the protection of UK statutory employment rules, remains. Therefore, there is no need for universities to panic and assume that the decision in this case will hold true for all of their overseas employees. Each case will be fact specific, with this case having a number of particular features:

- The claimant was a UK citizen recruited in the UK to work for a UK organisation.
- His contract of employment provided for English law to be applicable.
- The claimant was entitled to a civil service pension.
- His salary was subject to a notional deduction for UK income tax.
- The employer was a public body, playing an important role for the UK

However, universities may recognise a number of these features in their arrangements with employees based overseas, and this case should therefore serve as a reminder that universities should always consider that an overseas worker may be able to attract the protection of UK statutory employment rules, especially where they have "an overwhelmingly closer connection with Great Britain and with British employment law than any other system".

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