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Zahid – The High Court's guidance on how to preserve the right to seek judicial review pending proceedings before the OIA

Claimants are not entitled to proceed with judicial review (JR) if there are alternative and effective remedies available i.e. if a substantial part of the issue can be resolved by other means.

The difficulty arises because of the short time frame within which JR proceedings should be initiated: promptly and not later than three months from the date when the grounds for the claim arose (usually when the decision is made). The Rules and Practice Directions state that the time limit cannot be extended by agreement between the parties, although the court retains a general power to extend the time limit (and entertain claims which are filed late). The court has no obligation to use this power and it will not do so unless a good reason for the delay is shown.

Wary of losing their right to JR, students are often advised to initiate JR and ask for a stay of proceedings pending the determination of the same matter by the OIA (which students can resort to within 1 year from the date on which a completion of internal procedures letter is issued by the university). The average duration of OIA proceedings is longer than three months. Invariably, unless JR proceedings have been started and stayed, students wishing to contest a university's decision after an OIA decision will rely on the court's discretion to extend the time limit.

The Zahid case

In *Zahid, R (On the Application Of) v The University of Manchester ([2017] EWHC 188 (Admin))* the High Court dealt with three claims brought by medical students against expulsion decisions. The students filed for JR and requested a stay of proceedings while the OIA procedure was pursued. In making a decision on the requests, the court delved into some detail on the relationship between JR and OIA references.

Which procedure?

The OIA will not consider claims which have been the subject of court proceedings which have been concluded or which are ongoing and haven't been stayed. However, the OIA will consider claims in which a judge has identified the OIA as an alternative remedy and refused to hear a case on the basis that the alternative remedy has not been exhausted.

It is generally accepted that OIA procedures are not equivalent to and do not replace JR. The OIA does not determine legal rights and obligations. Consequently, the student's right to seek JR is not excluded by the OIA scheme.

However, on the other hand, the availability of alternative remedies may lead the court to exercise restraint when deciding whether to accept a JR case or not. Taking into account a variety of factors, if the court considers that an alternative remedy is suitable it is likely to dismiss the proceedings or order a stay.

The court in Zahid observed that there are many reasons why alternative methods of dispute resolution should be preferred, especially when that method is provided for by Parliament, as is the case of the OIA. It considered that in such circumstances the court "should be slow to become engaged with issues arising out of the same subject matter" until a reasonable time has passed for the alternative remedy to reach a conclusion.

A noteworthy observation which the court made is that with respect to discrimination

claims under the Equality Act, the statute extends the time limit for initiating such claims before the courts to eight weeks after the end of any OIA proceedings. The court noted that this reflects recognition of the importance of resolving public disputes outside of the courts although it did not have a bearing on claims which are not based on the Equality Act.

The difficulties

Students will seek JR of the university's decision. Although technically the OIA's decision can also be subject to JR, the court described this as an "uphill struggle" because of the wide margin of discretion that the OIA has.

The court went on to describe the practical difficulties faced by students, whichever route they choose to follow.

If a student wishes to pursue an OIA reference and at the same time preserve his/her right to seek JR by filing a JR claim and requesting a stay:

- there is a risk that the university does not agree to a stay and contests the request
- if the court does not stay the proceedings the OIA can no longer deal with the matter
- costs are incurred by both parties from the outset and this defeats one of the purposes of OIA proceedings, regardless of whether a stay is granted or not

If the student wishes to pursue an OIA reference without filing "protective proceedings" in court, it is likely that by the time the OIA decides the matter the three month time limit will have lapsed and the claimant's right to seek JR will depend on the court's willingness to grant an extension

If the student wishes to pursue JR in any event, the university could ask the court to stay proceedings or the court could stay the proceedings of its own motion, both of which involve additional delay and costs.

Guidance

Having outlined the issues above the court went on to deal with three situations in a clear and categorical manner.

The first is when the student wishes to pursue an OIA reference without filing protective proceedings. The court offered guidance on the factors which courts should take into account when considering an extension of time:

- the courts are generally willing to extend time while alternative remedies are pursued
- where an OIA reference is made there is no need for protective proceedings to be filed as long as JR proceedings are initiated soon after the OIA reference is concluded
- JR proceedings should not be initiated later than one month after the OIA procedure is concluded. A court is unlikely to grant an extension if proceedings are filed later
- the court is more likely to grant an extension if an agreement is reached between the parties that JR should only be proceeded to after the OIA reaches a decision
- although a student has 12 months to make a reference to the OIA, "if he or she wishes to reserve the right to pursue judicial review proceedings, then the decision to refer should be made sooner. In the ordinary course, a three-month period from the date of the Completion of Procedures Letter should, in the circumstances, be sufficient to make the reference"
- so as not to mislead students, universities should say in the Completion of Procedures Letter that although the students has twelve months to resort to the OIA, it is advisable to do so within three months if they wish to preserve their rights to JR
- the three month period should be enough for students to obtain the university's agreement not to object to eventual JR proceedings. Universities should be able to reply to such a student request within two weeks. The university's reply could contain conditions, such that it will be entitled object to JR if the student does not proceed to the OIA within the three month period and does not initiate JR within a month from the OIA's decision
- even if a student doesn't make a request for the university to agree not to take a time point, or the university does not give a satisfactory reply, the court is still unlikely to refuse an extension if the above recommendations are followed
- Unless the university positively states that it will object to JR the student is entitled to presume that it will not. If the university states that it will object the student should consider protective proceedings and the university may be ordered to pay the student's costs. If the student fails to engage with the university then costs may be awarded against him or her.

The second situation is where protective proceedings have been issued but the student wishes to stay proceedings pending an OIA decision. The court offered guidance on how the courts will exercise their discretion to stay:

- the courts are likely to grant a stay to allow an OIA reference to proceed, especially if it is requested at the earliest opportunity. This is more so if the university agrees
- there are situations when the university might prefer to proceed with JR regardless of whether the OIA decides the case or not; for example, when serious legal issues are raised or allegations made. The court will consider to what extent OIA proceedings might delay the progress of a JR case which will be pursued regardless of the OIA's decision
- if protective proceedings are issued the student should seek an agreement with the university to stay proceedings and then file an application for a consent order. The application should be filed before the university has spent time and money preparing summary grounds and should not be open-ended but should have a clear expiry date (such as one month after the conclusion of the OIA procedure). In the ordinary course the court should accept such an application
- if a university opposes such a request it should have compelling reasons and if it does not it may be ordered to pay costs

The third and final scenario is when JR proceedings are initiated and the student does not wish to resort to the OIA. Even if a request for a stay is not made the court will still consider whether it should stay proceedings. A party not requesting a stay should make its reasons clear from the outset. The court does not have to agree with the parties even if they both wish to proceed with JR straight away. The court will need to examine the reasons provided and the extent to which the parties' unwillingness could undermine the appropriateness of the OIA remedy.

Conclusion

Although the judgement was given by the High Court and as such does not bind another court faced with a similar claim, claimants and universities who act in accordance with the above guidance have some comfort in the fact that they are relying on guidance given in a court decision. The guidelines are reasonable and balance out the public interest in resolving matters using alternative dispute resolution mechanisms (to the greatest extent possible) with the requirement of promptness of JR proceedings and finality of administrative decisions. It is difficult to imagine a different court objecting to the guidance given by the High Court in this case.

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Brexit takeaway

When I am not advising on commercial law, I have, for the last ten years, been working as an adviser on a citizen's advice programme organised by the European Citizens Action Service. ECAS is a Brussels-based non-governmental organisation which provides advice, research and advocacy for citizens and assists in capacity-building for civil society organisations, which includes advising on making applications for EU funding.

With that declaration of interest out of the way, I commend a report drafted by ECAS, which is one of the few golden nuggets of wisdom panned out of the muddy creek of Brexit-related opinion pieces. The ECAS study "5 Takeaways On Brexit: Outlining Possible Scenarios for a New UK-EU Relationship" provides a useful legal analysis on the consequences of Brexit on citizens' rights and, of interest for our education clients, continued access to EU funding streams. This is based on an assessment of different existing scenarios. The ECAS study considers different scenarios and provides an analysis on the EU's existing models of international co-operation with other countries.

The report considers the following co-operation models with international partners:

a. the baseline position (current EU membership)
b. the "Norway" model (EEA-membership)
c. the "Switzerland" model (a series of bilateral agreements with the EU)
d. the "Canada" option, (a comprehensive free trade agreement)
e. the "Turkey" option (an accession state with an association agreement)
f. the "EU-neighbourhood" option (an association agreement with countries, as typified by representative examples of Morocco and Moldova).

The key messages from the study, in its analysis of EU funding programmes, are:

1. The only funding programmes which the UK would be automatically excluded from are the European Structural and Investment Fund, as well as common agricultural and fisheries policies. This is relevant for our HE and FE clients. Our FE clients in particular have benefitted from ESIF funding for projects related to promoting business skills and hubs for entrepreneurship in areas in need of support.
2. It may be possible to continue to take part as a full member on an equal footing to EU member states in Horizon 2020. Turkey and Moldova, for instance, both take part in Horizon 2020 as a full member under their association agreements.
3. While Horizon 2020 is open to non-EU countries, the EU programme would be unlikely to fund UK institutions unless the UK itself contributes. This is the position with other industrialised countries such as Canada, and explains why HM Treasury has already committed to continue to underwrite existing Horizon 2020 projects after the UK leaves the EU.
4. The EU institutions may, however, make the right to participate in Horizon 2020 contingent on the principle of freedom of movement. This is based on the experience of Switzerland following its own referendum on immigration in 2014. Following the Swiss referendum, the Swiss authorities wished to pause to consider the draft protocol to extend the EU-Swiss bilateral agreement on free movement of people to Croatian nationals. The Commission suspended negotiations on Swiss participation in Erasmus and Horizon 2020 explaining:

"Le Conseil a subordonné la conclusion des négociations sur l'association et la participation de la Suisse aux programmes Horizon 2020 et Erasmus+ à la conclusion de ce protocol".

While the current government wishes to create a "bespoke" deal, there are lessons to be learned on the likely consequences of EU funding based on what we already know.

You can read the full study **here.**

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New prompt payment reporting Regulations

The Department for Business, Energy & Industrial Strategy (BEIS) has recently published draft Regulations and guidance on reporting how well companies are paying their suppliers. These Regulations impose new reporting obligations on companies and introduce a new criminal offence on directors failing to submit a report or making a false report.

Under the draft Regulations this obligation may catch many of our university clients and/or their commercial subsidiaries, as there is no distinction as to whether the company is a charitable company, public, private or listed company.

The Regulations apply to a qualifying company which meets or exceeds at least two of the following criteria:

- £36 million annual turnover;
- £18 million balance sheet total; and
- an average of 250 employees in the financial year.

Under the draft Regulations the qualifying company will have to submit a report on the following information to a government website, on a six-monthly basis:

- information on payment terms with contractors including the maximum payment period;
- an explanation of the dispute resolution procedure in relation to payment;
- details as to whether the payment practices permit invoice financing, e-invoicing and whether subject to a payment code of conduct and whether the company imposes a charge to a supplier to remain on the qualifying company's list;
- the average number of days taken to make payments;
- the percentage of those payments which were made within 30 days, 60 days, more than 60 days, and those not paid within the agreed payment period; and
- the name of the director who has approved the information.

Under the Public Contracts Regulations 2015, contracting authorities are already obliged to pay their contractors within 30 days and to ensure that their subcontractors pay their subcontractors within a similar time-frame. In addition to this, recent changes oblige companies to monitor slavery and exploitation in their supply chain and to ensure that applies to any related company.

This new reporting duty is planned to come into force on 6 April 2017 and will impose a further reporting duty on clients – so much for the much-vaunted bonfire of red-tape. The government's aim is to ensure some protection of small businesses by attempting to change the business culture, all the while without imposing a statutory payment code for businesses. Instead, the government is creating a "name-and-shame" approach to tackling late payment as part of a piecemeal approach to specific contractual obligations. Think of it as an ebay buyer review... With the obvious disadvantage that the information will always be at least six months out of date and edited by the buyer himself.

Whether this will make any difference in practice or whether the bigger customers will massage the statistics by imposing obligations prior to invoicing – such as requiring (but delaying) purchase order numbers, or requiring prior approvals before an invoice can be submitted – is still to be seen. The Regulations will be reviewed not less than every five years, and this might yet mean that these payment processes which encourage good administrative practice could, in the light of how they are or can be abused by delay, be treated as sharp payment practice in the future.

You can find out more about this new legislation and the draft Regulations at the following websites:

https://www.gov.uk/government/news/late-payment-reporting-guidance-launched-for-large-businesses

https://www.gov.uk/government/publications/business-payment-practices-and-performance-reporting-requirements

http://www.legislation.gov.uk/ukdsi/2017/9780111153598

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Consent under the GDPR – time to opt out?

The ICO has now published a consultation paper with its proposed guidance for consent under the GDPR. It adds some significant flesh to the bare bones set out in the GDPR. Helpfully the guidance also sets out what is required for consent to be compliant under the GDPR.

The guidance makes it clear that consent under the GDPR will be a more limited and challenging proposition than under the DPA and that a lot of what was previously taken as consent won't hold water under the new regime. Before relying on consent you should consider whether there is another lawful basis for processing. The new regime may make more than a few universities move away from consent as a basis of processing.

Consent must be a genuine choice

If the individual has no real choice, this will not be consent. If consent is bundled as a condition of a service, this will not be consent. Similarly if there is a significant imbalance of power between you and the individual, consent will not be considered to be freely given. The guidance makes it clear that for employers dealing with employees and for public authorities you should look for another basis for processing. Similarly, the guidance clarifies that it is inappropriate to refer to "consent" in a document when the processing would take place (under another basis for processing) in any event.

Consent must be informed

The guidance states that as part of the process of requesting consent, you must identify both yourself and also name any third parties who rely on the consent. This is a significant change from the previous approach of asking for consent to pass the information on to "partners of our choice". This imposes a significant challenge to universities of identifying all potential partners at the time of seeking consent.

Consent must be specific

Where you are seeking consent for multiple purposes or multiple processing activities you must provide granular consent for each. Bundling together a raft of consents for matters which could otherwise be separated out will not, under the GDPR, be an acceptable approach. Processing for purposes outside of the original request for consent would require a further consent.

Consent must be given by a clear statement or action

The guidance reconfirms the position in the GDPR that you cannot rely on silence, inactivity, default settings or pre-ticked boxes as the basis for consent. Dropping a business card into a prize draw is still an example of consent by an action (but only for the purposes of the prize draw – the consent wouldn't extent to other marketing activities). Universities need to be able to demonstrate the action actively taken by the individual signifying their consent.

Consent degrades over time

How long consent lasts will depend on the specific circumstances. For instance consent given for a summer offer would expire in the autumn. For more general consents, if it is not possible to justify a longer period, the guidance recommends refreshing consent every two years.

Consent can be withdrawn

The GDPR requires that consent can be withdrawn at any time and that it must be as easy to withdraw as it was to give. The guidance confirms that where possible individuals should be able to withdraw their consent using the same method as when they gave it, but they should also be provided with both online preference management tools and other ways of opting out (such as customer service phone numbers). If consent was not originally given online it may not be enough to only provide an online opt-out.

You need to keep records

The GDPR requires that where processing is based on consent, the data controller can demonstrate that the data subject has consented to the relevant processing. The guidance requires that universities must keep records that show: who consented, when they consented, what they were told at the time (and what they consented to), how they consented and whether (and if so when) they have withdrawn consent.

Does consent need to be re-obtained?

The guidance confirms that, provided consent was originally obtained in a manner that is compliant with the GDPR, consent does not need to be re-obtained. Given the details contained within the guidance, universities who are relying on consent as the basis of any processing need to review the appropriateness of this approach and whether the consents as given do comply with the requirements of the GDPR. They also need to review their processes and procedures to ensure that they comply with the record keeping requirements as set out in the guidance.

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NEC4 a sneak peak!

On 3 March 2017 it was announced that a new updated form of NEC contracts will be released which will be available from 22 June 2017. The detailed changes brought about by the new forms of NEC contracts are not expected until early April, but the NEC have been keen to stress that the new forms of contract represent evolution rather than revolution.

The NEC4 contracts broadly are designed to streamline processes, improve contract administration, improve clarity and reduce the potential for problems and to improve risk management. The NEC4 will introduce the following two new forms of contract:

- Design Build and Operate (DBO); and
- Alliance Contract (ALC).

Both of these forms have been introduced as a result of user feedback and industry development. DBO is a contract which combines responsibilities from design phase, through construction to operation and/or maintenance from one single supplier. ALC is a single collaborative contract which is designed for use on large complex projects with a number of participants. We suspect that NEC4 will be updated to reflect recent developments in BIM and the new CDM regulations, and suspect that the new suite will contain an option for early contractor involvement.

The changes may have limited impact in the short term and will depend on organisations' appetite to use an amended standard form. Contracts which currently use the NEC3 will not be affected and it is likely that universities that are used to the NEC3 will be able to continue to use this form of contract for some time. Universities using the NEC for the first time arguably should use the NEC4 which reflects recent changes in the law and changes within the construction industry.

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Changes to off–payroll working

From 6 April new rules are being introduced to change the way in which off-payroll workers pay tax. Public authorities including universities will need to identify those to whom the new rules apply, and where they do deduct tax and National insurance from any payments made.

Off-payroll workers are defined as those who supply their services through an intermediary, and that especially includes what are known as personal service companies (PSCs). These are companies created to provide one worker's services. The Government Employment Status Service will be an online tool to help make the right decision. Universities need to bear in mind that an employment status decision for tax purposes will not determine status for employment law purposes. There is currently no plan to harmonise the definition, however current consultations and committee enquires may well suggest this as a solution.

Universities should therefore review all workers not providing their services as employees, consider whether the new rules apply to them and then register as appropriate. Those hiring or using such people should review their documentation before the worker starts.

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Is a redundancy dismissal unfair if it is tainted by indirect sex discrimination?

Yes, says the EAT in *Fidessa Plc v Lancaster ([2017] UKEAT 0093_16_1601).*

The facts

In this case Ms Lancaster, an engineer in Fidessa's Connectivity Operations team, returned from maternity leave to work part time, four days a week from 9am to 5pm. Ms Lancaster needed to finish at 5pm due to her childcare arrangements. When her Manager learnt she was pregnant again his response was "oh f***, she's pregnant".

The company subsequently required employees to work after 5pm. Despite agreeing with her line manager that she could do preparatory work before 5pm and complete work remotely from home, Ms Lancaster's ultimate manager refused to allow it.

A reorganisation was proposed which created two new roles including a Connectivity Operational Engineer (who would undertake a similar role to Ms Lancaster including work from the office after 5pm). Ms Lancaster did not apply, expressing amongst other things a concern about the need to work after 5pm. There was no other suitable vacancy and Ms Lancaster was dismissed by reason of redundancy. She brought complaints of direct and indirect sex discrimination, harassment, less favourable treatment as a part-time worker and unfair dismissal.

The Employment Tribunal's decision

The tribunal decided that the requirement for the new engineer to work in the office after 5pm put women at a disadvantage and Fidessa had not been able to sufficiently justify that requirement. It also found that reneging on the earlier agreement that Ms Lancaster could leave work at 5pm was less favourable treatment and that the manager's reaction to her pregnancy amounted to direct discrimination and harassment related to sex.

On appeal

Fidessa appealed to the EAT, which upheld the decision that Ms Lancaster had been unfairly dismissed and subject to indirect sex discrimination and part-time worker detriment.

What does this mean for universities?

- When designing an alternative role in a redundancy situation, do consider relevant employees' existing flexibilities. Where such flexibilities cannot be maintained, this may need to be justified.
- If you introduce a requirement for employees to undertake work in the workplace, outside of existing arrangements, the decision will need to be justified. You must give proper consideration to alternative ways of working, as additional presence in the workplace is likely to be indirectly discriminatory against female employees.
- Whilst the comment made in this case by the manager was particularly overt, avoid expressing any remarks which could be seen as negative when discovering employees are pregnant. Such remarks could be construed as acts of direct discrimination and harassment.

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