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The time for compliance is nigh - the new data protection regime

The Higher Education and Research Act 2017 raises many questions about the shape of the brave new world of higher education regulation. The OfS is as yet an unknown quantity as a regulator but its statutory power to impose conditions on HEIs, compliance with which will be mandatory for continued registration, may well confer a greater significance on legal compliance generally. It is not beyond the bounds of credulity for the OfS to impose a condition requiring registered HEIs to comply with their legal obligations.

Significant amongst HEI's increasing legal obligations is the General Data Protection Regulation (GDPR) which must be implemented by 25 May 2018. The legislation was drafted to account for the gargantuan developments in technology since 1998 and the power of that technology to build up profiles of individuals and make decisions about them. The GDPR seeks to redress the imbalance brought about by powerful technology. Instead it seeks a fair balance between the need to process personal data for legitimate business and educational purposes, and the reasonable expectations regarding privacy of the individuals whose data is being processed. It is important therefore that universities ensure that they are ready for implementation and the GDPR itself contains powerful incentives to do so.

There are a number of broad principles which permeate the GDPR:

Data protection by design and default

Universities' systems, both technical and organisational, should be designed to fulfil reasonable expectations of privacy by, for example, minimising the volumes of personal data held and minimising the opportunities for individuals to be identified from information (for

Increased accountability and transparency

Much more information will have to be provided to individuals when their personal data is obtained, including the purposes for which it is obtained, the legal basis/justification for processing it, recipients, retention periods and the adequacy of the safeguards for overseas transfers. This requirement subverts the unconscious belief that students' and others' personal data is universities' sovereign property to use as they see fit. No longer can universities assume the absolute freedom to act as ad hoc debt collectors for aggrieved local landlords or as conduits of information for parents with deficient relationships with their student children.

Proportionality and data minimisation

Universities must ensure that the personal data they create or obtain is adequate, relevant and limited to what is necessary, given the purposes for which it was created/obtained.

Higher standard of consent

Where a university is relying on consent because there is no other lawful ground justifying the use of personal data, such as contractual necessity, there will be a much higher threshold for valid consent under the GDPR i.e. it must be a freely given, specific, informed and unambiguous indication of an individual's wishes by which he or she, by a statement or clear affirmative action, signifies agreement to the processing of his or her personal data. It is a matter of real choice and control. If there is no genuine choice, there is no consent.

Duty to report breaches

Currently there is no duty to report breaches of the DPA, though the ICO's fining regime creates

an incentive to do so in some circumstances. Under the new regime, there is a duty to report breaches without delay to the ICO, unless the breach is unlikely to result in a risk to the individual.

There is also a duty to report breaches without delay to the data subject, where the breach is likely to result in a high risk to him/her. Such a duty will not apply where, for example, subsequent measures have been implemented so that the risk is no longer likely to materialise.

Sanctions

Good data protection enhances institutional reputation, but if that is not a sufficient incentive to take the GDPR seriously the increased fines available to the ICO may provide one, as follows:

- Up to the greater of 2% annual worldwide turnover of the preceding year or €10m will be imposed for specific breaches (including breaching the requirements relating to record keeping, data processor contracts, data protection by design and default); or
- Up to the greater of 4% annual worldwide turnover of the preceding year or €20m (including breaching the data-protection principles, data subjects' rights, and third-country transfers)

What to do now

We recently delivered a series of seminars on the GDPR and many of the attendees who responded to our questionnaire revealed an uncertainty regarding their university's preparedness for the new requirements, a fear of the changes that would be required together with a fear that senior management may not give their support to enable the changes to be effected.

The following steps taken now will help to ease the process of implementation:

- Conduct an audit of processing – what personal data do you have, how do you obtain it, what do you use it for, who has access to it, for how long do you keep it?
- Ascertain the legal basis on which you process personal data (e.g. contractual necessity, legal obligation). If it is on the basis of consent, will it fulfil the GDPR's higher standard?
- Conduct privacy impact assessments – do too many people have access to personal data, do we collect too much data?
- Check what documentation is in place – privacy policies, security procedures for dealing with rights and breaches.

There should be no turf wars in the quest for compliance. Good data protection is the responsibility of every member of staff.

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Guidance on monetary penalties under the Data Protection Act

Until recently there has been little guidance (other from the ICO) on the level of penalties that should be applied for breaches of the DPA and PECR. However, after being given a £50,000 fine by the ICO for sending direct marketing emails in breach of PECR, LAD Media Limited decided to appeal the level of the fine.

The facts, in brief, were that LAD sent out almost 400,000 spam SMS text messages without consent, having bought the SMS numbers from a third party. Despite the contract with the provider of the SMS numbers containing a warranty that the numbers came with valid consents, the ICO held that they didn't and that whilst LAD's actions were not deliberate, they had not undertaken sufficient due diligence in relation to the data they had received (by not checking the details of the consents).

Despite being found against in 5 of the 6 parts of the appeal, LAD were successful in having the fine reduced by 60% (to £20,000). In deciding to reduce the amount of the fine the court decided that the relevant factors were:

- The circumstances of the contravention
- The seriousness of the contravention assessed by:
  - The harm caused
  - Whether the contravention was deliberate or negligent
  - The culpability of the person concerned
- Whether the recipient of the fine was a person or an organisation (including its size and sector)
- The financial circumstances of the recipient of the fine
- Any steps taken to avoid further contraventions
- Any redress offered to the individuals affected by the breach.

The court reviewed the profit generated by the company (as paid to the sole director) and found that, during the year of the breach, it increased from £10,000 to £20,000. On the basis that this was a first offence and the only time that LAD had conducted a direct SMS marketing campaign, the fine was reduced to £20,000.

Whilst this is a significant reduction, it is worth noting that the fine was still twice the additional profit generated by the marketing campaign. The moral of the story is that infringing the DPA still doesn't pay but that, perhaps, the increase in maximum fines with the coming into force of the GDPR may not, in the main, impact on the bulk of fines imposed by the ICO.

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What does the general election mean for the construction industry?

The suspected impact of the general election on the construction industry is a topic clouded with uncertainty. Few would have predicted that when Theresa May called the general election there would be any other result other than a sweeping Conservative majority. No doubt if this result had come to pass the Conservatives' objectives following the election would have been clear - to continue with a very robust stance in the negotiations surrounding Brexit.

Instead, the general election saw an unexpected hung parliament, throwing these objectives into question. The future position of our government is currently uncertain, and at the time of writing the Conservatives are trying to form a minority government propped up by the DUP. This will undoubtedly have a knock-on effect on the UK's stance in the Brexit negotiations.

However, against this complex backdrop, the deadline for Brexit remains firmly as 29 March 2019 and negotiations have now officially begun. If no trade deal is achieved by this date the UK will face a hard and chaotic Brexit.

What does this mean for universities?

We are undoubtedly in a period of heightened uncertainty, bringing it with it various implications for universities – many of which are still unknown.

For the construction industry this uncertainty is likely to lead to a period of decreased investment from the private sector as private investors decide not to take the risk of investing in construction projects, particularly where potential losses may be severe.

Universities may similarly experience a period of decreased investment whilst public sector policies are rewritten and reformulated. Before the election it seemed that, regardless who came to power, there was a desire to build more with backing from the public purse. It remains to be seen whether this desire remains. That said, few predicted a vote to leave the European Union and the impact on the construction industry in the short term at least has been relatively minor. The long term impact is as yet unknown.

In the longer term if the Labour party were able to seize power it would seem likely that public investment in education for the medium term would increase greatly. This would undoubtedly lead to more funds being made available for construction projects. However this may stop in the long term, as many predict that the UK will simply run out of other people's money to spend.

One outcome of the Brexit negotiations may be that the UK still pays heavily into the EU in exchange for retaining free trade and free movement. From an investment point of view this may lead to public funds which may have been intended for construction projects in the UK being diverted abroad. However it may lead to increased private investment due to the removal of any costs associated with EU investment.

If free movement is retained it is likely that those who are highly skilled from other EU nations will continue to plug the skills shortage at the top of the industry, whilst cheap labour will continue to pour in from Eastern Europe providing the necessary casual workers at the bottom which the industry is so heavily reliant on.

To sum up

The result of the general election has brought with it a new wave of political uncertainty, throwing the UK's initially hard negotiating stance for Brexit into question.

This in turn makes understanding the potential impact on the construction industry and universities even more complex and uncertain.

One certainty is that the UK's deadline for Brexit is 20 March 2019, and negotiating will continue despite the various political unknowns.

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At what rate should employers deduct pay when employees strike?

The Supreme Court has recently considered whether s2 of the Apportionment Act 1870 (the Act), which states that payments accrue daily at an equal rate, applied in determining the rate at which a college was allowed to make deductions from its employees' pay for strike days.

Hartley and others v King Edward VI College ([2017] UKSC 390)

H and his fellow claimants were teachers at the College who went on strike for a day. When the College deducted their pay it deducted one day's pay calculated at a daily rate of 1/260th of annual salary; not 1/365th. This was based on the fact that the teachers' working days were specified in their contract as Monday to Friday; therefore the daily rate was based on five working days a week (5 x 52 weeks in a year equals 260 working days in a year).

It was not disputed that the College did not have to pay staff for strike days. The teachers however brought proceedings for breach of contract arguing that the College had used the wrong daily accrual and should have only withheld 1/365th of their salary. Their argument was pursuant to s2 of the Act which provides that 'All...annuities shall... be considered as accruing from day to day, and shall be apportionable in respect of time accordingly'.

Supreme Court decision

Both the High Court and the Court of Appeal ruled in favour of the College. The Court of Appeal held that s2 implied a daily accrual at a rate obtained from the construction of the contract. The teachers' contracts specified their working days as Monday to Friday and therefore the deduction of 1/260th was correct. This approach assumed that working days were limited to the days on which the teachers carried out directed duties.

H and his fellow claimants then appealed to the Supreme Court, which allowed the appeal. The Supreme Court ruled that there was nothing in the teachers' contracts of employment excluding the applicability of the Act. The court accepted that the teachers regularly undertook work at weekends in fulfilling their duties, undertaking tasks such as lesson preparation and marking. It could not therefore be said that the teachers only worked five days a week, meaning that under s2 of the Act the teachers' salary should have been divided by 365 days.

The court in reaching their decision took into account the following facts:

- The individuals were required to work 195 days, teaching on 190 days.
- They had to teach 1,265 hours per year.
- There was a contractual provision that they would need to work such additional hours as may be needed to enable them to discharge their duties effectively.
- Salary was calculated per annum with no reference made to teaching time or days of the week.
- The 'Red Book', which was expressly incorporated into their contracts, referenced Standard Working Time, Evening Teaching and significantly 'Undirected Time' (which resulted in teachers working Saturdays and Sundays).

What does this mean for your university?

- You should consider the extent to which this decision applies to you and check whether your contract of employment excludes the Act or states the rate at which deductions are made.

- You may start to receive claims from trade unions for alleged excess deductions and you will need to consider such claims carefully. However, there is no obligation on you to pro-actively undertake recalculations and repay any sums deducted in excess.

- This case illustrates that undertaking apportionment is not always straightforward. It is therefore advisable to include express clauses in your employment contracts.

- Whilst the facts of this case revolved around deductions of pay for strike action, the reasoning of the case could be applied to other instances of unpaid leave, such as compassionate leave. Therefore it may also be good practice, when reviewing contracts of employment, to include wider terms to cover these other instances of unpaid leave.

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