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Higher Education Bulletin

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Governance and Vice Chancellors' pay

The summer's various attacks on universities had a common theme of calling into question the effectiveness of their governance, whether that be in setting the pay of senior staff or (according to the allegation from the think tank UK2020) by participating in a cartel to set the level of undergraduate fees. The Chief Executive of HEFCE has taken the step of reminding the sector of its role in regulating the levels of senior pay (see: **blog.hefce.ac.uk**). Under the terms of the Higher Education and Research Act, the Office for Students, which will supersede HEFCE and OFFA, has the power to impose a public interest governance condition (s.13 of the Act and expanded at s.14) as part of the initial and ongoing registration condition for inclusion on the register it must maintain. Universities can expect that the principles to be included in a list to be published under the terms of s.14 to be part of a consultation which the OfS may conduct later this year. That consultation includes necessarily the Secretary of State in its scope, alongside bodies representing the interests of English higher education as the OfS may determine, and other persons as the OfS may also determine. The Minister for Universities, Science, Research and Innovation has recently pre-empted any such consultation by stating publicly that universities will have to publish more information about the salaries of staff paid above £100k and justify the pay of vice-chancellors when that exceeds the salary of the Prime Minister.

Meanwhile the CUC is considering the question of its advice to remuneration committees. It already publishes an illustrative practice note (2015) on such committees on its website. Until it is replaced, its Higher Education Code of Governance is still the benchmark against which English universities must show compliance or otherwise explain variance.

Wherever they may be in their cycle of governance effectiveness reviews, governing bodies as they reconvene after the summer break would be well advised to consider their own arrangements – especially for setting and reporting on senior pay – in advance of a requirement to do so or in anticipation of a wider consultation conducted by the OfS. It may even be that such consideration should include how the particular matter of the workings of remuneration committees are presented in the required statement on governance in their financial statements for 2016/17.

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The Equality Act 2010 - thoughts on gender and transgender

One of the certainties acquired as one matures is that there are few certainties, and that reality is often more complex than one assumes. Gender identity is one such example and as we learn more about our genetic and biological make-up, we realise that the use of binary terms, such as male and female, may no longer be appropriate or reflect the complexity of reality.

The law takes time to adapt and as currently drafted, the Equality Act 2010 affords protection to the characteristics of sex, which relates to either a man or a woman, and to gender reassignment. The latter refers to a person who proposes to undergo, is undergoing or has undergone a process or part of a process to change his or her gender from that of a man to a woman or from a woman to a man. Non-binary identities are therefore not expressly protected, but that does not mean that a person who identifies as neither a man nor a woman is deprived of protection. Direct discrimination can be committed if a person is treated less favourably because they are perceived to be a man or a woman or perceived to be engaged in a process whereby they are re-assigning their gender from male to female, or vice versa, even if in reality that is not the case (direct discrimination by perception).

Gender re-assignment is also itself a topical issue for universities. For example, trans students have been seeking to no-platform speakers who cast doubt on the ability of a person genuinely to acquire the traits of another gender, with threats of claims of harassment for universities that do not comply, **about which we have previously written**.

ACAS, the Advisory, Conciliation and Arbitration Service, has very recently produced a research paper regarding supporting trans employees in the workplace in recognition of the need for more effective inclusion. It is useful therefore to summarise universities' obligations to trans students and to explore some of the attendant issues that arise.

Gender re-assignment does not need to involve a medical or surgical procedure. It is in essence a personal process and protection is afforded once a person decides to begin the process even in the absence of medical advice or treatment.

Direct discrimination is, as indicated above, less favourable treatment of a person because of gender re-assignment, actual or perceived e.g. refusing to allow a student who is transitioning from a man to a woman and dressing as a woman to be a student ambassador on open days. This form of discrimination cannot be justified.

The law on indirect discrimination seeks to eliminate hidden or inadvertent discrimination and applies where an ostensibly neutral provision, criterion or practice (PCP) puts trans people at a disadvantage generally, puts the individual trans complainant at that disadvantage and the university cannot objectively justify the PCP. An example of indirect discrimination is a policy of only accepting a birth certificate as a proof of identity. This would put trans students who had not obtained a gender recognition certificate at a disadvantage generally and would put the individual trans student who did not want to reveal their birth gender also at a disadvantage. The policy is unlikely to be justified as there are many less-intrusive ways of verifying identity.

Trans students are also protected from harassment (i.e. unwanted conduct related to gender re-assignment that has the purpose or effect of creating an intimidating, hostile, degrading, or offensive environment for the trans student). The test for harassment has both a subjective and objective test. Open and candid debate about transgender matters, including the voicing of negative opinions, such as those promulgated by Germaine Greer as part of that debate in a university environment, is unlikely to fulfil the objective test and hence is unlikely to amount to harassment.

The law on victimisation protects those who make complaints related to gender re-assignment from suffering a detriment.

Where trans students have obtained a full gender recognition certificate, their gender becomes for all purposes the acquired gender. They are entitled to a new birth certificate with the name and gender amended. In order to fulfil a trans student's right to privacy, universities should seek to issue all formal documents in the acquired gender. A gender recognition certificate does not however rewrite a person's history and the duty to respect privacy is unlikely to extend to amending the totality of a student's record. Though some may request it, this would amount to an onerous exercise not warranted by privacy concerns. The General Data Protection Regulation may however provide an unlikely solution by requiring greater focus on retention period and deleting records when no longer needed.

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A new duty to prevent the facilitation of tax evasion

The Criminal Finances Act 2017 became law last April. Regulations issued on 12 July 2017 have now confirmed that new offences created by Part 3 of the Act which may be relevant to universities will come into force on 30 September 2017.

The Act introduces new measures to facilitate the recovery of proceeds of crime and tackling money laundering, corruption and terrorist financing by law enforcement agencies, as well as to improve cooperation between the private and public sectors. These include the introduction of "unexplained wealth orders" which can require suspected criminals to explain the source of their wealth; enables the seizure and forfeiture of proceeds of crime and terrorist money stored in bank accounts and certain personal or moveable items; and extends the time period granted to law enforcement agencies to investigate suspicious transactions.

Most of these measures are unlikely to be of any concern to universities. However, the Act also introduces two new offences which apply to any "body corporate or partnership". The two offences are:

1. Failure to prevent facilitation of UK tax evasion offences; and
2. Failure to prevent facilitation of foreign tax evasion offences.

   Corporate bodies will be liable to an unlimited fine for failing to prevent the facilitation of tax evasion offences by those who work for them, whether as an employee or agent. No knowledge of the tax evasion and no prosecution of the tax evader is necessary for the corporate body to be prosecuted under the new legislation.

The new offences have caused some uproar. Until now corporations could only be held criminally liable for the acts of their employees if it could be shown that those employees represented the directing mind and will of the corporation (the "identification principle"). The Act greatly extends the potential of criminal liability by creating offences which can be committed by simply not acting.

The obligation however is not absolute, and universities can avoid liability by having reasonable policies and procedures in place to prevent employees or agents facilitating tax evasion.

Section 47 of the Act empowers and requires the Chancellor of the Exchequer to issue guidance about procedures which need to be put in place. HMRC issued updated guidance on 1 September 2017 which states that: "The Government recognises that any regime that is risk-based and proportionate cannot also be a zero failure regime. If a relevant body can demonstrate that it has put in place a system of reasonable prevention procedures that identifies and mitigates its tax evasion facilitation risks, then prosecution is unlikely as it will be able to raise a defence."

The guidance is formulated around six principles which are identical to those required to defend a charge of failing to prevent bribery under the Bribery Act 2010. It should be noted however that having an anti-bribery policy will not be sufficient to meet the requirements of the defence, since the offences are not the same.

The six principles are:

- Risk assessment.
- Proportionality of risk-based prevention procedures.
- Top level commitment.
- Due diligence.
- Communication (including training).
- Monitoring and review.

All universities will need to ensure that their staff are properly trained and monitored and that their policies are regularly updated. Training should cover recognising and preventing financial crime. An obligation not to facilitate tax evasion can be included in employment contracts. An internal whistle-blowing procedure could also help avoiding an offence. These suggestions may not apply to all universities and could also not be enough. Every university will need to consider what measures are appropriate in its particular circumstances.

Although these offences give rise to new responsibilities for universities, it should be noted that the Act does not aim to punish facilitators of tax planning, even of aggressive tax avoidance schemes. A distinction must be drawn between tax evasion and lawful measures which are aimed at reducing a university's liability to tax. Even if it is discovered that an arrangement is not lawful, a facilitation offence is not committed if the persons involved in the tax evasion had no knowledge of the illegality or were merely negligent. There must be deliberate or fraudulent tax evasion.

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Public procurement after the UK leaves the EU

Recent discussion on the shape of the UK's public procurement regime following Brexit provides something of an analogy in microcosm for the wider negotiations on the terms for the UK departure from the EU.

By way of background, the UK government has published a general White Paper on leaving the EU and has started the process for exit from the EU. This did not mention procurement at all. The European Union (Withdrawal) Bill, variously described as "a monstrosity", "naked power grab" and "breach of constitutional principles", has narrowly passed its second reading in the House of Commons, which was the first opportunity for MPs to debate its general principles.

So what have we learned? The Bill proposes that the current EU-derived Regulations on procurement will continue to apply after exit day, and that the decisions of the EU courts and the rules of interpretation which apply on exit will continue to apply. This might provide a legal puzzle if the law requires, as procurement law does, for instance, equal treatment of EU standards which might no longer apply, and EU tools, such as eCERTIS, which might no longer be available. Even the contract value thresholds are expressed in euros! Following exit day the principle of supremacy of EU law will no longer apply, which will mean that the UK's interpretation of the EU-derived Regulations could diverge from the rest of the EU. Or, of course, it might not. The courts do not have to consider the views of the Court of Justice of the European Union, but may do "if they consider it appropriate to do so".

The UK law on procurement could change completely after withdrawal. The rules could change by Act of Parliament or by a decision of the relevant Department, with or without Parliamentary scrutiny at the discretion of the government depending on whether it sees procurement as creating opportunities or red tape. Brexit has been described as an opportunity to reduce red tape, but that is a little at odds with the UK's Procurement Regulations which already provide more bureaucratic requirements than are required under the EU Directive. The current detailed rules for below-threshold contracts are all self-inflicted.

The House of Commons Library Briefing Paper, "Brexit: Impact across Policy Areas", suggests that the procurement rules handicap the ability to "Buy British", but that the UK could open up procurement on the basis of reciprocal deals. One means of doing so is by participating as an individual country in the WTO's General Procurement Agreement (GPA), which is at odds with the position suggested by others that the UK would take the benefit of the EU's existing WTO deals following withdrawal. So that's cleared that up, then.

Across La Manche, by way of contrast, the European political institutions have appointed a (British!) expert to provide an informed report on EU public procurement law after the UK leaves the EU. This month, the European Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU has published its position paper on public procurement. The EU-27 have an entirely simple, intellectually coherent and straightforward position: any procurement exercise that is governed by EU rules and has commenced prior to exit day should continue to do so. This preserves the rights of EU (most importantly Irish) economic operators who are bidding for contracts in the UK under the existing EU rules, and is consistent with the principle of legal certainty. What does it say about public procurement and access to the UK and EU markets by the other's businesses in the context of a post-Brexit trade deal? Nothing.

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New debt protocol - 1 October 2017

Finance teams should be aware of the new pre-action protocol ('the Debt Protocol") which makes important changes to the steps universities ("Creditors") must follow when pursuing their students for arrears of accommodation or other fees. The Debt Protocol comes into force from 1 October 2017.

With this new Protocol undoubtedly slowing down the overall recovery process, Creditors should consider its net effect on their cashflow and whether they start the recovery process much sooner than as at present.

The Debt Protocol applies to debt recovery action where the debtor is an individual such as a sole trader – it is not limited to claims against students. The Debt Protocol does not otherwise apply to "business to business" debts.

Creditors are likely to face costs penalties from the court where they have not followed the Protocol.

Overview of the Debt Protocol

- Aims to encourage parties to avoid issuing court proceedings altogether and to enter into repayment plans or engage in alternative dispute resolution (ADR) at an early juncture;
- Does not apply to debts owed by companies and partnerships;
- Does apply to guarantees given by individuals to Creditors;
- Creditors are now required to include all salient information concerning the debt in their initial Letter before Claim (LBC) to the debtor;
- Debtors must be provided with a much longer period of time to respond to the LBC in order to seek legal advice or negotiate before court proceedings can be started. This will undoubtedly slow down the recovery process;
- Creditors now have an active obligation to mediate or engage in other forms of ADR with the debtor if possible before starting court proceedings.

The Letter Before Claim

The Debt Protocol now requires Creditors to send a LBC to the debtor before issuing any proceedings, which must include the following:

- Details as to how the debt arose along with details of how the agreement to pay was formed (orally, or in writing with date and time etc.)
- If the debtor is already making regular instalments (or has proposed to do so), Creditors must explain in writing why those instalments are no longer acceptable;
- The most recent statement of account, including details of all interest or other charges that have been applied to the debt;
- The LBC should be accompanied by a pro forma Information Sheet, Reply Form and Financial Statement – all of which are in a format prescribed by the Debt Protocol;
- The LBC must be sent by post, unless an alternative method of service (eg. by e mail) has been agreed with the debtor.

Time period for the debtor's reply

- Creditors are now required to wait 30 days after the postage date of the LBC before starting court action;
- If no response is received within that period, the Creditor may then proceed to take court action without more ado;
- If the debtor should respond by completing and returning the Reply Form, then the Creditor needs to allow the debtor a further "reasonable" period to take legal advice and to put forward payment proposals. During this time, the Creditor should not instigate court proceedings;

- If a debtor indicates they are seeking advice but have been unable to obtain it within those 30 days, then the Creditor must allow them "reasonable" extra time for this before going to court. In practical terms this is likely to mean debtors will be allowed an additional 28 days to respond in these circumstances;

- If an offer of payment of any kind is made, the Creditor is now expected to attempt to agree a proposal with reference to the debtor's means or, if the proposal is inadequate, to provide reasons for its refusal;

- If the Creditor should receive a partially completed form they should treat this as an attempt to engage and therefore, as above, should attempt to discuss the matter with the debtor before starting court proceedings;

- Creditors are then under an obligation to take steps to try to resolve matters without court proceedings and should consider ADR, which may simply comprise some discussion or negotiation, or, where appropriate, more formal ADR such as mediation.

Issuing court proceedings

In those cases where Creditors have exhausted these Debt Protocol procedures but are still unable to reach an agreement, they are encouraged to conduct a final review of their position to consider if court proceedings can nevertheless be avoided.

If having done that it is felt that court action is unavoidable, Creditors should then give the debtor at least 14 further days' notice of their intention to commence proceedings. This final time limit can be shortened, but the court is likely to take a dim view of this unless there are exceptional circumstances such as imminent expiry of a limitation period.

Conclusion

As a result of these changes, and especially the prolonged response times, some universities may now consider it more commercially viable to engage in alternative approaches when seeking to recover debts, such as serving a statutory demand, particularly if more urgent action is required.

If you would like any more information about these changes or to obtain copies of the forms specified by the Debt Protocol, please do contact us.

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The burden of proof in discrimination cases

In the recent case of *Efobi v Royal Mail Group Limited* ([2017] UKEAT 0203_16_1008), the Employment Appeal Tribunal, when applying the burden of proof test under Section 136 of the Equality Act 2010, departed from the traditional understanding and application of the burden of proof.

Facts of the case

The appellant, Mr Efobi, who is a black African born in Nigeria, worked as a postman for the Royal Mail Group Limited (RMG). Over the course of his employment, Mr Efobi made approximately 33 unsuccessful applications for IT-related positions with RMG. Mr Efobi then brought a discrimination claim in an employment tribunal against RMG where he argued that his applications were rejected on the grounds of his race.

The ET rejected Mr Efobi's claim of direct discrimination with regards to the multiple unsuccessful IT-related job applications, as they believed he had failed to provide "facts from which the ET could conclude that there had been discrimination". Therefore, the clams were struck out without the need for the ET to give any real scrutiny to RMG's explanation.

Decision of the EAT

On appeal, the EAT found that the ET had "misdirected themselves" in relation to the effect of Section 136 the Act. Section 136(2) of the Act states that "if there are facts from which the court [or tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred".

Following the principle of statutory interpretation of the burden of proof derived from existing case law, the EAT concluded that Section 136(2) does not place a burden of proof on the claimant. Instead the employment tribunal is required to consider all the evidence presented, from all of the sources, to decide whether or not such facts exist to satisfy the burden of proof in Section 136(2). The EAT also deduced that the inclusion of the term "facts" and not "evidence" suggested that an employment tribunal is required to apply section 136 of the Act at the end of the hearing.

It is clear from the judgment of the EAT in this case that a claimant is no longer required to establish a prima facie case of discrimination before a court or employment tribunal can make a finding of discrimination, provided there are sufficient facts, which, when examining all of the evidence at the end of a hearing, a court or tribunal is satisfied that conduct amounting to discrimination has occurred and the respondent has no explanation for their behaviour which can show their conduct was not discriminatory.

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Monitoring employees' personal messages

The recent case of *Barbulescu v Romania* (Application no. 61496/08) [2017] ECHR 742) concerned the infringement of the right to private life under Article 8 of the European Convention on Human Rights.

Article 8 provides that everyone has the right to respect for their private and family life, their home and their correspondence, except in circumstances such as the interests of national security, public safety or the economic well-being of the country.

In Barbulescu, the employer had set up a messaging service (Yahoo Messenger) to communicate with clients. The employee had then used this messaging service to send personal messages, which was contrary to the employer's IT policy.

The employer had, during the investigation, accessed and printed transcripts of intimate messages between the employee and his fiancée and his brother. These transcripts were then used as part of the disciplinary proceedings. The employer had not informed the employee that his messages might be accessed.

The case was ultimately appealed to the Grand Chamber of the European Court of Human Rights, which concluded that the employee's Article 8 privacy rights had been infringed when the employer had monitored and accessed the employee's personal messages without telling him, and that the Romanian court had not protected the employee's Article 8 rights.

Whilst this case highlights the issues that employers can face with monitoring employee communications, it only serves to reinforce the UK's already robust approach to this topic. Whilst the monitoring of employee communications is heavily regulated in the Data Protection Act 1998, Regulation of Investigatory Powers Act 2000 and set out in the ICO's "Employment Practices Code", employers are still at risk of infringing the Article 8 privacy rights if care is not given in their approach of monitoring employee communications.

In light of this decision, universities should consider the following points in relation to monitoring employees' communications:

- Consider why you are monitoring employee communications;
- Consider whether the extent of monitoring and degree of intrusion is necessary to the outcome you want;
- Notify employees about the monitoring of communications and extent of intrusion of the monitoring;
- Consider whether you have relevant safeguards in place, especially when the monitoring is intrusive in nature; and
- Have an up to date IT policy (including the monitoring of communications) and make sure that all employees are aware of it.

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