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Contents

The growing responsibilities of governing bodies

Long ago it now seems, and despite the clear authority given to governing bodies in university founding documents, Senates were once the powerful force in university decision-making. A necessary rebalancing occurred in the late 80s and 90s (prompted by the Jarratt Report of 1985). In more recent years, increasing responsibility and new duties have been given to governing bodies, empowering them further in a trend that is accelerated by the proposals in the Office for Students' consultation on Securing Student Success. In the Guidance on Registration Conditions, there are more than 20 responsibilities assigned to governing bodies of aspirant "approved fee cap" providers. That list includes the over-riding responsibility (Condition O):

> *"The governing body of the provider accepts responsibility for its interactions between the provider and the OfS, and the provider's compliance with all of its registration conditions. To assist and enable it to discharge this responsibility, the governing body must designate a senior officer as the 'accountable officer' who shall act as the principal contact for the OfS, and must notify the OfS accordingly."*

The list includes some current responsibilities, several new ones, but is not inclusive since existing legal responsibilities with regard to, for example, the 1986 Education Act with its provisions about freedom of speech, the 1994 Education Act with its provisions about the supervision of students' unions, and Prevent are not referenced.

Governing bodies need to be assured about the delivery of the conditions initially and regularly. But some of the conditions are vague (Conditions B1, B2, and B3, for example, about quality and standards) and will require new protocols or a deeper understanding by those serving on governing bodies of academic culture and processes.

There may still be changes to the conditions and how they are expressed. Yet it would be wise for governing bodies to assess their readiness to take on these responsibilities and to ensure they can discharge them effectively as they also oversee the process of registration. Good governance and its effective management is one of the pressing strategic problems that the sector needs to tackle. The arrangements for registration and regulation by the OfS only make this task more urgent.

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Freedom of speech or unfit to practise?

In the modern age of social media, students can take to their laptop or mobile phone to profess religious or political views at the click of a button, for the wider public to access, perhaps forever.

Freedom of speech and lively debate is to be encouraged in aspiring young minds. However, problems can begin where students on professional courses express views that could be perceived as contrary to the professional standards expected. In those cases, the university needs to strike a balance between a student's right to express their views against its responsibility as "gatekeeper" of professions where public services are provided to vulnerable service users.

The courts recently considered this issue in detail in the case of *R (Ngole) –v- Sheffield University* ([2017] EWHC 2669 (Admin)). In this case, Mr Ngole brought a judicial review claim to challenge the University's decision to remove him from his social work course following an investigation into his fitness to practise. The investigation was prompted by a number of comments that Mr Ngole published on social media regarding his Christian beliefs that homosexuality was a "wicked act" and "a sin". The comments were posted in response to an article published on the American NBC news website.

In finding that Mr Ngole was not fit to practise and should be removed from the course (a decision that was upheld by an Appeals Panel and, latterly, the OIA), the panel was concerned with the public forum in which Mr Ngole expressed his views, as opposed to what he actually said. The court agreed that the comments could be accessed by service users and perceived as judgmental, incompatible with service ethos or suggestive of discriminatory intent.

Of more importance to both the Appeals Panel and the court, however, was Mr Ngole's reaction to the instigation of the fitness to practise investigation. Mr Ngole denied that professional standards were relevant to his religious views and expressed an intention to persist in the conduct that had given rise to the investigation in the first place. This reaction led the court to accept that removal from the course was the only sanction that the University could reasonably impose. Accordingly, Mr Ngole's judicial review claim failed.

Decisions to remove students from professional courses due to concerns over their fitness to practise should not be taken lightly. Even where views are expressed that may be contrary to the professional standards expected, barring the student's entry to the profession all together could be draconian and unreasonable. However, where incompatible views are expressed in a public manner and the student fails to appreciate that professional discipline is required where conduct in public is concerned, the university must exercise appropriate caution as gatekeeper to our public service professions. Following the decision in Ngole, universities can be reasonably comfortable that the courts would endorse such an approach.

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Citizenship and Brexit: the end of the beginning

Still warm off the presses, the UK government has agreed a position on the three key preliminary issues regarding the UK's withdrawal from the EU: protecting the rights of Union citizens in the UK and UK citizens in the Union; the framework for addressing the unique circumstances in Northern Ireland; and the financial settlement.

For our university clients, the key concern has been continuing citizenship rights for their staff. The last year and a half has been extremely stressful for EU nationals living and working in the UK. Following the referendum vote in 2016, the Home Office issued guidance to reassure EU citizens that nothing had changed with respect to their rights. This was accompanied by instructions that EEA nationals did not have to make any applications to preserve their rights as all would be made clear in due course (just leave your contact details on an email list). A cynical person would suggest that this instruction was aimed at avoiding a deluge of panic-induced applications for registration certificates, residence cards and applications for British nationality by EU nationals and their families residing in the UK. An even more cynical lawyer would have read that statement of reassurance as a positive instruction to do precisely the opposite. I have regularly provided unsolicited advice to EU nationals (in shops, the local bakery, at weddings..) with five years' continuous lawful residence in the UK to apply for a permanent residence card.

As a side-note, the absence of residence documentation is a key difference in political culture between the UK and most EU-27 countries. In most EU countries, a citizen would expect to obtain a residence card issued by their local municipality as evidence of lawful residence. The UK has no such system for British nationals. There are no consequences of failing to have any similar official document, as a driving licence and a gas bill seem to perform the same functions. Again, a cynical person might suggest that the British police cannot really be trusted not to abuse any such legislation as it would invariably be used to target BAME citizens "on suss". By contrast, the UK has an extremely centralised and bureaucratic immigration control system for documenting non-EU/EEA citizens. This has meant that documenting the three million or so EU/EEA nationals who have, until the date of the referendum, never needed to register with the authorities, would create an administrative headache.

Since then, the agreed position is that EU nationals and their families currently in the UK on the date of the UK's withdrawal will be entitled to remain without discrimination. They are entitled to be joined by their family members provided that they are related to the right holder on the withdrawal date, with special rules for children.

The key positions are:

a. The UK can require EU/EEA nationals to acquire a new status conferring the right of residence and be issued with a residence document. This has already been accompanied by UKVI guidance that the permanent residence card will no longer be valid. So, was making that application for PR poor advice? Well, the Withdrawal Agreement provides that those already holding a permanent residence document will have that document converted into the new document free of charge, and this at least provides some certainty to workers today in order to avoid the risk of being turned away at immigration control without an employment contract and collection of P60s.

b. Staff who already have professional qualifications which are recognised or are in the process of recognition at the date of withdrawal will continue to have those rights recognised. While this protects those staff who are currently in the labour market, this does not seem to clarify the position for, for instance, EU students who are currently in the UK studying professional courses at some expense but who might find that their qualifications are not recognised back home. Medicine, nursing and architecture among others are courses that qualify for automatic recognition throughout the EU. What happens to students with those qualifications is outside the scope of the agreement, so the end of this first phase still does not provide either students or education institutions with the certainty that they need to plan for the UK's withdrawal from the EU in March 2019. We expect the position to be clarified over the course of 2018.

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Avoiding smash and grab adjudications

"Smash and grab adjudication" is the phrase often used where a contractor refers a dispute to adjudication on a technicality; usually where the employer has failed to issue a pay less notice in response to an interim application for payment.

There is a raft of cases all of which highlight the importance of issuing a pay less notice. The 'lessons learned' from a few of those cases can be summarised as follows:

- The failure to issue a pay less notice means that the employer has agreed the value of the works claimed in the interim application. As such, it isn't open for an employer to cross adjudicate on the issue of the true value of the works (bad news for employers).
- Although the value of the works is 'deemed agreed', that doesn't mean that there is an agreement as to the value of the works at another date. In other words, the employer can challenge the value of the works and correct overpayments in subsequent applications
- The 'deemed agreement' only applies to interim applications and not to final accounts. This means that the employer can cross adjudicate on final accounts.

We have seen that the general trend for contractors to commence smash and grab adjudications where pay less notices have been missed is continuing. The consequences can be severe; large sums applied for are 'deemed agreed' and often have to be paid in the short term pending subsequent revaluations on later applications of at the final account stage.

The old adage 'cash is king' remains as pertinent now as it ever did. As such, our top tip is that universities in the role of employer should ensure that their in-house or external contract administrators issue valid and timely pay less notices to avoid giving contractors the ability to commence smash and grab adjudications for sums that would otherwise not be payable.

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Proposal to close new DB accruals in USS

On 17 November, Universities UK (UUK), representing over 130 HE institutions across the country, announced its proposal to close the defined benefit section of the Universities Superannuation Scheme (USS). The proposal would see all future benefits provided by the defined contribution section of the USS; pension benefits accrued prior to any changes introduced to the USS would remain unaffected. The rationale behind this change of approach is to cut the financial deficit and increasing future costs of the current scheme whilst also ensuring that attractive pension benefits continue to be offered to members.

The announcement is another inevitable example of the UK's movement away from defined benefit schemes. Defined benefit contribution pensions are notoriously riskier for employers, as the employer is required to pay a fixed amount when an employee retires irrespective of the performance of the underlying pension investments, and in recent years, pension providers have witnessed very low prospective returns across all asset classes. This, coupled with the reality that these types of pensions are becoming increasingly more expensive as people's average life expectancy has increased compared to 30 years ago, means that it is not exactly a surprise that organisations which still offer employees a defined benefit pension scheme are opting to move away from this model towards a defined contribution scheme (whereby an accumulated sum is paid upon retirement that is generated through the employee's contributions, their employer's contributions, government tax relief and the performance of the investment assets).

In the announcement, UK made it clear that its proposal was not "driven by a desire to cut costs", by stating that employers are committed "fully to maintain their total contributions to USS at 18% of salaries" . The current USS system sees contributions on the first £55,550 of earnings going directly into the defined benefits scheme; contributions on earnings above this threshold go into the defined contribution scheme. Under the proposal, UUK would have the contribution threshold lowered to zero so all future benefits are accrued through the defined contribution scheme at a rate of 26% of the employee's salary. The defined benefits side of the hybrid pension would not actually close, it would just cease to accrue any new liabilities. By tabling the proposal in this way, the UUK has said that it has left the door open for the possibility of reintroducing the defined benefits scheme should USS funding improve (as unlikely as that seems today).

The Universities and Colleges Union (UCU) have met the creative approach tabled by the UUK with harsh criticism. Their general secretary, Sally Hunt, labelled the proposal as "categorically the worst proposal [she has] received from universities on any issue in 20 years of representing university staff" , and has reported that the overhaul of the USS could leave staff £200,000 worse off in retirement. UCU have called for industrial action, and the strike ballot on UUK's proposal opened on 29 November 2017 and is set to close on 19 January 2018. This is a story that we can therefore expect to hear plenty more about in the New Year.

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