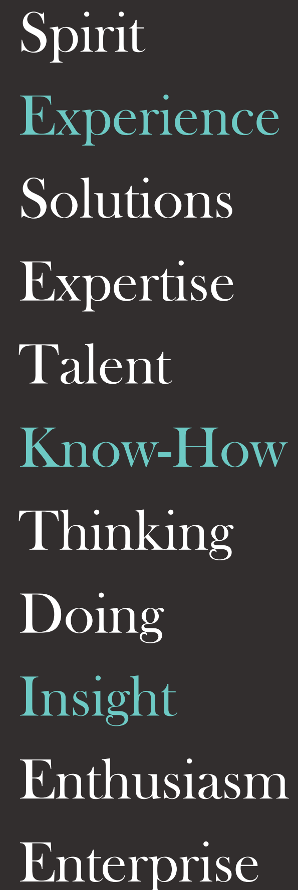

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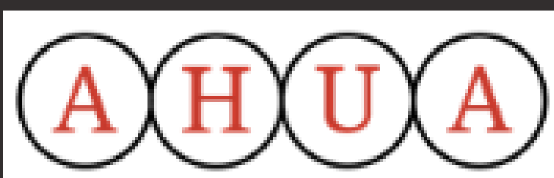

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Student claim fails

The national press has widely reported the case of *Siddiqui –v- University of Oxford* [2018] which concluded in the High Court this month. Mr Siddiqui, a former student of Brasenose College, graduated with a 2:1 degree classification in 2000. Some 14 years later, he brought a claim against the University, alleging (among other things) that the standard of teaching he received in one module fell below the reasonable standard expected, causing him to achieve a poorer degree classification than he would otherwise have done. He claimed that his career opportunities were limited as a result, leading him to suffer a financial loss.

An early attempt by the University to dismiss the claim on the grounds that it had been brought outside of the 6 year limitation period failed. It had no choice but to defend the claim at trial, expending significant costs, management time and academic staff time in doing so. Ultimately, it was successful and the claim was dismissed following a 7 day trial, at which witnesses were called upon give evidence about events that took place some 18 years ago.

In his judgment, Mr Justice Foskett emphasised the difficulties that students face in bringing claims for educational negligence, in particular in proving a link between "negligent" teaching and a financial loss. He also queried whether the court is the appropriate mechanism to determine claims relating to the quality of teaching, given how costly, time consuming and risky litigation is for all involved.

Whilst the judgment is encouraging for those universities facing allegations of inadequate teaching, it by no means offers a golden bullet to those called upon to defend a negligence claim. Even if litigation is successfully defended, the costs and time involved in defending a claim mean there is no "winner" at the end.

In a climate where students are incurring significant debts to attend university, Mr Justice Foskett noted that the quality of education will come under greater scrutiny than ever before and, despite this finding, negligence claims are likely to increase in the future. This is particularly the case if students feel that complaints cannot be successfully resolved via an internal complaints process and/or the OIA.

Whilst universities may therefore take some comfort from the finding in Siddiqui, they should continue to ensure that concerns about the quality of teaching are addressed promptly and effectively to avoid the risk of future claims for negligence.

Catherine Savage
Legal Director, Commercial Disputes
T: 0121 214 1502
E: catherine.savage@shma.co.uk

Advertising contracts

Rather than highlighting some new update in an exotic and obscure area of commercial law or musing on any current political disaster, I wanted to offer my interpretation of the principal requirement of procurement law in England and Wales: **advertising.**

Many universities have procurement policies which reflect an out-dated understanding of the procurement rules. These often come from historic standing orders which have not been revisited as the institution has not (yet) had the shock of a procurement challenge. Universities can hardly be blamed when even the guidance published by central government departments administering EU funds - the DWP (ESIF) and DCLG (ERDF) - also get it wrong. Under the most recent version, published in February 2017, the guidance provides:

"As a guide, the Department expects the following requirements to be followed for all contracts subject to the Treaty Principles:

Value of contract	Minimum Procedure	Advertising Required
£0 - £2,499	Direct award	None
£2,500 - £24,999	3 written quotes or prices Sought from relevant suppliers of goods, works and services	None
£25,000 - relevant Public Contracts Regulations threshold	Formal tender process in line with the Interpretative Communication...	1) Advertised on Contracts Finder, and 2) the opportunity is advertised on the ESIF grant recipient's website for a reasonable time period."

This guidance unhelpfully suggests that it is permitted to award contracts without any advertisement, and that the only relevant criteria is based on value. This is not really consistent with the law relating to the advertising of below-threshold contracts. Indeed, the DCLG has itself successfully challenged a local authority's award of a below-threshold works contract without advertisement.

The starting point is that contracts, even below the procurement value thresholds, should be advertised. This does not require complying with the onerous, rigid and technical rules which apply to the procurement of contracts above the relevant thresholds. However, in order to reduce the risk of challenge – and this applies in particular to projects which are supported by the ERDF or ESIF programmes - contracts should be advertised, rather than awarded directly to a preferred contractor or to a preferred shortlist. This is summarised:

Contract Value	Advertising Required
Up to £25,000	Lower value contracts could take advantage of lawfully pre-procured framework agreements. Contracts could be advertised on the client's website.
Between £25,000 and the applicable procurement value threshold	As a minimum, national advertisement on the Contracts Finder website.
Equal or greater than the procurement value threshold	Europe-wide advertisement in the Tenders Supplement of the Official Journal of the EU.

The relevant procurement thresholds are set out in the following table:

Contract Type	Value Threshold
Supplies and Services	£181,302
Services under the "light touch" regime	£615,278
Works	£4,551,413
Concession contracts	£4,551,413

Guidance on procurement under the ERDF and ESIF programmes is available at the following website.

The European Commission's Interpretive Guidance on Procurement is available at the following website.

The text of the judgment in *Mansfield District Council v DCLG* is available at the following website:

Udi Datta
Legal Director, Commercial
T: 0121 214 0598
E: uddalak.datta@shma.co.uk

Conflict avoidance pledge launch

It is well known that the costs of resolving disputes can quickly escalate, and that it is often not cost and/or time effective to pursue even more moderate value claims through adjudication or litigation. In an attempt to put an end to the number of disputes in construction and engineering, six leading institutions, and two of the UK's biggest employers, have launched the Conflict Avoidance Pledge (the Pledge).

The Pledge, created by the Conflict Avoidance Coalition (CAC) – who work to help the construction and engineering industry reduce the costs of conflict, and ensure major infrastructure and property developments are delivered on time and budget - is a voluntary commitment to self-assessment open to any organisation or firm regardless of size or location.

The CAC is made up of a number of the leading construction and engineering bodies including:

- Royal Institution of Chartered Surveyors
- Institution of Civil Engineers
- International Chamber of Commerce
- Royal Institute of British Architects
- Chartered Institute of Arbitrators
- Dispute Resolution Board Foundation
- Chartered Institution of Civil Engineering Surveyors
- Transport for London and Network Rail

The Pledge is the focal point of a wider campaign set out by CAC to drive behaviour change in the way relationships and disputes are managed throughout the construction and engineering sector.

The aim of CAC is to reduce financial and other costs associated with disputes. This involves promoting cooperation between contracting parties; and helping people and organisations to understand and use conflict management measures, which will ensure projects are delivered on time and on budget.

RICS is also encouraging parties involved in the land, property and construction industries to sign up to the Pledge. Whilst voluntary, the Pledge signifies a party's willingness to seek to avoid conflict by identifying potential disputes early, promoting collaborative working and utilising conflict avoidance mechanisms. The CAC hopes to promote a greater understanding and use of conflict avoidance to resolve disagreements early and avoid damaging business relationships or entering into expensive and time-consuming formal dispute resolution.

At the time of writing, around 68 companies have signed up to the Pledge including some of the industry's leading names in construction and engineering such as Amey, Balfour Beatty Rail, Morgan Sindall, Mott MacDonald, Skanska, VolkerFitzpatrick and Volker Rail. However, it is obvious that the Pledge will only work in practice if the majority of organisations and their supply chains sign up to it. On the other hand, it is a promising sign that these leading companies have already shown their support.

Methods that can assist with early identification of issues include "RADAR", which is a project horizon scanning service. It has been developed by ResoLex in response to its experience providing stakeholder engagement and dispute avoidance services on projects over the last 15 years. RADAR is designed to fill the communication gap between the reported data and the gut feelings of the stakeholders by utilising the team's own experience and expertise through anonymous reporting. The parties to a contract are therefore able to input responses to questionnaires and air grievances with anonymity. As the data is anonymised, it is likely that issues that would not be brought up in an open meeting would be raised, and concerns that the parties have addressed early on.

Comment

It is difficult at this stage to determine whether the Pledge will make a difference, as similar approaches have been attempted in the past, arguably to little avail. For the Pledge to be effective, universities will need to (a) sign up to the Pledge and (b) be cooperative with their contractors. It is of course likely to be in any party's best interests to resolve a disagreement amicably and without recourse to the courts in any event. Whilst it is unlikely that the Pledge can prevent all disagreements from escalating to formal resolution, it may well help to provide a framework for additional cooperation to resolve comparatively small disputes which could not effectively be resolved through adjudication or litigation. Accordingly, universities should consider signing up to the Pledge as avoiding conflicts saves time, cost and energy that would be better served in delivering projects.

Alex Dickinson
Solicitor, Real Estate Disputes
T: 0121 214 0541
E: alex.dickinson@shma.co.uk

Employer did not have constructive knowledge of disability

Under the Equality Act 2010 an employer has a duty to make reasonable adjustments for employees who are "disabled". This duty is triggered when the employer has actual or constructive knowledge of the employee's disability. In the case of *Donelien v Liberata Ltd* ([2018] EWCA Civ 129), the Court of Appeal has recently upheld the Employment Appeal Tribunal's decision that an employer did not have constructive knowledge of an employee's disability as it had taken all reasonable steps to ascertain whether she was disabled.

Facts

The claimant was employed by Liberata Ltd (the Company) as a court officer for nearly 11 years before being dismissed in October 2009 as a result of a failure to comply with the Company's absence notification procedure and persistent short term absences.

The claimant claimed to suffer from a number of medical conditions, including work-related stress and hypertension. In May 2009 the Company referred the claimant to occupational health as a result of her high level of absence. The Company posed a number of questions in its referral, including a question about whether there was a medical condition that explained the claimant's pattern of absences. Following a meeting with the claimant in July 2009, occupational health provided a report to the Company stating that the claimant was not disabled, but it failed to answer all of the Company's questions. The Company requested a further report, which it received but which still did not sufficiently answer all of the questions posed by the Company. The Company did not follow up again with occupational health but it did arrange return to work meetings with the claimant and corresponded with the claimant's GP in order to further investigate whether the claimant was disabled.

The claimant was subsequently dismissed for unsatisfactory attendance and failure to follow the Company's absence notification procedure. She brought a number of claims in the Employment Tribunal, including a failure to make reasonable adjustments.

The parties agreed that the Company did not have actual knowledge of the claimant's disability but there was a dispute as to whether the Company had constructive knowledge of it. The Tribunal and subsequently the EAT held that it did not. The claimant appealed to the Court of Appeal.

Decision

In upholding the original decision, the Court of Appeal distinguished this case from cases where employers had simply “rubber stamped” an occupational health report. It held that the Company had raised appropriate questions and had sought clarification where necessary in order to determine whether the claimant was disabled. Furthermore, it held that was not reasonable for the claimant to rely on her offer for the Company to contact her GP if it wanted further information about her condition, holding that it was entirely reasonable for the Company to require that communication with her GP should be via occupational health (the claimant consulted her GP regarding her illnesses, but refused to allow the Company’s occupational health specialist to contact her GP). It also took into account the fact that the claimant’s GP failed to provide a consistent picture in correspondence with the Company in relation to the claimant’s medical condition.

Commentary

This case provides some reassurance to employers on their ability to rely on the advice of occupational health specialists when determining whether an employee is disabled. It also confirms that an employer does not need to take every step possible to establish whether an employee is disabled in order to have constructive knowledge of a disability. Nevertheless, this case emphasises and reiterates the fact that employers cannot simply “rubber stamp” an occupational health report and acts as a reminder of the importance of following up with occupational health specialists where their reports do not address all of the issues.

Abigail Halcarz
Associate, Employment
T: 0121 214 0388
E: abigail.halcarz@shma.co.uk

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