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UCU strikes and compensation

On Friday 13 April 2018, members of UCU voted to accept an offer by UUK bringing an end to the recent industrial action involving academic staff from 64 universities across the country. The action led to lectures and classes being cancelled at short notice and more than 1,000 students are now seeking to launch collective legal action against some of the country's biggest universities.

The solicitor who represents a large number of these students is reported in the national press to have said "over 20,000 undergraduates attend each large UK university. Paying approximately £500 compensation each to 20,000 students would cost £10 million".

Such a view portrays a simplistic vision of a complex legal minefield. In reality, students are only entitled to receive compensation if they can demonstrate that the interruption to their studies caused them to suffer a demonstrable financial loss.

The ramifications of the strike action are not yet known and they will be felt differently by each student, depending on the extent to which their studies were interrupted, the stage of their course they are at and whether or not contingency plans meant that cancelled teaching was re-scheduled. It is therefore unlikely that each and every undergraduate student will be lawfully entitled to claim compensation, even if they can show their studies were interrupted.

Compensation is not to be confused with claims for price reductions under the Consumer Rights Act 2015, which do not require the student to show they have suffered a loss. However, the NUS is advising students to utilise internal complaints procedures and seek compensation rather than a price reduction, the latter of which is likely to result in any repayment being made to the Student Loans Company, rather than directly to the student (unless the student is privately funded).

It is hoped that universities put in place an effective strategy for dealing with the strikes and, where possible, mitigated the adverse effects on students by re-scheduling cancelled teaching, or by making teaching materials available where this was not possible. If such steps were taken, it is possible that claims for compensation can be either avoided or kept to a minimum and that complaints can be resolved internally, without the involvement of law firms who are seeking to ramp up pressure on universities by making sweeping statements in the national media.

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How good are universities at learning?

It seems odd to ask the question "how good are universities at learning?" given the very nature of the kind of institutions they are, but more oddly still, it is one that it is increasingly important to know the answer to. There are a whole host of reasons for this, but the most pressing is the introduction of the Regulatory Framework, where the OfS has made it clear that it will afford the greatest freedom from regulation not only to those providers who never make mistakes (a risk free, but clearly rather small, group), but also to those providers who show themselves capable of identifying where and why things have gone wrong, and then implementing plans to stop it happening again; in short to those providers who show themselves capable of learning.

What are the kinds of barriers to institutional learning that exist in the HE sector and how might they be addressed? The first, despite the potential benefits in terms of focus, creativity and innovation, is highly devolved management structures where considerable autonomy exists. These can make it very difficult to implement consistent mechanisms for identifying regulatory risk and the necessary remedial action, let alone ensuring that any lessons learned are then implemented across the board. We see this very frequently in areas such as disability discrimination, where attitudes towards reasonable adjustments can vary considerably from discipline to discipline and even from school to school.

Some of these differences have a legitimate basis - where for example professional requirements are involved there may be less ability to adjust - but in many cases there is less of an objective justification. The result is that good practice often sits right next to bad practice in the same institution without any straightforward mechanism for sharing it. Balancing departmental, faculty and college autonomy with an obligation to share and implement good practice, lessons learned and common approaches in appropriate areas will be increasingly important.

The second is the fact that the "command and control" model of management simply doesn't work in many universities. There is a rigorous debate going on at present over whether the management and governance of universities needs to become much flatter and more democratised, a model that is arguably much more in keeping with the instinctive values of universities. It is unfortunate that the direction of regulatory and policy travel is towards much more management of institutional risk, and therefore, for as long as HERA and the OfS survive, much more need for "top down" intervention. So the question that arises is what is the best way for the required institutional learning to happen given these opposing forces at play? As always, persuasion rather than coercion is likely to be the key, and given that, overall, what the Regulatory Framework seeks to achieve - a high quality and valuable education for all students, irrespective of their background - is what most staff within universities want to deliver, there is shared and fertile ground to build on, especially in view of the focus on outcomes rather than prescription about processes.

Finally, there is the question over how equipped universities are to identify and intervene when things are going wrong. The OfS has its famous lead indicators and once they are more clearly articulated, institutions will need to know how to spot them. The data requirements will, it is almost universally agreed, be challenging to meet, but so too might be the obligations around self-reporting, and around complaints and whistleblowing. Self-reporting requires (a) a mechanism for easily escalating the potential for regulatory breaches through to a level where a decision can be made about whether a report to the OfS is needed and (b) a culture where colleagues are comfortable in sharing the potential breach without fear of reprisals or detriment. These are not easy things to achieve, at least not quickly.

In terms of complaints and whistleblowing there is a need to ensure that these are reviewed, not just from the point of view of an appropriate resolution the specific subject matter, but also to identify whether individually or cumulatively there is anything in them to suggest systemic regulatory risks. How are any early warning signs or red flags picked up, addressed and the learning from them shared as widely as is needed?

The current focus understandably for most universities is drafting their applications to register. Potentially sitting behind the regulatory framework however is the need for much wider and deeper reflection which in turn requires institutions to demonstrate a strong capacity to learn.

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The vexed question of criminal convictions – the UCAS decision examined

UCAS's recent decision to remove questions on applicants' unspent criminal convictions on data-protection grounds does not come as a surprise, at least to this author. In response to data protection law a number of years ago, UCAS moved away from an open-ended question about unspent convictions to one that was confined to "relevant unspent convictions". This represented a clear attempt to respect an applicant's reasonable expectations of privacy and to focus on those convictions that could represent a risk to staff and students, should that applicant be accepted onto the course. In that decision, UCAS took to its heart the concept of proportionality and sought what it regarded as the least intrusive means of protecting the safety of staff and students at applicants' chosen universities.

What no one sought to question apparently until now, however, was whether UCAS itself was justified in obtaining such sensitive information, given that no risks were likely to accrue to UCAS. Clearly, in view of the recent decision, UCAS has addressed that question and concluded that obtaining the information is both excessive and unjustified.

UCAS's decision now forces universities to question whether they are justified in seeking the information about unspent convictions direct from applicants in the case of courses that do not lead to professional registration. The purpose of such questions is the assessment of risk, and the issue of suitability to pursue the particular discipline has no real relevance.

There is a respectable civil libertarian view that if a student has been convicted of an offence, the criminal justice system has imposed an appropriate penalty, which takes into account the risk to society posed by the commission of that offence. If that student is at liberty to move freely in society, then, the civil libertarian would argue, it is not appropriate for a university to second guess that decision. Assuming the applicant fulfils the relevant academic criteria, he/she should be allowed to avail of the benefits of a higher education, aiding his/her eventual rehabilitation.

The legal position post 25 May will not change materially from the current position under the DPA. Criminal convictions will continue to be regarded as sensitive personal data, requiring stricter conditions for compliance than required for the processing of non-sensitive personal data. Universities will therefore have to comply with two conditions, one from a list of conditions applicable to sensitive personal data generally, as set out in the Data Protection Bill, and one from the list that applies to non-sensitive personal data.

Usually, universities rely on explicit consent to justify processing sensitive data relating to disability. Because the Equality Act makes provision for the confidentiality of such personal data, an applicant can exercise genuine choice and genuine control, which are the hallmarks of consent, and is therefore at liberty to decide to withhold disability-related information. No such freedom is conferred on applicants who have unspent convictions. In most cases, offers will be withdrawn where applicants are discovered to have withheld unspent conviction information. Universities must therefore find another legal justification for asking for that information.

The condition for justification in the Data Protection Bill that is likely to be the most relevant is set out in Schedule 1 Part 2 para 8, as follows:

- the processing is necessary for the purposes of the prevention or detection of an unlawful act (e.g. re-offending, causing harm to staff or students); and
- it must be carried out without the consent of the data subject so as not to prejudice those purposes; and
- it is necessary for reasons of substantial public interest.

There are a number of hurdles to be overcome in fulfilling this condition. There are two tests of necessity, which is not a term defined by the DPA, the Data Protection Bill or the GDPR. It is however believed to be derived from human rights law, and means that in order to justify an interference with privacy, the interference must be in pursuit of a legitimate aim (e.g. protecting staff/student safety), and the means deployed must be the least intrusive available. If therefore there are other ways of protecting staff and students against the risk of re-offending, causing harm, rather than asking all students to disclose unspent convictions, then the first limb of the condition will not be fulfilled.

The tem "substantial public interest" is also not defined. It relates to an interest generally accepted as being of substantial public significance. Further, the detriment suffered if the processing of the conviction information is not carried out must be more than minimal. If universities do not ask the questions, will substantial detriment ensue?

Finally, universities must be able to show that relying on consensual disclosure would cause real prejudice to their ability to assess risk.

If the above conditions are fulfilled, then it may not be difficult to fulfil one of the conditions for non-sensitive data (e.g. processing necessary for the performance of a task carried out in the public interest – though the meaning "task" is not defined and may be interpreted restrictively to refer to a statutory function or legal obligation).

What is clear is that there is no automatic right to ask questions about unspent convictions when considering offering places to applicants. In the new era of heighted awareness of data-protection rights, the practice will be more vulnerable to challenge and will have to be justified. It is also vulnerable to challenge under human rights law, where the difference in treatment of applicants with unspent convictions has to be objectively justified.

All universities should therefore reflect on their approach and ask:

- How much information is needed to assess risk? The more focussed and targeted the questions, the more likely the practice will be proportionate.
- How effective is the university at assessing risk – is it speculative and theoretical, defaulting to refusal of admission?
- Are there other, less intrusive ways of providing a safe campus – having a clear code of conduct disseminated to all, working with community police officers?

The UCAS decision is a rational one and does not imply an absolute moratorium on universities asking their own questions. It is however a call for self-scrutiny and justification.

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Procurement and SMEs

The Crown Commercial Service has, this month, published a procurement policy note (PPN) on supply chain management in large procurements. This PPN applies to central government bodies but is worth considering for our education sector clients. Under the PPN all new procurements valued above £5 million per annum commencing from 1 May 2018 are required to require the successful prime supplier(s) to:

a. advertise subcontract opportunities arising from that contract above a minimum subcontract threshold of £25,000; and

b. separately, report on how much they spend on subcontracting (in particular with SME or VCSE organisations).

This raises a couple of questions as to the objectives of procurement law. The current procurement legal framework derives from common EU-wide rules which provide for a further objective – the creation and promotion of the EU Single Market, an area in which the free movement of goods and provision of services is ensured without discrimination on the grounds of nationality. This objective is part of a wider market objective to create more business opportunities, more efficient allocation of resources, better prices for customers and companies that are able to compete globally. At the same time, the single market is intended to perform the conflicting objectives of promoting employment as well as supporting small and medium sized enterprises. While promoting SMEs is the right objective, it begs the question whether procurement law is the right policy instrument.

The Procurement Regulations introduced reforms which imposed a requirement to centrally advertise contracts below the EU value threshold. Anecdotally, this has had the unintended consequences of reducing SME participation in our clients' supply chains. This is because opportunities which were previously advertised locally have been opened up to national competition, and as a consequence, have been brought to the attention of the larger players. In addition, formal tenders can be time-consuming and tend to privilege those bidders that have sufficient overheads to employ professional bid-writing sales teams.

Secondly, procurement law seems to be a "second-best" instrument for supporting SMEs. The Procurement Regulations have nudged contracting authorities to divide contract opportunities into lots in order to break down monster contracts to make them more digestible to smaller SMEs. But this requires the buyer to retain an overhead of managing multiple contractors: sometimes described as "integration" or "interface" risk. This might be acceptable in a catering contract, where the university acts as "principal" and purchases food, but less so in major IT or construction projects.

In addition, this is not helped by commercial incentives to outsource, wholesale, in-house functions including employment assistance, training and education, which create monster prime contractors, each sub-contracting work packages. The reason for this is obvious: while a small, expert, sub-contractor might perform the work, at each link of the supply chain there will be a management overhead and corresponding delay in payment. If each payment is made on a 30-day (or net 30-day) basis, it is no surprise that SMEs in Carillion's supply chain complained that they had effectively 120-day payment terms.

The problem most affecting SMEs is cash-flow. There have been moves to resolve this in public sector contracting which at least is a pointer in the right direction. The Procurement Regulations oblige government contractors to pay subcontractors' invoices within 30 days, and while late payment rules are intended to impose strict obligations on contracting authorities, there is still much more flexibility for private sector buyers. Businesses can still delay payment down the supply chain. The government response to this has been to add an additional layer of public reporting on payment practices which will have an impact on private sector businesses. Companies and LLPs will be required to publish their payment practices under new Regulations on Payment Practice which came into force last year. This is intended to provide transparency - daylight being the best disinfectant - but this falls well short of an effective remedy. The problem is, of course, a commercial culture of late payment and dissuasive legal and commercial costs of enforcement. Until the government tackles those through "first best" solutions, SMEs are still likely to struggle to get paid on time.

You can find the following documents at the web links:

The Procurement Policy Note on Supply Chain Visibility is available at the following link

The Reporting on Payment Practices and Performance Regulations 2017 (SI 2017/395), are available at the following website

The Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017 (SI 2017/425) are available at the following website

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The gender pay gap: universities and what's next

With the 30th March deadline for publishing 2017 information having passed, it is clear that universities need to take steps to narrow their gender pay gap figures. The Universities and Colleges Union (UCU) in its 2016 data report highlighted that, in higher education for all academics the average median gender pay gap stood at 12.2%, and in further education in England the average median gender pay gap was 2.3%. In general, across all staff at universities in England the BBC reports that the average median gender pay gap for 2017 stands at 18.4%.

The gender pay gap is calculated using the difference between the median average hourly earnings for men and women. The gap exists across universities due to the fact that men occupy the majority of the top paid management positions while women make up more of the lower paid roles such as cleaners, catering staff etc. There are also more male professors than female professors, providing further explanation for the gap.

What universities can do

One way of tackling the gender pay gap in the education sector is for universities to allow women with caring and childcare responsibilities to combine part-time work with their academic research posts, which is likely to assist women to progress up the academic ladder into senior positions. This solution, like any, will not produce 'overnight' results, but should result in a reduction in the gender pay gap over time.

Although some universities are dealing with the problem with short-term solutions, such as offering female employees more pay and bonuses, for longer term results better development initiatives need to be adopted at a much earlier stage to attract, retain and develop female talent. Although there are some academic research posts and sectors which require longer working hours and lone working, such as the sciences (working around the clock for experiments etc.), universities need to evaluate their initiatives to make these positions appear more attractive to women by offering more permanent full-time posts, publishing transparent pay bands, structures and progression pathways together with gender neutral job evaluation and classification systems.

An international problem?

Recent figures suggest that female MBA graduates from the world's top 10 business schools have a gender pay gap of 79% three years after their course ends. This highlights the need for change at a global level.

At the EU level, the EU Commission released an Action Plan for 'Tackling the gender pay gap' across Europe in November 2017. The Commission has identified eight main strands of action, which include improving sanctions and compensation by introducing minimum standards. It has been reported that women across the EU earn 16.3% less per hour than their male counterparts and this figure has remained the same for the past five years. The Commission intends to have measures in place by the end of 2019 when the current Commission term ends.

The snapshot date for employers in the UK for 2018 has already passed, so this year's figures will already be set, but for those universities wanting to show improvement in 2019, the time to take action is now.

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