Industrial Action is here again: the complexities of life in UK Higher Education

Introduction

The current industrial action which is being taken by staff at 58 universities in the UK will potentially impact a million students. The action is organised by UCU (the University and College Union) and the view of Jo Grady who is the General Secretary of the UCU is that this initial three days of action "is just the beginning". This industrial action is driven by concerns about workloads, pensions, casual employment conditions of many of its members, equality issues and remuneration.

Before proceeding with this overview there is merit in briefly recalling the Trade Union Act 2016 which came into effect on the 1st March 2017. Among several provisions which were designed to impede industrial action, unions are now required to gain a minimum 50% participation in any secret ballot prior to strike action. In addition, at least 40% of those entitled to vote in a ballot must vote in favour of industrial action. These provisions apply to fire, health, transport, education and border security. A ballot pertaining to pay and conditions had a 50% turnout with 70% voting for strike action and 84.9% voting for action short of a strike which would include marking boycotts.[1] The ballot on pension cuts was a 53% turnout with 76% voting to strike. This is noteworthy because it is an indication of the strength of feeling amongst the academic community that these requirements were met.

This industrial dispute has been ongoing since February 2018 when industrial action was intensified over a total period of 14 days in 64 Higher Education Institutions (HEIs). What has become known as the second wave of action resulted in 14 days of strikes between 20th February and 13th March 2020. This is important because of those students that began their university experience in the autumn of 2019. They have lived through; their lecturers striking, COVID and online learning only to return to campus and be greeted by industrial action.

It is of note that the pension issue does not directly affect all participating colleagues. The pension issue currently effects members of the University Superannuation Scheme (USS), who are overwhelmingly based in the pre-1992 institutions. These institutions are variously known as 'ancients', 'red bricks' and 'plate glass' HEIs and not those commonly referred to as being part of the 'million plus' group. The latter are enlisted in the Teachers' Pension Scheme (TPS).

The regulatory infrastructure

A number of issues have very quickly bubbled to the surface which have legal implications. Unsurprisingly the 'consumerisation' of students has, in part, driven these. It is a characteristic of the situation, that might be described as a cauldron of competing and conflicting interests, that political and legal ramifications became intertwined. Students, while articulating support for their lecturers' endeavours have also sought compensation from their universities for the lost / reduced educational experience. It is helpful that both the UUK and OIA have urged to students to pursue their grievances through existing institutional machinery rather than resort to formal external legal action in the first instance. To this end the Universities UK (UUK) has stated that students use their university's internal formal complaints procedure and if not satisfied with the result to then, after receiving a completion of procedures letter refer their concern to the OIA. This has been supported by the OIA which has said that it will accept complaints from students on an individual or group basis. There appears to be a realism and pragmatism extant within these bodies.

The Office for Students (OfS) has written of the requirement of institutions to have measures in place to maintain quality and standards and to preserve compliance with registration. This position appears to be echoed by the Competition and Markets Authority (CMA) which acknowledges the issues of force majeure and will focus on what providers have done to mitigate the consequence of industrial action. There appears to be a ubiquitous view among the regulatory infrastructure that the impact on students should be mitigated as much as possible and formal litigation through the courts should be mollified. To this end the OIA has said that it would not be appropriate for students to base financial

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1 https://www.ucu.org.uk/article/11860/Big-mandate-for-strike-action-at-UK-universities-over-pay--working-conditions?list=1676

compensation claims on a quantification of loss derived by dividing their tuition fees by the number of teaching weeks and the number of sessions per week.

An argument deployed to resist this was that students continued to be able to access a range of institutional services and facilities and therefore did not suffer a 'total loss of consideration.' This has been the position taken by the universities of Warwick and Manchester for example. In contrast other HIEs have started a fund sourced from salaries withheld from striking academics which will be used to ameliorate the impact on affected students.

It is within this context that it is useful to review recent complaints which have been received by the OIA which were strike related and the OIAs position. Those complaints which were not upheld by the OIA were characterised by the institution taking a range of actions which, as a whole, demonstrated the provider understood the detriment the student had experienced and taken reasonable and adequate steps to mitigate their disadvantage. These included:

- Made modifications to the assessments
- Communicated effectively
- Not assessing students on 'missed' topics
- Extending deadlines
- Provision of additional tutorials / support sessions
- Module leaders accessible electronically
- Learning materials accessible via the VLE
- Support services / additional sessions clearly signposted
- Ex-gratia payments where appropriate

The view is that HEIs are not expected to provide 'like for like' teaching. However, it is expected that there is a response to complaints which reflects individual circumstances and providers should transparently direct students to the appropriate procedures. Providers are expected to follow their own established procedures. In addition the nature of the specific programme of study and the student's year of study is germane and should be a priority in considering additional mitigating support for those students. Those institutions which have not done this tend to have complaints against them upheld by the OIA.

The Intellectual Property issue

The bank of electronic learning materials and recorded lectures that have been created in an attempt to maintain student learning during the pandemic is not insubstantial. Once created it is perhaps unsurprising that management may look to these resources as a vehicle for mitigating the impact of strike action upon students. It is within this nexus that the most recent conflict with UK HE has taken root and rapidly developed.

The management view, is based within the Copyright and Designs Patent Act 1988 (CPDA) Section 11 (2) which states that: "where a literary, dramatic, musical or artistic work….. is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement on the contrary."[2] It is an indication of the speed at which this issue has ascended the HE agenda that in November of this year the Higher Education Policy Institute (HEPI) published a paper titled 'Who Owns Online Lecture Recordings?'[3]

The report drew upon existing legislation, UCU guidance and consulted legal academics who specialise in Intellectual Property Law. Opinion was divided and nuanced with Dr Matt Fisher (UCL) holding the view that there is no reason why Section 11 (2) of the CPDA should not apply. In short Universities own the copyright. In addition if university Intellectual Property (IP) policies claimed ownership of internal teaching materials and / or eLearning materials Professor Justine Pila (University of Oxford) believes these will normally be binding, either contractually or statutorily.

[2] The National Archives, 'Copyright, Designs and Patents Act 1988' https://www.legislation.gov.uk/ukpga/1988/48/section/11
[3] Alexis Brown, Who owns online lecture recordings, HEPI, November 2021

Research suggests that more than three quarters of HEIs have such provisions within existing policies.[4]

However legal nuances potentially exist. It has been argued (Professor Sir Robin Jacob, UCL) that 'license' can be granted under specific and limited circumstances. The rationale here is that 'license is implied through conduct' hence recordings were made during lockdown because students were unable to attend lectures. The law therefore 'will imply a licence to use only to such an extent as was necessary under the circumstances'. Consequently there is 'no reason to imply a license for some purpose wholly unrelated to COVID such as strike action.'[5]

Professor Pila holds a similar view and says the legal position is likely to depend on what was said to staff. Specific emails indicate the nature of a license. As an example:

"If faculty said all teaching has to be online because of government restrictions… the implication there would be that those recordings are only to be used during periods in which, because of Government restrictions, teaching could not take place in person and had to be done online."

"Any use beyond that, according to Pila, would be absolutely outside the scope of that agreement" [6]

The ownership of IP rights which resides at the heart of this debate are focussed on by Professor Sir Jacob, (UCL). A key issue in thinking here is that of control over what and how the lecturer teaches. According to Jacob the test is not simply whether an individual is employed. The university does not direct precisely how an individual delivers lectures and this means that CPDA Section 11 (2) does not apply. Jacob unpacks the issues pertaining to an image / audio recorded lecture. Profess Andreas Rahmation (University of Glasgow) shares this view and points out the phrase 'in the course of employment' is interpreted narrowly by the courts.

Conclusions

Given the very real proposed diminution in the value of the USS Pension, the widespread use of casual employment contracts and the substantial teaching and administrative workloads placed upon academic staff, it would be a very optimistic individual who thought these issues might be easily or quickly resolved; or simply fade away. The relatively new and emerging sphere of conflict around IP and recorded teaching materials / lecturers constitutes fertile ground for ongoing discord, rancour and mistrust. There are persuasive arguments on both sides of the divide and each side has a deep self interest in ensuring their view prevails.

The Higher Education business model has become heavily reliant on a casualised labour force and this will not easily be resolved to the satisfaction of UCU. The administrative weight which academics are expected to carry, particularly in the post 1992 sector has become endemic. The IP issue appears to be an area which could be resolved. If management and academic staff work towards being explicit about what was intended and this was done in writing and if IP policies were collaboratively developed there is potential that an amicable resolution could be achieved. How likely this is remains to be seen.

To paraphrase a well-known Ian Dury song: Not too many "reasons to be cheerful".[7]

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[4] Elizabeth Gadd and Ralph Weedon, 'Copyright ownership of e-learning and teaching materials: Policy approaches taken by UK universities', Eudcation and Infroatmion Technologies, Volume 22, pp3231-3250, 4 February 2017 https://link.springer.com/article/10.1007/s10639-017-9583-4#citeas
[5] Alexis Brown, Who owns online lecture recordings, HEPI, November 2021
[6] Alexis Brown, Who owns online lecture recordings, HEPI, November 2021
[7] Payne, Jankel. Sung by Ian Dury, July 1979 "Reasons to be cheerful, part 3"