Spirit
Experience
Solutions
Expertise
Talent
Know-how
Thinking
Doing
Insight
Enthusiasm
Enterprise

Higher Education Bulletin

January 2017

AHUA

SHAKESPEAREMARTINEAU

Contents

Message from India

Spending the Christmas break in India was an eye-opening experience for me and my family for many reasons. It was certainly striking how little has changed in the last 20 years: the chaotic city streets are still choked with traffic, poverty and the indestructible Hindustan Ambassador taxis; the street food is streets ahead of all of our local "Indian" curry houses and the trains are packed and covered with glamorous dancers performing song and dance routines on top of the train carriage roofs. But look closer: the Maruti Swifts dodging through the traffic carry a tell-tale "Uber" logo, and wasn't that a sadhu with nothing but a saffron loincloth and a mobile phone? Domestic consumer demand in India for new and better consumer goods and services is vast. This means that that there is almost no need to target international markets and provides an enormous opportunity for our university clients.

A completely unscientific and unrepresentative survey of my family there provides the following messages:

- Friends and family are looking for university-level education for their children and are still looking at the UK, rather than the US, Australia or other English-speaking countries, for it;
- Young people are looking for practical, technical education in IT, engineering and business or management, rather than a liberal arts or humanities education;
- There are serious concerns around academic quality including some fairly trenchant views on nepotism, cronyism and corruption (although this might only indicate acute rosy retrospection bias amongst some of the older generation).

UK universities have traditionally recruited students from India using networks of local agents to provide information on education opportunities in the UK. However, this approach appears to have become the victim of its own success following the recent significant drop in numbers linked to the Home Office targeting of student visas. There is, in addition, a faintly colonial whiff which comes from the idea that India's brightest and best can be taught best in the imperial mother country. With hindsight, Niall Ferguson's "Empire: How Britain Made the Modern World" might also not have been the most politically correct gift.

What is clear is that there is a demand for capacity building in India itself. This can be met through private capital in order to assist in meeting the demand for education, as well as academic and administrative knowledge and skills. India is currently undertaking a reform process to allow greater flexibility for regional state legislatures to permit private education providers and to encourage teaching and research relationships. The Indian Ministry of Human Resource Development is currently undertaking a review of its education policy. This covers a number of key messages which include:

- improving English language tuition at school level;
- promoting internationalisation through academic collaboration;
- improving the ability to recruit and exchange staff and students and to improve research;
- improving quality control and assessment in education institutions.

Consultation for the Indian draft Education Policy 2016 has already finished, but the consultation documents can be found at the following website:

http://mhrd.gov.in/relevant-documents

http://mhrd.gov.in/sites/upload_files/mhrd/files/nep/Inputs_Draft_NEP_2016.pdf

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

Negotiating lessons from the UK and EU

It is instructive to take lessons from the markedly contrasting approaches to negotiating the UK's departure from the EU. The Prime Minister has, to date, not disclosed any specific negotiating goals in order to keep her cards "close to her chest". The PM has similarly refused to give a "running commentary" on the negotiating strategy, and there has been frustration that an objective which is described as "a deal that is in the best interests of Britain" does not really help in identifying what success would look like. The PM and senior members of the UK government have, for this reason, refused to give any assurance to EU nationals living in the UK, instead insisting on reciprocity.

By contrast, the other 27 members of the EU Council of Ministers have set out an agreed procedure for its negotiation with the UK. The first step following notification by the UK that it wishes to trigger Article 50 will be the adoption by the European Council of guidelines that will define the framework for the overall positions and principles that the EU will pursue throughout the negotiations.

The EU Council has no qualms in setting out its stall on its negotiating objectives, and this is, indeed the approach that the European Commission has previously taken in negotiating trade deals. You can find the Commission's position papers on, for instance, its trade deal with the US (the Transatlantic Trade and Investment Partnership Treaty, TTIP), which details each of the specific concerns raised by EU member states, at the following website:

http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#eu-position

In addition, the EU has already detailed its position in the absence of a negotiated agreement on long-term British residents in the EU. This is set out in Directive 2003/109/EC, an EU Directive which does not apply to the UK, but in almost all other EU member states. This Directive provides that any non-EU national – from anywhere from Azerbaijan to Zimbabwe – is entitled to long-term residence in an EU country provided that they have been residing legally and continuously in that country for five years. The UK could easily have already made this simple reciprocal concession as a gesture, on the basis that the EU has already shown its hand, if only the PM's advisers had had the wit to spot it.

These two approaches reflect different models of negotiating ethics and apply equally to commercial negotiations. Theresa May's recent statement focused on two specific positions: "We are not leaving the European Union only to give up control of immigration again. And: "we are not leaving only to return to the jurisdiction of the European Court of Justice." These positions are clear lines in the sand, but leave the team with only a binary "win-lose" solution, rather than a "win-win" solution where a multi-faceted understanding of the issues (rather than just the negotiating position of the other party) permits alternative options and creative solutions.

The Guidelines are set out in an Annex to the statement by 27 members of the European Council:

http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/

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

JCT Design and Build 2016 - a change in the payment provisions

The new JCT Design and Build 2016 Contract has now been rolled out, and amongst the changes is a key change in relation to payment provisions.

Under the new contract, the due date is now defined by reference to the Interim Valuation Date, being 7 days after the Interim Valuation Date if the Interim Payment Application is received before the Interim Valuation Date. Final payment is then 14 days after the due date, providing a 21 day payment term.

For example, where the first Interim Valuation Date was agreed as 6 February 2017, the next Interim Valuation Date would be 6 March 2017. If an Interim Payment Application were put in on 6 March 2017, then the due date would be 13 March 2017 and the final date for payment would be 27 March 2017.

It is therefore important to choose the first Interim Valuation Date with care, as all subsequent Interim Valuation Dates will follow either on the same day of the subsequent months or the nearest business day that month.

The Payment Notice date must be no later than 5 days after the relevant due date, meaning that where the Interim Payment Application is put in before the Interim Valuation Date, then there are 12 days to serve the Payment Notice. The cut-off date for service of any Pay Less Notice is then no later than 5 days before the final date for payment.

Using the example from above, this would mean that the Payment Notice date would be 18 March 2017 and the last date for the service of any Pay Less Notice would be 22 March 2017.

Care should therefore be taken to ensure that universities are not caught out when paying contractors or looking to withhold monies from them.

Ruth Phillips
Partner, Real Estate Disputes
T: 0121 214 0341
E: ruth.phillips@shma.co.uk

The Employment Appeal Tribunal holds that long term stress alone does not amount to a disability for the purposes of the Equality Act 2010

In order to be protected by the disability provisions of the Equality Act 2010 (the Act), an employee must be able to show that he/she has a physical or mental impairment that has a substantial and long term effect on his/her ability to carry out normal day-to-day activities.

Conditions such as blindness, cancer and MS are deemed disabilities under the Act, whilst conditions such as alcohol dependency, tendency to set fires and voyeurism are specifically excluded. Whether other conditions such as depression and anxiety are considered as a disability has depended on the severity and long term nature of the condition. Historical case law has provided some guidance on when stress and anxiety would be considered as a disability, making a distinction between stress caused by life events, such as difficulties at work, and clinical depression. The latter is likely to be a disability whereas the former is not.

Herry v Dudley Metropolitan Council

In *Herry v Dudley Metropolitan Council ([2016] UKEAT 0100_16_1612),* Mr Herry was employed as a design and technology teacher and youth worker. In 2012 he brought tribunal proceedings against the Council, claiming amongst other things, disability discrimination. The tribunal dismissed Mr Herry's claim, finding that he was not disabled for the purposes of the Act at the relevant time.

EAT decision

Mr Herry appealed the decision, suggesting that the tribunal had incorrectly determined what amounted to a substantial adverse effect and normal day-to-day activities, and that the tribunal had incorrectly focussed on what Mr Herry could do. This was rejected by the Employment Appeal Tribunal (EAT), holding that the tribunal was correct to focus on the fact that Mr Herry could carry out a number of normal day-to-day activities and there was no evidence to suggest that his stress was having a substantial adverse effect on him. In particular, the medical evidence showed that Mr Herry's stress was clearly a reaction to life events rather than a medical impairment, and Mr Herry was not taking any medication to manage his stress.

Providing useful guidance for future cases, in making its conclusions the EAT noted the following:

- There is a class of case where an individual will not give way or compromise over an issue at work and refuses to return to work, yet in other respects suffers little apparent adverse effect on normal day-to-day activities;
- A doctor may be more likely to refer to the presentation of such an entrenched position as "stress" than as anxiety and depression;
- An employment tribunal is not bound to find that there is a mental impairment for the purposes of disability in such a case; and
- Any medical evidence put before the tribunal that supports the diagnosis of a mental impairment must be considered with great care, as should any evidence of adverse effect over and above an unwillingness to return to work until any issues are resolved to an employee's satisfaction.

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

Unfair dismissal: taking into account the employer's view when considering the practicability of re-engaging an employee

In the case of *United Lincolnshire Hospitals NHS Foundation Trust v Farren* (UKEAT/0198/16/LA), the Employment Appeal Tribunal held that it is the employer's view of the dishonesty of an employee seeking re-engagement that matters, not that of the Tribunal, when determining whether re-engagement would be practicable.

The facts

Mrs Farren had been employed by United Lincolnshire Hospitals NHS Foundation Trust since 1992, and had been a band 5 staff nurse since September 2006. She was dismissed for administering drugs without a prescription and for failing to keep adequate records. The Trust had sufficient concerns regarding Mrs Farren's honesty.

The Employment Tribunal agreed that the Trust had established a potentially fair reason for dismissal, but found that due to procedural failings the dismissal was unfair. Mrs Farren sought reinstatement or re-engagement.

The Tribunal must first consider reinstatement and can only go on to consider re-engagement if it decides that reinstatement is not appropriate. Mrs Farren's request for reinstatement was considered unsuitable due to the misconduct alleged, but the Tribunal was of the view that she could be re-engaged in another role.

The Trust appealed to the EAT.

The EAT

The EAT upheld the appeal and remitted the case for the same Tribunal to revisit the issue of re-engagement. The EAT noted that the issue of trust and confidence had to be tested between the parties in order for the Tribunal to determine whether re-engagement was practicable. The Tribunal had made an error in the approach that it had taken; it came to its own conclusions about trust and confidence, rather than actually testing the Trust's view to see whether it genuinely believed that Mrs Farren was dishonest and that it was rational to have that belief in the circumstances.

What this means for you

Orders for reinstatement and re-engagement remain rare, but this case shows how a Tribunal should not "substitute" its own view on the practicability of returning an employee to the workplace. The appropriate test is whether the employer genuinely believes that trust and confidence has broken down, and that the belief is not irrational.

This is useful for employers who wish to avoid re-engaging a former employee, as it is clear that a Tribunal will take into account any breakdown of trust and confidence where an employee has been dishonest.

Emma Oliver
Solicitor, Employment
T: 0121 237 3096
E: emma.oliver@shma.co.uk