AHUA Perspectives

Legal updates for the world of higher education

April 2019

Dear Colleague

In the March edition of Perspectives, we considered some of the features of the Government's UK Industrial Strategy, including the sector deals for Artificial Intelligence and for Life Sciences. In its one-year review document detailing progress of the Industrial Strategy - 'Forging our Future' - published in December 2018, the Government noted the following:

"As our Industrial Strategy acknowledges, the way we live continues to be transformed by the technological advances of what is a fourth industrial revolution."

The Information Commissioner's Office published its first Technology Strategy (2018-2021) in 2018 and noted:

"Technology is driving changes to the societal, political, legal and business environment that the Information Commissioner's Office (ICO) needs to regulate. The most significant data protection risks to individuals are now driven by the use of new technologies. The risks are broad – from cyber-attacks to the growth of artificial intelligence and machine learning."

Importantly, the ICO also noted the importance of innovation:

"These advances [in technology] need not come at the expense of data protection and privacy rights – the ICO's approach to technology will be underpinned by the concept that privacy and innovation are not mutually exclusive. When they both work together this creates true trust and data confidence. Technology is therefore viewed by the ICO as both a risk and an opportunity."

The ICO noted that the General Data Protection Regulation (GDPR) includes new provisions to "better regulate the risks arising from technology, including data protection by design and data protection impact assessments".

In this edition of Perspectives, we keep with this theme and look at: the Government's new White Paper on 'online harms' which covers more than 'privacy harms'; the recent Court of Appeal decision on the Prevent duty; the Counter-Terrorism and Security Act 2019; and employment status in the 'gig economy'.

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In this issue

Online harms White Paper

In April this year, the Government published a significant and ambitious White Paper to set out a proposed new regulatory framework for what are described as 'on-line harms'. A long list is included of such harms which are considered to have a clear definition:

- child sexual exploitation and abuse
- terrorist content and activity
- organised immigration crime
- modern slavery
- extreme pornography
- revenge pornography
- harassment and cyberstalking
- hate crime
- encouraging or assisting suicide
- incitement of violence
- sale of illegal goods / services, such as drugs and weapons (on the open internet)
- content illegally uploaded from prisons
- sexting of indecent images by under 18s (creating, possessing, copying or distributing indecent or sexual images of children and young people under the age of 18).

There are a number of other harms identified which have a less clear definition:

- cyberbullying and trolling
- extremist content and activity
- coercive behaviour
- intimidation
- disinformation
- violent content
- advocacy of self-harm
- promotion of Female Genital Mutilation (FGM)

The White Paper also notes the harm caused to those who are underage of access to pornography and other inappropriate material. In this area, the Information Commissioner has now published a draft Code of Practice for consultation on "Age appropriate design" for online services.

The Government's vision in the White Paper is for "the UK to be the safest place in the world to go online, and the best place to start and grow a digital business." The core problem addressed by the White Paper is "the prevalence of illegal and harmful content online and the level of public concern about online harms". The White Paper comes hot on the heels of the terrorist attack on a mosque in New Zealand on 15 March 2019 where footage of the attack was widely circulated on social media.

At the heart of the White Paper is a proposal for a new regulatory framework which would include the following key features:

- a new statutory duty of care to make organisations "take more responsibility for the safety of their users and to tackle harm caused by content or activity on their services";
- compliance with the new duty of care to be overseen and enforced by an independent regulator;
- Codes of Practice to be developed relating to specific harms;
- a new culture of transparency, trust and accountability whereby the regulator is to have power to require annual 'transparency reports' outlining the measures taken by those covered by the regulatory framework to tackle the various harms;
- a significant range of penalties and enforcement powers available to the new regulator;
- encouragement to using technology as part of the solution.

Although the White Paper talks about 'companies' being within the scope of the new statutory duty of care and the new regulatory framework, the proposal appears to be very broad and, on the face of it, includes organisations "that allow users to share or discover user -generated content or interact with each other online."

The White Paper rightly notes that:

> "These services are offered by a very wide range of companies of all sizes, including social media platforms, file hosting sites, public discussion forums, messaging services and search engines."

It goes on to state in the section on "Companies in scope of the regulatory framework":

"The scope will include companies from a range of sectors, including social media companies, public discussion forums, retailers that allow users to review products online, along with non-profit organisations, file-sharing sites and cloud hosting providers."

The focus appears to be on the services provided, rather than on the business model or sector. Charities are expressly stated to be included in the scope of the proposed new regulatory framework.

The White Paper explicitly recognises the importance of protecting freedom of speech in the online space and also proposes that there should be a legal obligation on the regulator to have due regard to innovation. The regulator will be required to take a proportionate, evidence-based and risk-based approach according to the severity of the harm in question.

The consultation is open until 1 July 2019 and is promoted by both the Department of Culture Media and Sport and the Home Office.

Balancing freedom of speech and security: Court of Appeal decision on Prevent Duty Guidance

On 8 March 2019, the Court of Appeal gave its judgment in the case of R (on the application of Salman Butt) -v- Secretary of State for the Home Department [2019] EWCA Civ 256. The claimant, Dr Butt, had brought a claim for judicial review against the Home Office challenging (1) the lawfulness of the Higher Education Prevent Duty Guidance and also (2) the collection, recording and sharing of information relating to him by the Government's Extremism Analysis Unit.

The Court of Appeal dismissed Dr Butt's challenge under Article 8 of the European Convention of Human Rights (the right to a private and family life) in respect of the information gathering and sharing activities of the Government's Extremism Analysis Unit. However the Court of Appeal did determine that the Secretary of State did not promulgate sufficiently balanced and accurate guidance to higher education institutions on the statutory Prevent Duty setting out their competing obligations to assist institutions to reach proper conclusions. The Court of Appeal noted as follows:

> "The [Higher Education Prevent Duty Guidance] in general, and paragraph 11 in particular, is expressed in trenchant terms. The HEPDG is not only intended to frame the decision of [Relevant Higher Education Bodies] on the topic in question, it is likely to do so....Even the well-educated reader called on to take a decision on behalf of a university is likely to assume that this particular focused guidance already represents a balance of the relevant statutory duties affecting the RHEB decision-maker."

The Court of Appeal declined to attempt a redraft of paragraph 11 of the HEPDG 'since that is a matter for the government'. We await a revised version of the HEPDG.

However, it is appropriate to note that the statutory obligations on relevant higher education bodies continue, notwithstanding the decision of the Court of Appeal relating to the guidance issued by the Home Office. The statutory duty in section 26 of the Counter-Terrorism and Security Act 2015 is for the specified authority "to have due regard to the need to prevent people from being drawn into terrorism." Section 31 CTSA provides that relevant higher education bodies must have "particular regard to the duty to secure freedom of speech" when complying with the statutory Prevent Duty.

"Terrorism" is defined in the Terrorism Act 2000 (as amended) and that legislation sets out a number of specific terrorist offences in addition to other offences prohibited by the criminal law.

Counter-Terrorism and Border Security Act 2019

The Counter-Terrorism and Border Security Act 2019 came into force on 12 February 2019.

The aim of the 2019 Act is to update existing terrorism offences for the digital age and to strengthen the enforcement authorities' ability to intervene to stop terrorist activities.

The Terrorism Act 2000 already prohibits the collection of information likely to be useful to a terrorist. The 2019 Act extends this criminal offence to cover the viewing or streaming of such material online. There is an existing defence which applies where the individual has a reasonable excuse. This is clarified by the 2019 Act to include a situation where the individual did not know and had no reason to believe that the document or record contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing to commit an act of terrorism. The 2019 Act includes further specific situations where the defence may be relevant, namely where the individual's actions were for carrying out work as a journalist or for academic research.

The existing offence of inviting support for a proscribed organisation is extended to apply to situations where a view is expressed by someone, reckless as to whether this will encourage others to support the proscribed organisation.

It is also now an offence to publish an image online which displays a flag, emblem or other symbol of a proscribed organisation. An equivalent offence already exists for such publications off-line.

The Home Office fact sheets explaining the new legislation confirm that 74 organisations have been proscribed under the Terrorism Act 2000 and that to the year to 30 September 2018, 85 individuals were charged with terrorism-related offences.

The 2019 Act enables local authorities, as well as the police, to make referrals of individuals considered to be at risk of being drawn into terrorism to a Channel panel to discuss ways of accessing support.

A duty is placed on the Secretary of State by the new legislation to establish an independent review of the Government's strategy in this area which is aimed at preventing vulnerable individuals from becoming terrorists, or supporting terrorism.

Further reference should also be made to the Government's fact-sheets and the detailed provisions of the legislation.

Employment status and the gig economy: taking stock

As legislation and case law continues to emerge about how individuals should be classified for employment and tax purposes, we take stock of where we are now and suggest how employers can respond.

The uncertainty problem: a quick reminder

There has always been a degree of uncertainty about how relationships between organisations and the individuals they engage to work for them should be classified. For employment law purposes there are three possible categories:

- **Employees**, who have the full range of employment protection rights;
- **Workers**, who form an intermediate category, and can broadly be defined as non-self-employed individuals who work under a contract to perform work personally; and
- **The self-employed**, who work in business on their own account.

The growth of the gig economy and the steady expansion of workers' rights has magnified the problem. That is because the opportunities for ad hoc and casual work have expanded while the risks to employers of applying the wrong classification have increased.

The uncertainty has been compounded by the fact that our tax system doesn't recognise worker status. That means the tax rules for determining employment status are slightly different. So, for example an individual could be a worker for employment rights purposes, but taxed as a self-employed person. It is even possible for someone who has been taxed as a self-employed person to obtain a ruling that they are an employee for employment law purposes.

The significance of the gig economy cases

Sophisticated platforms operated by tech companies like Uber have opened up new opportunities for working flexibly, but have also increased the ability of businesses to control and monitor how the individuals they engage do their work. There is nothing new about casual working, so the question is whether the gig economy is a game changer and calls for a significantly different approach, or whether the tried and tested criteria for establishing employment status can be dusted off and applied to these new ways of working.

Over the last few years many individuals working on a "gig by gig" basis for companies like Uber, City Sprint and Addison Lee have been successful in establishing worker status in the employment tribunal. In the case of Uber and Addison Lee, decisions in the workers' favour by the employment tribunal have also been upheld by the Employment Appeal Tribunal.

The latest significant development was the decision of the Court of Appeal in the Uber litigation at the end of last year. Although the drivers were successful, it was not a unanimous decision. One of the three judges, who was the employment specialist on the panel, thought that the employment tribunal had not given sufficient weight to the contractual documentation, or indeed to earlier case law about traditional mini cab companies. He thought this pointed to the conclusion that the drivers should be classified as self-employed.

The Uber case will now go the Supreme Court for a definitive ruling, probably early next year. Although the odds still remain in the drivers' favour, the minority judgment has reminded us all that broad generalisations about the gig economy are unwise and each decision on employment status is likely to depend on exactly what arrangements have been adopted in that particular case.

What about other case law?

The latest decision from the Supreme Court on employment status comes not from the gig economy world, but from the plumbing sector, a trade that has had a tradition of self-employment for generations. For that reason it might have been thought that Mr Smith would face an uphill task in his claim to establish worker status against Pimlico Plumbers. The Supreme Court finally ruled in his favour in July 2018 not because of the broad sector picture, but because of the precise arrangements that had been adopted in his particular case, and in particular the provisions that limited his ability to take time off and to provide a substitute.

Since then we have had a number of other decisions from the employment tribunal addressing a wide variety

of working arrangements. These have included a group of "educators" at the National Gallery who succeeded in establishing worker status, and a visiting music teacher at a private school in Essex whose application was also upheld. On the other hand the former Olympic cyclist Jess Varnish was unsuccessful in her claim against British Cycling.

Stepping back and looking at these cases as a whole, it is probably most helpful to see employment status as a continuous spectrum. Broadly speaking, assuming that there is some kind of legal relationship, the more closely the individual is integrated into the organisation they work for, and the more limited the rights of substitution, the more likely it is that they will be able establish worker status even if their work pattern is sporadic. However, other factors will also determine where an individual sits on the spectrum. These include the degree of control exercised by the employer and the degree of risk assumed by the individual, but the importance of these other factors is probably more dependent on the nature of the work involved.

What is the Government doing?

In its "Good Work" plan published at the end of last year the Government identified increasing certainty about employment status as one of its key priorities. However it has yet to identity what steps it will be taking to achieve this.

One step that would certainly help would be to align the tax and employment test for employment status, or, if that is not possible, align the tax treatment so that there is not such a big difference in the way that employees and the self-employed are taxed. However reforming the tax system in this way is likely to be a complex and long-term project, if indeed it is politically feasible.

There is however one significant step the Government has been taking, which is to shift responsibility for making the correct assessment of an individual's tax status to the organisations that are ultimately paying for these services. As from April 2020, revised "IR35" rules, which were introduced in the public sector in April 2017, will be extended to medium and large companies in the private sector. That will mean that where an individual is engaged via a personal service company, not only will they be treated for tax purposes as if they had been engaged direct, but the primary responsibility for making appropriate tax and national insurance deductions will rest with the end user, not the intermediate company.

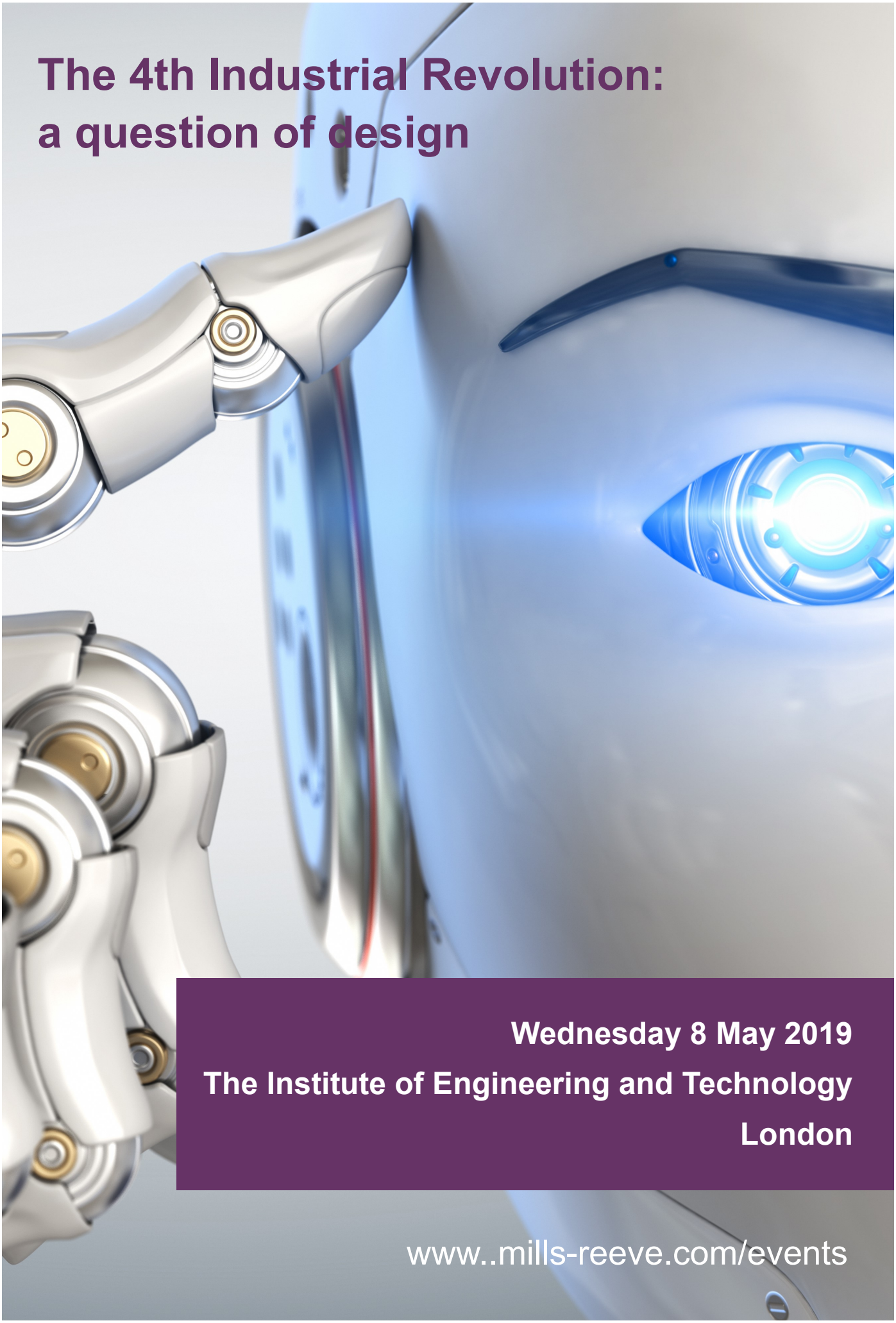
To help employers assess their liability under the new rules, the Inland Revenue has published an online status calculator. While not legally definitive, it can be a helpful way of ascertaining its view on a particular set of arrangements, and it is possible that the Government will develop a similar tool for employment rights purposes.

How should employers respond?

In a climate where there is increased public concern and press publicity about the rights of workers in the gig economy and of other casual and atypical workers, now would be a good time for employers to revisit their standard terms of engagement for these workers. That is particularly so for employers who are likely to be affected by the new IR35 rules.

A good starting point is to define the kind of arrangements that best reflect your organisation's aims and objectives. Once that is clear, it is easier to make a robust assessment of where those arrangements are likely to fall on the self-employed/worker/employee spectrum, and the extent to which the risk of a wrong classification can sensibly be reduced.

The 4th Industrial Revolution: a question of design



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