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Philanthropic payday for UK universities as donations surpass £1 billion

Whilst the old adage may be that charity begins at home, it appears that philanthropic giving is extending much further afield and UK universities are reaping the benefits. A recent survey from Ross-CASE has reported a 23% increase in philanthropic income for the 110 participating universities in the last year. These donations represented over £1billion of funding. This is good news for universities which are operating in the shadow of a looming Brexit and concerns about funding cuts in the future. More and more universities are starting to look to alternative funding options rather than simply relying on the traditional methods of government funding and student fees.

The Ross-CASE report confirms that in the past year universities have invested more in fundraising and alumni relations (an increase of 16% and 10% respectively). This investment appears to be paying off as donations from alumni are now proving a major source of funds for universities and are worth £322 million. Income from non-alumni individuals was worth £149 million. Whilst there has been an overall drop in the overall numbers of donors pledging year-on-year, a significant proportion of the new funds were secured from large gifts and pledges. There was a 27% increase in the number of donors making gifts worth over £500,000 or more.

For the 2015/2016 academic year, the total amount gifted from legacies represented £104.7 million from 1,179 legacy donors. This shows that legacies can represent a very valuable resource for universities. Whilst fundraising efforts aimed at legacies should take a long term view, it can be an attractive revenue stream both financially and from a marketing perspective. Those alumni or other individuals who may consider making a donation to the university may discount the idea during their lifetime, as they may feel that they do not have the disposal income to make a donation. However, leaving a legacy in a will may be something a potential donor would be more inclined to consider. Estates can be very valuable, especially with the boom in property values, and so can "carry" such legacies and still leave significant sums for family members to inherit. Alternatively, the university itself may be viewed by a donor as a worthy beneficiary of the residue estate especially from those alumni who feel grateful for the education and opportunities the university provided.

However, legacy donations can be at risk from a challenge to the will by a disgruntled family member, either on grounds that the will is invalid or that the donor's estate did not make reasonable financial provision for them. This could result in an anticipated legacy being significantly reduced or even withdrawn altogether. Universities may feel that they are not able to actively defend such claims from family members. However recent case law has confirmed that charities and other institutions are to be treated as a beneficiary in their own right and do not have to demonstrate that they are in need of the monies.

It is quite clear that donations will continue to play a major part in plugging the funding gap for universities in the future, and efforts should be make to maximise the opportunities for both lifetime and legacy donations.

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Damaging damages remedies in procurement

The decision of the Supreme Court in the case of *Nuclear Decommissioning Authority v Energy Solutions EU Limited (now ATK Energy EU Limited)* ([2017] UKSC 34) has re-written the rules on the conditions required for aggrieved bidders to claim damages for breach of the procurement rules.

In this case, the NDA had clearly failed to award a contract in accordance with the Public Contracts Regulations 2006 (the predecessor to, but for our purposes, materially the same as, the current procurement regulations) - it had wrongly allowed the winning tenderer to pass through the qualification exercise; and it had made manifest errors, wrongly marking down the aggrieved bidder. The stakes could hardly have been higher – this was the procurement for the decommissioning of 12 former nuclear sites over 14 years, with an approximate value in the first seven years of more than £4 billion.

The Supreme Court analysed the conditions that the claimant needed to meet in order to demonstrate that it could recover damages. Its controversial decision reverses both the High Court, the Court of Appeal in the NDA case and at least 15 years of accepted wisdom following an earlier Court of Appeal decision from 1999 (in which the Court of Appeal concluded that the right to damages is a non-discretionary one, based on the national remedy in damages).

The Supreme Court considered that the Regulations were intended to replicate the minimum conditions of state liability for breach of an EU rule - breach of the underlying EU procurement rules - rather than being implemented into and subject to the general legal principles of liability for breach of duty. It concluded that the damages remedy is not subject to common law principles, but is, instead, a "Euro-tort" and subject to common principles of state liability for breach of EU law.

The Court's interpretation is based partly on two judgments of the European Court of Justice; and partly on how it imputes the legislative decision to incorporate the Directive wholesale into the Regulations. It considered that the Regulations which were implemented into English law, instead of applying and being subject to traditional English (common law) principles regarding damages claims, should be interpreted as incorporating the EU law relating to state liability for breach of EU law. State liability for failure to properly comply with EU law was limited by conditions which require that (a) the rule was required to confer rights on individuals; (b) the breach was "sufficiently serious"; and (c) there was a direct link between the breach and the damage.

It could also have been open to the Supreme Court to consider that the UK legislator had intended the Regulations to be applied in the light of English legal principles, on the basis that (a) the legislator could have made an active decision not to introduce different conditions to implement the law on the basis of its understanding of the common law at the time; and (b) the Regulations do not exclude the principle that they are intended to apply within the context of the national legal system, rather than under the more restrictive conditions of EU state liability.

By adding this further condition, the Supreme Court introduces an additional line of defence on the basis that the breach was not "sufficiently serious". The irony of this is inescapable: the Supreme Court has had the opportunity to rely on the power of the English common law to provide a legal remedy, but has, instead, incorporated a legal principle from the European Court of Justice, supporting its decision by reference to an article

entitled: “Damages in Public Procurement - An Illusory Remedy”.

The outcome of this decision is that it changes the risk profile for contracting authorities. It provides an additional legal hurdle for challenging bidders to tackle in addition to the costs of challenge and (potentially) an undertaking in damages, the extremely tight limitation period and the practical problem of having to challenge blind.

You can read more about the decision at the following websites:

- **Supreme Court - case details**
- **Bailii case database**

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Cash machines on campus

Universities in their capacities as both landlords and tenants will be interested in the recent case of *Sainsbury's Supermarkets Ltd & 5 others v Chris Sykes & others (Valuation Officers)* ([2017] UKUT 138 (LC)), which considers whether cash machines (ATMs) are separate from the premises within which they are situated for rating purposes and that of occupation.

The Upper Tribunal held that each cash machine (whether inside premises, or a "hole in the wall" external ATM) was capable of being the subject of a separate entry in the rating list. However the liability for rates depends on the accessibility of the cash machine. The Upper Tribunal held that externally accessed ATMs are in occupation by the ATM provider (i.e. the bank) and therefore rates are payable by them. However, internal ATMs, which face onto the shop floor and which are accessible only to those who have entered the premises, are in the occupation of the store and not the bank. As such, the liability for rates may well be the responsibility of the landlord/tenant of the premises.

Permitting an ATM to be installed within a property may also have wider landlord and tenant implications. Universities should keep in mind that authorising a bank to install an ATM may amount to an alteration or addition to the premises requiring consent. In addition, if space is given to a bank to install an ATM, this may well breach the alienation covenants contained within a lease. Whilst in this case the Tribunal did not think that the provision of internal space to a bank amounted to a parting with possession, it did result, for rating purposes, in the space being "occupied".

It is therefore important for universities to seek advice before permitting a bank to install an ATM on their land/premises either in their capacity as a landowner/landlord or tenant.

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Is it discriminatory to make an individual with Asperger's sit a multiple choice test?

The Employment Appeal Tribunal recently considered whether a job applicant with Asperger's syndrome suffered disability discrimination by virtue of having to undergo a multiple choice test.

The Government Legal Service (GLS) v Brookes (B) *UKEAT/0302/16*

B was required to sit a multiple choice test based on situational judgement (SJT), as part of a recruitment process. B told the GLS in advance that she was likely to find this format particularly difficult because of her Asperger's. She wanted the same questions but in short narrative form. The GLS indicated that an alternative format was not available. B took the test and was informed she had not passed; she was two marks short of the pass mark.

B lodged a claim, arguing that the requirement to sit a multiple choice test amounted to indirect discrimination and demonstrated that the GLS had failed to make reasonable adjustments.

ET decision

The Employment Tribunal upheld B's complaints on all grounds. It had regard to medical evidence which, whilst not conclusive, could support the fact that B was placed at a disadvantage by the requirement to sit a multiple choice test. An adjustment could have been made as to the format of the test, allowing written answers to be supplied.

EAT decision

The GLS appealed. The tribunal's finding that the GLS had applied a provision, criterion or practice which placed people with Asperger's at a disadvantage was not challenged, but it was disputed that B had experienced this disadvantage. The EAT held that the tribunal's reasoning was beyond reproach: 'The tribunal was presented with what appeared to be a capable young woman who, with the benefit of adjustments, had obtained a law degree and had come close to reaching the required mark of 14 in the SJT, but had not quite managed it. The tribunal was right to ask itself why, and was entitled to find that a likely explanation could be found in the fact that she had Asperger's, and the additional difficulty that would place her under due to the multiple choice format of the SJT'.

The ET had not adopted a flawed approach when carrying out the proportionality exercise, nor had it failed to weigh sufficiently the employer's interests. While it was acknowledged that the GLS needed to test the core competency of ability of its candidates to make effective decisions, a psychometric test was not the only way to achieve this. Allowing B to provide short written answers might have presented logistical problems but these inconveniences did not outweigh the factors on B's side.

What does this mean for universities?

- This case serves as a reminder that you have obligations in respect of potential employees and applicants for employment from the outset of the recruitment process.
- If you receive a request to make adjustments, on disability grounds, to your assessment process, which does not prejudice the test's effectiveness and is not unreasonable, then you should adopt the adjustment. Even when the

request, in your opinion, is unreasonable and would impact on the test's effectiveness, you should still examine it before rejecting it.

- You should not adopt a 'one size fits all approach' and instead look at what would be appropriate based on the individual circumstances.
- If you use a particular form of testing you may wish to plan ahead, considering possible alternative methods for disabled applicants. It is important to have flexibility in your assessment methods.

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