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All that glitters is not gold...

It is of course entirely understandable that many universities who secured a gold award in the recent TEF are promoting it as vigorously as they can. Quite apart from the pride at having hard work recognised, student recruitment is, increasingly, a fiercely competitive activity and anything that helps secure an advantage is to be welcomed and utilised to the full.

There seem to be at least two ways in which TEF awards could influence student choice:

(a) There is the fact of the award itself; and

(b) There are representations that universities make about what the award means in terms of what current and prospective students can expect.

Here are some random examples of the sorts of statements universities have made in light of the TEF, anonymised and slightly modified to deter identification (although not to any extent that distorts the substance):

"TEF gold status means that current and prospective students can be confident of the best possible educational experience at X University."

"The TEF offers solid evidence to prospective and current students of the gold standard quality of teaching and student support they can expect at X university. This in turn ensures that our students go on to enjoy high levels of employment after they graduate."

"The TEF gold award shows prospective students that the teaching on offer at University X is of the highest calibre."

"University X has been singled out for praise by the TEF panel, who noted that students from all backgrounds achieve consistently outstanding outcomes, especially mature, disabled and disadvantaged students."

It is important to note that these statements have not been selected because they are particularly unusual, but rather because they are so typical.

Against the backdrop of a heightened focus on the rights of students, as consumers, what, if any, is the legal significance of these statements?

A number of the provisions of the Consumer Rights Act 2016 might be relevant here. For example, the Act provides that:

- Every contract is to be treated as including a clause that the service will be delivered with reasonable skill and care. Breach of the term gives rise to remedies such as a repeat performance, a discount on the price and damages. Reasonableness is a flexible concept which adapts to the circumstances of each case. Might, therefore, the skill and care expected at a university that claims to provide a "gold standard experience" be higher than that expected from one that is silver or bronze?

- Anything that is said or written to prospective students, by or on behalf of the university, about the university or the service it provides, is to be treated as a term of the contract if it is taken into account by students when deciding to enter into the contract, unless it is expressly qualified at the time it is said or written. Statements that prospective students can be "confident of the best possible educational experience" are likely to be taken into account by applicants and so could, it appears, be regarded as terms of the contract. Breach of these (i.e providing a sub-optimal educational experience) again gives rise to the substantive remedies of repeat performance, right to a discount and damages.

- Where a term of a contract may have different meanings, the one most favourable to the consumer will apply. So universities which want to dispute what they meant by, say, "the best possible educational experience" may find that they are held to the broadest possible interpretation of the phrase in a dispute with a student.

The Consumer Rights Act is a new and relatively untested piece of legislation and it may be that these provisions are not interpreted as unfavourably to universities as suggested above. However, even from a broader consumer protection perspective, there are concerns about what can and cannot reasonably be extrapolated from a university's TEF grading. Most obviously, because of the way the grading was arrived at, it tells the individual student almost nothing (or at least nothing reliable) about the assessment of teaching on his or her chosen course. Secondly, as a review of historical practice and metrics it can tell the prospective student nothing about what to expect when he or she arrives on the programme, let alone in later years of study. Potentially, therefore, making exaggerated claims about what the grading shows or means could be misleading practices under the Consumer Protection from Unfair Trading Regulations.

The recent example of the Advertising Standards Authority's investigation into a university for claiming to be in the top 1% of institutions globally when the rankings it relied on to demonstrate this had not surveyed all global institutions is also a potentially useful case study. In senior management meetings and higher education conferences across the country, everyone is agreed that whatever TEF is, it is not a measure of teaching excellence. Yet in promotional material from universities it is being described as just that. Might the next ASA investigation be into inflated claims that there is an objective verification of the quality of teaching based on the TEF?

There are other fascinating questions about the interrelationship between the TEF grading and the legal representations and terms applicable to the student/university contract. What, for example, happens if a student chooses a university on the basis of a gold award, which the university then loses half-way through? Is this evidence of a decline in teaching quality to support a claim or complaint for breach of contract? Is it the basis of a claim under the Consumer Rights Act to the effect that even though the student got what s/he contracted for (higher education), it was not delivered to the specification promised (i.e. a gold standard) and therefore s/he should be entitled at the very least to a discount on the price.

There is an undoubted irony that a government that has supported many initiatives to make clear and accurate information available to prospective students about what they can expect at universities appears to have inadvertently created a rating scheme that has the potential to mislead applicants about what conclusions they can draw from it. This may be something that the independent review of TEF reflects upon. In the meantime, universities need to exercise a degree of caution and restraint to avoid unnecessarily making claims and representations that expose them to the risk of complaint by disgruntled students further down the line.

Smita Jamdar
EducationPartner and Head of Education
T: 0121 214 0332
E: smita.jamdar@shma.co.uk

Privacy matters – issues with fundraising practices

Action taken by the Information Commissioner's Office (ICO) against the Royal Free London NHS Foundation Trust recently made the headlines. The ICO found shortcomings in the way the Trust handled the data of 1.6 million patients when it shared their details with Google's DeepMind Technologies, a company which specialises in artificial intelligence, for the purpose of testing a new system for diagnosing and detecting kidney injury.

The ICO considered that the Trust breached data protection principles one, three, six and seven because:

a. patients were not sufficiently informed about the processing;

b. the extent of data processing was not limited to what was necessary; and

c. the data processing agreement between the Trust and DeepMind was not sufficient.

However, ICO action is not reserved for such large-scale breaches. According to the ICO website, 11 charities were fined in April this year for breaching data protection requirements in relation to their fundraising practices. The fines, which were imposed under the current Data Protection Act 1998 (DPA) and not the incoming General Data Protection Regulation (GDPR), ranged from £6,000 to £18,000.

Universities should review their own practices in the light of the ICO's findings as summarised below. The consequences of breaching data protection requirements are not limited to financial penalties, and universities should also be wary of the potential bad publicity. Universities acting with good intentions can still breach the rules.

Ranking based on wealth

Charities which profiled donors based on their wealth were considered to have breached their obligations under the DPA because the donors were oblivious to the practice. These charities supplied donor information to companies which analysed the financial status of donors in order to determine which donors were capable of and more likely to make further donations.

The ICO considered that using personal data in this manner would not be within the reasonable expectations of the data subjects. Donors were not provided with sufficient information to understand that their data would be used in this way.

The first data protection principle under the DPA requires that data is processed "fairly". To determine if data is processed fairly, the extent to which the individual is informed about the processing is considered. Data subjects should always be informed about the purpose of all data processing and, quite vaguely under the DPA, should be provided with "any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair."

The GDPR provides more clarity and detail about the information which needs to be given. This includes not only the details of the

(a) the categories of data concerned and the source;

(b) the recipients of the data;

(c) the period for which the data will be stored;

(d) the interests pursued;

(e) the use of automated decision-making; and

(f) the rights of data subjects, including the right to make a complaint to the ICO and the right to have personal data erased.

The practice of ranking donors was also considered to be in breach of the second data protection principle, which requires that data is obtained for one or more specific, lawful purpose(s) and that the same data is not used for other purposes. Once again the issue turns on the information given to donors.

The GDPR contains similar requirements. It states that where data is processed for a purpose other than that for which it was collected, in the absence of the data subject's consent, the compatibility of the new purpose with the original purpose is ascertained by taking into account:

(a) any link between the purposes;

(b) the context in which the data is collected, including the relationship between the controller and the subject;

(c) the nature of the data;

(d) the possible consequences of the further processing; and

(e) the safeguards in place, such as encryption or pseudonymisation.

Finding out information about donors which the donors did not provide

A second practice for which a number of charities were fined was that of engaging companies to discover additional information about donors, such as telephone numbers, or updating the information which they already had. Once again, donors were not aware of which information was being processed, and how, in breach of the first and second data protection principles under the DPA.

Sharing data with other charities

The third practice which led to fines was sharing data with other organisations, including other charities. It does not matter that the data is shared for the benefit of a charitable cause. Some charities participated in the 'Reciprocate' scheme which enabled participating charities to share personal data with each other. Although data subjects can consent to their data being shared, consent must be informed.

This practice also engages the first and second data protection principles. The ICO evaluated the sufficiency of the privacy notices used by the charities involved. These were often vague, contained no information about who the data would be shared with and how, and inferred consent by requiring donors who didn't want their data to be shared to opt out. Although charities can share data with third party organisations they can only do so if donors consent, freely, specifically and positively. Consent cannot be inferred even if the organisation with which the data is shared has similar objectives.

Under the GDPR the requirements for valid consent are heightened. The controller is required to demonstrate that it has obtained consent. The request for consent must be presented in a manner which is separate and distinguishable from other matters, using clear and plain language, and giving sufficient information about the intended processing. Withdrawal of consent should be as easy as giving consent.

Lauro Fava
Paralegal, Education Team
T: 0121 631 5245
E: lauro.fava@shma.co.uk

When it pays to say exactly what you mean!

Universities may be interested in two relatively recent Court of Appeal cases which looked at the interpretation of access rights (Shaw v Grouby[1] and Gore v Naheed[2]).

Shaw v Grouby

In this case, a 1999 transfer between the owners of Broome Manor House in Swindon and the owner of another property on the estate (Hereford House) included a right of way over the driveway leading to the Manor House but also allowed access to three newly developed detached houses on the estate. Hereford House was bought by Mr & Mrs Shaw in 2005.

The express right of way in the 1999 transfer was to use the driveway "at all times for all purposes over and along so much of the private driveway edged green on the said plan as is necessary to obtain access to the property". In return a contribution towards the upkeep and maintenance of the driveway was payable.

In 2008, the Shaws had some work done to their property and moved the access point to a point further along their own boundary from which they accessed the shared driveway. As a result, the new access point now connected with the driveway at a point closer to the entry to Broome Manor House. The owners of Broome Manor House objected on the basis that such use went beyond what was "necessary".

The matter eventually came to be determined by the Court of Appeal which took the view that there were no grounds for interpreting the word "necessary"' as requiring the Shaws to take the shortest route possible to gain access to the drive.

The court also held that what is "necessary" need not be construed by reference to a fixed point in time (i.e at the date of grant of the right of way). The interpretation of what is "necessary" to access the property could vary from time to time. This in turn would allow different points of access to be used from time to time.

The position might have been different if the wording in the transfer had been tied to a fixed or permanent landmark as a frame of reference. This was an extremely expensive and long running case which ultimately comes down to "say what you mean". If the owners of Broome Hall Manor had intended to prescribe the precise location of the access way on to the driveway, they should have said so.

Gore v Naheed

The same common sense approach is also reflected in another Court of Appeal case, this time in relation to whether a right of way could be used to access a newly built garage positioned on a second piece of land.

Mr Gore's property, the Granary in Berkshire, had the benefit of an express right of way over a driveway by virtue of a 1921 conveyance. For these purposes the Granary was the 'dominant land' and the driveway was the 'servient land'. One of Mr Gore's predecessors had in fact acquired a part of the same driveway (adjacent to the Granary) by adverse possession and in 1994 a garage with some bedrooms above it was built on that land. The garage was accessed directly from the driveway. The garage was effectively on non-dominant land.

Mr Gore initially brought proceedings for an injunction to stop deliveries to a neighbouring wine merchants' business run by the defendants which obstructed his access to the Granary and to his garage. The defendants objected and asserted that the right of way could be used to access the Granary (the dominant land) but could not be used to access the garage (the non-dominant land), primarily because the land on which the garage had built had only been acquired after the right of way had been granted, and it therefore fell outside the scope of the right of way.

Given the dimensions of the driveway, whether or not the delivery vans could lawfully park in front of the garage (but in so doing obstruct access to it) was a major feature of the case.

[1]Shaw v Grouby [2017] EWCA Civ 233
[2]Gore v Naheed [2017] EWCA Civ 369

The key questions for the Court of Appeal were (i) the terms of the express grant; and (ii) whether the use of the garage was 'ancillary or subsidiary' to the use of the Granary.

The court held that the terms of the express grant "for all purposes connected with the use and occupation" were very wide and did not limit the right of way in any way. Further, the court was satisfied that access to the garage was ancillary to the use of the Granary and that therefore the right of way could be properly be understood to extend to accessing the garage also.

However, if the garage were ever sold to a third party, the use of the garage would no longer be ancillary to the use of the Granary and therefore there would be no right of way to access that land over the driveway.

Once again, while a common sense position has prevailed, this would have been a long and hard fought battle. Here, Mr Gore was able to persuade the court to accept his use of the garage as being lawful, but it seems to have been close run with previous case law on this point going in both directions.

Neither of these two cases changes the law, but they do emphasise that for anyone relying on express rights of way, the express wording of the right of way will be crucial. However, it may be difficult for the draftsman to anticipate every eventuality, and therefore if there are certain aspects of a right of way which are crucial then it would be better to spell these out. For instance, specifying the precise location of an access onto a shared driveway and/or limiting the use of a right of way for the purposes of access/egress to a house rather than for 'all purposes'. Essentially, rights of way can be complex and the devil is definitely in the detail.

Pia Eames
Associate, Real Estate Disputes
T: 0121 214 0350
E: pia.eames@shma.co.uk

Updated HEFCE Guidance on Severance Pay

Universities will be aware of previous guidance from HEFCE regarding severance pay and remuneration for senior staff (defined as those earning over £100,000). In June of this year, updated guidance was issued by HEFCE in Circular Letter 17/2017. The majority of the letter focuses on the issue of severance payment for those earning over £100,000 and the issues that a university should consider when making such payments.

Key considerations regarding severance payments

The HEFCE letter reminds universities of the seven Nolan Principles - selflessness, integrity, objectivity, accountability, openness, honesty and leadership - which should be shown by those making decisions, and potentially those in receipt of payments. Further it is the remuneration committee that should propose severance payments for senior staff and seek legal advice before making their recommendation to the governing body. The governing body, in turn, should reflect on the outcome of the government's consultation on reforms to public sector exit payments, published in February 2016, when considering such payments.

Any enhancements to contractual entitlements, either out of public or charitable funds, should be made with caution, and compulsory severance payments should be based on contractual entitlements and those entitlements should not be made excessive when contracts are entered into.

Poor performance

Crucially, and unsurprisingly, HEFCE have again reiterated that where severance arises from poor performance, any payment should be proportionate and not be seen as a reward for poor performance.

Confidentiality clauses in settlement agreements

The letter reminds universities that whilst they need cost effective solutions, for example settlement agreements, they need to balance public requirements for accountability and openness. HEFCE's guidance therefore suggests that confidentiality clauses in settlement agreements should be the exception rather than the norm. Any confidentiality clause should leave the transaction open to scrutiny by the National Audit Office and the Public Accounts Committee.

Decisions on remuneration

The letter also reminds remuneration committees of the need to place remuneration decisions in the context of charity law, to follow the principles of the HE Code of Governance, have regard to the Good Pay Guide for Charities and Social Enterprises and, if necessary, seek legal advice.

Seek advice!

Undoubtedly, and definitely as a result of HEFCE Circular Letter 17/2017, any university wanting to make a severance payment to a member of staff earning over £100,000 a year would be well advised to seek legal advice on its obligations and the terms of that payment before doing so.

Tom Long
Legal Director, Employment
T: 0121 237 3061
E: tom.long@shma.co.uk

Gender pay gap reporting - are you still avoiding the gap?

As the summer months draw in, it is difficult to think back to the darker days of March 2017 which heralded the arrival of The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (the "Regulations"), which require public sector organisations with over 250 UK-based employees to calculate and publish their gender pay gap information.

Whilst most people are thinking about their impending summer holidays we thought that, as almost four months has passed since the snapshot date, now is an opportune moment to remind ourselves of the requirements of the Regulations and to see what steps universities have taken (or not) to publish their data.

In summary, the Regulations require that the following information is published:

- The difference between the mean hourly rate of pay of male full-pay relevant employees and that of female full-pay relevant employees;
- The difference between the median hourly rate of pay of male full-time relevant employees and that of female full-time relevant employees;
- The difference between the mean bonus pay paid to male relevant employees and that paid to female relevant employees in the year ending with the snapshot date;
- The difference between the median bonus pay paid to male relevant employees and that paid to female relevant employees in the year ending with the snapshot date;
- The percentage of male and female employees who were paid bonus pay; and
- The proportions of male and female full pay relevant employees in each of the four pay bands (quartiles), based on a university's overall pay range.

As if this isn't enough, universities will need to consider carefully who is an 'employee' under the Regulations, the definition being wider than covering just those who have a contract of employment with the university.

At this point in time there are a limited number of trailblazer organisations (27 in total) who have decided to take an early lead and publish their gender pay gap information on their own website and the required government site. Those that have include:

- PWC - median hourly pay gap 34.4%;
- Virgin Money PLC – median bonus gap 40.7%;
- Department for Education – median hourly pay gap 5.9%; and
- One Midlands FE college - median hourly pay gap 3.2%.

Currently the published information does not include any HE institutions, and our discussions

with universities tend to suggest that, as a sector, HE is considering its position carefully.

Whilst 30 March 2018 may seem like a long way into the next academic year, universities do need to ensure that they are ready to publish the required data on time. Further, calculating the gender pay gap is not necessarily the end of the story, as organisations are encouraged to provide explanatory notes for the data. Some organisations have commendably published full reports setting out their gender pay gap data and the steps they consider need to be taken to close the identified gaps and the identified reasons for these. This is something universities may wish to consider, especially in light of the fact that large pay gaps without any explanation could lead to questions from the current workforce, trade unions and prospective talent.

Tom Long
Legal Director, Employment
T: 0121 237 3061
E: tom.long@shma.co.uk