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Perspectives

Legal updates for the world of higher education

April 2020

Dear Colleague,

At the time of writing, the UK (and much of the world) is in lockdown to seek to slow the spread of the coronavirus Covid-19. In one sense, it is "business as usual" as many businesses continue to deliver their goods, services and facilities. However, it is clearly not "business as usual" as many businesses, institutions and organisations have either had to cease their usual activities or adapt in significant ways.

As a business, we have moved to home-working for all (save for essential facilities and IT staff) across our 6 UK offices – Birmingham, Cambridge, Norwich, Leeds, London and Manchester. We have increased the quantity of free legal resources across all the sectors to which we provide services in order to provide additional support at this difficult time. Further details are set out at the end of this briefing.

We are also privileged to be able to continue to provide support as a corporate partner to the charity IntoUniversity which itself supports young people from disadvantaged backgrounds. IntoUniversity had to close all of its learning centres but has moved to providing much-valued support remotely for its young people. You can find out more from its website www.intouniversity.org

This month we were due to be speaking at the Association of Heads of University Administration's annual conference, hosted this year by the University of Winchester. Our plan was to take a fresh look at the law relating to "whistleblowing". In keeping with providing as much "business as usual", we have kept with this theme for this edition of Perspectives.

Employment partner Nicola Brown will look at developments in the Public Interest Disclosure Act 1998 from an employment law perspective, Robert Renfree will look at the UK Supreme Court's decision concerning the data breach by an employee of the supermarket Morrisons and I will look at the framework for raising concerns in the higher education sector as part of a wider look at the "language of regulation."

In this issue…

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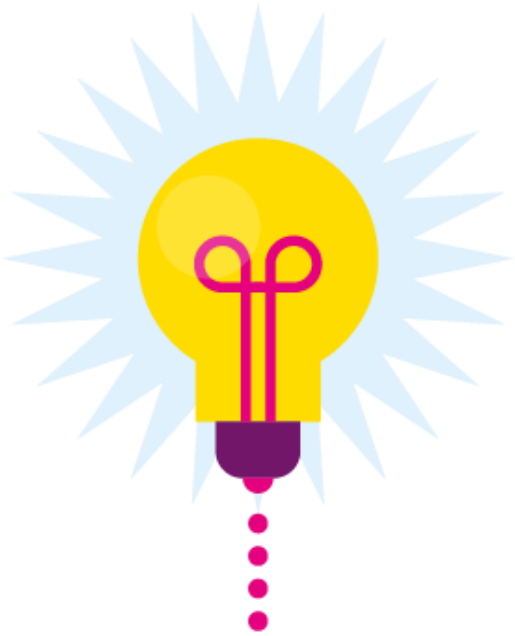

Shortlisted for our work with IntoUniversity

In partnership with national education charity IntoUniversity, we have been shortlisted for a Third Sector Business Charity Award 2020 - Charity Partnership - legal category. We have been working with IntoUniversity for the past eight years to support students from disadvantaged backgrounds to achieve their ambitions.

Our multifaceted partnership across five locations, includes funding, fundraising, volunteering and strategic support, all of which having contributed to the huge success of our long-term relationship. Award winners will be announced on 20 May. IntoUniversity gives such valuable support to young people. More important than ever in these difficult times.

IntoUniversity

ThirdSector Business Charity Awards Shortlist 2020

Fusion Education Law Blog

The Language of Regulation

The Higher Education and Research Act 2017 (HERA2017) heralded in a new language for those working in this sector. We highlight in bold some of the new words and concepts in this briefing note. Their meaning and impact are likely to unfold over time.

A new regulator – the Office for Students – was established by HERA2017 and OfS set out what it was going to do in a Regulatory Framework. This was published in February 2018 and presented to Parliament.

We have previously highlighted and examined the concept of "reportable events". As defined by the OfS, these are:

"any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration."

There has been considerable debate in the sector over what is (or is not) - and what should (or should not) - be included in this concept. Readers will be aware that the OfS issued new guidance on 26 March 2020 with a revised explanation of what is included within the scope of this concept during the coronavirus pandemic.

Reportable events (whatever their scope) are circumstances which must be reported by a registered English Higher Education Provider to the regulator, the OfS. By contrast Notifications are complaints or concerns raised by others with the OfS which may be of interest to them. As the OfS website makes clear, the OfS has no direct role in dealing with disputes between students and higher education providers. However, the OfS will receive complaints from students, staff and other people and organisations. We would expect that a Notification would need to engage the OfS's regulatory jurisdiction in some way for it to be considered by the OfS.

OfS will take such information into account in its general monitoring of registered providers as it confirms in paragraphs 145/6 of the Regulatory Framework:

"The OfS will also draw on information volunteered by providers and others, including whistleblowers, as well as any wider experience it gains through contact with that provider.

The OfS will seek input from students – this may be insights from lead indicators from the national student surveys, complaints raised with the OIA, or by inviting information from individual students and student bodies."

Lead indicators are various chosen datasets which, as explained in the Regulatory Framework, "will provide signals of change in a provider's circumstances". The Regulatory Framework said (paragraph 136) that these were likely to include:

- overall student numbers and patterns that might suggest unplanned and/or unmanaged growth or contraction
- applications, offers and acceptances for students with different characteristics
- changes in student entry requirements and the qualifications profile of students on entry
- continuation and completion rates
- performance in the Teaching Excellence Framework
- degree and other outcomes, including differential outcomes for students with different characteristics, or where there is an unexpected and/or unexplained increase in the number of firsts or 2:1s awarded
- the number, nature or pattern of complaints to the OIA
- graduate employment and, in particular, progression to professional jobs and postgraduate study
- composite financial viability and sustainability indicators based on annual financial statements and forecasts

The OfS will consider the lead indicators – and other information – and consider "whether the provider is at increased risk of a breach of one or more of its ongoing conditions of registration.

These indicators are extremely important to how the OfS exercises its regulatory jurisdiction. This was recently exemplified in what the OfS described as a "landmark victory" when it successfully defended a judicial review challenge in the High Court: R (on the application of Bloomsbury Institute Limited) -v- the Office for Students [2020] EWHC 580 (Admin), 12 March 2020.

The legal proceedings had been brought by Bloomsbury Institute Limited which is a for-profit provider of business, law and accountancy courses. OfS had refused its application to be registered. While this was a case of the OfS exercising its regulatory jurisdiction in respect of an institution seeking to get onto the Register of English Higher Education Providers, reference was made by the Judge to the Regulatory Framework and the lead indicators, in particular Student continuation and completion rates and rates of progression to professional employment or post-graduate study. These datasets were included in the Condition B3 requirements of the conditions of registration and OfS had concluded that Bloomsbury Institute Limited had failed to satisfy the requirements. The institution had not been able to show that the OfS had erred in law in the application of its regulatory jurisdiction on the facts of that case.

The OfS has powers of intervention for institutions which are on the Register including:

- enhanced monitoring of providers
- imposing specific ongoing conditions of registration
- imposing formal sanctions:
  - Monetary Penalties
  - Suspension from the Register
  - Deregistration

Each of these concepts will require close examination to understand their meaning and impact on registered higher education providers. The OfS has, however, confirmed that all its current consultations (including in respect of Monetary Penalties) have been suspended during the coronavirus pandemic period.

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Whistleblowing: recent developments

Nicola Brown reports that case law is continuing to expand the scope of our whistleblowing legislation, though questions are still being asked about whether it goes far enough.

The early days of the coronavirus crisis reminded us about how much society across the world still depends on whistleblowers, and how badly they are often treated. The course of the pandemic might have been different if the Chinese authorities had listened to ophthalmologist Li Wen Liang at the outset, rather than trying to silence him.

The situation in the UK is of course very different, but unfortunately employers do not always engage with whistleblowers when they should, and in extreme cases do try to silence them.

Britain's whistleblowing law goes back to 1989. In 2013 it was considerably strengthened by imposing personal liability on workers who subject a whistleblower to a detriment, as well as making employers vicariously liable for these actions. Over the past couple of years, case law has been emerging which gives useful guidance on the effect of these new provisions.

Similar legislation applies in Northern Ireland, but this article addresses the law in Great Britain only.

A quick reminder of the scope of protection

Current and former workers (but currently not job applicants, except in the NHS) are protected from being subjected to a "detriment", or from being dismissed, because they have made a "protected disclosure". This protection extends not only to actions by employers, but also to the actions of other workers engaged by them, or to agents acting with their authority.

The definition of protected disclosure is complicated. However, the basic position is that a worker's disclosures to an employer are protected if they include information which "tends to show" that the law is being broken or any person's health and safety is being endangered. The worker must also reasonably believe that the disclosure is being made in the public interest.

Are office-holders protected?

The definition of workers who are protected is wider than under ordinary employment law and has been further extended by case law to include:

- An equity partner in Clyde & Co LLP;
- Judges and potentially other office-holders.

The Supreme Court found that District Judge Gilham (who was an office-holder not a worker under the relevant law) was protected by virtue of the European Convention on Human Rights. The case in the Supreme Court focussed on whether or not District Judge Gilham had a contract, as the legislation says that protection extends to (my emphasis)

"an individual who has entered into or works under (or where the employment has ceased, worked under) —

> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."*

The Supreme Court extended the definition to include in that particular case (my emphasis):

"an individual who works or worked by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder."

This case potentially has implications for other office-holders such as non-executive directors and members of governing bodies at HEIs. Such individuals usually hold their appointment under the provisions of the relevant governing documents. Whether or not they have a contract as well will be dependent on the individual circumstances, but in the light of Gilham it seems they may be protected if they can show an interference with a Convention right, which in District Judge Gilham's case was the right to freedom of expression (Article 10).

How far does personal liability for whistleblowing extend?

Colleagues who victimise whistleblowers are personally liable for the detriment caused. It was unclear if this extended to them being liable for the consequences of any dismissal. This was clarified 18 months ago when the Court of Appeal ruled on a case involving two-non-executive directors, who were, to varying degrees, responsible for the dismissal of the chief executive of an oil exploration company (Mr Osipov). He had raised concerns about "serious wrongdoing" in relation to the company's activities in Niger, and the employment tribunal accepted that it was for this reason that he had been dismissed.

Because the company was insolvent by the time proceedings were issued, Mr Osipov decided to name the two NEDs as joint respondents. In the end, the Court of Appeal upheld an award against both these individuals jointly and severally. It confirmed that the compensation could extend to the consequences of the dismissal, resulting in an award of well over £1 million. In practice is seems that there was no loss that Mr Osipov could not claim against these individuals, except his basic award for unfair dismissal.

This extension of liability is a useful reminder to all workers in HEIs (which may include members of governing bodies (see above)) not to subject other workers to a detriment by virtue of a protected disclosure and can be a useful point to raise when encouraging good practice by workers, in the same way as potential personal liability for discrimination.

Is an employer liable for a dismissal when the person dismissing did not know about the whistleblowing?

The primary remedy for employee whistleblowers who are dismissed is a claim for automatically unfair dismissal. No continuous service is required for these claims and there is no limit on the amount of compensation that can be awarded.

However, until a ruling from the Supreme Court last year involving Ms Jhuti, it was not completely clear how our courts should determine the reason for dismissal in whistleblowing cases. Ms Jhuti's case was a very unusual one, because the person who made the decision to dismiss her was not aware that she had made protected disclosures. That knowledge was held by another senior person in the organisation who used his influence to manipulate his employer's disciplinary procedures to ensure that she was dismissed.

The Court of Appeal, applying earlier case law, thought that this lack of knowledge by the decision-maker prevented Ms Jhuti from being able to establish that the "reason" for her dismissal was that she had made a protected disclosure. The Supreme Court overturned this ruling, saying that in these exceptional circumstances the manipulator's motivation could be attributed to the employer which was therefore liable.

This is a potentially far-reaching case not only for whistleblowing but also for unfair dismissal. HEIs should be even more careful when dismissing whistleblowers to ensure that a fair process is followed.

Looking ahead

Legislative activity is currently largely on hold because of the coronavirus crisis, but the Government has long faced calls to strengthen whistleblowing legislation, particularly by extending protection to job applicants. This is a feature of the first EU Whistleblowing Directive which came into effect last year. It will not become part of UK law if the Brexit transitional period ends at the end of the year, as planned. But given the economic disruption caused by the global pandemic, it is possible that this period could be extended long enough for the Directive to be incorporated into our domestic law.

In the shorter term, it is more likely that the regulatory framework will be tightened to promote best practice on dealing with whistleblowers. We have already seen this happening in the NHS and the financial services sector but it is not clear the extent to which the OfS envisages similar changes for the HE sector.

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The UK education and research sector is internationally renowned. Our **market-leading team** assists clients in managing the complexities of the rapidly changing legal, commercial and regulatory landscape.

Supreme Court finds employer not liable for rogue employee's data breach

Overturning previous rulings in the High Court and Court of Appeal, the Supreme Court has this month held that Morrisons was not vicariously liable for the actions of a former employee, Andrew Skelton. The judgment is not just of interest from a data protection perspective, but also from the perspective of wider questions of employer liability for the acts of others.

Background

In summary, a disgruntled senior IT auditor employed by Morrisons, Andrew Skelton, had sought to damage his employer and other staff by unlawfully posting data online relating to nearly 100,000 Morrisons employees. The data included employee names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank sort codes and bank account numbers.

Skelton had lawful access to this information in the course of his duties, for the purpose of providing it to Morrisons' external auditors. Unknown to his employer, he made his own copy of the information and uploaded it to a file sharing website. The data remained public for two months before Morrisons were alerted to the situation and took steps to prevent access to the data.

Skelton was subsequently sentenced to 8 years' imprisonment for offences under the Computer Misuse Act 1990 and the Data Protection 1998 Act (DPA).

Nearly 10,000 Morrisons employees then brought civil proceedings against their employer, contending that either Morrisons had itself breached the DPA ("direct liability"), or alternatively that it was vicariously liable for its employee's (Skelton's) actions that were in breach of his own obligations under the DPA and under the common law in respect of his duties as regards confidential and private information.

The direct liability claim failed at the High Court, which held that Morrisons had not itself breached the DPA in any material way. However both the High Court and Court of Appeal held that Morrisons nonetheless had vicarious liability for Mr Skelton's activities, which were also in breach of his own duties under the DPA and at common law.

The Supreme Court

In finding that Morrisons had no vicarious liability, the Supreme Court judgment concluded that the Court of Appeal had incorrectly applied the law. The court considered various earlier relevant case law, in particular cases concerning how "closely connected" an employee's actions must be to their duties to be regarded as an activity within the scope of their employment, and therefore potentially within the scope of vicarious liability. The Supreme Court highlighted that on the facts, the following were material to its decision that Morrisons had no vicarious liability for Skelton's actions:

- "the disclosure of the data on the Internet did not form part of Skelton's functions or field of activities";
- The lower courts had misapplied earlier case law which had been concerned with whether "the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply.", rather than the issue in the present case, which was the application of the "close connection" test;
- "although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG [Morrison's external auditors] and his disclosing it on the internet, a temporal or causal connection does not in itself satisfy the close connection test";
- "the reason why Skelton acted wrongfully was not irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was highly material."

Conclusions

The conclusion reached by the Supreme Court was that:

"in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment."

However the Court has not completely shut the door to the possibility of 'no fault' vicarious liability under the DPA arising on different facts (a ruling which would likely also apply to the current data protection regime under the GDPR and the Data Protection Act 2018). It remains to be seen whether such a claim might arise in a case where an employer has no direct DPA/GDPR liability. However the Supreme Court judgment will nonetheless be of considerable comfort to employers and data controllers concerned by the earlier vicarious liability findings in the Morrisons litigation.

On the same day as the Morrisons judgment, the Supreme Court also delivered a ruling holding that Barclays Bank was not vicariously liable for acts of sexual assault committed by a self-employed doctor that it had engaged to conduct pre-employment medical assessments. Like the Morrisons judgment, this also overturned a Court of Appeal ruling which had upheld a High Court finding that Barclays had vicarious liability.

The fact that cases on vicarious liability reach the Supreme Court on a regular basis, and often involve overturning the judgments of lower courts underline the complex legal and factual analysis which can be required in cases of vicarious liability.

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About Mills & Reeve

Mills & Reeve offers a deep knowledge of the higher education sector and the commercial strength of one of the UK's leading national law firms.

Our multi-disciplinary team is ranked in tier 1 in the UK legal directories for advising the higher education sector.

We have supported our clients in over 75 jurisdictions through our international network of law firms around the world.

The Sunday Times has recognised us as a Top 100 Best Employer for the last 16 consecutive years; the only UK law firm to have achieved this. We work hard to create a culture where everyone feels that they contribute and can make a difference, delivering outstanding service to our clients.