Bevan Brittan

Employment Eye

Higher Education in Focus

December 2019

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Employment Eye

Higher Education in Focus

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Welcome to the December 2019 edition of our update on employment law issues of particular relevance to Higher Education institutions. This supplements our regular workforce law update, Employment Eye, and is published quarterly.

Please email **subscriptions@bevanbrittan.com** if you would like to sign up to receive our regular employment bulletin, Employment Eye, and if you would like to receive invitations to our free in-house employment law training events.

Ashley Norman heads our employment law services to the higher education sector and would be pleased to discuss any issues relating to employment law, immigration and student matters.

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The General Election.... what to expect in Higher Education from the Conservative government

The results of the 2019 UK general election saw the Conservative Party gain a significant majority in the House of Commons, allowing Boris Johnson to retain his role as Prime Minister and form a new Tory government.

The key theme of the Party's manifesto was to "get Brexit done" and it is likely that this will still consume the majority of parliamentary and government time. Although the Conservative party has not made radical proposals for education, there were some points to note for higher education in their 2019 election manifesto. The first reference was to the Augar Review which the manifesto promises to 'consider carefully'. The manifesto notes that the review made recommendations on tuition fee levels and the balance of funding for universities. As the review recommended lowering the undergraduate fee cap to £7,500, it is unclear whether the government will look to meet this recommendation or not, but it is most likely that they may freeze tuition fees at their current level of £9,250, at least in the short term.

The manifesto also pledges to look at the interest rates on loan repayments with a view to reducing the burden of debts on students. Again, it is unclear exactly what this means, but the Augar Review has suggested that there be no real rate of interest charged during the period of study and the repayment threshold be reduced to the median salary for non-graduates. The review also recommended that the sliding scale of interest based on salary is retained and lifetime repayments are capped at 1.2 times the original loan amount to avoid those with higher salaries paying less overall by virtue of paying it back more quickly.

Further pledges from the manifesto promise to tackle the issue of grade inflation, low quality courses and the application and offer system for undergraduates committing to observe principles of fairness, quality of learning, and access to education. They also look to strengthen academic freedom and free speech, strengthening universities and colleges' civic role.

University strikes

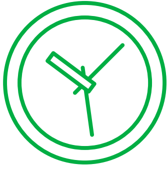
November saw staff at 60 universities undertake eight days of strike action against their employers, escalating concerns regarding pensions, pay and working conditions. The strikes were co-ordinated by the University and College Union ('UCU') and involved over 40,000 union members from lecturers, to support staff. The strikes caused considerable disruption across the affected universities and put a halt to scheduled classes from 25 November until the 4 December.

University staff have been concerned about the pay disparity between the senior managers of the organisations, and those who deliver and support the services. Vice-chancellors' salaries have been generally increasing rapidly, whereas the UCU has reported that the average pay for university staff has fallen 17 per cent in real terms since 2009. At the University of Manchester, 2,200 UCU members joined the picket line raising banners criticising the vice chancellor, Nancy Rothwell for "failing to listen to the concerns of staff", whilst receiving an annual salary of £260,399. Further criticisms were made of the university's finances in light of changes employees' pensions and allegations of unequal pay for BME staff which have caused hardship for junior members of staff. Concerns were fuelled by the apparent influx of seemingly lucrative leases with branded restaurants and bars restaurants including the fast food chain, Five Guys, and pub chain, Brewdog.

Other staff have claimed that their fixed-term contracts have been made their lives difficult to manage. Staff have noticed a reluctance from universities to commit to employing staff long term, frequently engaging them on 12 month contracts which leave them looking for work and having difficulty with their personal financial lives. One teaching assistant at the University of Manchester claimed that her contract of six hours a week for 20 weeks a year was the reason she had been refused a credit card as it was not secure enough as a form of income.

Other sources of dispute surround the Universities Superannuation Scheme ('USS'), one of Britain's largest private pension schemes with 420,000 members and £67 by in assets. Academics and their employers currently disagree on the scheme's financial position and there are concerns over its governance. The relationship between the two sides is currently in a poor state following the sacking of a whistle-blower from the trustee's board in October of this year.

The UCU general secretary, Jo Grady, has warned that there may be a further wave of strikes if universities do not offer a long-term, sustainable solution to the concerns raised by staff. Universities also need to bear in mind the mixed reaction from students. Whilst some have come out in solidarity for their teaching and support staff, others have expressed dissatisfaction in the loss of teaching time. Students at Bangor University have been writing to their university stating an entitlement to compensation. It is unclear at this stage whether or not these claims pose a serious threat to universities, however, it is in any case in the interests of all parties to attempt to reach some kind of resolution.



Extending time in tribunal cases

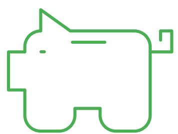
(Caterham School v Rose, EAT)

This case gives an update on the application of the current guidelines for granting an extension of time. At the initial Tribunal hearing, the claimant, Mrs Rose brought claims of direct sex and age discrimination, harassment, unpaid holiday pay and constructive unfair dismissal as a result of the alleged discriminatory conduct of the respondent. The conduct complained of involved a variety of alleged remarks made by the school's head teacher relating to her age and sex.

The Claimant subsequently resigned on 24 August 2017 and claimed that she was constructively dismissed as a result of continuing acts that constituted a cumulative breach of the implied term of mutual trust and confidence.

At a preliminary hearing, the judge was presented with a series of claims that had been brought out of time. She held that the claims for unfair dismissal, unpaid holiday pay and harassment had been brought out of time but considered that there had been discriminatory conduct extending over a period and that time had started to run for all 2017 complaints from 24 August 2017 and it was just and equitable to extend time for all of them. The query at the appeal was whether or not there had been a substantive determination from the judge in relation to this matter or whether it had been only a prima facie determination that the claimant may have a case to that effect.

The EAT held that the Tribunal *had* substantively decided the extension of time point as opposed to making a prima facie conclusion, and had subsequently made an error of law by deciding it was just and equitable to extend time. The EAT had considered that at this preliminary hearing, the judge had not had not satisfactorily explored the factual basis of the matters complained of, and therefore would have been unable to safely conclude whether or not there had been conduct extending over a continuous period. The EAT concluded that this approach was erroneous and that Tribunals should only make these kinds of decisions based upon suitable evidence. Without actually hearing the relevant evidence, a judge cannot make findings of fact and will be unable to determine whether or not conduct constituted 'conduct extending over a period'. The Tribunal had erred in its decision to grant an extension of time.



Redundancy and pension entitlements

(Downe v Universities Superannuation Scheme, HC)

This case considered the definition of redundancy under the Consolidated Rules of the USS ("the USS Rules") and an individual's entitlement to an unreduced pension on termination of her employment. The Appellant, Ms Downe had agreed a termination of her employment with the Society of College, National and University Libraries ("SCONUL") on 16 November 2012 with terms recorded in a compromise agreement. Her claim related to the meaning of Rule 11.2.1 of the USS Rules and specifically, the meaning of termination 'by reason of redundancy'. If this was found to be satisfied, then Ms Downe would be entitled to an unreduced pension from the date on which her employment terminated.

The decision was heard by the High Court which had to consider the meaning of the USS Rules and the implication on Ms Downe's case. Ms Downe carried out a number of roles whilst working at SCONUL including accounts and events management. Unfortunately, she had a poor working relationship with her manager who joined as an Executive Director in 2010 and Ms Downe went on long-term sick leave on 27 April 2012, citing a stress related illness. In August, SCONUL's human resources manager discussed two options to address Ms Downe's situation. The first option of a "without prejudice conversation" and an "amicable separation" if she felt unable to return to work; the second was a phased return in September. Ms Downe opted for the latter and returned to work in September 2012. However the following month, Ms Downe informed human resources that she was still having problems with her manager.

Later that month, the Executive Director proposed a restructure which was approved at board level. Although the restructure did not seek to reduce the number of staff, the main differences would be in 'the focus of the new roles within the structure and a change in the balance of between the work carried out internally as opposed to being outsourced'. Ms Downe expressed an interest in negotiating severance which took into consideration that her role may be redundant as a result of the approved restructure. Severance terms were negotiated and Ms Downe entered into a Compromise Agreement with SCONUL on 30 November 2012.

As part of the agreement, Ms Downe was given a sum referred to as "Enhanced Redundancy Pay". However, she later applied for an unreduced pension after receiving the USS booklet that revealed her potential entitlement. Her entitlement would be dependent on whether or not her employment was terminated by reason of redundancy.

Ms Downe said that once she had returned to work, her accounts were being managed by someone else and she had very little left to do. In light of the restructure plans, she argued that her employment had terminated as a result of a redundancy situation. Her employer said that this was not the case and that she had left the organisation voluntarily. When Ms Downe appealed to the Ombudsman, he agreed with SCONUL. The Ombudsman cited reasons that included a lack of coercion by the employer to terminate Ms Downe's employment and the fact that not all reorganisations were redundancies. The Ombudsman appeared primarily concerned with who had initiated the termination and concluded that the termination was not a redundancy as Ms Downe had in fact wanted to leave.

On appeal, the High Court disagreed with the Ombudsman's conclusions. The Court considered that the Obudsman had misdirected its analysis by focussing on the initiation of the termination.

Whilst it is true that a redundancy payment for the purposes of s 139 ERA requires a dismissal, a redundancy for the purposes of an entitlement to an unreduced pension under the USS rules does not require a dismissal. Rule 1.1 defines redundancy as a cessation of eligible employment wholly or mainly attributable to the employer ceasing or intending to cease the activity for which the member was employed or the requirements of the activity for employees of the employer carrying out a particular kind of work ceasing or diminishing. The Court considered that the second limb of the test was relevant in Ms Downe's case and that the Ombudsman had failed to analyse Ms Downe's situation. The Court found that the initiation of the settlement agreement was not relevant to whether or not there was a redundancy situation and allowed Ms Downe's complaint to be remitted to the Ombudsman for re-consideration.

Whistle-blowing and public interest test

(Ibrahim v HCA International Limited, CA)

Heard by the Court of Appeal in November, this case considered the conditions required to make a whistleblowing claim whether or not the correct legal questions had been asked to examine Mr Ibrahim's case.

Mr Ibrahim had been employed by HCA Healthcare as an interpreter from 2008 until October 2016. On 24 January, he issued claims in the Employment Tribunal for unfair dismissal, wrongful dismissal, arrears' of wages, sex discrimination and detriment on the grounds of public interest disclosures made in March 2016. The Employment Tribunal had rejected most of his claims for a variety of reasons, except for the public interest disclosures.

Mr Ibrahim's claimed that he was the subject of false rumours that he had breached patient confidentiality and that a colleague had behaved badly towards him. On initial consideration of this case, the Employment Tribunal ruled that Mr Ibrahim had not identified any legal obligation that may have been breached in either claim. The Tribunal ruled that in any event, the disclosures made by the claimant were not made in the public interest, but rather they were made with a view to the claimant clearing his name and re-establishing his reputation.

On appeal to the EAT, the claimant alleged errors of law in two respects. The first being that a disclosure of information showing that the employer or employee has defamed the claimant is one that tends to show that a person has "failed to comply with a legal obligation". The second was that the finding that the claimant's disclosures were not made in the public interest "[elided] the two stages of the public interest test which are, first, whether the worker genuinely believed that the disclosure was in the public interest and secondly, whether that belief was reasonable". The claimant submitted that it was wrong for the ET to conclude that the public interest test was failed because the claimant's motive was to clear his own name.

The Court considered the decision of Chesterton in 2017 which held that a worker can believe that a disclosure is in the public interest while not being motivated by that belief. In light of this, it considered that the Tribunal had in fact misdirected its analysis of the claimant's position and should have spent more time asking the claimant whether he believed that he was acting in the public interest when he made his disclosures in 2016. The Court considered that the case had to be remitted back to the Tribunal for reconsideration of the legal issues.

Supreme Court weighs up liability for data breach

(WM Morrisons Supermarkets plc v Various Claimants, SC)

This case concerns the application of vicarious liability for breaches of the Data Protection Act or misuse of private information or breach of confidence and was heard by the Supreme Court in early November 2019. The supermarket was appealing an earlier decision. The judgment is yet to be handed down.

The claimants were bringing claims for damages for breaches of the Data Protection Act against their employer, the supermarket chain, Morrisons, from whom their data had been leaked.

The data was leaked in November 2013 when a disgruntled employee downloaded the payroll data of almost 100,000 employees and uploaded it onto a file sharing website. In doing so, he used the date of birth of another employee in an attempt to frame him and shared the upload anonymously to three UK newspapers, pretending to be a concerned person who had discovered the breach. It was a deliberate act taken by the employee motivated by a grudge against his employer.

Morrisons was alerted to the data breach on 13 March 2014 and within a few hours had taken steps to have the website taken down and had also alerted the police. The employee was identified and arrested on 16 March 2014. He was charged with fraud under the Computer Misuse Act 1990 and s 55 of the DPA. He was convicted and sentenced to a term of eight years in prison.

Proceedings were commenced by 5,518 employees of Morrisons on 8 December 2015 for which the Court of Appeal held Morrisons liable for the employee's acts; Morrisons appealed to the Supreme Court. The issues were: whether or not the Data Protection Act excluded liability for wrongful processing of personal data by an employee, and whether or not the acts occurred during the course of the employee's employment (and thus, whether or not the principle of vicarious liability applied).

On the first issue, the Court found that there had been no exclusion for vicarious liability in the Data Protection Act and if there had, Parliament would have been more explicit about it, and ensured that the Act had dealt with this exclusion more thoroughly. On the second issue, the Court found that the uploading of the information and the employee's actions at work had been a seamless and continuous sequence of events and the employer was vicariously liable, ensuring that the 5,518 employees who had brought a claim had a remedy available to them. We await the Supreme Court's findings on the Court of Appeal's decision.

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