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Higher Education Review



Welcome to the first edition of our review exclusively for Universities

Our dedicated Education Team have a working understanding of the operational challenges you face and includes individuals who have worked in Higher Education institutions both delivering legal advice and contributing to the management.

In this Review, we look at age discrimination, student contracts and The Charities Act 2006 for HE bodies. The articles provide a practical view on how to achieve best practice within the legal framework in which you operate. If you would like to discuss the issues raised then please let me know or contact the author who will be very happy to discuss these with you.

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Age discrimination: traps for the unwary

In a time where landmark employment law rulings seem to hit the papers every other day, it is unsurprising that the impact of the Age Discrimination Regulations, now two years old, have created thorny issues for universities in the way they recruit, promote and dismiss their staff.

A key issue which affects all these aspects is length of experience. Experience is often intrinsically linked with age, but universities need to determine how to recruit and retain the most suitable staff for their vacancies without falling foul of the age discrimination laws.

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Job Advertisements

Whilst most employers have realised that advertisements calling for “young” or “mature” individuals are no longer acceptable, many recruiters still specify a minimum (or maximum) number of years’ experience for candidates to be suitable for the role. Although no age category is specified, referring to a particular number of years of experience could still effectively exclude younger or older candidates, who would either have too few or too many years’ experience for the role.

The recent case of *Rainbow v Milton Keynes Council* is an example of an employer being caught out by a discriminatory job advert. Mrs Rainbow, a 61 year old applicant with over 30 years’ experience in teaching, did not get shortlisted for a teaching position which was advertised as suiting someone “in the first five years of their career”. The tribunal determined that there had been indirect discrimination against Mrs Rainbow and that if costs were to be used as justification then the employer would have to show that it was “more or less compelled” to take the discriminatory action to lower its costs.

Action Points:

- **Avoid any reference to a specific number of years’ experience when recruiting;**
- **A candidate with vastly greater experience than had been envisaged for the role should not be excluded from interview on the basis of being ‘over-qualified’.**

Redundancy Selection Criteria

When deciding selection criteria for redundancies, many employers have avoided using length of service as a selection criterion, fearing that this would be considered in breach of the age discrimination legislation.

However, a landmark ruling last month established that this was not necessarily the case. The High Court, in the case of *Rolls Royce v UNITE*, agreed that giving extra points for length of service was justified, even if it intrinsically favoured older workers, as older workers may find it more difficult to find new work after being made redundant.

However, the High Court indicated it would not have been acceptable if the redundancy selections were determined solely by length of service.

Promotions and Retirement

The thorny issues of promotions and retirement are often interlinked. For example, vacancies for professorships often arise only when an existing professor leaves, which means many universities need to carefully balance between the need to retain the rich experience of the long-serving professors, but without frustrating the ambitions of younger lecturers aiming for professorship.

Some universities aim to retire all academic staff at the age of 65. However, such a strict retirement policy may create tensions among staff. The Open University’s policy recently came under the spotlight when it emerged that new, strict criteria had been introduced to determine whether associate lecturers would be permitted to continue working past age 65.

Lecturers could only be kept on if they fulfilled a critical business need, worked in an area of skill shortage or needed to complete time-limited development work. However, many academic staff complained that such a policy was depriving students of the quality of teaching and teaching experience to be gained from long-serving teaching staff.

Statutory Retirement Procedure

The employer is to inform the employee, between 12 months and 6 months before the expected date of retirement, of their statutory right to request to work beyond the normal age of retirement.

If an employee makes such a request, the employer is required to consider the request. However, there is no statutory obligation to consider the request fairly or reasonably, or to give employees any reason as to why their request was refused.

This means there is nothing, strictly speaking, to prevent an employer setting tight retirement criteria which most employees are unable to meet.

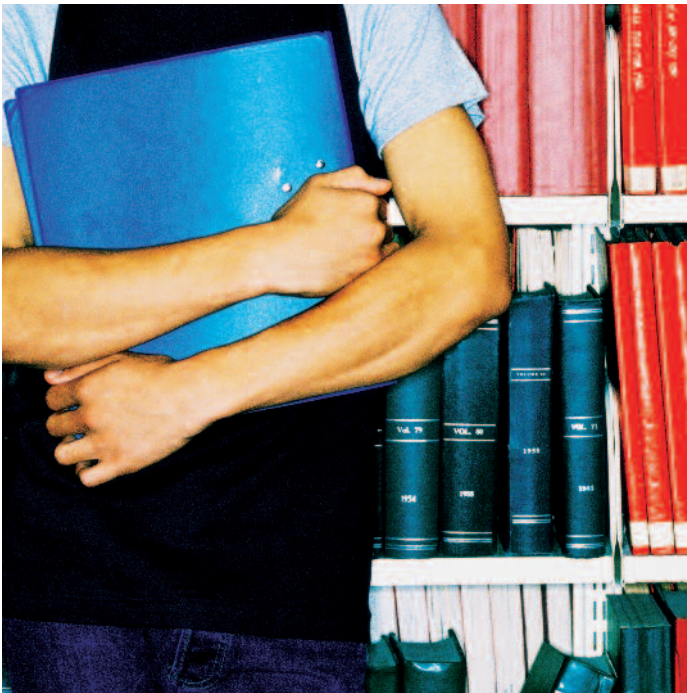
In all issues of recruitment, retention and dismissal of staff, the priority for most universities will be retaining the best quality staff and maintaining staff morale. However, universities will need to tread carefully through the legal landmines to ensure they achieve these goals without finding themselves at the wrong end of an Employment Tribunal claim.

For more information on Age Discrimination or HR Issues please contact:

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Student Contracts

What form should a student contract take?

The HE sector has for several years debated the nature of the legal relationship which exists between a University and its students. It is now accepted, if not always understood, that students have a contractual relationship with Universities and the legal contract which exists comprises a complex, and at times, unclear mixture of oral and written information.

The complexity of oral and written information shared with students by Universities means that there is a significant degree of uncertainty as to what makes up the contract and what a University has committed to do for its students. The position is further complicated because the legal relationship between a University and its students is not simply contractual. It is a complex one governed by several different areas of law which overlap and therefore the legislative framework can require detailed consideration. As a result of this the question continues to be asked "what form should the student contract take?"

Is a rigid legal approach helpful?

One way of giving greater clarity to the legal contract which currently exists between a University and its students is to put in place a formal written contract which students are required to sign on admission. A formal written contract would set out the parties' respective rights and obligations in legal terminology and would refer to other documents, for example, general student regulations to ensure that they are incorporated into the contract by way of reference.

The benefit of this approach is that if a dispute arises there is a clear point of reference as to the parties' respective rights and obligations.

The problem with such an approach is that it runs contrary to how many Universities perceive their relationship with students. Universities recognise the reality of that relationship as being more complex than that of supplier and customer and are eager to emphasise their pastoral role.

There is also a concern that by adopting a rigid legal approach and implementing a written legal contract which seeks to restrict students rights, it may serve to alienate students and actually increase the number of student claims. This is therefore a scenario where legal advisers need to think more sector specifically and be creative in looking to mitigate the risks faced by Universities in relation to student claims, whilst at the same time recognising the delicate nature of the relationship that exists between a University and its students.

Is there an alternative approach?

There are always alternatives to a rigid legal approach. Universities are complex, multipurpose organisations facing increasing commercial and operational pressures. Legal advice therefore has to be given in context and with an appreciation of operational realities. Universities need to consider the risks involved in student claims and weigh them against the need to attract students.

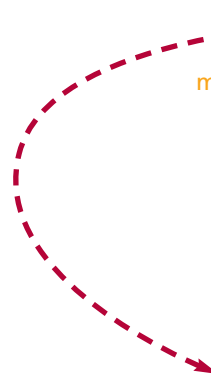
If Universities adopt a flexible approach it will allow them to achieve a middle ground. Universities can take steps to protect their position whilst maintaining the integrity of their relationships with students. This can be done by carrying out a legal review of existing admission arrangements and a legal audit of oral and written information shared with students with a view to preparing a 'student memorandum of understanding' which, in plain English, provides a framework to the complex legal relationship which exists.

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Why should HE bodies take any note of the Charities Act 2006?

Aren't HE institutions exempt from the Act?

That's right. HE institutions previously fell outside the scope of the Charity Commission's monitoring and investigative powers because of the assumption that another government department or public authority adequately oversaw them.

HE bodies remain exempt but, with effect from this year a principal regulator will be given responsibility for monitoring compliance with Charity Law – the Higher Education Funding Council for England (HEFCE).

The Charity Commission will be able to investigate an exempt charity at the request of HEFCE but will be required to consult with HEFCE before exercising any of its powers in relation to the exempt charity.

But what's going to change?

Day-to-day, possibly not a lot. The high profile topic for debate in charity circles and the media has been the question of "public benefit" but we don't see this as a real issue for HE bodies because:

- *the HE sector is highly regulated;*
- *the public benefit of your work is so self-evident; and*
- *there are already in place government-set targets*

But, in a keenly-contested marketplace Governors should always be looking for that competitive "edge". HEFCE will require charity trustees to comply with their legal obligations in exercising control and management of the charity and, in the case of an HE institution, the Governors are the charity trustees. So it will be even more important for Governors to be fully aware of their duties under charity law. Why not see this as an opportunity for your institution rather than as yet another layer of compliance to deal with?

Go on... a couple of pointers

A key theme of the Act is to devolve more administrative powers away from the Charity Commission to those who are responsible for a charity's general control and management, here the Governors. So, for example, there is greater flexibility to change a charity's constitution, to pay trustees for their services (but not when just acting as trustees / governors) and to provide indemnity insurance.

The creation last year of the Charity Tribunal may present HE institutions with a creative opportunity to influence the agenda. It gives charities and other affected parties the chance to challenge Charity Commission decisions in a cost-effective way. So let's say a comedy festival sought charitable status because it was "promoting arts & culture" (one of the new categories of charitable purpose) but this was refused. An HE institution which ran courses on writing and performance and which included comedy writing might have something to say about that in support of the festival and could give evidence in the Charity Tribunal in its support- and gather the plaudits as a result. Seriously!

If you ever receive legacies or might do so in the future and you merge with another HE body consider, as a post-completion step, whether you can register the merger with the Charity Commission. It doesn't cost anything and may mean you receive an unexpected windfall.

What should we do next?

No-one is saying that the implications will be dramatic for HE bodies (as HEFCE suggested in an impact assessment appended to its circular letter dated 20 March 2007) but they are worth monitoring. As a first step, why not have a look at the useful Charity Commission / Cabinet publication "Charities Act 2006: what trustees need to know" and think what that might mean for your University:

http://www.cabinetoffice.gov.uk/~media/assets/www.cabinetoffice.gov.uk/third_sector/charities_act_interactive%20pdf.ashx

If you'd like a confidential, no obligation chat to see if you might be missing a trick, feel free to call:

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Whilst every effort has been made to ensure the accuracy of this review, it does not provide complete coverage of the subjects referred to, and it is not a substitute for professional legal advice and should not be relied upon as such.

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