



EDUCATIONBRIEF



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50 NOT OUT!

Welcome to the 50th edition of Education Brief, our termly bulletin which is designed to introduce you to legal issues of concern for managers in further and higher education.

50 is a big number by anyone's standards and we felt that it was appropriate to look back at some of the law making the news and how we have all changed since our launch 16 years ago.

In looking back what is evident is the huge range of law that has made it to the statute books, and into regulations and guidance, and which has been deliberated by High Court judges, Tribunal chairs and (since 2003) the Office of the Independent Adjudicator. If universities and colleges were complicated places in 1993, they are even more so now, and that perhaps is reflective also of the number of new posts which have arisen during that time, whether dealing with data protection and freedom of information, equality and diversity or environmental issues and climate change. We have also reported on how the more traditional directorships of HR, estates, finance/commerce and the role of the secretary-registrar have also undergone radical change.

Some of the topics we have covered over the years are:

- the impact of new laws dealing with discrimination of all sorts; equality and diversity; part-timers rights; debates over fixed term contracts; pensions; references; and stress;
- addressing environmental issues and climate change - solar, wind, wave power, biomass/bio fuels, CHP, plants and anaerobic digesters; new legal structures to develop campuses and not just as student accommodation; PFI/PPP, joint ventures, share deals;

“If universities and colleges were complicated places in 1993, they are even more so now”

the growth of student accommodation as a distinct investment sector in its own right and the proliferation of new build creating exciting new campuses; studentification and the codification of HMO law; plus significant changes to construction and engineering law, planning law and public procurement;

- the successful exploitation of IPR; utilisation of trading subsidiaries; tax and especially the treatment of VAT and major projects; domain names; the internationalisation of universities and colleges as global businesses, where

China, Malaysia and the US are seen as key partners; and how to access the right capital money at the best price and on the best terms;

- academic freedom of speech; freedom of information and data protection; on-line student contracts; electronic ways of working and the new risks that brings (e-liaible, cyber bullying, e-conveyancing); the treatment of students as consumers with the consequences that has for the nature of

the student contract and any unfair contract terms; human rights; plagiarism; the role of student unions; and significant charity law changes.

As L P Hartley once wrote, “the past is foreign country, they do things differently there”.

And what of Martineau and our Education Team during the past 16 years?

- We have grown our practice from a handful of universities (and in 1993, still just) polytechnics to encompass colleges, following on from the passing

of the Further & Higher Education Act 1992, so that we regularly advise over 90 further and higher education institutions.

Our experience over many years, centred on a core Education Team, allied with key specialists throughout the firm, all of whom know how universities and colleges operate, is unique. We have been recognised, not only by our longstanding and loyal client base (thank you), but also independently by the guides to the legal profession: the Legal 500 and Chambers & Partners rank us top for our education work.

A consistency of approach, focused on our clients and service delivery, has been the hallmark of our practice over the years. We aim to provide clear, easy to understand advice. However, we do not rest on our laurels. We have been very fortunate to have partners at the helm with a passion for education and a willingness to embrace new ideas and ways of working, and Smita Jamdar is no exception. The growth of our practice has seen us recruit many new faces over the years, but we are pleased, too, that a core of lawyers remain from the very earliest days of the team so that our clients get the best advice possible without us learning at their expense.

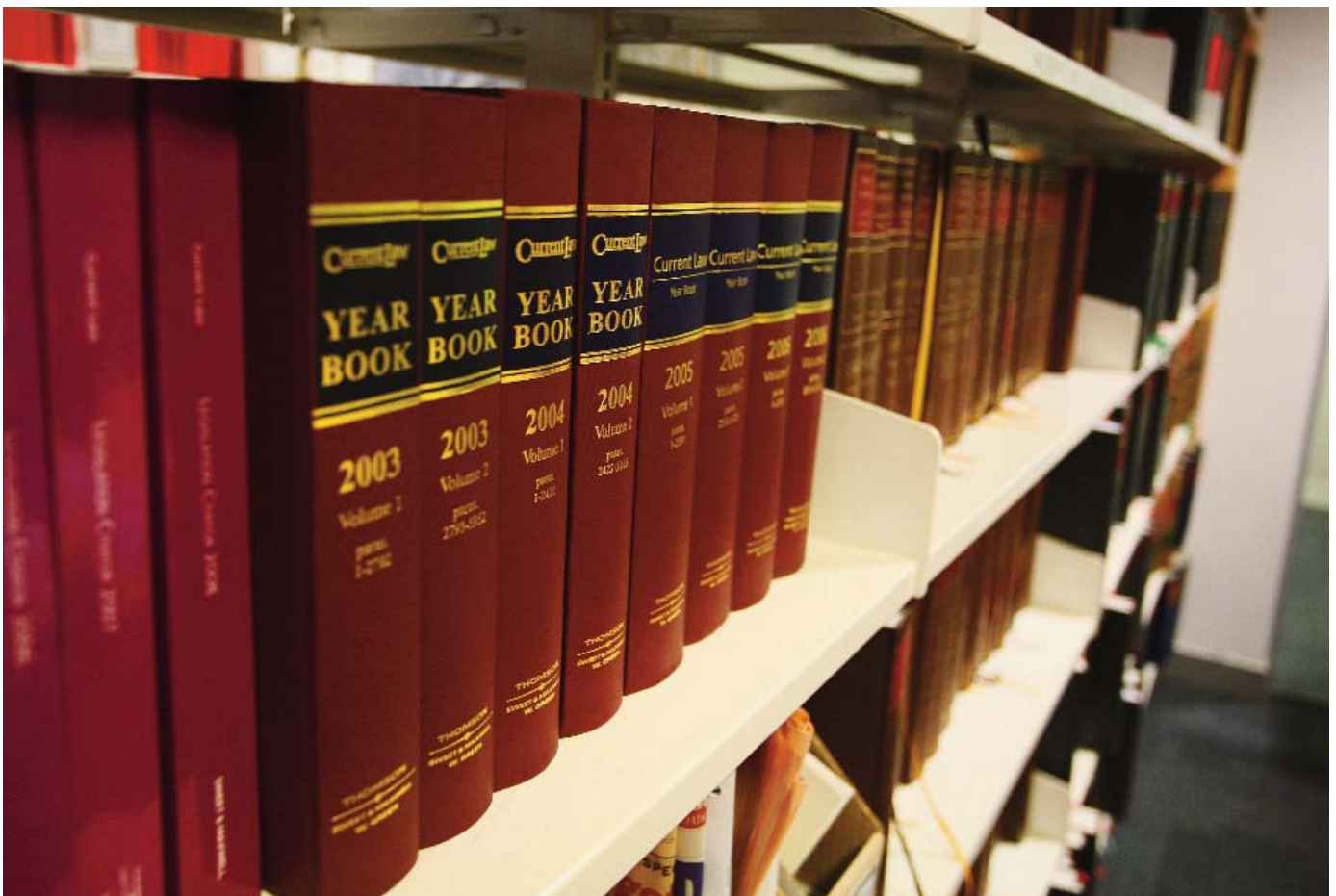
We hope you will enjoy the current edition of Education Brief. In the first edition we said we were striving to be “topical, practical and informative”; we believe we have lived up to that original aim but, as ever, if you have any comments or observations please do not hesitate to let us know - we are always interested to see how we can improve for the next 50 editions.

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DISCRIMINATION BY ASSOCIATION

In issue 45 of Education Brief we reported on the publication of the Advocate General's opinion in a case referred to the European Court of Justice (ECJ) from the Employment Tribunal concerning a claim of disability discrimination by an employee who was not herself disabled, but who was principal carer of her disabled child (EBR Attridge Law LLP (formerly Attridge Law) v Coleman 2009). The Advocate General, who advises the ECJ on the merits of cases, concluded that EU Directive 2000/78, which established a general framework for equal treatment in employment and occupation, including vocational education (i.e. HE and FE), covers cases where an able-bodied employee is treated less favourably by reason of her association with a disabled person. The ECJ agreed.

On 30 October 2009, the EAT considered the ambit of the Disability Discrimination Act 1995 (the DDA) which implements EU Directive 2000/78, in the light of the ECJ's decision. It concluded that it could interpolate words into the DDA to render unlawful "associative" discrimination in order to ensure compatibility with the Directive. The consequence is that the ambit of the DDA is significantly wider than hitherto understood.

The reasoning of the Advocate General was that prejudice deprives disabled individuals of valuable options and as a result erodes human dignity and personal autonomy, values which underpin equality. However, targeting a person who is himself disabled is not the only way of discriminating against



him; there are other subtler, less obvious ways of doing so i.e. by targeting not the disabled individual but persons closely associated with him. The Advocate General's view was that a robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as the dignity of a disabled person is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. As a result of the EAT decision, it is clear that if someone is the object of discrimination on the grounds of disability, he can now avail of the protection of the DDA, even if he himself is not disabled.

Though the EAT interpolated the relevant wording into the employment section only of the DDA, similar wording is likely to be interpolated by a court considering alleged discrimination in HE and FE, in order to

ensure compatibility with the Directive. As a result, institutions will now not only have to take into account the rights of their disabled students not to be treated less favourably, but also the right of those students who are not disabled, but who are the primary carers of disabled persons. Institutions will not, however, incur any liability unless they have knowledge of non-disabled students' roles as carers.

The Equality Bill, which is scheduled to come into force in October 2010, has widely defined direct discrimination to include less favourable treatment of a person who is associated with a disabled person. This will apply in the context of further and higher education.

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WORKING FROM HOME

Working from home can be a tempting alternative to the office. However, you do have to exercise some caution when allowing employees to take work home. The Information Commissioner's Office (ICO) recently found that the Mid Staffordshire NHS Foundation had breached the Data Protection Act 1998 due to the actions of a member of staff.

An employee of the HR department of the Trust transferred personal information about an employee to a home computer. The information included details of the employee's previous criminal conviction, which is defined as "sensitive personal data" under the Data Protection Act and which is, as you might expect, to be treated particularly carefully.

The information transferred was not subject to any protections, such as passwords or encryption and the ICO found that this amounted to a breach of the Data Protection Act. Furthermore, the ICO felt that the Trust did not initially act with sufficient urgency when it became aware of the matter. The Chief Executive of the Trust has had to sign an undertaking confirming that certain security improvements will be made, including new rules for staff working from home.

The Seventh Data Protection Principle requires that:

"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

This requirement can pose problems for organisations when people are working outside the workplace, particularly with the prevalence of laptop and hand held computers. The ICO published a Good Practice Note back in November 2007 recommending that portable devices have appropriate encryption software in place in case they are stolen, lost or left in a taxi, as may be the case. If the devices are not protected with encryption software, the ICO has indicated that it will pursue enforcement action against the relevant organisation.

Marks & Spencer fell into difficulties with the ICO for this reason. M&S employed a company to assist with its pension scheme. In order to enable the company to carry out this work, the personal data of 26,000 members of the M&S pension scheme were

provided to this company. The information was loaded onto a laptop in preparation for a meeting the next day but that night the house of the Managing Director of the company was burgled and the laptop stolen. The information on the laptop was not encrypted and, as a result, M&S was the subject of an enforcement notice from the ICO.

If you do allow staff to work from home or if you provide staff with portable devices such as laptops, you need to consider whether there is a risk of a security breach and take measures to avoid this, such as protecting devices with encryption software. It is also a good idea to make staff aware of the problem and to put in place an appropriate policy regulating how staff are to use personal data when working from home.

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WORKPLACE **PARKING** LEVY

The Workplace Parking Levy (England) Regulations ('the Regulations') came into force on 1 October 2009. The seeds for the Workplace Parking Levy were sown in the Transport Act 2000 ('the Act'), which has been in force since November 2000.

The Act introduced a licensing scheme which allows local authorities to charge for a licence which will be required by, principally, employers as occupiers of premises. The licence is for car parking spaces, which are to be occupied by motor vehicles, which are provided at the employer's place of business and used by, amongst others, employees. Each car parking space will be a "licensed unit".

Universities and colleges fall within the category of a "business" as they provide courses of education or training, which are specifically caught by the Act. In calculating the number of car parking spaces, those provided for students who are attending a course of education or training will be counted, in addition to those used by employees. Parking spaces provided for business customers are also caught by the provisions of the Act.

It is said that the principal aim of the Levy is to provide an incentive to businesses to discourage car commuting and to encourage alternative modes of transport. The measures are also said to be consistent with the government's principles of sustainable development.

The Act allows local authorities to create schemes to cover the whole or part of the area for which that local authority, or licensing authority, has administrative responsibility. A licensing scheme can only be made where it is desirable for the purposes of directly or indirectly facilitating the achievement of policies in the licensing authority's local transport plan.

The first scheme, proposed by Nottingham City Council, has been confirmed and will come into effect in 2012. The Regulations were introduced to provide an appropriate regulatory framework for consideration of their scheme order, although the Regulations themselves will apply to the whole of England excluding London. Nottingham City Council's scheme order has introduced a Levy which will impose fees from £250 per licensed unit and affects businesses with 11 or more staff car parking spaces.

The Council intend to utilise the money paid by way of licence fees to fund a proposed second tramline, and to invest in an improved public transport scheme which includes the following:

- more link bus services and funding to continue existing link services which serve areas not covered by commercial public transport;
- improving Nottingham station with improved connections to buses and trams; and

- increasing support and advice to businesses for travel planning and parking management.

The Regulations are remarkably bare, concentrating in the main on the penalty charges and associated provisions. There is, for example, no procedure laid out for the making of an order or a form for the orders themselves. The Regulations do not specify charging levels, exemptions or discounts. The government considers that these are matters that are best left to the local authority making the licensing scheme.

A licensing scheme is required to be submitted to, and confirmed by, the Secretary of State for Transport and may be confirmed with modifications. The Act does not require a licensing authority to expressly carry out consultation before making, varying or revoking a licensing scheme, but there is an expectation that consultation will take place and that there is an assessment of the impact on those who will be affected by the licensing scheme. A scheme order will not be confirmed if this has not been done.

A licensing scheme must:

- designate the area covered by the scheme;
- state the days on which, and hours during which, a licence is required;
- specify the charges payable on licence (expressed as a specified sum per licensing unit); and

- III state whether or not the licensing scheme is to remain in force indefinitely or the period for which it is to remain in force, if not indefinitely.

The Regulations, as stated above, are in the large part centred around penalty charges. A penalty charge can be imposed in the following circumstances:

- III where workplace parking spaces are provided and there is no licence in force;
- III where the number of vehicles occupying workplace parking spaces exceed the maximum number expressed in the licence;
- III if a condition attached to a licence has been breached.

So is this a burden or a benefit? The British Chamber of Commerce estimated that the Levy, if every local authority introduced a licensing scheme, could cost businesses £3.4 billion each year. Local authorities may have ambitious local transport plans which require funding and the Levy will be seen as a solution. Universities and colleges may benefit in the long run from improved local transport, but a big consideration will be whether the cost per licensed unit can be passed on, for example to staff or students. There would appear to be no reason why the charge cannot be passed on unless there is, unusually, a contractual right to a parking space. Some universities and colleges already charge for parking; would the Levy mean that parking at that institution would be prohibitively expensive?

From an administrative point of view a licence cannot be granted for more than one year at a time, and accordingly there is the burden of ensuring that a licence is renewed and that the information provided upon

renewal is correct to ensure that there is no overpayment or underpayment, exposing the institution to the penalty charge pitfall. A licence may be granted subject to conditions and therefore procedures will need to be in place to ensure that compliance with conditions is being met to ensure that the licence holder is not exposed to penalties for breach of conditions.

If a local authority is considering introducing a Levy education institutions ought to consider inputting into the consultation process as well as assessing what the potential financial liability will be by considering how many liable spaces they have, and how they are going to recover the cost. This will also involve ascertaining who will want to continue to use parking spaces

once the Levy is introduced.

Martineau is committed to environmental issues and to reducing our carbon footprint - see our dedicated climate change portal at <http://www.cc-forum.co.uk/> for further details. In order to find out how our clients are tackling the issue of green travel we have devised a short questionnaire which can be found at <http://www.martineau-uk.com/expertise/property/realestateq.asp> - we would be very grateful if readers could take the time to complete it.

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CHARITIES ACT 2006 UPDATE

HEIs as registered charities

In December 2009, colleges and halls in Cambridge, Durham and Oxford, all HEIs in Wales, and charitable institutions connected to them will lose exempt status and be required to register with the Charity Commission.

HEFCE as principal regulator of HEIs in England

As expected, HEFCE will be one of the first three principal regulators of exempt charities to assume the new role, from a commencement date currently anticipated to be 1 January 2010. HEFCE's understanding is that it will not be required to take action in respect of matters which occur before the commencement date.

The Charity Commission's new powers of intervention in the event of mismanagement or misconduct, exercisable after consultation with HEFCE, is expected to come into force at the same time.

Principal regulators in FE

The legislation creating the Young People's Learning Agency and the Chief Executive of Skills Funding, which will be the principal charity regulators for sixth form colleges and general FE colleges respectively, has only just been granted Royal Assent. It will therefore be some time before the new regime is applied to them.

In the meantime, it seems unlikely that the Charity Commission itself will have the inclination or resource to interest itself in FE.

Students' unions

Students' unions are expected to cease to be exempt charities in December 2009, triggering a requirement to apply to the Charity Commission for registration if their income exceeds £100,000.

The NUS and the Commission have updated their joint guidance on the implications of the 2006 Act for students' unions,

(<http://www.officeronline.co.uk/uniondevelopment/resources/charityregistration/276475.aspx>), although it still states that the Commission's own guidance will be revised in conjunction with NUS, and model clauses will be issued, "in the coming months". The guidance deals with incorporation as well as registration. There has been a widespread misconception that the former is a necessary consequence of the latter.



Public benefit

The Charity Commission is seeking to soothe the indignation of private schools, after two of the first five to be assessed failed its public benefit test. Schools will be allowed five years to improve. One head likened the Commission’s actions to Henry VIII’s dissolution of the monasteries. A Conservative government would apparently refocus the Commission’s approach, although it claims to be applying the existing law rather than redrawing it. Litigation sooner or later, leading to a decision by the newly constituted Supreme Court, seems inevitable.

There have been few suggestions that either HEIs, FE corporations or students’ unions will fail to meet the public interest test, and for HE the emphasis on the availability of bursaries in the case of private schools is an encouraging sign. HEIs subject to HEFCE’s jurisdiction as principal regulator will in future have to demonstrate public benefit to them, but it will be interesting to see how the Charity Commission approaches the issue itself in Wales and with registered institutions in England.

The press persists in referring to the prospect of schools’ being “stripped of charitable status”, implying that they could simply continue as private businesses, but without the tax-breaks. In fact the consequence of continued failure to demonstrate public benefit would be the re-application of a school’s charitable assets in some other way, putting the institution out of business unless the market price could be raised to pay for them, and a deal struck to acquire them. The same would apply to universities’ or colleges’ “going private”, if that means moving from a charitable to a commercial footing.

Charitable incorporated organisations (CIOs)

This is the new form of corporate body which will be available only for registered charities, and may eventually replace the company limited by guarantee as the usual vehicle for incorporated charities - perhaps including students’ unions. The Charity Commission and Office of the Third Sector consulted on regulations and draft constitutions in 2008.

Subject to parliamentary approval of the regulations, CIOs should be up and running in the second quarter of 2010.

So farewell then, Charities Act 2006

The 2006 Act extensively amends the Charities Act 1993, but at present the two have to be read together. Some fragments of earlier legislation also survive. All this is to be replaced by a single piece of legislation.

The Office of the Third Sector is consulting on a draft Charities Consolidation Bill. It does not contain any policy changes, but would provide parliament with another crack at public benefit.

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OPTIMISE: CONTRACTS AND GETTING THE BEST DEAL

Universities and colleges do not need to be told that these are straitened times and the financial constraints are unlikely to ease in the education sector for some time to come. Therefore, any opportunity for savings without reducing purchases and sales is well worth pursuing and may be an easy win.

It is worth asking whether the contractual basis on which you are dealing might be renegotiated, at least to some extent. A supplier might perhaps be willing to give additional discounts or other incentives to keep your business. Maybe a customer is more trouble than he is worth – always complaining and paying late so that you wish you could remove the risk of his financial failure and devote your energies elsewhere.

Depending on what the contract says, you may be able to have your way or at least open a conversation with the supplier or customer that can take you in the right direction.

Most of us know (broadly) what agreements and commitments we have, but if we are truthful we are not close enough to some of the specific contractual detail to know whether the terms would allow us to bring advantageous change about. That is not surprising: we all enter into so many agreements and have other things to do than spend all our time reading the detailed terms.



However, now would be a good time to make an exception and do just that: have a look at all of your contracts. Perhaps start by considering which customers and suppliers are either not giving you a good deal (whether that be on price or for some other reason) and also those where you think there is some kind of heightened risk, for example a customer who might become insolvent owing you a large sum.

Have a close look at some of the key clauses in those documents. As is so often said, the devil is in the detail. Maybe the notice and duration provisions will allow you some way to terminate an agreement much earlier than you thought. Perhaps when you look closely, something a supplier has been doing is indeed a breach and would allow you to terminate. Perhaps a customer's late payments allow you to suspend delivery of services to him until he pays. Perhaps the duration clause affords an early termination.



Exercising such rights is hardly the way to build a great relationship with the other party, but talking to him about the possibility that you might be doing so at some point if you do not get some improvements in your terms might be a very good way to open a negotiation and get a better deal. The improvements you are likely to be looking for include:

- accelerated payment terms or the right to a deposit from a customer;
- insertion of a retention of title clause;
- the right to pay a supplier less or later;
- changes in delivery arrangements – perhaps enhanced acceptance procedures before you have to pay.

These are just a few of the many possibilities and intended as food for thought. What is appropriate or relevant will depend on the individual circumstances of each contract you are looking at.

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SICKNESS DURING ANNUAL LEAVE - ANOTHER BLOW FOR EMPLOYERS

Last month, the European Court of Justice (ECJ) held in the case of *Pereda v Madrid Movilidad SA* [C-277/08 ECJ] that a period of illness whilst on holiday does not count towards the minimum period of four weeks' paid annual leave under the EU Working Time Directive.

Mr Pereda, a specialist driver, suffered an accident at work around 14 days before the commencement of his allocated period of four weeks annual holiday leave. The injury put him out of action for six weeks. Mr Pereda's request for an additional period of holiday was refused. The ECJ ruled that his period of sick leave should not have counted towards his annual holiday leave and Mr Pereda should have been allowed to reschedule it, even if it meant carrying it over to the next leave year.

This case highlights the distinction between the purpose of holiday (i.e. to rest) and the purpose of sick leave (i.e. to recover). This distinction was made by the House of Lords earlier this year, in the case of *HMRC v Stringer* [[2009] UKHL 31], which confirmed the ECJ's prior decision in the same case that the right to paid statutory annual leave continues to accrue during sick leave and, on termination of the employment relationship, a worker who has been on sick leave and has been prevented from taking paid annual leave is entitled to a payment in lieu of that leave.



However, it raises the issue which the House of Lords failed to deal with in *Stringer*, which is that the UK Working Time Regulations only allow for eight days of the 28 days statutory holiday to be carried over, whereas under the Directive it now appears employers may be required to allow employees to carry over the remaining 20 statutory days.

Employers may be reluctant to amend policies to allow annual leave to be carried over before UK case law or legislation has addressed the inconsistency between the UK Regulations and the EU Directive. However, this does risk having to defend Tribunal claims for a breach of the Regulations and/or an unlawful deduction from wages on the basis that Tribunals may construe the Regulations "purposively" in line with the Directive as interpreted by the ECJ. This is more of a risk for universities and colleges, as public sector employers, because their employees can rely directly on the provisions of the Directive.

What is certain is that (following *Stringer*) institutions now not only need to monitor the accumulation of annual leave entitlement for employees on long-term sick leave, but also (following *Pereda*) give employees who request it extra holidays in lieu when they are genuinely sick during annual leave. Institutions should consider making their sickness policy more robust including ensuring the effective management of long term sickness absence and obtaining medical evidence if an employee claims to have been sick when on holiday before reallocating the annual leave.

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EDUCATION NEWS

Top ranking maintained

We are delighted to report that we have maintained our top ranking for education work nationally in the 2010 Legal 500 guide to the legal profession. The firm was described as having “the broadest practice in the market, packing a punch in litigation, regulatory, employment and planning”. Thank you to all of our clients and contacts who contributed to the survey.

Education Breakfast Briefings

The Education Team run three free Breakfast Briefings every term, in Birmingham, London and Leeds. We have many regular attendees but new faces would be very welcome. The briefings are very informal and participants enjoy the

opportunity to discuss issues with colleagues from other institutions. Please see the enclosed flyer for details of next term’s programme, or our dedicated education website at www.educationsolutionsonline.co.uk/training/breakfast.asp



Education Brief aims to introduce you to legal issues of concern to managers in education. It is not a substitute for taking appropriate specialist advice in individual cases. Education Brief may be photocopied for the use of colleagues within your institution. An electronic version is available on our dedicated education portal:

www.educationsolutionsonline.co.uk

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