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CYBER-BULLYING: TIME TO UPDATE YOUR E-MAIL & INTERNET USE POLICY?

The problem of bullying and harassment of staff by students has always existed in colleges and universities. However, the rising use of mobile phones, e-mail and social networking sites amongst young people means that malicious, offensive and often demeaning comments and images can be posted anonymously worldwide from an unknown location 24 hours a day, 7 days a week.

The rising popularity of web sites like ratemyprofessors, myspace, facebook and youTube has meant an increasing number of teachers are finding themselves abused, bullied and mocked in cyberspace. Research carried out by the Association of Teachers and Lecturers found that 17% of teachers had experienced cyber-bullying. One in five teachers said they were scared to go to work as a result and 17% admitted to taking time off following cyber-bullying.

Promoting good practice

A major talking point at the recent NASUWT annual conference, the government is so concerned by the spread of cyber-bullying that it has asked a working party including industry members from the websites concerned to draw up best practice guidance. It is also looking to making changes to UK discrimination law to impose a duty on employers to take steps within their power to stop discriminatory harassment of their staff online.

Cyber-bullying policy

Whilst most teaching institutions have e-mail and internet use policies, very few have firm cyber-bullying guidance. Without a robust cyber-bullying policy, recommended changes to the law could find institutions facing legal action from staff for failing to take steps to protect them from defamation and harassment online.



What your Cyber-Bullying Policy should do:

- Warn students that they will face disciplinary action if they post damaging or offensive messages attacking staff on social networking sites such as ratemyprofessors, myspace, facebook and youTube.
- Include clear grounds as to what is and what is not acceptable - and that certain instances will be grounds for removal of online privileges and potentially expulsion.



Supporting your staff

Taking legal action against a student over website postings does have a precedent with one former teacher having made legal history by winning damages from a former pupil over defamatory comments posted about him on the social networking site 'Friends Reunited'. However, both teachers and institutions should be aware that suing students is likely to draw even more high profile attention to the already damaging comments made.

If a staff member raises a complaint, the best approach is to act quickly and contact the website involved directly, as soon as you are made aware of the posting. Most popular networking sites will have terms and conditions which allow them to act quickly to remove any potentially defamatory, abusive or harassing material as soon as it is brought to their attention.

What to do now?

We would strongly recommend that every institution establishes a clear

cyber-bullying policy to set a high standard for what is acceptable behaviour in the working environment and allow you to react quickly to instances of abuse. Failing to tackle cyber-bullying can seriously damage staff morale and could even mean your institution finding itself facing legal action from its own staff.

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CASE UPDATE: FIXED TERM CONTRACTS

In the last edition of *Education Brief* (Issue 42, Spring 2007) we referred to a recent Tribunal case in Northern Ireland, *Biggart -v- University of Ulster*, which held that a lecturer on a fixed-term contract was unfairly dismissed and discriminated against. The Tribunal awarded Mr Biggart compensation in excess of £36,000, and the decision has been trumpeted by UCU as a major victory for academics employed on fixed term contracts.

We have now seen the full decision of the Tribunal, which contains some interesting points for education institutions which use fixed term contracts.



Facts of the case

Mr Biggart was employed initially on a five year fixed-term contract and was primarily engaged in research. He was not a contract researcher, which distinguished him from the vast majority of fixed-term contract staff, but rather a member of the lecturing and academic staff directly employed and funded by the University.

For various reasons particular to the case, when Mr Biggart's contract of employment was about to come to an end there was a short extension to allow him to continue and complete certain aspects of his research. During the last year or so of his fixed term, he also sought funding for new projects so that his employment might continue beyond its expiry. It was accepted that his particular School had for some time been in financial deficit, though by the time of his dismissal this had been redressed.

Alternative employment was available in another School, but this was not offered to Mr Biggart and he was dismissed at the end of his fixed-term contract. The University claimed the dismissal was fair despite not offering him alternative employment.

Tribunal's findings

Although the findings of unfair dismissal and less favourable treatment on the grounds of fixed-term status are unsurprising on the facts, the case does highlight a few points that should be borne in mind when contemplating the continued use of fixed term contracts.

The critical finding of fact was that there was suitable alternative employment available for Mr Biggart in another School. The University gave evidence that it was not possible to transfer him because he was on a fixed-term contract (which would seem to be an obvious admission of discrimination) and also contended that the University had to externally advertise all posts for reasons of equal opportunities and could not just offer it to Mr Biggart automatically.

The key findings against the University were:

1. Simply notifying trade unions and Heads of Schools of the impending expiry of fixed-term contracts was not sufficient consultation for unfair dismissal purposes when there was no



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meeting with affected employees to facilitate discussions regarding the grounds for dismissal, consideration of any points the employees wished to raise, or discussion of any suitable alternative employment.

2. The University was criticised for not having a written redundancy procedure and the obvious point was made that, even in the absence of a written procedure, a fair and proper procedure should be adopted in a redundancy case.
3. For redundancy consultation to be meaningful, it must involve managers who have authority to make decisions. Many institutions in the education sector leave fixed-term contract expiry and non-renewal to middle level managers, and where this is the case, institutions ought to be aware that this practice now risks an adverse finding in the Tribunal.
4. The contention that not advertising externally would be a failure to comply with equality legislation was rejected. The

Tribunal held that this ignored the right of existing employees not to be dismissed for redundancy where there is suitable alternative employment available.

5. There was suitable alternative employment available for Mr Biggart and he would not have been dismissed had he been properly considered for it. Again, it is important that institutions now realise that they need to address this issue on any fixed-term contract expiry.
6. Addressing a budget deficit by deciding not to renew fixed-term contracts when they expired was said to be identifying fixed-term employees as a group vulnerable to dismissal, and therefore prima facie less favourable treatment.

In summary, this case highlights a number of factors to be borne in mind when contemplating the use, but more particularly, the expiry of fixed-term contracts. These findings plainly demonstrate that there is a need for institutions to treat fixed-term workers equally with permanent staff in a redundancy situation in order to prevent claims of unfair dismissal and discrimination arising.

The case is far from the groundbreaking decision UCU have made it out to be, but it does remind institutions of the key features of a fair redundancy dismissal, whether for fixed-term or open-ended contract staff.

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CHARITY AND PUBLIC BENEFIT: SHADES OF ROBIN HOOD?

You may be wondering why this *Education Brief* contains an article on public benefit, having assumed that it is of little if any relevance to institutions within the FE or HE sectors. However, recent statements from politicians and government departments suggest that there may well be some significant relevance concerning this debate for FE and HE institutions.

For example, if you are charging any fees whatsoever then as a charity the public benefit test and its guidance will most certainly apply to you.

It would be naïve to consider that this test is aimed (despite protestations to the contrary from official bodies) at anybody other than private hospitals and independent schools, at least in the first instance. However, in setting out the rules for those institutions general principles are emerging in the consultation document which perhaps will be a surprise.

As many will know, there has always been a public benefit test in determining whether a body should be classed as a charity, which of course has included educational provision and the relief of sickness. The difference now is that the presumption of public benefit has of been removed by the effect of the Charities Act 2006 in respect of all charities.

There is a statutory obligation under the Act for the Charity Commission through public consultation to produce guidance in relation to the application of the public benefit test, and there is a statutory duty then placed upon trustees (who may be called governors or have some other title, but who basically are charity trustees) to have proper regard to that guidance.

Much of what has been produced does not present any particular controversial problem. However there is one area that is a cause of concern.

The legal authority that confirmed the principle that charities could charge for their services is a Privy Council case (*Resch's Will Trusts* (1967)). This case established that, provided the 'poor' were not wholly excluded by the level of charge from receiving benefit, then charities could charge. In the draft consultation document, however, the Charity Commission has expressed the view that in applying this principle a charity's benevolence must be available to 'low income' groups. This of course is a wholly different test. Quite apart from the fact that we would suggest that the existing case authority does not actually say this, it appears to run contrary to established principles in many of the Commission's own publications.

For example, in assessing whether somebody was in a condition of poverty, the view was that it was a subjective test to be applied in the relevant circumstances. Such subjectivity appears to have been abandoned in relation to the public benefit test, and if this principle is carried forward it will make a significant difference.



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For those institutions charging fees therefore it may be the case that they will have to demonstrate that the benefit of their charity is available to 'low income' categories. In addition, it has already been indicated, for example, that making school facilities available to local inhabitants out of school hours will not of itself be sufficient to demonstrate adequate public benefit.

Quite apart from the fact that it is unclear how the new test will be imposed in a regulatory sense (and that issue of itself could be the subject of an entire article), there have been high level suggestions that the Department for Education would wish to see, for example, teachers from independent schools used in the state sector, and perhaps provision for secondments for students from the state sector to attend independent schools.

Inevitably this is going to result in increased overheads for independent schools who were already the subject of some criticism in respect of fee levels. It seems clear that there will be an expectation that bursaries will be available to assist low income groups, that somehow the budgeting of such institutions will have to be amended in order to accommodate things like secondments of teachers or students, and that the overall effect of relieving the state system by paying for a child to attend an independent school would seem to have little impact in demonstrating public benefit. In overall terms therefore one could be forgiven for thinking that this is a Robin Hood scenario.

Those HE and FE institutions who have been following this dilemma will have spotted the opportunity to perhaps form partnerships with the independent school sector in order to exploit the opportunity to either use their facilities, their teaching staff, or in some instances perhaps even sending students on secondment.

In addition, when setting fees FE and HE institutions are now going to have to be very careful that they do not exclude low income groups, or they themselves will find that they are in breach of the public benefit test and susceptible to Charity Commission regulation (albeit with the consent of their principal regulator).

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TACKLING JOINT VENTURES

Leeds Metropolitan University hit the back page headlines recently when it announced it had taken a controlling 51% stake in Leeds Tykes Rugby Club. The club will return to top flight rugby union next season, contesting the Guinness Premiership under the new name of Leeds Carnegie.

It has been reported that the University originally entered into discussions with the club with a view to a shirt sponsorship deal, and these talks ultimately lead to a substantial joint venture. The deal will no doubt generate a great deal of interest both in the HE community and the sporting world. Whilst an education institution taking over ownership of a professional sporting organisation is an unprecedented arrangement, the deal holds a great deal of potential for both parties.

The profile of the University's sporting facilities and courses will no doubt receive a major boost, there will be the benefit of shared sporting facilities for both parties, and for the club there is the enticing prospect of tapping into the potential fanbase of Leeds' huge student population. In fact, they have already openly targeted a

22,000 sell-out for their opening game next season.

Whilst the University's ongoing financial commitment to the club has not been publicised, it is understood that the University acquired its stake free of charge and that the previous owner has agreed a significant sponsorship deal.

The deal throws into the spotlight the kind of complex joint ventures that universities and other education institutions have been entering into for years. Institutions considering joint ventures, sporting or otherwise, have a vast number of legal issues to consider. Whilst the success or failure of any venture is unlikely to depend upon the legal arrangements, it is imperative that a formal legal structure is put in place which provides for a stable framework, does not unduly hinder the management of the venture, and ensures that the expectations of all parties are maintained.

Structural options

Legally, joint ventures take many forms and there is no standard structure. However, a common form of joint venture vehicle is a limited liability company specifically incorporated for the purpose. Other options include a partnership (whether a traditional partnership or a Limited Liability Partnership (LLP)), or a contractual agreement between the institution and its partner. Appropriate legal and tax advice will need to be taken when deciding on a structure.

If a corporate vehicle is the preferred option, the legal relationship between the participants will be governed by the articles of association of the company and usually a separate joint venture agreement. Exercising control of this company will be key and one option could be a 50:50 "deadlock" company. Alternatively, institutions could ensure they maintain a certain amount of control, whether by having a majority stake, or the ability to dictate the management of the venture by appointing its directors. In the case of Leeds Carnegie, the board of directors includes the University's Vice-Chancellor and



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Finance Director, together with two directors of the rugby club. The composition of the board of any joint venture vehicle will be of key importance.

A joint venture which operates via a company will be subject to compliance with the Companies Acts and other related legislation. Its directors will need to ensure they comply with their fiduciary duties and are not placed in situations where they face conflicts between the interests of the joint venture and those of their institution.

LLPs combine the organisational flexibility and tax status of a partnership with limited liability for their members, and as such they might make a good choice of vehicle for some joint ventures. As with limited companies, LLPs have the benefit of limiting the liability of the participants, but they also commit the venture to publishing certain information (such as accounts) publicly. Institutions should always consider the extent to which they wish to keep information about the joint venture confidential.

If a partnership structure is adopted, the Partnership Act 1890 will apply to the joint venture and the participants will have certain statutory obligations which, to the extent that they cannot be contracted out of, will apply. Whether or not a joint venture constitutes a legal partnership is a question of both fact and law, and if a partnership relationship is not intended, advice should be taken to ensure one is not inadvertently created.

It may be more desirable for a joint venture to simply take the form of a contractual agreement between the institution and its joint venture partner. Any such contract will need to clearly document the obligations and rights of the parties. Agreements of this nature will avoid institutions taking on statutory responsibility for the liabilities and obligations of the joint venture, but institutions might still be exposed to claims and liabilities as a consequence of both their own actions and those of their partner, and as a result careful drafting is vital.



Other issues

Even when the form of the joint venture is established and the key terms documented, there are numerous other legal issues that must be considered.

The financing of the joint venture will be of great concern to institutions who must ensure they are utilising their resources to the best effect. Advice should be taken to ensure the institution is complying with its constitution and with applicable charity laws. Equal attention will need to be given to ensuring any profits generated are distributed appropriately.



The status of employees participating in the venture needs to be considered. If the venture acquires existing parts of the institution the TUPE Regulations may apply, in which case the institution's employees will automatically transfer to the joint venture, which may or may not be desirable. If not, the joint venture must obtain the relevant employees' consent to the transfer (which may be difficult).

Joint ventures may involve institutions transferring assets in exchange for shares, or acquiring assets from the other party. In these circumstances the institution may wish to obtain warranties and indemnities in relation to the shares or assets being acquired so as to protect their position going forward and ensure they are not exposed to unknown liabilities.

If the joint venture is to have a dedicated property from which it will operate then the institution will need to bear in mind the usual landlord and tenant issues and the need to obtain any necessary consents. If institutions are themselves providing premises from which the venture will operate they need to be aware of the risk that the joint venture will obtain security of tenure.

Ultimately, all things come to an end and the potential termination of the joint venture should also be considered and documented in detail to ensure the institution's entitlement to any assets, and exposure to liabilities, is properly regulated.

However, as with any substantial legal commitment, specialist advice should always be taken to ensure the institution's position is protected and it is able to fully realise the fruits of its endeavours.



As Leeds Metropolitan University have demonstrated, joint ventures (be they commercial, sporting or cultural) can afford education institutions exceptional opportunities to expand their operations and improve their service and facilities.

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HAS PFI/PPP FOR STUDENT ACCOMMODATION FINALLY GRADUATED?

With ever-increasing pressure to find ways to fund their activities and to compete in a market which is becoming more and more cutthroat, universities and colleges need something to make them stand out from the crowd. The vast majority of those involved in higher and further education view residential accommodation as an essential and integral part of the whole learning experience, which ranks equally with the quality and content of the course being offered, the institution's academic standing and all of its facilities. Such accommodation needs to be of a high standard and purpose built, and must meet the needs and expectations of students and potential students if the institution is to attract students in sufficient numbers to boost its reputation and to make its position financially secure.

Student accommodation is now viewed as a mature market and many institutions have experience of the PFI/PPP process. We have been involved in a number of student accommodation projects which have used private finance and a private contractor, and have spoken to a number of institutions and other people involved in designing, building, maintaining and operating

student accommodation to see how they view the process. Needless to say their opinions are many and diverse, and what follows is a summary of the core themes which were raised.

Some finance directors said that they would first look to see whether the institution can borrow more cheaply than involving a private sector partner, and that much will depend on their borrowing capacity at any given time. However, even those who are most sceptical of the process said that if they were to be involved in a very large expansion beyond the institution's borrowing capacity they would look to PFI/PPP, recognising its proven and ever-growing track record.

Finance directors are very aware of the need for private sector partners to show a return for their shareholders, and some have concerns that both the cost of PFI/PPP and rents are higher than if the institution were to finance and build the accommodation itself. However, it is the whole life cost of the accommodation which must be considered, and the huge advantage that the institution only begins paying for the accommodation once the construction is complete. The

institution passes much of the risk to the private sector and benefits from a fixed price contract under which the private sector partner is heavily incentivised to deliver to time, budget and specification. A monthly payment covers the costs of designing, building, operating and maintaining the building and the institution gets a high quality fully-maintained asset at the end of the contract term without the worry of ensuring ongoing maintenance or, in many cases, minimum occupancy. All of which is attractive even from a purely financial viewpoint.

Another concern which emerged was whether any student accommodation which was built would be relevant to the needs and requirements of students in 15 or 20 years time. However, this is a risk that will also face an institution which owns and maintains its own accommodation, and to a certain extent it can be addressed in the specification and the change management process.

The estates managers we spoke to all appreciated that PFI/PPP provided them with a means of transferring risk away from the institution to those best able to manage that risk. However, some



were concerned that the transfer of that risk could also result in a handover of and loss of control of the student accommodation. Some also felt that there was an element of political pressure from HEFCE discouraging institutions from using their own borrowing to own, run and maintain their own accommodation, and encouraging the use of PFI/PPP. There were even those who lamented the fact that the public sector was unable to build and manage its own accommodation as cheaply as the private sector and run it at a profit. Overall, they accepted that in order to enable the institution to concentrate on its core activities of providing education to the highest possible standard they needed to allocate their resources in the most effective and efficient way, and that meant effectively outsourcing their student accommodation to those better able to manage the risk and operate the accommodation.

One University that is enthusiastic about the PPP process has completed four accommodation projects with the Universities Partnership Programme (UPP) and now considering a fifth. Martin Berkien of the University of Plymouth believes that the whole process "makes very good sense

and is a very rational approach." He is very clear that, whilst the off balance sheet treatment of the finance had enabled him to build a medical school which would not otherwise have been possible, more importantly it was the process adopted with UPP which ensured that in operating Plymouth's student accommodation in this way he had been able to concentrate on the University's core activities, thereby using the new accommodation to enhance Plymouth's reputation but leaving the University with the resources, not just financial, to create a centre of academic excellence.

For Martin and everyone else we spoke to, education is a people business and the welfare of students is paramount. For universities and colleges it is not simply a case of constructing and operating a building. Whilst student accommodation can very effectively be operated, managed and maintained by a private sector company all of the people to whom we spoke agreed that for their students to benefit from "the student experience", they needed a sense of belonging, and that only the institution was in a position to offer that pastoral care to its students.

More and more therefore institutions are leaving private sector companies to operate, manage and repair their student accommodation but are retaining a major role in dealing with students and their needs within that accommodation.

Whilst the process has its critics, overall those we spoke to were on the whole enthusiastic. Having undertaken student accommodation projects they are now looking to see whether the model used is applicable to and can be adapted for other university and college facilities eg sports complexes. It seems therefore that PFI/PPP projects may truly have found a home within the sector!

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EDUCATION NEWS...

Our friends in the North

We are pleased to announce that from next term we will be running our popular Breakfast Briefings in Leeds, as well as Birmingham and London. We frequently have delegates from northern institutions attending these early morning events, and have long been conscious of the effort that the early start must entail for those travelling long distances. We hope that by identifying a more convenient venue for delegates from these institutions, more will be able to take part in what are always lively, interesting and enjoyable events.

Taking their duties seriously

The Education Team hosted its most successful ever seminar at Aston Business School on 12 July 2007, on the always contentious issue of institutions' duty of care to their students. The seminar was attended by over 80 delegates from HE and FE institutions. The aim of the seminar was to explore the legal extent of the duty of care, and to consider how this can be reconciled with the often higher duties of care that institutions feel under pressure to adopt on moral, social, and PR grounds.

Climate change seminar: risks and opportunities

Our Energy & Environmental Team have recently been running in-house seminars for clients and contacts on climate change, with specific reference to the legal measures and policy initiatives which are affecting our clients. Topics covered include:

- What is climate change?
- Stern report/IPCC report
- International framework of obligations
- Kyoto Protocol
- EU initiatives (emissions trading, energy efficiency, renewables, biofuels, buildings)
- UK initiatives (climate change programmes, energy review)
- What's coming up
- Risks and opportunities for education institutions

If your institution would be interested in a seminar on these issues, please contact Kelly Massey on 0870 763 1426 or kelly.massey@martjohn.com for further details.

Improving dispute resolution

Following the article on the benefits of mediation that appeared in the last edition of Education Brief, and our subsequent Breakfast Briefing on the subject, we are very pleased to have become project partners to

the HEFCE funded project on Improving Dispute Resolution in Higher Education. The project aims to audit the current use of mediation in the sector, identify the types of disputes that might benefit from the use of mediation in the future, and to identify and meet training needs. We believe that this is an important project that will have real benefits for the sector in terms of saving costs, management time, and the often corrosive impact on staff and student relationships that disputes can have, and hope that all institutions will participate in the initial fact-finding survey. Further information can be found at: <http://www.commundesign.co.uk/projects/idr/build03/index.html#>

If you would like any further information about this edition of Education Brief, or about our work for education clients, please contact Paul Pharaoh, Partner and Head of Education, on T: 0870 763 1314 or E: paul.pharaoh@martjohn.com.

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.