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## AND FINALLY (BUT THEN AGAIN POSSIBLY NOT)...GENDER EQUALITY

### The general gender equality duty

As a result of the Equality Act 2006, the third in the triumvirate of general equality duties will come into force on **6 April 2007**. From that date, public authorities such as publicly-funded educational institutions, research councils and regulatory bodies will have the following duties in relation to gender:

- to eliminate unlawful discrimination and harassment
- to promote equality of opportunity between men and women.

The general duty also applies to transsexual people i.e. those who intend to undergo, are undergoing or have undergone gender reassignment, insofar as they are employees and students. The general duty in respect of transsexual people gaining access to goods and services other than education (e.g. conference facilities, galleries and theatres) will apply when legislation extending the protection to discrimination in the

provision of goods and services comes into force in December 2007. It is of course open to institutions to extend the general duty in this respect before that date.

The Equal Opportunities Commission (EOC), which has enforcement powers under the Equality Act, states that the duty is intended to address widespread and persistent gender discrimination. The right of individuals to bring claims under the Sex Discrimination Act 1975 (SDA) has existed for over 30 years, but has not effected a significant change in a culture in which disparities between the sexes continue to exist. The EOC cautions that while policies and procedures may appear neutral, they can have a significantly different effect on men and women, thus perpetuating inequality.

The legislators concluded that there was a need for a broad positive duty to achieve an egalitarian society, which the SDA has apparently failed to bring about. The duty applies therefore to the totality of an institution's

functions, and from 6 April, colleges and universities will have to consider their businesses through the prism of gender, as they are already doing for race and disability. Rather than merely refraining from or avoiding discriminatory practices, institutions will be required to create a culture where equality is actively promoted.

### The specific gender equality duties

The general duty is bolstered by the following specific duties:

- preparation and publication of a gender equality scheme, setting out how the general and specific duties will be discharged. The scheme must be published by **30 April 2007**. In formulating the scheme's objectives, institutions must consider the need to include objectives to address the causes of any gender pay gap
- to gather and use information on how the institution's policies and practices affect gender equality in the workforce, and in



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the delivery of education and other services

- to consult employees, trades unions (which may include students' unions), students, other service users and any others who appear to have an interest in the way the institution carries out its functions, in order to determine its gender equality objectives
- to assess the impact of current and proposed policies and practices on gender equality
- to implement the actions set out in the equality scheme within three years, unless unreasonable or impractical to do so
- to report on the scheme every year and review it at least every three years.

These specific duties do not apply to Welsh education institutions. The Secretary of State must consult with the National Assembly for Wales before making an order imposing such duties and none had been made at the time of writing this article.

## Outcomes

The EOC identifies in its statutory Code of Practice various factors

which may indicate an institution's progress towards gender equality. They include:

- women and men feeling that they are effectively engaged in decision - and policy-making
- greater support for staff and students with caring responsibilities
- fathers receiving greater support for childcare responsibilities
- diminished tolerance of harassment, which is dealt with promptly and systematically
- greater use of services (e.g. access to courses) by men or women which were hitherto underused by the particular sex
- gap in pay between men and women narrows and is eventually eliminated
- transsexual people are supported and valued, and barriers to recruitment and retention of such staff are removed
- reduction and eventual elimination of discrimination against pregnant staff and staff returning from maternity leave

- gender equality issues and their budgetary implications are considered at the beginning of policy-making
- information to assess how certain actions will affect men and women is accessible

## A Utopian vision?

The EOC's statutory Code of Practice helpfully recognises that institutions will not be able to improve their functions all at once. There is however a continuing duty to review as a matter of priority those functions which are most relevant to gender equality. For universities and colleges, the primary functions are obviously providing access for men and women to particular courses and related services, and the recruitment, employment and progression of staff. However, the Code of Practice emphasises the need to consult with students, staff and unions in order to enable institutions to identify the most significant gender issues that require redress.

Gathering data is crucial to discharging the duty and should not be an unduly onerous task for institutions, which are already amassing information on race and disability. The Code of Practice suggests collecting and monitoring



data relating to the following:

- gender difference in relation to the provision of education - student needs, expectations, barriers, satisfaction rates, outcomes
- balance of men and women in key decision-making bodies
- gender profile of staff, analysis of patterns for part-time and those with caring responsibilities
- the extent and causes of the gender pay gap for full-time and part-time staff
- the prevalence of harassment of staff and students (and any other users of college/university services), the number of formal complaints and their outcomes
- return rates of women on maternity leave and level of responsibility and pay following return
- issues affecting current and potential transsexual staff.

## Enforcement

As in the case for the duties relating to race and disability, the general duty can be enforced by means of an application for judicial review of the institution by an individual, by a

group of people with an interest in the matter or by the EOC. A claim of judicial review is different from a claim of sex discrimination, which can be brought only by the alleged victim of sex discrimination. Judicial review is unlikely to give rise to an award of damages except in very rare circumstances.

The specific duties will be enforced by EOC by means of compliance notices, which may require institutions to provide information to the EOC and to take particular steps within a specified time to comply with the specific duty. The EOC will however seek to engage with institutions informally in order to achieve compliance, before embarking on formal enforcement action.

The Commission for Equality and Human Rights will replace the EOC (as well as the DRC and CRE) in October 2007. It will have the power to issue compliance notices not only in relation to the specific duties, but also in relation to the general duty. This is likely to be beneficial to institutions as it may diminish the need on the part of aggrieved individuals or groups to opt for judicial review, where there is a perceived failure to comply with the general duty.

## Further legislative changes

Current discrimination law is extremely complex and inconsistent. For example, it is unlawful to publish an advertisement indicating an intention to discriminate on the grounds of race, but not in relation to age.

The government has recognised this and has set up the Discrimination Law Review with a view to drafting a Single Equality Act, which should provide us with a legislative framework that is both simple and consistent. There are also proposals to devise an integrated public sector duty that covers not only race, disability and gender, but also sexual orientation, age and religion/belief. We will of course monitor the progress of these proposals and keep you updated through Education Brief.

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## A LITIGATOR'S PERSPECTIVE ON MEDIATION: WHY TURKEYS SOMETIMES REALLY DO VOTE FOR CHRISTMAS

The news that HEFCE has allocated funds to promote awareness of mediation in the HE sector is apparently a reaction to the significant sums spent on dispute resolution in the sector. The public perception of lawyers is that they get pound signs in their eyes and drool uncontrollably at the prospect of any type of work that involves significant sums of money. There is therefore widespread suspicion that the chances of a lawyer vigorously promoting mediation are about as high as the proverbial turkey wrapping itself in tin foil and singing "tis the season to be jolly".

As always, Martineau Johnson are proud to be different: we have spent the last decade advocating the merits of mediation in disputes of all kinds in the education sector. Now we find ourselves in elevated company, not only through HEFCE's reported involvement, but also with the courts requiring that the use of alternative dispute resolution should be considered carefully in all cases.

### Litigation in the education sector - the downsides

At the risk of stating the obvious, it is a truth universally acknowledged that litigation is expensive. When public money is being diverted from its primary purpose in order to fund litigation there is understandably even greater concern that the amounts spent on legal costs could be put to much better use. Very often the individuals or companies suing education institutions may themselves be cash-strapped and there is therefore a real question over whether any costs will be recovered even if the institution is successful in defending the claim.

In addition to the legal costs, the amount of management and staff time spent in dealing with litigation is high. Senior managers will often find themselves coordinating the institution's response while staff will spend time that could be put to much better purpose trying to find documents and giving statements and instructions on the details of the case. If the matter does get to trial, then the institution faces the prospect of having potentially a team of people out of the office for a number of days.

Another real problem area for many education institutions is the quality of the evidence that can be gathered in relation to any particular claim. The adversarial system adopted in the UK means that litigation is effectively about what you can prove, not necessarily what is true. It is our experience that often the record keeping in institutions is of varying quality and not centralised, which means that putting together the institution's response can be very difficult.

Three other downsides of litigation are commonly cited and although they should not be overstated, they are relevant factors. The first is the adverse publicity that an institution may attract if it is involved in a protracted dispute, especially where it is viewed as the "Goliath" to a student's "David". A decision against the institution can sometimes lead to a fear of the floodgates opening and hundreds of other similar claims following, although in our experience this rarely happens in practice. There is also a natural wariness of having a court decision that may set a binding precedent with which it may not be easy for the institution to comply.



## Mediation - the courts' approach

Mediation has a real role to play in trying to address these difficulties. In addition to the practical benefits, mediation is now routinely required to be considered where proceedings have been commenced. The courts take great pains to encourage parties in litigation to mediate, but stop short of compelling it. At one stage there was a concern, through a series of decisions, that the courts considered mediation as virtually mandatory in all cases. However, the courts have stepped back from that, recognising that it is a voluntary process and so it is wrong to try to force the parties to participate, and that it may not be appropriate in all cases.

The position under the current case law is that the court may impose a costs sanction if mediation has not been considered during the course of litigation or has been unreasonably refused. The effect of this is that even if an education institution wins a claim, whereby it would normally expect to recover its costs from the other side, if it has failed to take up an offer of mediation or indeed failed to make one where it would have been sensible to do so, then those costs may be denied to it.

In deciding whether to impose a costs sanction, the courts will take the following considerations into account:

- **The nature of the dispute**

The starting point for the court is that there is no type of claim which is inherently unsuitable for mediation. However, they do recognise that there may be certain factors in a case which make it less suited to some form of alternative dispute resolution. This may be where, for example, the case turns on a new point of law, or where there is a need for a binding precedent. In these situations, the court would not regard the refusal to mediate as unreasonable, meriting a disapproving costs sanction. However, institutions can of course still choose to mediate even where cases fall into these categories if they so wish.

By way of comparison, cases which are particularly suitable for mediation include those which are very "fact sensitive", such as claims based on work-related stress, or discrimination claims. The rationale behind this is that these cases would otherwise lead to very lengthy trials based on what is essentially well settled law, and that can have a very heavy burden on witnesses.





Other cases that might be particularly suited to mediation include those where there is an ongoing relationship to protect, or ones where the real solution is one which the courts have no power to order.

- **The merits of the case**

If the case against the institution is truly a hopeless one, then the institution may be justified in declining to mediate or settle.

- **The extent to which other settlement methods have been attempted**

If an institution has tried, without success, to make offers to settle or to arrange without prejudice meetings to discuss settlement, then it may be entitled to assume that mediation would be similarly rebuffed. In these circumstances, the court may view a refusal to mediate as justified.

- **Whether the costs of the mediation would be disproportionately high**

Obviously in claims which have very low value, the costs of the mediation do need to be taken into account. However, there are many schemes now run by the courts themselves which are comparatively cheap and yet perfectly effective methods of mediation. If these schemes are taken up then a mediation can be attempted at the cost of only a few hundred pounds.

- **Whether the mediation had a reasonable prospect of success**

It is important to stress that the process of mediation is a confidential one and the courts will never find out what was or was not discussed at the mediation.

Therefore, they will not be taking a view on the prospects of success based on what they know about the case. Instead, they will be looking at the behaviour of the parties and considering whether taking all conduct into account it was clear that one or other party had no real interest in mediating or was only offering it for tactical gain.

It seems therefore that mediation is something that needs to be considered in all disputes, not just those involving students, although those are often the ones that most benefit from early resolution. HEFCE are offering an awareness-raising carrot, but in appropriate cases the courts are quite happy to wield a costs sanction stick. Institutions should therefore review relevant policies, such as their student complaints procedure, to see whether mediation should be offered or at least referred to, so that it becomes a natural and ordinary part of the institutional response to disputes and challenges.

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# FUNDING OF EDUCATION SECTOR COMMERCIALISATION

## How can the education sector commercialise its activities most effectively and profitably?

The political plan to harness innovation to improve the country's future wealth creation prospects means that there are many opportunities and alternatives for commercialisation. One of the more effective methods of commercialisation involves tapping into pre-existing private sector knowledge. It is good practice to work with an FSA-authorized fund manager due to the complexity of financial services regulation and the commercial risks.

Fund managers are increasingly keen to align themselves with the education sector as they see potentially lucrative deal flow emanating from education institutions, particularly those with high quality research track records. However, institutions must then ensure that any subsequent commercial risks are restricted as far as possible.

Institutions may:

- enter into closed agreements with fund managers or venture capitalists to effectively sell their IP for a fixed sum over a fixed number of years;
- form a new fund for the

individual institution in order to provide funding for any spin out companies;

- syndicate with other higher or further education institutions to form a joint fund;
- set up business angel networks;
- tap into alumni expertise and funding;
- take on new or train up staff in technology transfer and financial services activities.

Historically the education sector has received funding from wealthy individuals, but more recently we have seen the formation of funds in order to spread the risk to individuals and also increase the amount of funding available. Significant new dti and Regional Development Agency grants are often available in the current political climate.

University challenge funds are an established example and they usually give the education sector greater control over the monies than would be seen with a more commercial fund. Martineau Johnson helped to establish some of the university challenge funds, and we are aware that some of them are reaching the end of their investment phase and could often usefully receive additional monies for further investments. Further

investments may be made along the same lines as the original successful investment policies or, alternatively, new funds can be formed to provide follow-on funding to the spinouts which have previously received the early stage challenge fund monies. We are currently working with a number of universities to achieve this.

Of course, new funds can make use of the experience gained from running the early education sector funds, and, though they may often use similar structures, as yet some corporate structures have yet to be exploited. Enterprise investment schemes (EIS) or venture capital trusts (VCTs) can offer tax incentives to investors who may or may not be alumni, and these may form the basis of new funds for the education sector of the future. The current timing for the formation of new or follow-on funds in the education sector is enhanced by the government's commitment to commercialisation, and this opportunity is likely to be seized by those institutions looking for the next phase of commercialisation funding.

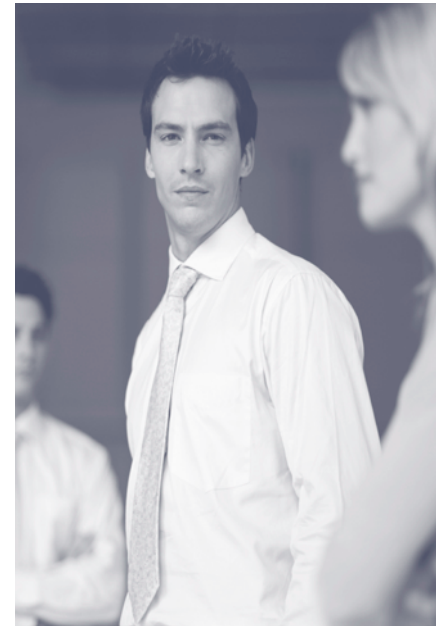
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## WHEN CO-OWNERS CAN'T AGREE

The Court of Appeal has upheld a decision that the Comptroller of Patents has the discretion to decide that one co-owner of a patent can grant a licence under the patent without the consent of another co-owner. Under the Patents Act 1977 co-owners of a patent can each work the patented invention without accounting to the other. However, the grant of a licence, assignment or any mortgage of the patent requires the consent of all co-owners unless there is an agreement to the contrary.

The Court looked at the Comptroller's jurisdiction under the Patents Act to decide on ownership disputes. It decided that the Comptroller had jurisdiction to order the grant of licences under the patent. The jurisdiction existed under older patent legislation and was wholly consistent with the purpose of patent legislation, which was to encourage invention and its exploitation. The case serves as a reminder to joint owners and those collaborating in research that it is clearly advisable to agree at the outset how the parties will deal with the ownership and control of patent rights.



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## FIXED TERM & HOURLY PAID STAFF

**A**t the start of 2007, UCU published its latest document focusing on fixed-term and hourly paid staff.

The document includes advice to UCU members on negotiating fixed-term and hourly paid issues, the prevention of less favourable treatment, a model fixed-term policy (HE) and calculations of fractional/pro rata contracts and hourly rates of pay.

UCU's campaign identifies the following objectives:

- to secure the offer of conversion to permanent fractional (pro rata) or full time posts for all hourly paid staff;
- to resist the imposition of zero hours and unfavourable 'variable hours' contracts;
- to transfer fixed-term staff to permanent contracts and encourage the use of permanent contracts as the norm.

### So, where does this leave institutions?

In the education sector, perhaps more than in any other, a variety of employment contracts are used to ensure human resource flexibility necessitated by variations in funding or variations in student numbers, either institution-wide or from course to course.



Legislation does not prevent this. However, the key question for institutions to consider is whether an employee is engaged on either a fixed-term or hourly-paid contract which, as an overall package, offers less favourable terms than a permanent or full-time comparator.

If so, the institution runs the risk of falling foul of legislation except where the treatment can be objectively justified.

### Fixed Term Contracts

A fixed-term contract is "a contract which will terminate on the expiry of a fixed term, on the completion of a particular task or on the occurrence or non-occurrence of a specified event other than achieving retirement age".

As a general rule of thumb, for example, employing contract research staff on a fixed term basis is probably justifiable, though of course this must be assessed on a case-by-case basis.

Assuming it is justifiable to employ an individual on a fixed term, or alternatively he/she has not reached the four year limit to consider conversion to permanent status, the question arises as to whether differential terms can be objectively justified.



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Any difference can be justified term by term, or globally (i.e. some terms are less favourable but the contract as a whole is not), or by a combination of these approaches. In particular, fixed-term staff ought to have equivalent terms and conditions of employment to colleagues on comparable permanent contracts, including pay, absence provisions and pensions; have the same opportunity to develop their careers; have the right to participate in governance and committees; and be provided with information on, and the opportunity to apply for, permanent positions.

The case law on justifying different treatment is very limited. The dti's limited guidance on justification suggests two possibilities which relate to pension provision and redundancy:

- pensions - the dti suggests that fixed term employees could be excluded from an occupational pension scheme, especially in the case of short contracts, where the benefit to the employee may be marginal;

- redundancy - the guidance considers whether a fixed-term employee could lawfully be excluded from a contractual redundancy/severance scheme, and states that "where [employers] have special redundancy schemes to compensate permanent employees for the unexpected loss of their jobs and these [employers] generally employ fixed-term employees on fixed-term contracts with no reasonable expectation of a renewal" it may be possible to justify the exclusion of the fixed-termers, though of course a Tribunal would not necessarily follow that guidance.

In practice, objective justification should always be applied on a case-by-case basis, and any such case should be resolved by applying a three-fold test, namely whether the employer can show that the less favourable treatment

(a) is to achieve a legitimate objective, for example a genuine business objective;

(b) is necessary to achieve that objective; and

(c) is an appropriate way to achieve that objective.

In a recent Tribunal case in Northern Ireland, which highlights how topical this issue is at the moment, it was decided that a lecturer on a fixed-term contract was unfairly dismissed and discriminated against. He will apparently receive compensation in excess of £36,000. The university claimed the dismissal was fair when the lecturer was dismissed at the end of his fixed-term contract despite not being offered alternative employment. The Tribunal ruled that the university did not have a procedure for properly consulting upon the impending expiry of fixed-term contracts. This case highlights the 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.



## Hourly Paid Contracts

Hourly paid employees who are engaged to fulfil a particular function, usually lecturing, may often have few or none of the other duties of full-time employees. There is no requirement to justify not giving hourly paid workers full-time contracts. Nevertheless, less favourable treatment of part-time workers (in relation to comparable full-time workers) is forbidden unless objectively justified. There will often be identifiable differences in the work that full and hourly paid employees carry out but in some cases a comparator will be found.

Where a comparator is identified, the same principles of objective justification for less favourable treatment apply (as discussed above). Overtime payments for a particular period are expressly excluded from consideration unless the hourly paid worker in question works as long (including overtime) as a full-time worker's basic hours for that period. Other objective justifications may include a benefit not being offered because it is impractical or disproportionate to do so having regard to the part-timer's hours (e.g. a dedicated computer workstation).

Another consideration of particular importance is the provision of paid holiday for hourly paid staff. Such staff are often paid their holiday pay by way of an element in their basic pay and are paid nothing at the time of taking leave (known as "rolled-up holiday pay"). This has been held by the ECJ to be contrary to the European Working Time Directive, although further case law is required to clarify the position.

## Summary

The education sector relies upon a wide spectrum of employment contracts to accommodate the need for flexibility. Such reasons are normally objectively justifiable for the purposes of employment legislation; nevertheless, an institution must be able to show (on a case-by-case basis) that it has genuinely considered the need for such contracts rather than relying on stereotypical preconceptions of labour requirements.

The trend is for more, not fewer, categories of workers to acquire the employment rights enjoyed by permanent, full-time employees. Given the fast-moving developments in this area of law, all employers in the education sector now need to work hard to justify employees on different types of contract being treated differently.

This is not to say that fixed-term, hourly paid, casual etc employment is in any sense inappropriate, just that the rationale for any individual being on a particular type of contract must be sound and any disparity of treatment must be transparently and objectively justifiable. It is being able to show differences in what various types of employee do on a week-by-week basis that is most likely to be a sound basis for differences in terms and conditions: once an employee gets to the point of establishing a comparator, justifying different terms, benefits or other treatment will, in many instances, be very difficult indeed.

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## CHANGES TO THE TEACHERS' PENSION SCHEME

With effect from 1 January 2007, the TPS has undergone a makeover which makes it, for new entrants, look much less like a traditional public sector scheme. For joiners after that date, there will be a move from the public sector model of an eightieths pension plus an automatic lump sum, to a sixtieths pension, with the option to exchange part of it for cash, a model more familiar in the private sector. New joiners will also have a normal retirement age of 65, rather than 60, and will not be able to take early retirement, other than on ill-health grounds, before 55.

Existing members will largely retain the old benefit structure and the rise to a minimum retirement age of 55 will be deferred for them until 2010, the last possible date by which registered pension schemes must adopt this change.

Death grants are increased from two to three times salary for all members. Dependants' benefits are extended from spouses and civil partners to nominated dependants; this benefit will be subject to a two

years' service qualification from 1 January 2007, although existing members will be able to buy in pre-2007 service to count towards the qualifying period.

One of the most significant changes, affecting both existing members and new joiners, is a structural change enabling members to draw some or all of their pension benefits whilst remaining in employment, provided that their pensionable salary is reduced by at least 25%. This is likely to prove popular with members who want to phase in their retirement, but may prove to be less popular with institutions trying to juggle their staffing levels and organise succession planning.

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## EDUCATION NEWS

Members of the Education Team are speaking at the forthcoming AUA conference on topics including equality and transnational provision. We look forward to seeing many of our clients and contacts there.

The Head of our Corporate Finance Team, Roger Blears, is speaking on REITS at the BUFDG conference at the University of Hertfordshire.

We will soon be relaunching Education Solutions Online

our interactive website for administrators



in further and higher education. Watch this space....

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 0870 763 1314 or [paul.pharaoh@martjohn.com](mailto:paul.pharaoh@martjohn.com).

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