

Be Connected higher education - Autumn 2022

12 October 2022

[Welcome to be connected, our quarterly update for Higher Education Institutions.](#)

We aim to provide content that offers you real value and relevant, useful information from our national team of legal and HR experts.

be connected is your space. Please help us to help you by providing your feedback and letting us know what you would like to see featured in a future edition.

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New legislation

[New for 2022 - Public Procurement Bill](#)

The new Procurement Bill has now been with us for about four months, during which time there have been a huge number of amendments proposed in the House of Lords (circa 320). We summarise some of the key issues and themes so far, as well as clarifying definitions for some of the revised terminology and the objectives of the bill and what it means for universities.

We also ran a webinar over the summer which talks through the introduction of the new bill, key changes, what to expect during the transition period and advice on how to prepare.

[Procurement Bill — what's new in 2022? →](#)

[On-demand webinar: The new Procurement Bill →](#)

[Subsidy Control Act 2022 – unanswered questions](#)

New statutory guidance on the Subsidy Control Act 2022 is expected to come into force later this year. We have reviewed it in draft form to understand what it may mean for universities.

Historically, under the State aid rules, universities were treated as capable of giving and receiving state aid, and the draft guidance does not suggest that this position will change.

However, the Act introduces new provision relating to whether an activity is classed as an economic activity or not, which denotes whether it gives rise to a subsidy. This can be clear-cut in some cases – most businesses are enterprises engaged in economic activities, other organisations such as community groups, are not. But in the case of universities carrying out a mix of activities the position is less clear.

There will almost certainly be implications for universities engaging in activities such as building research infrastructure, renting-out equipment, entering into a collaboration, operating an innovation cluster etc.

We seek to define what constitutes economic (and non-economic) activities, review precedent set in case law to set out the likely implications for universities and consider the questions which will need to be addressed in readiness for the new act coming into force.

The Building Safety Act – what does it mean for university campuses?

During the summer, the Government published the Building Safety Act as part of its continuing efforts to respond to the Grenfell disaster and recommendations made following the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt.

The government has described the reforms introduced by the Act as “the biggest changes to building safety regulation in a generation”. For once the hype is justified. The bill includes a number of changes to the regulatory framework surrounding the construction industry, which will inevitably have implications for new university buildings and some student accommodation.

The changes include:

- Strengthened regulatory regime for high rise buildings
- Extended period to claim compensation for sub-standard construction work, to apply retrospectively
- New Building Safety Regulator within the Health and Safety Executive
- New competence requirements to apply to building professionals
- A new gateway regime at the design, construction and completion phases of residential high-rise buildings

We recently published a series of articles setting out the impact of the Building Safety Act 2022 for:

[**Buildings completed before the Act comes into force**](#) →

[**The design and construction of buildings commenced after the Act comes into force**](#) →

[**The ownership and occupation of higher-risk buildings**](#) →

[**Building Safety Act on-demand webinar**](#) →

Case law

Holiday Pay: Term-time workers

In July 2022, the Supreme Court handed down its long-awaited Judgement in the case of *Harpur Trust v Brazel* relating to the correct calculation of statutory holiday pay for term-time workers.

The Supreme Court’s decision has implications for all term-time workers on contracts which subsist all year round, whether their hours are normal or irregular.

The decision has highlighted the manner in which the courts interpret the Working Time Regulations 1998 and employers will want to ensure their practices in respect of all term-time staff are consistent with the applicable rules explored below.

For education employers, the decision has particular importance due to the prevalence of a special type of part year worker: the term-time only worker, being a worker who only works the weeks when students are in. However, the principles from the decision also apply to casual and zero-hours workers provided they are engaged under permanent continuing contracts, rather than on a “per assignment” basis.

Many education employers employ a variety of term-time workers on a permanent basis to work a limited number of weeks each year. They may also engage casual or zero-hours term-time workers on continuing contracts.

Authorship disputes and employment claims

In an academic environment, there can be pressures to publish, particularly where funding is dependent upon research and reputation. Whilst there can be competition between Higher Education Institutions to be first to publish, there can also be internal conflicts over authorship rights where several individuals have contributed to the work.

This was precisely the issue that arose in *Moghaddam v Chancellor and Scholars of the University of Oxford and others*. Whilst this is a first-instance Employment Tribunal decision – and therefore is not binding – it does demonstrate how a dispute over authorship can escalate into employment claims of (amongst others) unfair dismissal, discrimination and whistleblowing.

This case demonstrates how perceptions of unfairness in respect of authorship rights can escalate.

Can legal privilege be retrospectively acquired?

In *University of Dundee v Chakraborty*, a member of the University's academic staff was asked to investigate a grievance issued by the Claimant. She did so and produced a report dated 28 February 2022. The University then asked its external solicitors to review that report. They did so and proposed amends; the original author approved the amendments and made some more of her own.

During Employment Tribunal proceedings, the amended version of the report was disclosed but the Claimant sought disclosure of the original report dated 28 February. Disclosure was ordered by the Tribunal and the University appealed this decision.

The University accepted that the original version was not protected by legal privilege at the time it was created; however, it sought to argue that it retrospectively acquired privilege because its disclosure would tend to show the contents of the legal advice received by the University. This argument was not accepted by the Employment Appeal Tribunal – there was no ability for a non-privileged document to acquire privileged status simply because of later legal advice.

During internal proceedings, HE institutions should be mindful of the potential for future disclosure obligations as a result of litigation – such disclosure obligations could require the provision of earlier drafts, notes of internal discussions or notes of HR advice where such documents are relevant and are not protected by legal privilege at the point of creation. The fact that later legal advice is sought, or at some future point litigation is contemplated, will not allow a label of privilege to be retrospectively applied.

Guidance

Conference conversations: Successful spinouts

What do universities need to generate equity from their intellectual property?

We often get asked for advice about spinouts and managing the relationship between founding stakeholders and this was a common theme at this year's PraxisAuril conference in Brighton. Following an oversubscribed pop-up meeting on "Busting myths and moving on: the reality of UK university approaches to taking equity in spinouts" the conversation spilled out into a lively community discussion online. Such was the demand, we were subsequently asked to write a blog post commenting on the key steps, which in our experience of advising higher education institutions (HEIs), academics and investors, are vital to ensure a successful spinout for all involved in the spinout journey:

1. an agreed purpose;
2. a well-thought-out governance and equity structure;
3. an Intellectual Property (IP) Strategy; and
4. a growth plan and exit strategy.

Find out more about each of these steps and read our advice on how to effectively commercialise your IP.

Mitigating the risk of cyber security breaches

The Department for Digital Culture Media and Sport has surveyed the education sector as part of its aim to inform government policy on cyber security in its annual Cyber Security Breaches Survey 2022. The results show 92% of Higher Education Institutions identified a breach and the education sector experiences even higher levels of the most dominant form of attack - phishing emails – than the business sector.

The frequency, sophistication and variety of modes of the attack continues to increase, as does the level of disruption breaches can cause. The extent to which universities can manage and control risk not only depends on financial management and internal controls, but also the robustness of security and processes which can be exploited from outside the organisation.

It is perhaps testament to the education sector's reported high levels of compliance with the 10 Steps to Cyber Security and its proactivity in seeking guidance and enhanced security that has led to its overall rating, which in some instances outperforms business. Despite the concerning levels of attacks which target Higher Educational Institutions, these efforts go a long way to block potential disruption.

Find out more about risk mitigation and the legal support you may need in the event of a data breach >

You may also be interested in...

Working together to support displaced Ukrainian students

With university education in Ukraine being significantly disrupted and many law schools closed as a result of the Russian invasion, we are looking to find ways to support displaced law students to continue their studies.

The #BeJoined campaign is all about bringing together the combined strength of different organisations to deliver social good. We believe we can help by facilitating links across our national, cross-sector network to support any law students universities agree to host from Ukrainian universities – with work placements, donations of equipment, contributions towards living costs, etc.

Our Education expertise recognised again in Legal 500 rankings

Browne Jacobson's education expertise recognised in latest Legal 500 rankings

The new set of Legal 500 directory rankings have been published and we are proud to once again be recognised as one of the country's leading firms advising the Education sector. The annual Legal 500 directory reflects extensive research and analysis by the Legal 500 team, who conduct thousands of interviews to select the very best law firms in the UK.

We would like to express our gratitude to our clients for the fantastic set of testimonials published in the Legal 500 this year, which included:

"...provides a full understanding of employment issues in a higher education context."

"... a deep understanding of HE issues, listens to your requirements and helps you manage risk"

"We get a bespoke service that feels like they know us."

"... responsive, able to meet deadlines; able to dissect complex matters and concepts and relay the same to clients; pragmatic ..."

"Browne Jacobson are hungry for education work, and provide a wealth of knowledge. They are expanding in the higher education sector and spend a lot of time getting to know the client."

"It is a local practice but is a national firm. It ensures that you get that local knowledge and continuity of people however they have the backdrop of all the expertise within the firm."

Partner and National Head of Education, Mark Blois, said: "It is a real honour to receive such market leading rankings and exceptional client feedback in the latest Legal 500 directory. We thank all our clients for their ongoing support. This fantastic set of results also reflects the hard work of every member of the Browne Jacobson Education team and I am also grateful to all of my colleagues for their ongoing commitment to serving our clients and the wider education sector."

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Our expertise

Education

Higher education institutions and universities