

HERA AND SIDDIQUI

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Topics to be covered

- Higher Education and Research Act 2017 – an Introduction and key points to note
- Case law – where are we with negligence cases after Siddiqui

Higher Education and Research Act 2017

- First major regulatory reform to the H. E sector since 1992 (save for the introduction of the OIA): replaces the Further and Higher Education Act 1992. Some of it is in force – some is coming into force.
- Made up of four parts: I will be talking about Parts 1 and 2 – which deal with regulation of the sector by the Office for Students, student loans and student complaints. Part 3 deals with regulation of research. Part 4 deals with data sharing and other matters.

Key changes

- The Higher Education Funding Council for England (“HEFCE”) is abolished. Also abolishes the Office for Fair Access. Replaced by the Office for Students.
- The Office for Students – “OFS” –Regulator : and protector of students interests (including the need for a specific post of Director of Fair Access and Participation).
- Creates the statutory underpinning for the OFS to permit education providers to award degrees.
- Also provides the process for an education provider to be called a “University”

Key Changes (2)

- Permitted to revoke degree awarding powers and university status (even if this comes from a Royal Charter – which will be the case for most pre 1992 institutions).
- Provides grants, loans or other payments to the higher education provider and may attach such conditions as are appropriate.
- Part 3 brings together the previous 7 research councils which provided grants for research in universities into one body – the United Kingdom Research and Innovation – UKRI. Each are replaced with “committees” within UKRI.
- Idea is to pool resources and strengthen interdisciplinary research.

Key Changes (3)

- The government maintains a level of control over the budgets of individual councils – but it is up to the councils how this money is then allocated.
- Expands the OIA's role in handling complaints to cover any provider on the OFS register – so greater number of institutions than had, to date, been the case.
- Also enables the payment of sharia compliant student loans by the Student Loans Company.
- Also creates a link between teaching quality and tuition fees – can only charge higher fees if the teaching quality is good.
- Is primarily a piece of legislation for England, save for UKRI and the Teaching Excellence Framework (see below).

View of the Act from providers and consumers

- The NUS objected to the "marketisation of HE" and said that competition would not be in the best interests of students.
- Seen as too easy for entry by profit centred organisations .
- Criticism of level of intervention of OFS who could de-register universities.
- Baroness Wolf said that this weeping legislation makes it more likely that we will end up with an American style catastrophe.
- Universities UK welcomed the changes, saying that the previous Act had not kept up with the sector.

Teaching Excellence Framework

- Ratings given for all English universities
- Awarded bronze, silver or gold.
- If have a TEF award, may charge up to a maximum tuition fee – is £9,250.
- If do not, can charge a maximum of 9k (but this may go down in 2019/2020)
– it is Parliament /the Government who decides the level of fees .

Office for Students: Headlines

- Created April 2018 – transitional for 2018/19 academic year.
- Headed by Sir Michael Barber
- Has provided new regulatory framework based upon four objectives (issued Feb 2018) : (a) Students irrespective of background are support to access and succeed in higher education
- (b) Receive a high quality academic experience and their interests are protected whilst they study
- © Are able to progress to employment or further study and their qualifications hold value over time
- (d) Receive value for money

Regulatory Framework – Key points

- 166 page document – issued under s75 of HERA – issued Feb 2018: laid before Parliament.
- Operates a risk based approach - Principles based rather than rule based to avoid “stifling diversity and innovation” .
- Regulation is to be focused upon protecting the interests of students

Regulatory framework

- Has regard to its general duties and powers under statute which are: (a) autonomy of institutions (b) promotion of quality and choice for students © encouraging competition , where in the interests of students and employers (d) value for money (e) equality of opportunity and access (e) have proportionate, transparent and accountable regulation and targeted only at cases where action is needed.
- Has to comply with any directions issued by the Secretary of State and any conditions to any grants it receives from the SoS.

“Provider” regulation – the Register

- Single register for all HE providers - if want to (a) access public grants or student support funding (b) have Tier 4 licence © Award a degree or University Title. Public document sets out grants of registration, access plans, access statements, fee limits, outcome of TEF and their rating etc.
- Must meet a set of initial conditions, and are subject to a risk assessment – so not on age, size or mission. If less risk, then less monitoring. Initial conditions designed so that do not have to have a track record of delivering higher education. Larger organisations have to use TEF (government designed framework to assess teaching quality).
- OFS will audit the designated quality body to assess the quality and standards of the HE providers.
- Can be registered with conditions – which can be either general or specific (used so that meet the baseline of quality standards).
- Can provide enhanced monitoring.
- Only where carrying out activities in England - defined as more than 50% of HE provision in the UK – if not then no need to register, but if does register, have to meet UK laws

“Usual conditions”

- Access and participation statement updated annually
- Deliver well designed courses with reliable assessment.
- “must provide” all students with the support they need to succeed.
- Must deliver successful outcomes for all students.
- Qualifications hold their value.

“Usual conditions” (2)

- Must participate in the Teaching Excellence and Student Outcomes Framework – ratings system to quality of such. Applies to all HE providers with more than 500 students.
- Its policies have regard to relevant consumer protection law
- Has a students complaints scheme and complies with OIA requirements.
- Has a student protection plan approved by the OFS , and can implement the steps
- Must be financially viable and sustainable and have the resources to comply with conditions of registration.

“Usual conditions” (3)

- Have adequate governance and deliver the courses advertised.
- Ensure compliance with the OFS and have an “accountable officer” responsible for regulatory requirements with OFS
- Must notify of any changes to information contained in the register
- Comply with guidance on electoral registration of students
- Must provide transparency information publicly – applications for HE courses, offers made, those accepted, completion of courses , degree award by gender, ethnicity, social – economic
- Must have transfer arrangements and publish information about how to transfer (must be able to transfer under s38(2) of HERA)

The two registers

- The Approved Register
- Ineligible for funding for direct grant funding through UKRI
- Ineligible for teaching grant funding
- Eligible for research council funding
- Students can apply for student support up to the lower fee amount with uncapped fees
- Post grads also student support and DSA
- Can have a sponsor licence
- Degrees awarded
- Approved (fee cap) is everything, including eligibility for direct grant funding and teaching grant funding.

Registration

- Full guidance on the conditions – Regulatory advice 2 and 3: Registration for current and new providers 2019-2010 and on evidence to be supplied.
- Risk assessment compulsory for all providers to determine conditions and registration – this will not be published, but the conditions will be.
- Refusal of registration can trigger written representations appeal (and then judicial review)

Provider Regulation – Monitoring

- Monitored using risk register/profile – which will not be published:
- (a) Lead indicators – which are in development and to be based upon data to understand what should be examined re : performance – including growth/diminution of students numbers, student access, changes in entry requirements, TEF performance , degree outcomes, OIA complaints.
- (b) Reportable events (guidance to be published about this)
- © Other intelligence (eg student surveyys, OIA, information from student unions)
- (d) Random sampling with a more extensive assessment.

Reportable events

- Anything which could materially affect their “legal form” or business model or ability to comply with conditions, for example:
 - (a) sale, merger, acquisition
 - (b) Structural changes or separation into multiple entities
 - © Change of ownership
 - (d) Change of control
 - (e) fraud , legal or court action , regulatory investigation , loss of accreditation by regulatory body, opening a new campus,
 - (f) Risk to financial viability (e.g. gearing)

When will intervention take place?

- Either a breach of registration conditions or where the risk of a breach is likely.
- Posed on risk of harms to students/taxpayers and likelihood of any breach.
- Whether dishonesty/criminality
- Where breach less likely to be remedied or not taken adequate steps to comply
- Lack of co-operation with OFS investigations.
- OFS has powers of entry and search (s61 and Schedule 5 of HERA) – by way of magistrates warrant: entry granted if reasonable grounds to suspect breach of conditions and sufficiently serious to justify needing to enter or entry will be voluntarily refused. Says will only use them rarely and exceptionally.

Auditing Quality and standards

- This is called the Quality Assurance Agency for Higher Education
- It will perform assessments of quality and standards (Schedule 4 of HERA and s45 of the Act).
- MOU about how this relationship will work.

Provider Regulation – sanctions

- Imposition of further conditions
- Enhancement of monitoring
- Formal sanctions – fines, suspension, deregistration, not agreeing access plans, revoking degree awarding powers, revoking title of the university.
- Fines: where negligent, dishonest, financial enrichment – have opportunity to make representations – can appeal to the FTT against this.
- Suspension – where a breach to reduce the impact upon taxpayers- expectation will take remedial action – for example where a course has very weak retention rates – few students progressing to professional jobs.

De-registration

- Set out in HERA when the OFS can seek to do this. One of the following must be met:
- (a) Either a fine or suspensions and there is again a breach or a continuing breach of the same or a different breach.
- (b) Where suspension/a fine would not be sufficient to deal with the breach.
- Can also be removed voluntarily (but needs the OFS provision to do so) and the provider needs to comply with its student protection plan.
- Right of appeal to the FTT (on law/unreasonable/mistake of fact)

Siddiqui v University of Oxford [2018] EWHC 184

- Claim in negligence for inadequate teaching (also in contract) of a special subject paper he took as part of his history degree – in fact, one paper “the gobbets” paper. This is one exam out of 7 in a final year of a 3 year course.
- Failure of his personal tutor to provide information about his ill health to those responsible for making reasonable adjustments and moderating results.

Inadequate teaching?

- Based largely upon letter written by another student at the time (not a complaint – simply seeking to improve it) criticizing the structure of the course and saying that the teacher had too many pupils to teach it thoroughly.
- That student described as “exceptionally brilliant but very demanding”. The tutor accepted that the course sought to teach too much in too short a timescale, and that the teaching was not ideal, but denied that it was sub-standard. Also said that SB’s expectations were completely unrealistic and that she wanted an independent course in a way which catered to her interests – the judge found those observations to be valid.

How was inadequate teaching judged?

- Judge accepted the evidence that there were no complaints about the course other than SB.
- Judge also accepted evidence of other teachers and of the teacher's own record (no other complaints).
- Only difference in course provision from other years is that one person had to take tutorials, other than 2 and that "merely because some has to work harder and longer hours does not mean that the task is accomplished less competently".
- Not judge the competence of the course by SB's complaints
- No contemporaneous evidence to support SB and no other contemporaneous complaints.
- Rejected argument that fact only a small proportion of the document in the exam expressly covered in the class – but the expectation was that they would be read independently and otherwise seen as "spoonfeeding"
- Also no consistent pattern of underachievement in comparison with other courses and exam results.

Causation

- The judge also examined his marks in other papers, both in Mods and “collections” (mock exams) and saw that his overall mark did not change much between these and his finals – so the idea that he would leap to having a First was unlikely.
- Also at the time he had severe hay fever which he said contemporaneously had impacted upon his answers to the exam (he wrote a couple of weeks afterwards saying how much discomfort he was in with this during the exam).
- Also six months afterwards when he wanted a clerical re-check on some of his marks, this did not include the gobbets paper he now complained about.

Causation (2)

- Judge says – there are so many variables that go into the result of a particular individual, difficult to see how a causal connection could be established between a level of tuition and a result unless the tuition failed to meet the most basic of standards such that simple operational negligence has taken place. The judge says [118]:

“It is very difficult to envisage the circumstances in which it could be”.

So even if the tuition fell below a reasonably acceptable standard, he cannot establish the requisite link and the cause of action.

Causation – psychiatric damage

- No contemporaneous record of his having psychiatric issues during the time he was sitting his finals and no evidence he had depression or insomnia, or that he told his tutors of this and they failed to tell the examiners (there was evidence before or afterwards of psychiatric issues).
- Judge also said that considerable caution needed to be taken with the Claimant's recollection as he had been reflecting which had influenced his subsequent experiences.
- Also that depression/insomnia across the board would not have lead to any revision in marks as it is impossible to judge what the performance should have been.

Limitation and knowledge

- Claimant argued that he did not have “knowledge” of the negligence until October 2013 - the date he communicated with SB.
- He issued the claim in August 2014 about events in 2000.
- Judge says that someone’s knowledge involves examining their beliefs as to what evidence they had and what they know – one has to know the “subjective thinking” of someone about an event.
- Judge found that he knew in 2001 to justify bringing a claim – as he knew of SB’s concerns, had e-mailed to say he thought the paper was not well covered.
- Claim therefore time barred and not going to exercise discretion.

Judicial postscript

- “... The underlying issues which have lead to his periods of depression have never been fully addressed and unfortunately for the last four years or so he has focused on this litigation as a solution to his difficulties.....hope he can refocus.....” .
- “....There is a wide spectrum of abilities and attainments in almost any sphere of activity.....But whilst it cannot be said that an aspect of a person’s education , inadequately delivered, can never be the cause of that person’s failure to achieve some otherwise attainable objective, the hurdle in establishing that claim for compensation are great and often insurmountable....”b