

The quality of teaching and online learning - what legal issues arise?



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Legal Framework

- Complex legal relationship between student and Higher Education Institution
 - Contract
 - Public law principles: *R (Zahid) v University of Manchester* [2017] EWHC 188 (Admin), para 6 (Hickinbottom J)
 - Statute

Legal Framework

- Statute
 - Higher Education Act 2004
 - Established complaints scheme run by Office of the Independent Adjudicator
 - “*Qualifying institutions*” (section 11)
 - “*Qualifying complaints*” (section 12(1))
 - “a complaint about an act or omission of a qualifying institution which is made by a person as a student or former student” but excludes academic judgment.

Legal Framework

- Generally speaking, will need to complain to OIA before bringing claim in High Court
 - *R (Zahid) v University of Manchester* [2017] EWHC 188 (Admin), para 68 (Hickinbottom J):
 - “...where there is such a complaints procedure as provided by the 2004 Act through the OIA, the court should be slow to become engaged with issues arising out of the same subject matter, unless and until that procedure has been given reasonable time and opportunity to run to a conclusion; and, where either a claimant or a defendant (or both) wish to progress court proceedings before then, they must provide the court with good reasons for doing so. In my view, both parties and the court should approach the issues raised in the applications such as those before me – and all issues that arise as a result of the relationship between a reference to the OIA and judicial review proceedings – with this uppermost in mind.”

Office of the Independent Adjudicator

- OIA Scheme Rules (April 2018)
 - Students can complain to the OIA about “*anything their higher education provider has done or failed to do*”: Rule 4.1.
 - **Free!**
 - OIA will not review complaint unless provider has considered matter first, usually through internal processes: Rule 7.1. BUT OIA will forego this requirement in “*exceptional circumstances*”: Rule 7.3.
 - Decision usually made on papers but hearing will be held if “*it is necessary to do so*”: Rule 11.2.
 - Timeframes: OIA will tell complainant and provider whether it can review complaint within 3 weeks of receiving complaint or further information requested: Rule 10.5. Final decision normally made within 90 days of receiving all relevant info from both sides: Rule 13.2. OIA can extend 90-day period if matter “*highly complex*”: Rule 13.2.

Office of the Independent Adjudicator

- OIA Briefing Note 2: Our approach to complaints arising from the effects of coronavirus (COVID-19)

“Consumer protection legislation has not been suspended for students. This means that providers still need to deliver learning and other services that are consistent with students’ reasonable expectations.”

What students can reasonably expect, and what providers can reasonably be expected to deliver, is likely to change and evolve as circumstances change and evolve, especially if restrictions are tightened again. But providers should be planning to deliver what was promised - or something at least broadly equivalent to it - and to ensure that learning outcomes can be met. It’s unlikely to be reasonable not to do that, especially now the initial crisis period has passed.

Where providers have not or decide they cannot deliver what was promised they will need to consider how to put that right. A blanket refusal to consider tuition fee refunds in any circumstances is not reasonable. There may be groups of students that are particularly affected, and providers should take steps to identify those groups and address their issues. But they also need to consider concerns raised by students about their individual circumstances.”

Office of the Independent Adjudicator

- OIA Briefing Note 2: Our approach to complaints arising from the effects of coronavirus (COVID-19)
 - On exclusion clauses:

“Clauses that attempt to exclude a provider’s liability for failing to deliver the educational service to the required standard, and those giving the provider a wide discretion to change significant aspects of the course of study, contrary to students’ expectations, are unlikely to stand up to scrutiny.

Even if a provider might have been able to rely on this type of clause during the initial crisis period, in our view it is unlikely to be reasonable to rely on it in relation to students who are starting or continuing with their studies in the autumn. Providers have now had time to prepare and plan for the longer-term effects of the pandemic, and so those effects are unlikely to be considered an extraordinary event outside of the control of providers that is preventing them from delivering the service they have promised.”

Office of the Independent Adjudicator

- OIA Briefing Note 2: Our approach to complaints arising from the effects of coronavirus (COVID-19)
 - On course delivery:

“In this context, we can consider (for example) a complaint that a provider did not cover subject areas that it said it would; that a student’s supervisor was unavailable; that a student didn’t benefit from teaching because they could not access it, or the delivery method did not work for them; that a provider did not support its students adequately; or that the provider did not follow a reasonable assessment process.

...

We will look at whether what the provider has done is reasonable in the circumstances – so reasonable delivery in the middle of lockdown is likely to look different to reasonable delivery in a more managed and planned environment.”

Office of the Independent Adjudicator

- Based on examples, OIA considers following factors:
 - Whether the provider acted reasonably and treated the student fairly.
 - What the provider did at the time to minimise disruption for students affected by the circumstances, to try to put things right.
 - What the provider promised, and what the student could reasonably expect in terms of contact hours and other learning opportunities.
 - What the provider did to ensure that students were not disadvantaged academically and could achieve their learning outcomes.
 - What the provider delivered, and whether that matched what was promised and what students reasonably expected, and was broadly equivalent to its usual arrangements.
 - Where there has been a shortfall of delivery, what were the consequences for the student, and whether the provider has considered those consequences.

Case studies

- 10 decisions in November 2020 relating to COVID:
 - 1 justified
 - 2 partially justified
 - 3 not justified
 - 3 not eligible
 - 1 settled

Justified

- Studies disrupted due to industrial action – missed 24 hours of teaching. Missed further lessons due to lessons going online following lockdown – delay, online sessions shorter and disruption not minimised.
 - “The provider told the student that it would not consider their complaint because it was not giving any tuition fee refunds. It said that it had no option but to move to online teaching and that it had put in place measures to minimise disruption. The provider did not consider the student’s individual concerns about the impact of the pandemic and the industrial action on them or explain how the measures it had taken addressed those concerns.

We think that it can be pragmatic for a provider to shorten or streamline its usual complaints processes, especially when there are a large number of similar cases to manage. But in this case, we concluded that the provider had not engaged with the student’s individual concerns at all and so it was not reasonable to reject their complaint. We recommended that the provider should consider the student’s complaint, looking at whether the student was able to meet their learning outcomes, whether the provider had delivered what it had promised, or something broadly equivalent to it, and whether the student had been able to access what had been offered.”

Partially justified

- International student paid £13,500 per year before university cancelled half of on-campus learning due to lockdown:
 - “The student was studying two modules and we looked at what the provider had done to mitigate the disruption in both modules. One module included a significant element of practical group work. In that module the module leader adjusted the group task, had encouraged students to contact other members of their group, and arranged online support and discussion sessions and regular feedback sessions. We were satisfied that the actions the module leader had taken mitigated the disruption to the student’s learning opportunities and ensured that the delivery of the module was broadly equivalent to usual arrangements.

For the second module four weeks of teaching were cancelled which meant that four topics (out of ten) were not covered. In addition a final project that was originally worth 60% of the module was cancelled which meant that the student lost the opportunity to develop their written work and research. The provider did not replace the project with another assessment with similar objectives, as described in the module guide. We concluded that the provider had not taken sufficient steps in relation to this module to mitigate the disruption to the students learning experience or to ensure that the delivery of the module was broadly equivalent to its usual arrangements.”

Partially justified

- **We recommended that the provider should pay the student compensation.** The starting point for our assessment was the notional cost of the teaching hours for the one module missed. We decided that it would also be reasonable to compensate the student for the loss of the project and we assessed that compensation at £500. We recognised that providers must also provide and maintain facilities, infrastructure, administration and other student services, and that although the student could not access facilities on campus they did have access to services remotely including pastoral and other support services and online library facilities. We reduced the amount we had assessed by 30% to take account of this, making a total of just over £1,000 in compensation.

Partially justified

- Health-related course disrupted by industrial action and lockdown
 - “But we concluded that it was not reasonable for the provider to refuse to consider the students complaint about disruption caused by the coronavirus lockdown. The provider had not explained what it had done to minimise disruption to the students’ studies or why it was satisfied that it had delivered teaching that was broadly equivalent to its usual arrangements. We recommended that the provider should consider the students’ complaint about the disruption caused by the lockdown.”

Not justified

- International student complained about move to online teaching following closure of campus:
 - “online delivery was very different from face-to-face interaction with teachers and students, and the experience of campus life”
 - Provider had given students detailed information about changes to courses including how lectures, seminars and other teaching sessions would take place online.
 - Teaching staff offered office hours that accommodated students in other time zones.
 - Group work facilitated online
 - Although some practical sessions had to be cancelled, the students affected were not disadvantaged academically.
 - Provider had communicated clearly and in timely way how it was continuing to deliver course, including opportunities to interact with staff and other students and support services
 - Had made reasonable efforts to ensure students could achieve expected learning outcomes and to continue to deliver learning in a way broadly equivalent to usual arrangements.

Not justified

- Student complained about disruption from industrial action and COVID-19 lockdown:
 - “missed learning, a reduction in quality teaching time, and a lack of access to facilities”
 - Provider had done enough:
 - Students not assessed on any material not taught
 - Introduced open book assessments
 - Extended and staggered assessment deadlines
 - “No detriment” policy to ensure students could progress with studies provided met learning outcomes
 - Made available recorded lectures from previous year
 - Facilitated remote discussion groups
 - Library and other service available online
 - Student support and well-being services continued to operate

Not eligible

- Student had not complained to the provider first
- Student's complaint to provider was at final stage of internal processes
- The course was a Level 2 course and not a higher education course

Judicial review

- High Court
- Costs implications
- Challenging OIA decision on public law grounds
- Deference to OIA

Partially justified

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Judicial review

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- Costs implications
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Thank you for listening

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