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STUDENTS' UNION BULLETIN

AUTUMN 2022

Welcome to the autumn edition of Wrigleys' students' union bulletin

Welcome to the latest legal update for students' unions from Wrigleys Solicitors LLP.

As the new term kicks off, you're no doubt drowning in work so we'll keep it brief.

This update includes several timely articles to help you. A new intake of trustees prompts an article about what the role entails, including a reminder about trustee duties and a handy checklist of information to give to new trustees. The return of students to campus prompts an article about the campaigning and political activity which SUs are permitted to do. We are certainly seeing an increase in the number of SUs seeking legal advice on campaigning and expect this to continue as the cost of living crisis, climate change and EDI issues remain hot topics for students.

You'll also find an invitation to our annual charity governance seminar, a fully virtual event to make it more convenient for everyone to attend. Our keynote speaker this year is Sally Stephens of NCVO, who previously worked at Leeds University Union as their governance lead, so she'll no doubt share tons of insights relevant to students' unions. The seminar is always an enjoyable, stimulating event and many students' unions join us every year, so we'd love to see you there.

As always, if you have any legal questions, please get in touch with any member of our team.

Best wishes,
Wrigleys Students' Union Team

– Laura Moss, Editor **laura.moss@wrigleys.co.uk**

Watch our past webinars now available on-demand:

Tuesday 10 May 2022 | 11:00-12:00

Creating change through campaigning and politics: what can student's unions do?

Speakers: *Joanna Blackman & Daniel Lewis, solicitors at Wrigleys Solicitors*

Click here for more information or to book

Tuesday 24 May 2022 | 11:00-12:00

Student complaints

Guest speaker: *Jim Dickinson, associate editor at Wonkhe SU*

Wrigleys speaker: *Laura Moss, partner at Wrigleys Solicitors*

Click here for more information or to book

If you would like to catch up on other previous webinars, please follow this link.

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Political activity, campaigning and students' unions: what is permitted?

Article published on 26 September 2022

How can student's unions run campaigns and engage with political activity whilst complying with Charity Commission guidance?

Across the country, the university term is starting again. As students return to campus and students' union (SU) societies start looking for new members at the annual Freshers Fair, SUs will be considering what campaigns will be the focus of the coming academic year.

Many students are heavily involved in debates on hot societal topics, such as climate change, decolonising education, anti-semitism and tackling inequality. The cost of living crisis, and its effects on students, is also a highly topical subject for many students. This article is a reminder of the activities which an SU and its societies may or may not engage with.

Campaigning and political activity

There are strict rules which govern what kind of campaigning and political activity a charity may do. Simply put, any campaigning activity must be justified as furthering the charity's purposes and the Charity Commission is clear that it must not become the sole activity or the reason for the charity's existence. The Charity Commission has useful guidance on this (CC9) (see here) and its Official Guidance for students' unions (OG48) has a handy section on political activity and campaigning (see here). It's well worth reading both of these if your SU or any of its societies are planning political or campaigning activity.

Does the SU have the power?

Before engaging in any political activity or campaigning, an SU should ask itself whether it has the power to do so in law. There are three key aspects to consider:

1) Is the activity permitted by the SU's constitution, particularly the charitable objects? The objects will almost always involve the advancement of education of students at a named institution, especially where an NUS model constitution has been used. Consequently, everything the SU does must further those objects, that is to say, it must assist with the education of students at that particular named institution. It may be possible to justify debates and campaigns as furthering students' education, but it always turns on the facts.

2) Is it compatible with being a charity and is it for the public benefit? If the trustees permit the activity to go ahead, are they complying with their duties and acting in the best interests of the SU?

3) Is it compatible with the Education Act 1994? If an SU is funding a society activity, it needs to reflect a fair allocation of resources between societies. If the activity involves the affiliation of the SU with external bodies, this must have been approved by all students, annually or more frequently.

Is a society part of the SU?

We find that this question crops up regularly and the lawyer's answer, as always, is 'it depends'. We sometimes see societies which are separate registered charities: they are not part of the SU. In contrast, where a society has a constitution prescribed by its SU, has no separate bank account and isn't affiliated to any external organisations, it's highly likely to be part of its parent SU. For these purposes, it's safest to assume that societies are part of the SU and that any activity a society engages in must be possible for the SU itself to do.

SUs should also bear in mind the Higher Education (Freedom of Speech) Bill, currently making its way through Parliament. If approved this will place direct obligations on SUs in respect of freedom of speech. The extent to which this will affect an SU's campaigning and political activity remains to be seen, but it is something we will be watching closely.

In making a decision about whether to permit a particular campaign or political activity to go ahead, trustees will need to demonstrate they have acted reasonably in the circumstances and be able to justify their decision. Carefully minuting any decisions taken in writing and setting out the reasons for the decision recorded will assist with this.

If you have any doubt about whether or not your SU can engage with a particular activity please do get in touch with our SU team and we will be happy to help. We also recently hosted a webinar on this topic which is available to view here.

Trustee duties: a reminder for students' union trustees

Article published on 21 September 2022

With students' unions welcoming many new trustees at this time of year, this article is a reminder of what the role entails.

Eligibility

A person must be eligible to be a charity trustee:

- They must be at least 16 years old to be a trustee of a charity that is a company or CIO, or at least 18 years old to be a trustee of another type of charity.
- They must be appointed following the procedures in the SU's governing document. If they are not properly appointed, their decisions or actions may be invalid.
- A person must not have been disqualified from acting as a charity trustee, for example due to being bankrupt, having an unspent conviction for certain offences, being on the sex offenders' register or having been disqualified from being a charity trustee by the Charity Commission. Your SU's governing document may set out further disqualification criteria, so check it.
- Trustees should be 'fit and proper persons' (HMRC has detailed guidance on this here). You should ask new trustees to sign a form declaring they are a fit and proper person – you can find a model declaration form here.

Information for new trustees

Once a trustee has been appointed, help them settle into their new role by giving them all the information they need to do their job properly. This might include:

- A copy of the SU's governing document and bye-laws.
- A copy of the trustee role description, if you have one, including any details of committees which trustees may, or may be expected to, join.
- Confirmation of their start date and term of office.
- A copy of the Charity Commission guidance, 'The Essential Trustee: What you need to know, what you need to do' (CC3), along with information about any trustee training opportunities which may be be available.
- The SU's most recent annual report and accounts, with any accompanying commentary.
- Information about meeting dates, agendas and timings.
- Information about the SU's conflicts of interest policy, including a conflicts of interest declaration form for trustees to sign and return, if you have one.
- Information about the fit and proper persons test, including a copy of the declaration form for trustees to sign and return.

- Any other policies and procedures relevant to trustees.

This information might be contained in a welcome letter for new trustees, although you may need to give some of this information to all trustees, on an annual basis.

You might also consider a mentoring programme for new trustees, where they are paired with more experienced members of the board to help them get up to speed.

Trustee duties

Trustees are subject to various duties set out in law and the Charity Commission guidance CC3 acts a useful summary of these.

The six key trustee duties are as follows:

- **Carry out purposes for the public benefit:** trustees must ensure that the SU is carrying out its charitable purposes, as set out in its governing document. These purposes will almost always involve a requirement to advance the education of students at a particular named university or college. In addition, SU trustees must understand how the charity benefits the public through carrying out its purposes.

- **Comply with the governing document:** trustees should read the governing document (including any bye-laws) and if they have any questions regarding legal requirements to which an SU is subject, they should seek appropriate legal advice.

- **Act in the SU's best interests:** trustees are required to make informed decisions, which will best enable the charity to carry out its purposes. The personal interests of the trustee should not conflict with their duty to the charity and no benefit should be received by the trustee (or any person connected to the trustee, such as a partner or child) from the SU unless it is properly authorised and is clearly in the charity's interests.

- **Manage the SU's resources responsibly:** charity trustees must act responsibly, reasonably and honestly, exercising sound judgment when making decisions and putting in place appropriate safeguards to minimise the SU's exposure to theft, fraud or other kinds of abuse.

- **Act with reasonable care and skill:** trustees should make use of their specific skills and experience, take appropriate advice when necessary and ensure that they give enough time, thought and energy to their role, preparing for and actively participating in trustee meetings.

- **Ensure accountability:** trustees should ensure the SU complies with statutory accounting and reporting requirements, to demonstrate that the SU is acting within the law, is well run and is accountable to its student members.

We regularly provide training to charities (including SUs) on trustee duties and would be happy to discuss the points covered in this article in more detail. Please get in touch with Laura Moss if you would like to arrange an appointment.

Student complaints: trends in students' unions

Article published on 18 July 2022

Are students' unions seeing a rise in the number of student complaints? Is the type of complaints changing? How should they be handled?

This article summarises a webinar we recently held on this topic, exploring these questions and more.

Thanks go to Jim Dickinson of WonkHE for co-hosting the webinar.

Impact of an increase in complaints

- In general, we are seeing more complaints from students about things which they may not have raised in a formal setting in the past. Instead of a narrow focus on academic appeals, complaints cover a wider range of areas. This could be because students are more aware of behavioural standards, expectations around consent and their right to complain, all of which will hopefully give them more confidence that their complaint will be handled well. This is of course a positive thing.

- However, it does mean that things which may have previously been resolved through an informal mediation process are now being dealt with far more formally. The students' union is increasingly seen as a process-orientated referee of disputes. This generates more work and more complexity for students' unions with resultant pressure on resources. It also means that students unions must develop their standards and processes to ensure they are robust enough to cope with these new trends.

- The OIA say that they are seeing an increase in the number of group complaints from students. This is unsurprising, given the pandemic and recent industrial action. However, it has implications, because the remedies generally only benefit the people who have signed the complaint letter. It raises the question about whether students' unions should be encouraging these group complaints, if it means that only those students who have engaged with it stand to benefit from any redress.

Third party involvement in complaints

- Another trend involves third parties bringing complaints on behalf of students. We have seen multiple examples where external pressure groups or national organisations put forward representations on behalf of individual students or student societies.

- In many cases, this legalises a process which perhaps should not be legalised and can introduce very complex issues, which then have to be considered by the student-led complaints panel. The student panel is then expected to come to a decision without always having the necessary knowledge or training, and the weight of responsibility can be a significant burden.

Should complaints panels always be student-led?

- The involvement of third parties in complaints processes raises the question about whether students should be removed from complaints panels. This is undoubtedly controversial, when a students' union is supposed to be a student-led organisation with its complaint process being a peer-to-peer resolution process.

- Another question arises when a student officer is on a complaints panel. Can they really be unbiased when they are hearing complaints, especially if their manifesto was focused on a particular issue which has some relevance? Policies and processes designed to exclude

external representation and manage conflicts of interest can help, but don't always solve these problems.

Dealing with a multitude of policies

- A common issue in the students' union sector arises when there are a multitude of policies and procedures which may apply in any given situation. For example, a student may be resident in halls, may be an employee of the students' union, may be a member, officer, trustee and/or society official. If they are accused of unbecoming conduct, and a complaint is initiated against them, which disciplinary policy or procedure should apply? There is a risk that a students' union could be accused of pinballing between different policies, in other words "jurisdiction shopping" depending on what the situation requires.

- Issues can arise where the definitions used in different policies are different, for example definitions of misconduct or harassment. In some cases, a students' union's code of conduct or policies may also go further than a university's (or even the law) in what it requires, and vice versa. Consistency in policies is really important, but not always easy to achieve.

- Some students' unions operate a "severity trigger policy", whereby complaints of a particular level of severity are referred to be dealt with under (for example) the university's code of conduct, rather than the students' union's. The severity trigger could be a particularly serious alleged incident or could involve a repeated pattern of behaviour.

- The willingness to refer a complaint on to elsewhere does require a certain level of trust that the complaint will be handled properly. Not all students' unions will have confidence that a university would handle a case appropriately, and remedies under a university's procedure may be different to the students' union.

- In addition, a students' union still has its own legal duties, which it will need to discharge. If it is subcontracting a complaint out, it needs effective oversight to ensure it is going to be dealt with properly.

Kindness in handling complaints

- The OIA has developed its 'kindness principles' and the general feeling was that these are having a positive effect. More listening is happening, and a student has the chance to be listened to and understood.

- In some students' unions, "wellbeing contacts" for people going through an investigation or a disciplinary procedure have been introduced, which gives people a safe, confidential space to talk things through.

- The language used in complaints policies can be combative – could it be refocussed towards resolution rather than conflict, in order to reduce defensiveness, and demystify intimidating procedures.

What does the future hold?

- A trend we are seeing, which we anticipate will continue to increase, is the moving of political debates into the disciplinary / complaints arena. From transphobia to anti-semitism, student complaints are increasingly set in a wider political context – making the job of a student-led complaints panel even more difficult.

- There is an ongoing tension between the right to free speech and the need to protect students from discrimination and harmful behaviour. For example, gender critical comments may breach an EDI policy, but may be defended in the name of free speech. In anticipation of the

new Higher Education (Freedom of Speech) Bill, there will be even more pressure on students' unions to balance the right to free speech with a complaints process which gives students the confidence to raise a complaint in the knowledge it will be handled properly.

Students' Unions: Holding Remote AGMs

Article published on 12 July 2022

Can students' unions still hold remote AGMs in a post-lockdown world?

The COVID-19 pandemic, and the resulting lockdowns, social distancing and self-isolation rules, had an impact on nearly every aspect of our daily lives. One thing made particularly difficult during this time was meeting face to face, which affected us as individuals but also had implications for all types of organisations, with students' unions no exception.

From June 2020, the government brought in temporary legislation (the Corporate Insolvency and Governance Act 2020 ('CIGA')) which enabled SUs that are companies to hold meetings remotely, even where their governing document did not allow this, in an attempt to help slow the spread of COVID-19. The Charity Commission also provided guidance to say that it would take a flexible and pragmatic approach to meetings held outside the terms of a charity's constitution.

However, in line with the easing of other Covid related restrictions, the CIGA provisions relating to remote meetings expired on 30 March 2021 and the Commission's more flexible approach to remote meetings ended on 21 April 2022.

Our AGM is coming up and we want to hold it remotely, what now?

SUs, and other charities, must now make sure they comply with the terms of their governing document in relation to holding remote meetings.

The first step is to check your governing document. Many governing documents include an explicit power to hold members' meetings remotely (e.g. by video or telephone conference). If your constitution does include an explicit power enabling you to hold virtual meetings of the members, you must make sure that you also comply with the provisions related to giving notice, quorum and voting.

If you don't have the power to hold virtual meetings and decide that it would be in the best interest of the SU to postpone, adjourn or cancel your AGM for any reason, you will need to ensure that you follow any specific rules set out in your constitution and carefully document the reasons for doing so.

If there is no explicit power in the constitution to hold virtual meetings of the members and you do not want to (or cannot) postpone, cancel or adjourn the meeting, you may want to consider amending the governing document to give the required flexibility going forward. It is important to remember that the provisions in the governing document around making amendments must be complied with, which may involve meeting in person to agree the changes.

Please note that there is a question mark over whether (now that the CIGA provisions have finished) a company is permitted to hold a fully virtual members' meeting or whether a physical "place" is always required. There are differing views on whether a fully virtual company members' meeting is valid and, if it is valid, on what is required e.g. in terms of proving that the technology worked correctly throughout the whole meeting. The cautious approach is therefore either to continue to hold company members' meetings at a physical place or to amend the company's articles of association to permit the holding of hybrid meetings where some people attend physically and others virtually. We appreciate that this may be frustrating at a time when university lectures are

increasingly online and when AGM attendance can be a challenge for some. We have asked the Law Commission to look at amending the law in this area to make the CIGA provisions permanent and await their response, but it may take years for the law to catch up with technological changes in this area.

Overlapping grievances and disciplinary procedures

Article published on 31 August 2022

What should employers do if the subject of a disciplinary process raises a grievance?

The subject matter of a disciplinary and grievance may overlap, and therefore it is not uncommon for an employer to find that an employee will raise a grievance during a disciplinary process.

This might be done for a variety of reasons. It may be that there is a genuine concern about the way the process is being conducted or about someone involved in it, or it could be a mechanism used by an employee to delay the outcome of a disciplinary decision, particularly if they are facing dismissal. Failure to deal with a grievance before concluding a disciplinary could result in an unfair dismissal.

Below, we consider the options for an employer and how to deal with these situations.

Check contracts, policies and relevant ACAS publications

It is always a good idea to start by reviewing your employment contracts and policies. It is not uncommon for employers to set out in their disciplinary policy that a grievance may be raised whilst a disciplinary process is ongoing and how it should be dealt with.

Written contractual provisions on these issues are less likely, but it is always good practice to check. It is also worth noting that there are implied terms in employment contracts that:

- employers will 'reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance', and
- disciplinary processes will be conducted fairly.

The ACAS Code provides some guidance on overlapping grievance and disciplinaries, referring to the fact that a disciplinary may be suspended to allow for a grievance to be dealt with, or even for them to be dealt with alongside one another where the issues are related to the disciplinary.

ACAS guidance provides some examples of when it may be appropriate to suspend a disciplinary process to deal with a grievance, for example where allegations concern:

- possible discrimination
- a conflict of interest or bias that affects the person overseeing the disciplinary or the disciplinary's proceedings
- there are issues regarding the selection and use of evidence as part of the process (for example, evidence which points to the innocence of an accused party has not been searched for or referred to)

No guidance is given on the length of time an employer should suspend a disciplinary process to deal with a grievance and employers will need to gauge for themselves what is required taking into consideration the following points.

Is a suspension of proceedings necessary?

A suspension of disciplinary proceedings should only be considered if the grievance raises serious risks around the fairness of the disciplinary process to the extent it would call the process and/ or outcome into question.

While employers have an obligation under employment law to address a grievance, unless it affects the disciplinary process in the ways outlined in the ACAS guidance set out above, a grievance can always be addressed after a disciplinary process has concluded, even if this is after employment has been terminated.

Does the grievance have to be completed before a disciplinary decision is made?

Even where a decision is taken to pause a disciplinary process or otherwise run the grievance process concurrently, case law has established that it will rarely be unreasonable for an employer to complete a disciplinary process before hearing a grievance appeal, provided there was no evidence of unfairness or prejudice to the employee concerned (*Samuel Smith Old Brewery (Tadcaster) v Marshall and another [2009]*). Even in cases where an employee had raised a grievance against their managers whilst subject to a disciplinary process, tribunals have held firm that there is no obligation on an employer to pause a disciplinary process until a grievance was dealt with (*Jinadu v Docklands Buses [2014]*).

Where an employer is dealing with a 'serial complainer' and those complaints have been found to be unsubstantiated then they may take the view that the risks of not dealing with the grievance before concluding the disciplinary is acceptable.

That said, employers should not rush to conclude a disciplinary because a related grievance is received. Due consideration should be given to the issues raised in the grievance before deciding what to do next and extra care should be taken in cases of alleged discrimination, harassment and/ or bullying.

Conclusion

Employers need to carefully consider the content and potential impact on a disciplinary process of an overlapping grievance. The key thing to look out for is whether the subject matter of the grievance poses a serious risk to the fairness of the process or the outcome a disciplinary. If so, it is sensible for an employer to pause the process to investigate the grievance.

Statutory minimum holiday pay cannot be pro-rated for part-year staff

Article published on 23 August 2022

Supreme Court: all workers are due 5.6 weeks' paid annual leave no matter how many weeks they work.

Working out holiday leave and pay for workers with variable hours is a tricky business. Over the years, employers have used short-cuts to try to ensure that zero hours and variable hours staff are getting their holiday pay. For example, paying staff an additional 12.07% of pay for each hour worked. The problem with these kind of short-cuts is that they are far removed from the way the law works and can lead to workers not receiving their leave entitlement, or the correct pay for that leave.

Statutory minimum holiday leave

It is important to understand that the law on holiday leave and the law on holiday pay are different.

Taking holiday leave first, the Working Time Regulations (WTR) provide for 5.6 weeks' minimum paid leave per year. The contract may provide a more generous entitlement to paid leave, but this is a statutory floor below which holiday entitlement for workers and employees cannot fall.

Holiday pay: a week's pay for a week's leave

The WTR states that workers should be paid a week's pay for a week's leave. It is the Employment Rights Act 1996 which sets out the rules on working out what is meant by a week's pay. Broadly, there are two different ways in which a week's pay is calculated.

For those with normal working hours, a week's pay is simply what the worker earns if they work their normal hours in a week. (Although this has been complicated by case law which means that any regular payments made on top of pay for normal hours should also be included in holiday pay.)

For those with no normal hours, or whose pay varies because of the amount of work done, or the time when it is done, a week's pay is the average of remuneration paid over a reference period. This was previously 12 weeks before the date of the holiday leave. Since 6 April 2020, the reference period has been extended to the 52 weeks before the leave is taken. In working out the average, no account is taken of weeks during which no work is done and the employer must go as far back as 104 weeks to find the last 52 working weeks. Where the worker has not worked for the employer for that long, the average should be calculated from all their worked weeks to date.

The problem with the 12.07% calculation

12.07% is commonly used to calculate holiday entitlement and/or pay for variable hours workers. It is a holiday accrual rate and comes from the following calculation: 5.6 weeks' leave divided by the number of working weeks in the year (52 – 5.6 = 46.4).

This percentage may be accurate to calculate holiday leave entitlement, but only where a worker has statutory minimum leave and works for all of the other weeks in the year.

The problem with this calculation is that it is inaccurate if there are weeks during the year when the worker is not working and is not on holiday. For example, a worker who has 5.6 weeks' holiday entitlement but works only 30 weeks during the year should have the following leave accrual rate: 5.6 divided by 30 = 18.67%.

Rolled up holiday pay

Paying an additional amount on top of pay each month for holiday pay (known as "rolled up holiday pay") is not compliant with the way paid leave works under the WTR. This is because holiday pay should be paid at the time leave is taken rather than effectively being paid in lieu during the contract.

The reason for this is that the fundamental purpose of the European Working Time Directive, which the WTR implemented in the UK, is to protect the health and safety of workers. Paying rolled up holiday pay can disincentivise workers from taking leave, as they do not actually have to take leave to receive holiday pay.

Case details: *Harpur Trust v Brazel*

We reported on the Court of Appeal's judgment in this case in 2019. For details of this please see How should holiday pay be calculated for term-time only workers? (available on our website).

Mrs Brazel is a term-time only visiting music teacher on a zero hours contract. She is paid holiday pay three times a year and designated leave days in each school holiday period. Her leave entitlement was worked out at 12.07% of hours worked and paid at her hourly rate.

Mrs Brazel brought a claim for unlawful deductions from wages to an employment tribunal. She argued that she was owed 5.6 weeks' paid holiday, without pro-rating, and that the trust should have used the statutory reference period to work out her average weekly pay. She calculated that her leave accrual rate should have been about 17.5% and that she had been underpaid by around £235 per term.

The Supreme Court decision

The Supreme Court handed down its judgment on 20 July this year. The key points clarified in the judgment are that:

- all workers who are on contract throughout the holiday year are entitled to the statutory minimum of 5.6 weeks' paid annual leave under the WTR – this minimum entitlement cannot be pro-rated to reflect the number of weeks worked; and
- to work out holiday pay, average weekly pay should be calculated over the statutory reference period just prior to leave being taken (discounting all non-worked weeks).

Implications for employers

Mrs Brazel's case particularly applies to part year workers on a year-round contract who have no normal hours. These are workers who have some unpaid non-worked weeks each year. That could include seasonal, term-time only and zero hours contract staff on ongoing contracts who have some weeks each year where they are neither working nor on holiday.

This case has not changed the law on holiday leave and pay. It simply clarifies the existing law and highlights that the practice of applying 12.07% of additional pay to account for holiday pay for variable hours workers is likely to be non-compliant with the WTR.

This case is the end of the litigation process and the law on this point is now settled. The law will only change if parliament legislates to do so in future.

Claims for unlawful deductions from wages must be brought within 3 months of the last in a series of deductions. Where a correction is made, workers will usually not be able to bring an employment tribunal more than 3 months after that correction. There is also a backstop of two years on arrears which can be claimed as unlawful deductions from wages.
Employers should review their current contracts and holiday entitlement calculations to determine whether their practice is compliant with the law. We recommend that employers seek legal advice to assist with assessing risks and making changes to leave and pay calculations going forward.

Lack of belief in "transgenderism" is protected but doctor was not discriminated against

Article published on 20 July 2022

Policy on use of service users' preferred pronouns was a proportionate means of achieving a legitimate aim.

In October 2019, we reported on the Employment Tribunal's decision in the case of Dr Mackereth, a doctor engaged through a contractor, Advanced Personnel Management Group (UK) Limited (APM), to work as a health and disability assessor for the Department for Work and Pensions (DWP). See our article, Doctor who refused to use pronoun chosen by transgender patients was

not discriminated against (available on our website). The EAT has now published its decision on Dr Mackereth's appeal.

Dr Mackereth is a Christian who believes that God created only males and females and that a person cannot choose their gender. During his induction he made clear that he would not refer to transgender people by their preferred pronoun as was required by a DWP policy. Alternative roles and procedures were explored which would not require Dr Mackereth to work with transgender people, but these were not found to be feasible. Dr Mackereth decided he could not work under the DWP policy and APM confirmed that he would not be able to work in the role.

Dr Mackereth brought claims for harassment, direct discrimination and indirect discrimination against both the DWP and APM.

The tribunal decision

The tribunal dismissed all the doctor's claims. It held that Dr Mackereth's beliefs were not worthy of respect in a democratic society, not compatible with human dignity and conflicted with the fundamental rights of transgender individuals, and that they were not therefore protected under the Equality Act 2010.

The tribunal also found that, had the doctor's beliefs been protected, the DWP would have been able to defend the indirect discrimination claim as the policy was a proportionate means of achieving a legitimate aim. This was because the harm to vulnerable service users of accepting Dr Mackereth's stance would have outweighed the discriminatory impact on the claimant.

The EAT decision: *Mackereth v DWP*

Dr Mackereth's belief is protected

The EAT overturned the tribunal's decision that Dr Mackereth's Christian belief or his lack of belief in "transgenderism" were not protected.

The EAT noted that the tribunal had come to its decision before the judgment of the EAT in *Forstater v CGD Europe and others* (see our article on this decision: Claimant's gender critical belief is protected under the Equality Act on our website). The EAT stated that the tribunal had imposed too high a threshold when considering whether the belief was worthy of respect in a democratic society, compatible with human dignity and did not conflict with the fundamental rights of others. It noted that the *Forstater* decision made clear that minority beliefs should be protected, even where those beliefs might offend or shock others. It agreed that a belief will meet the threshold for protection if it does not destroy the rights of others.

Dr Mackereth was not discriminated against

However, the EAT went on to agree with the tribunal that Dr Mackereth had not been discriminated against on the basis of his belief or lack of belief.

On the direct discrimination claim, the EAT held that the tribunal had been entitled to draw a distinction between Dr Mackereth's beliefs and the way he wished to manifest those beliefs. It found that any health and disability assessor who refused to use service users' preferred pronouns would have been treated the same way, regardless of their beliefs.

On the indirect discrimination claim, the EAT held that the tribunal had properly weighed the discriminatory impact on Dr Mackereth against the impacts on vulnerable service users of not insisting that he follow the policy. It noted that the tribunal had considered whether less discriminatory alternatives would be feasible, such as triaging transgender people to ensure they were not seen by Dr Mackereth. However, it decided that the tribunal was entitled to find that the

particular sensitivities for transgender people accessing the service meant these alternatives would in themselves cause offence.

Comment

This case reflects the current case law on so-called "gender-critical" beliefs. Dr Mackereth has expressed his intention to appeal. We are still awaiting the decision of the employment tribunal in *Forstater* as to whether the claimant was discriminated against on the basis of her protected belief.

Employers should continue to take what steps they reasonably can to prevent workplace discrimination and harassment. This will include putting in place clear and well-communicated codes of conduct, policies, and statements of organisational values, organising induction and regular update training on equality and diversity, and taking robust action to deal with breaches of such codes and policies.

A key learning point from this case is the importance of being able to justify policies and practices which put groups sharing a protected characteristic at a disadvantage. This means being clear about the aims of the policy and explaining how it meets the needs of the organisation, commissioners / stakeholders, service users and customers. It also means thinking through policies to ensure that they do not go further than is necessary to meet those aims. When an employee raises concerns about a policy or way of working, employers should consider whether there are alternative approaches which would avoid the discriminatory impact on the employee. Documenting these thought-processes and considerations at the time will assist employers where employees go on to bring discrimination claims.

Claimant with long covid found to be disabled for purposes of the Equality Act 2010

Article published on 19 July 2022

Tribunal decision confirms that symptoms of long covid are capable of meeting the definition of disability.

As my colleague Alacoque Marvin commented in her May article ONS statistics indicate some cases of "long Covid" will be a disability, employers are increasingly seeing staff self-report long Covid symptoms and we commented on the likelihood that long covid would be found to be a disability under the Equality Act 2010.

The definition of disability is set out at section 6 of the Equality Act:

(1) A person (P) has a disability if:

a. P has a physical or mental impairment, and
b. The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

"Substantial" means 'more than minor or trivial' and the effect of an impairment is "long-term" if it "*has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected*".

The medical understanding of this issue continues to develop, with those suffering effects after 12 weeks since contracting covid sometimes being referred to as suffering from 'post-covid-19 syndrome'. Nonetheless, long covid is increasingly recognised as being an umbrella term for several symptoms including coughing, cognitive impairment, fatigue, breathlessness, anxiety and low mood.

The issue has started to appear as part of Employment Tribunal proceedings where claimants are seeking to bring claims of disability discrimination on the basis of suffering long covid symptoms.

Case: ***Mr T Burke -v- Turning Point Scotland (2022)***

Mr Burke had worked for TPS as a caretaker/ security guard for nearly twenty years when he returned a positive covid test in November 2020. Mr Burke became absent from work and never returned before his employment was terminated by TPS in August 2021.

The symptoms were reportedly very mild at first, but developed into severe headaches and fatigue. Mr Burke reported finding it difficult to carry out simple activities, like taking a shower and dressing or household activities like cooking, ironing and shopping without needing to rest.

Subsequently, Mr Burke did not attend social events such as his uncle's funeral or Christmas celebrations which was reportedly 'very out of character for him.' Mr Burke also found his symptoms of fatigue and exhaustion unpredictable in that they seemed to improve and then suddenly would come back.

Mr Burke secured fit notes for his absences which noted that he was fatigued. In June 2021 Mr Burke's sick pay ceased and following a consultation and capability process, Mr Burke's employment was terminated in August 2021. On dismissal, TPS advised it could not keep Mr Burke's position open due to its limited resources as a charitable organisation and the "*uncertainty around a potential return to work date*". Mr Burke was dismissed on ill health grounds.

Mr Burke subsequently brought claims against TPS for unfair dismissal and discrimination on the grounds of disability, amongst others. Due to the defence presented by TPS the Tribunal held a hearing to determine whether or not Mr Burke was disabled for the purposes of the Equality Act 2010 at the relevant time.

When considering the point, the Tribunal judge found that:

- Mr Burke's symptoms met the definition of a physical impairment;
- The impairment had an adverse effect on Mr Burke's ability to carry our normal day to day activities; and
- The effect was substantial and long-term

Therefore the Tribunal found Mr Burke's symptoms met the definition of disability.

In reaching this conclusion the following evidence was particularly key to the findings:

- The witness evidence of Mr Burke and his daughter on the substantial adverse effect of long covid on the claimant was credible;
- The nature of Mr Burke's symptoms and conditions meant it was difficult to predict how long the effect would last, but as both TPS and Mr Burke explained that they did not know when his symptoms would abate, then at the time his employment was terminated it 'could well' have lasted until the end of November 2021 and thus would have met the definition of 'long term'.

Comment

The key takeaway confirmed in this case is that, as has been long suspected, whether or not long covid is a disability will depend on the effect of the symptoms on the individual. As a first instance tribunal decision the outcome of this case is not binding on any other courts or tribunals. However, it does serve as a practical example of an Employment Tribunal applying the definition of 'disability' to the symptoms of someone who contracted covid and subsequently experienced protracted symptoms that have an effect on their ability to carry out day to day activities.

The case only reports on the finding of disability and it remains to be determined whether Mr Burke's substantive claims (for unfair dismissal and discrimination) will succeed. Employers should ensure that they follow and can evidence that they have followed a fair procedure and that any action taken in regard to discipline or dismissal of employee reporting 'long covid' was necessary and proportionate in the circumstances. Likewise, when dealing with employees with potential disabilities, employers should look at making reasonable adjustments, including adjustments to the sickness and disciplinary or capability processes.

When making this judgment, employers will need to continue to consider both the needs of their organisation and the discriminatory impact on the individual. Where a decision is made to dismiss following long term absence, the reasons for that decision should be carefully documented and, as always, we would recommend that employers take specialist employment advice if they are faced with this kind of situation to best manage and assess the risks.

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