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STUDENTS' UNION BULLETIN

SPRING 2024

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

In this edition, you'll find a raft of articles outlining recent legal developments affecting the SU sector.

With a general election set to take place no later than 28th January 2025, we take a closer look at political campaigning during the election period along with considering the ultra vires rules for students' unions. We also explore the environmental, social and governance obligations of a students' union, and to what extent their activities may be considered trading. Finally, there is an article looking at a number of recent employment cases which highlight useful lessons for managing a diverse workforce, as well as a couple of other employment law articles which we hope you'll find useful.

We are also delighted to share that, in May, we are hosting two virtual panel discussions on handling contentious topics for SUs. Please follow the links below for more information and to secure your free place.

Our SU legal team has been kept busy over the last few months. As well as the usual mix of governance reviews, incorporations and employment advice, we are frequently being asked to advise on campaigning, political activity and freedom of speech. Laura Moss, a partner in our SU team and former sabbatical officer, is speaking at an upcoming webinar on the 'Next steps for freedom of speech in UK higher education', hosted by the Westminster Higher Education Forum on Tuesday 23 April 2024. She will be focussing on the impact of the new legislation on campus conduct and culture, and looking at the new regulation of students' unions which the Higher Education (Freedom of Speech) Act 2023 introduces. We'd love to see some of you there to join the debate.

As always, if we can help with any legal queries, please don't hesitate to get in touch.

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Keeping it legal: a reminder on the ultra vires rules for students' unions

Article pubished 4 March 2024

Students' unions must take into account charity and education law when deciding what activities to engage in.

We act for many students' unions and are often asked about the rules on ultra vires, in other words, what activities a students' union may legally engage with. This is a particularly hot topic at the moment, with major events such as the conflict in Gaza and an upcoming election prompting debates and action at many students' unions. This article is a reminder of the rules.

Before engaging in any activity, a students' union should ask itself whether it has the power to do it. There are four main aspects to look at:

1. Is it permitted by the students' union's constitution, particularly its charitable objects?

In the vast majority of cases, the objects of a students' union are the advancement of education of students at a named institution. In other words, does an activity further the education of students at that named institution? If it doesn't advance education in some way, the students' union shouldn't be doing it.

2. Is it compatible with being a charity? Is it for the public benefit?

Does the activity entail the trustees complying with their duties under charity law and, in many cases, company law? This includes duties to protect the reputation of the charity and obligations towards beneficiaries, volunteers and staff.

The Charity Commission has produced some useful guidance for charities engaging in campaigning and political activity, available here. We have also published a couple of recent articles which are highly relevant:

Charitable campaigning and political activity: can charities and politics mix?

Charity campaigning and political activity in an election period

3. Is it compatible with the Education Act 1994?

Is a students' union operating in a fair and democratic way, with its resources allocated to groups and clubs in a fair way and according to a written policy? Are any external affiliations approved by all members at least once a year? This last point raises an interesting question about SU societies. If societies are considered to be part of the SU, it would mean that any external affiliations these societies have should be approved by all SU members. Whether or not this happens in practice at all SUs is debatable.

4. Are trustees considering their duties under section 172 of the Companies Act 2006 (where a students' union is a company?

Where a students' union is a company, its trustees (as company directors), must have regard to their legal duties under section 172 of the Companies Act 2006. This requires directors to act in a way which helps the company to achieve its purposes. In making decisions, directors make take into account a variety of factors, including the long-term consequences of those decisions; the interests of employees; the need to foster relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; its reputation for high standards of conduct; and the need to act fairly between its members. This gives students' union trustees a broad framework in which to act: although they must always have regard to the charity's purposes, decisions should also be set in a wider social, political and environmental context.

Recording decisions

When a students' union decides to pursue a particular course of action, the decision to do so must be carefully minuted, recording reasons for the decision. This is to help demonstrate that trustees have acted reasonably in making that particular decision.

Good practice

We have seen some good practice in students' unions in relation to student resolutions. For example, one students' union we have worked with has a designated committee which assesses resolutions before they are put to a student vote. The job of that committee is to ensure that a particular resolution is appropriate for the students' union to be voting on, and that any course of action to which the students' union will be committed, is a lawful one.

We have also helped students' unions reword proposed resolutions so that they are more clearly focussed on the advancement of education of students. Doing this means that students still feel empowered to debate and vote on important political topics, without breaching the ultra vires rules.

Upcoming webinars on dealing with contentious topics

We are planning a series of free webinars in May which will look at the question of approaching contentious topics. The first webinar will look at some strategies to prevent problems from arising in the first place, with the second webinar considering how problems may be managed once they've arisen. They will touch on freedom of speech, discrimination, harassment and the rules on ultra vires, as well as discussing what approach the various regulators are likely to take in relation to these things. Sign up to our mailing list to hear more about these webinars and to reserve your place once bookings are open.

Charity campaigning and political activity in an election period

Article published 30 January 2024

Will the upcoming general election impact your charity's activities?

With a general election set to take place no later than 28 January 2025 – perhaps far sooner if some rumours from Downing Street are to be believed – charities must be aware of the tighter restrictions on their activities as we enter a 'regulated period'. Campaigning has been a hot button issue in recent months, with the introduction of the Charity Commission's long-awaited social media guidance, as well as several high-profile charities being subject to public scrutiny as a result of their political messaging and engagement with government policy. It is therefore important for trustees to remember their ordinary duties and obligations as regards campaigning and political activities, and to be aware of recent changes which may impact upon their activities in this regulated election period.

For many charities, many of their activities will be able to continue as usual. However, charities need to be extra mindful of any political activity in the year running up to a general election and certain other elections (the year starts retrospectively). In this article we set out some key headlines in relation to the Political Parties, Elections and Referendums Act 2000 (often known as PPERA).

It is possible that the outcome of the election will affect the work of your charity in other ways – demand for your services could go up or down; funding could be made available or cut; public policy or legislative change could smooth the path for you or your beneficiaries or make it harder. Consideration of these factors is beyond the scope of this article, but we would encourage you to consider these issues as part of your charity's risk register and risk assessments.

What are the normal rules?

Charities can in normal circumstances carry out non-political campaigning and certain political activity. There are criteria to meet, processes to follow, and some restrictions, but there is also quite a lot of freedom within that. More on that in our article on Charitable campaigning and political activity: can charities and politics mix?

What changes in an election year?

There is increased regulation in an election year – this time by the Electoral Commission. The usual charity law rules still apply, but some additional election law rules apply as well and charities need to be that bit more careful about their activities.

Questions for charities to ask themselves:

Is it a "regulated period"?

The regulated period is the 365 day period leading up to and including polling day. That means that, with the way the UK political system works, we can be in a regulated period without knowing it. As we know that the general election will be held no later than 28 January 2025, we know that we are now in a regulated period.

If yes, are you a "non-party campaigner"?

For the purposes of electoral law, non-party campaigners (sometimes called third parties) are individuals or organisations who campaign for or against political parties or candidates or on issues around elections without standing as a candidate or being a registered political party. This may include charities. Charities must not campaign for or against candidates or parties because of charity law, but they may wish to campaign on relevant issues. The issues must be relevant to the charity's charitable purposes.

If yes, are you taking part in "regulated campaign activity"?

Non-party campaigners are subject to spending and reporting requirements where they engage in "regulated campaign activity"; broadly this is campaigning which can reasonably be regarded as intended to promote the electoral success of a particular party, parties or candidates supporting or not supporting a particular policy by influencing voters to vote in a particular way. Whether a charity's campaigning is considered to do this relies on an assessment of several factors, including how a reasonable person would see the activity, the context and timing, the tone, and the call to action of the activity.

Are you planning to spend more than £700 on regulated campaign activity?
If so, you need to check that you are eligible. If you are not UK-based or an unincorporated association with the requisite UK connection, you are not eligible and you must not spend more than £700 on regulated campaign activity.

Eligible parties include:

- Individuals resident in the UK or registered in an electoral register.
- A company registered under the Companies Act 2006 and incorporated with the UK and carrying on business in the UK.
- A limited liability partnership.
- A friendly society.
- An unincorporated association carrying on business or other activities in the UK and whose main office is in the UK.
- A body incorporated by Royal Charter not falling in the list above.
- A charitable incorporation organisation.
- A Scottish CIO.
- A partnership constituted under the law of Scotland which carries on business in the United Kingdom.

Do you intend to spend more than £10,000?

If so, you must check that you are eligible (same list as for spending over £700) and, if you are, notify the Electoral Commission and appoint a "responsible person".

Do you intend to spend more than £20,000 in England or £10,000 in Scotland, Wales or Northern Ireland?

If you spend more than £20,000, you must record and report your spending.

Is your proposed budget within the spending limits?

Make sure that you don't go above the spending caps. There are caps per constituency as well as for parts of the UK and overall.[1]

Charity law restrictions mean that charities should not be seeking to influence voters to vote for a particular party. This means that they should not be engaging in what the Electoral Commission call "targeted spending" (which might require authorisation from the political party in question).

It isn't just spending which is regulated – the receipt of donations (or donations in kind) over £500 specifically towards regulated campaign activity is also regulated.

Have you checked the rules and taken advice if needs be?

There are traps for the unwary in how this is calculated. For example, you may think there is very little cost associated with certain activities (such as reusing materials from previous years, or avoiding the cost of print by utilising online platforms). However, staff and overhead costs associated with the regulated campaign activity must be taken into account, as well as other costs such as storing, altering and re-using old materials. The administrative burden of the reporting requirements associated with exceeding the notification threshold may be such that charities should carefully consider the scope of their campaigning during an election period. Where two or more charities or organisations work together on a joint campaign, expenditure by one counts towards the total spend of all. So some charities could in theory reach the thresholds without spending more than £700 themselves.

Are you planning to conduct regulated campaign activity using digital materials?

If so, please note that digital materials (such as social media posts) which constitute regulated campaign activity must now contain a digital imprint. This tells voters who was responsible for publishing and promoting the material.

Do students' unions need an ESG strategy?

Article published 23 October 2023

ESG (short for environmental, social and governance) is a hot topic but what is it and do students' unions need an ESG strategy?

ESG is a set of standards used to help stakeholders understand an organisation's wider impact on the world, rather than measuring purely financial performance. ESG is well established in the investment and corporate worlds and we are now seeing it on the rise amongst the charity sector too.

The 'E' stands for environmental and relates to how an organisation interacts with and impacts on its surrounding environment, this includes things such as resource use and waste produced.

The 'S' stands for social and is concerned with how an organisation interacts with its stakeholders (for example its students, staff and trustees), as well as how it contributes to the wider society.

The 'G' stands for governance and relates to how an organisation is run and operates. This includes considerations such as whether your trustees know and understand their legal duties and how you engage with your students to ensure all of your stakeholders are engaged in a meaningful way.

One of the main difficulties with ESG is that there isn't a single framework that every organisation can use. Instead, there are several different elements and sets of standards that could fall under each of the E, S and G limbs, and various different reporting requirements, each of which apply to different sizes and types of organisation. As things stand, most of the compulsory reporting only applies to 'large' organisations and is unlikely to be relevant to most SUs. However, there are several reasons why SUs may want to think about adopting an ESG strategy, and reporting on it, even if there is currently no legal need to do so. These include:

Reputation – an SU's reputation is a valuable asset and damage to reputation is sufficiently detrimental that the Charity Commission suggests it may warrant making a serious incident report (of course, depending on the nature and severity of the damage). Complying with ESG principles may help to improve an SU's reputation and conversely, ignoring or going against ESG principles may actively damage an SU's reputation.

Staff and partnerships – a strong response to ESG issues may help an SU to attract staff and other partners as well as increasing the morale of the staff it already has.

Cost – there may be cost efficiencies associated with some ESG activities, particularly those relating to the environment, for example reducing waste, energy efficiencies and the reduction in the consumption of other resources may actually save you money as well as being beneficial for the environment.

Funding – If your University has adopted an ESG strategy, there might be pressure on your students' union to do the same thing in order to access funding. Additionally, if your SU receives any other grant funding, adopting an ESG strategy could make it more attractive to funders. We have found that grant givers are paying more and more attention to how charities conduct their work, not just what they do and we expect that organisations will increasingly need to demonstrate their ESG credentials to access pots of funding in the future.

Many SUs will already be carrying out activities which fall under the ESG umbrella but few, if any, appear to currently be reporting on this activity. Taking time to consider what you are already doing from an ESG perspective, where you would like to go with it in the future and then putting this together into a strategy can be a useful and rewarding way of engaging with your stakeholders.

When you are considering ESG factors in relation to your SU's activities it is crucial for your trustees to remember that everything the organisation does must be in furtherance of its charitable purposes for the public benefit and in line with the law and its own governing document. ESG considerations should not be a diversion or distraction from an SU's charitable purposes; instead they should be a way of helping the SU to achieve those purposes, in the most positive way possible. What this looks like will vary on a case by case basis and if in doubt, we would recommend that you take professional advice.

What does a students' union need to consider if undertaking

Article published 08 December 2022

What does 'trading' mean?

As a charity, all activities undertaken by a students' union must be in furtherance of its charitable objects. The vast majority of students' unions have objects which refer to the advancement of education of students at a named institution.

Where trading is in line with the charitable purposes (such as selling tickets to an event for students which is aimed at supporting their personal development), or is ancillary to the charitable purposes (such as charging students for drinks at an SU event), it is classed as 'primary purpose trading'. Such activities can be carried out by a students' union to any value, as it furthers the charitable objects.

However, if the students' union undertakes activities that are not in furtherance of its objects but are purely a means of income generation, such as selling tickets to events to non-students or selling branded SU merchandise (hoodies, t-shirts etc), this is considered 'non-primary purpose trading'. Profits arising from non-primary purpose trading are chargeable to corporation tax, unless it falls under 'the small scale exemption'.

What is permitted?

The small scale exemption means that a students' union can do a small amount of non-primary purpose (i.e. non-charitable) trading, provided that the income generated falls under a certain threshold. The current threshold is 25% of a student union's total annual income between £32,000 and £320,000, up to a maximum of £80,000 per year. If a students' union is undertaking a significant amount of non-primary purpose trading, and the income exceeds the relevant threshold, it would need to set up a trading subsidiary if it wished to continue to undertake this activity. These thresholds do change from time to time and you should check the current allowances or speak to your accountant.

Using a trading subsidiary

A trading subsidiary may also be considered for proposed trading activities which carry significant risk (for example, if property or minors may be involved), or for activities which the SU has not previously undertaken. In general, a trading subsidiary wholly owned by the SU would transfer any profits it generates up to the SU, reducing or eliminating its liability for corporation tax.

A trading subsidiary reduces the risk to the students' union itself, creates a separate administrative entity for the risky or high value activity and can reduce or eliminate the tax liabilities which might arise if the activity had been undertaken directly by the students' union.

The amount on which tax relief may be claimed is limited to the profits that the trading subsidiary has available to distribute (which may be less than its taxable profits). This means that where the taxable profits of the trading subsidiary are higher than the distributable profits, the trading subsidiary may still have a tax liability.

It is important to maintain independence in the management of a students' union and any trading subsidiary. This means holding separate meetings and preparing separate accounts for each organisation, and ensuring that the two entities are sufficiently distinct so as not to be confused by the student body or the general public.

The relationship between a students' union and its trading subsidiary should also be carefully documented. Both organisations need to understand the use of shared resources (including staff and premises), what the financial expectations might be, and their individual liability for any trading activities being undertaken.

Further information

This is a complex area of law and this article only covers some of the general principles. The tax consequences of any trading activity will need to be considered carefully, including implications for corporation tax, VAT and business rates and you should take advice from your accountant or tax adviser.

For further information, students' unions can also refer to the following guidance on charity trading:

Trustees trading and tax: how charities may lawfully trade
Trading and business activities – basic principles
Charity Tax Group - trading

Every SU is different and we are always happy to discuss your own specific situation and the legal aspects of trading and using a trading subsidiary. Please get in touch with the authors of this article or any other members of our SU team.

New holiday leave and pay guidance for part-year and irregular hours

Article published 31 January 2024

Government publishes guidance on holiday reforms from 1 January 2024.

The Department of Business & Trade has published new guidance, Holiday pay and entitlement reforms from 1 January 2024, to reflect the changes to the Working Time Regulations 1998 (WTR) which came into force at the start of this year. The most significant of these changes cover the holiday leave and pay rules for part-year and irregular hours workers.

Employers should note that their current arrangements for holiday leave accrual and holiday pay are likely to be contractual and that any changes to these must be agreed with the worker (or in some cases with the recognised trade union) in line with normal employment law principles. Employers are encouraged to seek legal advice when considering changes to or clarification of holiday leave and pay entitlements.

The new guidance is not statutory and it should not be relied upon in specific cases or in preference to the statutory wording. We note for example, that one of the examples of a part-year worker given in the guidance does not mirror the statutory wording.

The statute defines a part-year worker as one required to work only part of the leave year, with periods

within that year of at least a week which they are not required to work and for which they are not paid. This suggests that term-time only workers who are only contracted to work, say, 39 weeks per year, but are paid an equal salary each month, would qualify as part-year workers under the new law.

The guidance on the other hand suggests that a worker will not be a part-year worker if they are paid an equal salary each month of the year, but have some weeks where they are not paid and not working. There is potential for employment tribunal claims arising from this kind of ambiguity in interpretation of the amended WTR and we will need to await appeal decisions to have more clarity.

Changes taking effect from 1 January 2024

The following changes have already come into effect:

Carrying over holiday leave

The new rules clarify previous case law principles on how much annual leave workers can carry over when they have been unable to take it because of family-related leave or sick leave.

All workers are entitled to carry over to the next leave year up to 28 days' statutory leave if they have not been able to take it because of maternity and other family-related leave.

Irregular hours and part-year workers are entitled to carry over up to 28 days' statutory leave if they have not been able to take it because of sick leave. This carried over leave must be taken within 18 months of the end of the leave year in which it accrued.

Workers with normal hours working all year round who have not been able to take annual leave because of sick leave are entitled to carry forward up to 20 days' statutory leave into the following leave year. Again, this carried over leave must be taken within 18 months of the end of the leave year in which it accrued.

From 1 January 2024, workers are no longer able to carry over leave they have been unable to take due to Covid. Leave accrued and carried over for this reason prior to 1 January 2024 must be used on or before 31 March 2024.

What is included in "normal" remuneration for holiday pay purposes?

The new rules set out the elements which must be included in the calculation of holiday pay for the 4 weeks' statutory leave under Regulation 13 WTR, codifying the previous case law in this area. These are listed as:

- payments, including commission payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out;
- payments relating to professional or personal status relating to length of service, seniority or professional qualifications; and
- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

While this brings some clarity, there remains some doubt as to what will constitute a regular payment for this purpose, and it is likely that the courts will continue to consider the meaning of this in future cases.

Changes coming into effect on or after 1 April 2024

It should be noted that the following key changes will only apply to leave years starting on or after 1 April 2024:

- holiday leave accrual for irregular and part-year workers will be calculated as 12.07% of actual hours worked in a pay period;
- a new method to work out how much leave irregular hours or part-year workers accrue when they take family related leave or sick leave; and
- rolled-up holiday pay as an alternative method to calculate holiday pay for irregular hours workers and part-year workers.

Employers should note that there may be a significant lead in time for these changes depending on the timing of employee holiday leave years. For example, where the leave year runs in parallel with the calendar year, these rules will not come into effect for that employee until 1 January 2025. It is possible that different workers in your organisation will have different leave years, and so care should be taken to ensure changes are not brought in for workers before the new rules actually apply to them.

Holiday accrual for irregular and part-year workers

New accrual calculation

The new rules will allow employers to calculate leave accrual on an hourly basis. For each hour worked, the worker will accrue 12.07% of an hour in statutory leave.

The 12.07% figure is only accurate where workers are entitled to statutory leave only – that is the pro rata equivalent of 5.6 weeks' leave. This is because it is based on total working weeks in a year of 46.4 (52 weeks minus 5.6 weeks of leave): 12.07% of 46.4 is 5.6. Workers with additional contractual leave will have a higher percentage accrual rate than this.

It is to be hoped that these new rules on holiday accrual will assist employers to calculate how much leave workers are entitled to when they do not have normal hours or only work for part of the year. However, there may still be uncertainty when it comes to calculating how many hours' leave a worker with irregular hours has taken when they take a day's leave.

Working out accrual of annual leave when on family-related leave or sick leave

The new rules will allow employers to work out how much annual leave a worker accrued when on family-related leave or sick leave by looking back at a 52-week relevant period before the leave period to work out the average hours worked. This will not include any weeks where the worker is on family-related leave or sick leave but will include weeks which are not worked for other reasons. If the worker has not worked for the employer for 52 weeks, the relevant period is shortened to the number of weeks the worker worked for the employer.

Rolled-up holiday pay

The new rules will give employers the option of paying irregular and part-year workers "rolled-up holiday pay" which is currently unlawful following previous case law decisions.

Rolled-up holiday pay occurs where employers include an additional amount with every payslip to cover a worker's holiday pay. The worker is paid holiday pay alongside other pay and not when they actually take the leave.

Under this method, holiday pay for statutory leave will be 12.07% of a worker's total pay for the pay period. However, this will not be accurate where the worker is entitled to additional leave under their contract: in that case a higher percentage will apply.

If this method is chosen, it will be important to ensure that the amount of holiday pay being paid in each pay packet is clearly set out in the payslip so that there is a record of how much holiday pay has been paid.

Employers will still need to ensure that workers are enabled and encouraged to actually take their annual leave and they should be able to evidence that they have done so.

Next steps

Employers should review employment contracts and holiday policies in the light of these changes and ensure they plan for any proposed changes in good time before the desired implementation date, including seeking legal advice on the proposals, the consultation process and timeline, as well as on draft policies and contractual documentation.

How Wrigleys can help?

Wrigleys Solicitors are one of the few law firms in the country with dedicated lawyers working exclusively for charity and social economy clients. We act for students' unions all over England and Wales and our team of solicitors includes a former sabbatical officer of the University of Bristol Union and a previous member of the Appointments and Governance Committee at Leeds University Union. This means we have first-hand experience of the students' union sector and the key legal issues that trustees and staff face.

We support over 50 students' unions with their legal needs, advising on everything from governance and employment law to property, data protection and commercial arrangements.

To find out about the services Wrigleys can provide your students' union please visit our website. You can also sign up to receive our Students' Union newsletter by using the sign up form.

If you would like to contact us please email:

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