Spring 2017
Further Education and Academies

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Introduction

Introduction by Diane Gilhooley, Partner, Head of Eversheds Sutherland’s UK and International Education Practice

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Welcome to the Spring Edition of our InStep magazine, looking at all things topical in relation to FE and Academies.

As ever there have been plenty of developments since our last issue. The introduction of the apprenticeship levy is upon us and we are delighted in this issue to have interviewed Mark Dawe, the Chief Executive of AELP. In our interview Mark gives his thoughts on the apprenticeship levy and the vocational and employment provision industry, which make extremely interesting reading for us all. The introduction of the levy also provides opportunities for colleges to work together to increase their share of the apprenticeship market and lawyers from our corporate education practice examine this in an informative article.

The Higher Education and Research Bill is still making its way through the Parliamentary process and one of the key provisions in the Bill is the establishment of the Teaching Excellence Framework (TEF). Whilst initially it might be thought that this is of more concern for universities it does, of course, apply to higher education providers, including FE colleges delivering such a provision, and of the 234 providers who have applied for a TEF assessment in Year 2, 94 of those are further education colleges. In this issue we look at what we now know about Year 2 of TEF and some of the issues for institutions to consider.

Managing staff performance issues (whether arising out of the TEF assessment or not) and how to deal with employees where the institution is concerned that their behaviour has caused, or might cause, damage to the institution’s reputation, are often tricky issues for colleges and academies to get to grips with and our education lawyers provide guidance in this issue in relation to both of these topics.

There have been some recent important developments in relation to charity fundraising and institutions that raise funds, whether from their alumni or the general public, need to bear these in mind. Our education charity team have highlighted for you the key issues to be aware of.

Finally, as from 1 February 2017 Eversheds combined with the US law firm Sutherland Asbill & Brennan (with six offices across the United States) to create Eversheds Sutherland – hence the new name on the front of our magazine. At the end of this issue we have provided an updated list of our offices both within the UK and internationally and please do talk to us if you would like to explore how we can help you with your requirements.

I hope you find the magazine interesting and useful. As always we value your comments and suggestions for topics to be covered in future issues.

Diane
An interview with...

Mark Dawe, Chief Executive of the Association of Employment and Learning Providers (AELP)

Mark, you joined AELP as Chief Executive in March 2016. What attracted you to the position and what do you feel are your biggest challenges?

My background is very firmly in the education skills and vocation area. I have worked as a civil servant, as a college principal and also in assessment. I believe that the apprenticeship system is one of the key policy areas for the country and my role in AELP gives me the opportunity to be at the heart of the skills agenda and able to affect policy implementation on the ground. I also thought the role would be a very exciting one as the work is not a repetitive regular cycle but changes on a week by week basis.

The biggest challenges are the apprenticeship levy; standards; assessment; the operation of the register; devolution; the whole skills agenda; traineeships, particularly the dynamic between adults and young people, and how the new system is going to work - but there are plenty of others as well! Under the changes that are taking place there is in fact not a lot left to change. There is a great opportunity for many but it is also quite scary for established organisations and there are a number of consequences which could flow from the changes which the Government would not particularly want to happen and our job at AELP is to highlight those and bring them to the Government’s attention.

“I believe that the apprenticeship system is one of the key policy areas for the country and my role in AELP gives me the opportunity to be at the heart of the skills agenda and able to affect policy implementation on the ground.”

Over 50 of your members are further education colleges. Are their needs and the services you provide to them different at all from those of your other members?

When I was principal of Oaklands College it was the first college to join AELP (in those days called ALP) and that was on the basis that I could see the importance of workplace learning. We want to be experts in apprenticeships and study programmes leading to work and colleges can see the benefits of that. All of our members have individual needs but there is a common theme which is that we need to make sure our members understand what is being proposed, how policy will be implemented and to work their way through that. It’s being the eyes and ears of our members and we can raise issues with the Government without members individually putting their head above the parapet.

The subject of apprenticeships has been very topical over the last few months with the forthcoming introduction of the apprenticeship levy and the Technical and Further Education Bill. What is AELP’s view of the forthcoming changes, what do you think are the major advantages contained in the proposals and what areas do you still have concerns about?

I believe AELP has been instrumental in driving some of the changes to the proposals as they have progressed, including changes concerning the employer contribution down from a third to 10%, subcontracting, the disadvantage uplift and 16-18 funding.
Many say the framework is still not properly funded and that having to negotiate a price for 16-18 year-old apprenticeships will drive down the quality. There are concerns that 16 to 18 year olds could be pushed out as there’s not a great deal of difference in the funding between those aged 19+ and those aged 16-18 and therefore employers are likely to select the older individuals. Given that the Government is talking about putting quality at the heart of apprenticeships it does not seem quite right and I have described this as the eBay of the education system.

I am also concerned as to whether the standards and assessments in relation to apprenticeships will deliver to employers and to learners what they are looking for. I have concerns about whether there will be enough of the levy left over for the non-levy-paying SMEs and as a result the whole social mobility and productivity agenda could be damaged.

There are, however, a number of positives that have come out of the consultation which includes the fact of an additional annual investment of up to a billion pounds and that the issue of apprenticeships is now being discussed at senior level such as HR Director and Finance Director in large companies who are looking at whether they are simply going to take it as a tax or invest in the apprenticeship system. I think the degree apprenticeship programme is fantastic as it allows individuals to get a degree, get a job and be debt free but that could cause issues with lower level apprenticeships and how they are going to be funded.

When everything is changing, such as delivery, funding, the relationship between employer/funders and Government, assessment, quality mechanisms – in fact there is not one bit staying the same – then our job is to make sure the reputation of the apprenticeship system is maintained and to identify concerns without being seen as continually complaining about the proposals.

“...we need to hold the Government to account on its commitment to its social mobility agenda and we will keep pressing for key skills programmes such as apprenticeships and traineeships to be adequately funded to make sure that young people across all areas of the country have career opportunities.”

What impact do you think the vote to leave the European Union will have on the apprenticeship system?

There is already a skills deficit in the UK and the only thing it seems to me that Brexit is going to do to this is make it worse and give rise to a greater demand for skills. The levy is a tax and the Government could therefore, depending on the financial circumstances applying post-Brexit, look at altering the £3 million wage bill threshold and/or the 0.5% contribution rate. The Government needs to understand what is needed, since the country is not going to get anywhere without an appropriate skills strategy, and properly invest in it. I believe that there will be work opportunities for levy-paying employers and more money really needs to be put in for non-levy-paying employers. We’ve asked for a commitment from the Government for £1bn for non-levy-paying employers. There needs to be enough money to develop the skills for the UK to be competitive in the global economy.

Where do you see AELP, and the vocational learning and employment provision industry, in five years’ time?

There needs to be an adequate resource to support skills across all companies and all sectors at all levels moving forwards. We act for a range of organisations providing training and development, however funded, for this country and there will always be a need for study. It is not core business for most employers and it is important to look at how organisations respond to the provider world, whether that be through larger providers or niche local providers.

On the funding side what is happening is a significant change bringing an employer led demand system to the fore. The assessments/standards/quality agenda will I think still be an area change moving forwards, probably much more than the funding regime. At the same time, we need to hold the Government to account on its commitment to its social mobility agenda and we will keep pressing for key skills programmes such as apprenticeships and traineeships to be adequately funded to make sure that young people across all areas of the country have career opportunities.

Mark Dawe, thank you very much.
Apprenticeship companies

Models for collaboration

The apprenticeship levy starts in April 2017. Employers with a wage bill of over £3 million each year will need to contribute 0.5% of their total wage bill to the levy (less an annual allowance of £15,000). The levy is expected to raise apprenticeship funding to £2.5 billion, encourage employers to hire more apprentices and help the Government to create 3 million apprenticeships by 2020.

In the midst of the Government’s apprenticeship agenda, colleges have also been going through area based reviews (ABRs). Many ABRs recommended, or at least discussed the possibility of, colleges working together to increase their share of the apprenticeship market. The combination of spending cuts and ABRs means that levy funding will be critically important to some colleges.

Collaboration

The apprenticeship levy is undoubtedly an opportunity for colleges. Whether private providers or colleges will benefit most from the levy remains to be seen. Closer co-operation between colleges following ABRs may better position them to compete with established private apprenticeship providers.

The employers paying the levy will be substantial businesses. They are organisations that will demand quality, competitive pricing and scale from their apprenticeship training providers. The form of collaboration between institutions will be instrumental in fulfilling these criteria. Colleges will need to overcome obstacles such as a regional rather than national presence and a comparatively higher cost of doing business, thanks in part to greater staffing and estates costs.

Company formation

One choice of collaborative model is a private limited company. Companies have limited liability, capacity for both for-profit and not-for-profit business and an accessible membership/governance structure. These, among other reasons, make companies an obvious choice for many new ventures. While selecting a corporate vehicle may be relatively straightforward, the collaborating partners (being the founding members of the company (Founders)) will need to carefully consider the company’s business model, including the need for initial funding and resources. While the Founders may act collectively, their governing bodies will need to individually satisfy themselves that making any investment in the new company (either in cash or in kind) is in the best interests of their institution.

Delivery

A fundamental question for the Founders is whether the company will deliver apprenticeships itself. The Founders could invest money, staff and ongoing support services to set up a business capable of delivery. In order to receive funding directly from the Skills Funding Agency (SFA), the company must be listed on the Register of Apprenticeship Training Providers (RoATP). Alternatively, the company could act as a subcontractor to its Founders who would receive the SFA funding. However, the Government’s attitude to subcontracting could mean that this may not be a long-term option.

It may be that the company does not deliver apprenticeship training at all. The company could simply market the Founders’ capabilities to employers and apprentices and act as a broker, placing apprentices with employers and introducing employers to the Founders. Each option will have a different risk/reward profile that will need to be evaluated by the Founders.
Investment / Return

The models available for apprenticeship companies give rise to a number of commercial decisions and complex legal questions for colleges. Moreover, the commercial, legal and regulatory issues will not exist in isolation from each other. At its core, setting up an apprenticeship company will require an investment from its Founders. The investment may be cash, staff or ongoing support services. The Founders will also need a return. What the Founders get back could be apprentices to train to increase each institution’s revenue; it could be connections with new employers; or it could simply be cash. How the Founders structure these arrangements, both input and output, must be carefully considered to avoid a number of potential pitfalls.

Finance

The Founders may have to fund the venture themselves as external finance may be difficult to find. The assets that are contributed to the company and how easily those assets can be contributed will be a key discussion. Measurement of input and output may be difficult for the Founders to calculate, and the distribution (particularly of returns) between the Founders will need to be agreed, equitable and sustainable.

Legal

The Founders will need tax advice which may influence the company structure. VAT and corporation tax should be considered, in conjunction with other areas of advice such as charitable status.

Staffing issues will be important, particularly if the Founders are contemplating the transfer of staff into the company. The application of TUPE and access to the Local Government Pension Scheme (LGPS) and the Teachers’ Pension Scheme (TPS) regulations may be relevant.

Apprenticeship companies may also give rise to competition issues if a group of institutions in the same area are working together in the local apprenticeship market. Further, state aid issues (whether the Founders are gaining an advantage by using public monies to distort competition) should be considered. Public procurement regulations may also be relevant depending on the structure adopted by the Founders.

Conclusion

In a financially challenging sector, the predicted growth in apprenticeships will be attractive to many organisations. Colleges may be competing for apprenticeship funding with private providers, higher education institutions and levy employers themselves. Many institutions will be looking to collaborate to unlock this growth and an apprenticeship company can be a good model. Institutions should carefully consider how the company is structured and how its business model can be achieved, otherwise they may find that the risk of investment was not worth the return.

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Managing underperformance of academic staff

Managing underperformance is challenging at the best of times. Mix into the equation often demanding students and the isolation from colleagues in a lecture theatre/classroom and it is understandable why management often shy away from tackling the issue. But ignore the issue at your peril.

An underperforming member of staff not only impedes the progress and ultimate success of students’ education, but they are also likely to lose motivation and become disengaged as a result of the difficulties they may be encountering. Given the ever increasing funding pressures on the education sector, and in particular, further education institutions and academies, it is more important than ever that performance management is dealt with quickly and effectively.

To prevent performance issues arising in the first place, the required standards of teachers and lecturers should be clearly set out and communicated to them. Further, probationary periods should be used effectively. This is an ideal time to assess a member of staff’s suitability for the role and should not be overlooked. In addition, honest formal appraisal systems provide managers with an opportunity to sit down and discuss any concerns which they might not otherwise have time to do.

Don’t bury your head in the sand

The key to managing underperformance effectively is to intervene at an early stage. To delay in addressing the problem will increase the burden on all those involved, will mean that improved performance is more difficult to achieve and will make it more likely that the member of staff leaves their employment, whether of their own accord or not. This is inevitably costly for any education institution when taking into account any temporary replacements who may be required, the recruitment process and the possibility of the teacher or lecturer bringing a claim for unfair dismissal (if they have sufficient service) and/or discrimination.

From the outset, managers should be made aware that the need to keep records of any evidence of underperformance as well as all emails, letters, conversations or meetings (formal or informal) that they have with their employees relating to their performance. This will not only be helpful in keeping track of action taken, but can also be used as evidence of the process followed if a dispute arises. It is crucial that any documentation is appropriately worded.
Open lines of communication

Given the variables in teaching, it is not always easy to detect underperformance. Not only should lesson observations and student progress be monitored closely, but complaints from the students, their parents or even other members of staff are also an indicator of a someone who maybe struggling. But what action should you take? When these warning bells starting ringing, it can be counterproductive to jump in with comprehensive improvement plans, assuming you know the reasons for underperformance and how to address these. This can lead to unnecessary stress and anxiety for the member of staff in question.

Rather, the first step is to simply open a two way supportive dialogue to try and understand what the issue is. There are many different factors that can cause underperformance such as lack of experience or understanding of what is required of them, a demanding workload or personal issues to name a few. Simple and relatively quick solutions can be put in place to overcome some of these problems without any further intervention required.

Keep monitoring

Regardless of whether the issue can be resolved following an initial conversation or not, regular meetings should take place to ensure the problem does not reoccur or to provide ongoing support where the issue remains live. This is when a more detailed plan can be put in place if required. The timings of the meetings should be agreed at the outset as well as any preparation that is required for the meeting. These meetings should be supportive in nature rather than being too critical. It is advisable to open any performance management meeting by mentioning the positive aspects of the member of staff’s performance and to praise them where possible. This will boost their confidence and make them more amenable to discussing the areas where improvement is required.

However, it is crucial that, where there are issues of underperformance, these are tackled rather than glossed over. When discussing how the member of staff is not meeting the standards you expect of them, any criticism should be constructive and the employee should be given guidance on what they can do to meet those expectations. Further, this guidance should be specific and measurable to avoid any confusion over what is required to improve their performance.

Provide effective support

In some situations, one meeting may be enough to turn the employee’s performance around. However, more often than not, further support will be required. This is where many managers struggle. What is effective support? It can take many different forms such as:

- coaching or mentoring – mentoring from experienced and high performing teachers and lecturers can be invaluable for those who are grappling with the profession
- training – this can include internal or external training, individual training or within a team, training on specific teaching methods or soft skills such as time management training.
- observing other academics – observing best practice can help improve a variety of skills such as how to handle behavioural problems and understanding successful teaching approaches

What if there’s no improvement?

If an initial informal approach does not lead to a satisfactory improvement in performance, a formal capability procedure will need to be embarked upon. An investigation into the member of staff’s performance will need to be carried out, formal capability meetings will need to be held and the employee will need to be given a reasonable timescale within which to improve. The statutory Acas Code of Practice on Disciplinary and Grievance Procedures and supporting non-statutory guidance “Discipline and grievances at work: The Acas guide” provides helpful guidance on how to follow a fair procedure. Education institutions should make sure their capability procedures are clear, fit for purpose and in line with the Acas Code. Assuming they are, it is important that those policies are then followed.

Unfortunately, there will be occasions when, despite having followed a fair capability procedure, a member of staff’s performance continues to fail to meet the standards expected. In such a situation, it is possible to fairly dismiss that employee. Although this option should only be considered when all other options have been exhausted, an education institution cannot continue to employ someone who is unable to carry out their role effectively.

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The Teaching Excellence Framework

What will it mean for FE institutions?

Amongst the various controversial and debated aspects of the Higher Education and Research Bill, the establishment of the Teaching Excellence Framework (TEF) has probably been the most commented upon. Indeed many of our clients are telling us that it is now the main topic of conversation in their senior teams.

Whilst the White Paper “Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice”, which was published on 16 May 2016, contained information about the proposed staged approach to TEF, the Bill itself contains very little detail. Clause 24 of the Bill states that the Office for Students (when created) may make arrangements for a scheme to give ratings to higher education providers (including FE colleges delivering a higher education provision) regarding the quality of, and the standards applied to, the higher education that they provide.

Year 1 of TEF will affect students commencing their course in Autumn 2017. All providers with satisfactory quality assessments automatically achieved a rating of “meets expectations” and were able to participate in TEF. A list of the eligible providers for Year 1 of TEF was published by the Government on 1 September 2016.

Year 2

The technical consultation for Year 2 of TEF closed on 12 July 2016, with the Government responding to the consultation on 29 September 2016 and issuing the Year 2 specification. Pending creation of the Office for Students, HEFCE was given the responsibility for implementing Year 2 of TEF and on 31 October 2016 HEFCE issued additional guidance clarifying its role in the process.

Year 2 of TEF is a trial year covering undergraduate provision at levels 4, 5 and/or 6. Postgraduate provision will not be in scope for TEF until Year 4 at the earliest. Institutions wishing to apply for TEF for Year 2 needed to do so by noon on 26 January 2017. In total 134 higher education institutions, 94 further education colleges and 6 alternative providers have applied for a TEF assessment and 15 further education colleges and 50 alternative providers have opted-in for a provisional award. The Devolved Administrations confirmed they were content for providers in Wales, Northern Ireland and Scotland to take part in Year 2 but of the 234 providers who have applied for a TEF assessment in Year 2 only 7 are from Wales, 5 from Scotland and 0 from Northern Ireland.

The outcomes of these applications will be published in May 2017 (which has left a relatively short time frame for the TEF panel members and assessors to be assembled, trained and carry out the assessments) in time to inform the decisions of students who are applying from Autumn 2017, with a view to commencing studies in Autumn 2018. The ability for English providers to uprate fees, based upon a successful TEF application, will then apply to the academic year 2018/19.

Providers who are successful with their application will be given one of three ratings: Gold, Silver or Bronze. The intention is that approximately 20-30% of participating providers will receive the Gold rating, 50-60% Silver and 20% Bronze.

English providers receiving at least a Bronze rating will be eligible for the full inflationary uplift for fees from 2018/19, though for Year 3 of TEF (applying to the academic year 2019/20) providers with a rating of Bronze will only be eligible for 50% of the inflationary uplift, whereas those with a rating of Silver or Gold will be eligible for 100% of the inflationary uplift. The ability of English providers to uplift fees will also depend on whether they have the legal power to do so under the terms of their student contracts.
The assessment will be made against a set of common criteria covering different aspects of teaching and learning quality. The three aspects of quality are teaching quality; learning environment and student outcomes and learning gain. These will be assessed by way of evidence provided by core metrics, split metrics and additional evidence in the form of a provider submission.

The metrics draw on currently available, nationally collected, data to provide assessors with a common set of metrics that relate to each of the three aspects of teaching excellence. For Teaching Quality the metrics are taken from the teaching on my course and assessment and feedback sections from the National Student Survey. For Learning Environment the metrics are taken from the academic support section in the National Student Survey and the non-continuation figures from the Higher Education Statistics Agency. For Student Outcomes and Learning Gain the metrics are from the employment or further study and highly skilled employment or further study statistics from the Destination of Leavers from Higher Education survey.

In January 2017 it was reported that Chris Husbands, Chair of TEF, had stated that they would “not be overweighting the NSS” data when assessing the ratings. This follows the NUS encouraging students to boycott the NSS. If this is the case then it will be interesting to see how this will impact on the assessments and whether any institutions feel they have been disadvantaged as a result.

On 31 October 2016 HEFCE made available to each potentially eligible provider a workbook including core metrics, split metrics and contextual data in the same format as would be presented to the TEF assessors once the application window closed. Providers then had the opportunity to view this data and had until 18 November 2016 to request HEFCE to make amendments.

Providers were also able to submit evidence to support their case for excellence. Submissions could be no longer than 15 pages, although there was no minimum length. The HEFCE guidance includes details on the style, format and coverage of the submission but providers were not obliged to follow a prescribed template. The purpose of the provider submission was to enable a provider to add additional context; to support or explain its performance against the core and split metrics, particularly where the performance is not strong; put forward evidence against the assessment criteria and further explore performance for specific student groups based on split metrics. Certain parts of the sector are telling us that they foresee difficulties with being judged against an apparent ‘one size fits all’ approach and it remains to be seen whether the consideration given to representations in the provider submission will allay these concerns.

As mentioned, a number of further education colleges and alternative providers have opted-in for a provisional award. This applies where the provider does not have a suitable set of metrics to enable it to be assessed. in such circumstances the provider may be eligible for a provisional TEF award, which lasts for one year, subject to meeting the remaining eligibility requirements. A provisional TEF award will make it clear that the provider has met the baseline quality expectations required for TEF eligibility but is unable to apply for a TEF assessment (and therefore the higher ratings) on procedural grounds.

**The assessment process**

The TEF panel and assessors are made up of academic and student representatives and the assessment will involve a 3 stage process:

- **stage 1** involves an individual independent assessment. Each submission will initially be allocated to at least 3 people. Wherever possible 2 will be academics and one a student. One will be a panel member and 2 will be assessors.

- **at stage 2** all panel members and assessors meet together in a single location for one week, to discuss their assessments and form recommendations to the TEF panel. Following a general briefing and discussion to develop consistent standards of judgement for the three ratings, the three individuals who reviewed each application will jointly seek to agree a single rating of Gold, Silver or Bronze; or identify the case as complex or borderline and refer it for further consideration. Following consideration by the three individuals that reviewed each application, groups of nine (comprising at least three panel members and up to six assessors) consider the full set of applications reviewed by that group of nine individuals. They consider applications where all three reviewers agreed a single rating to test for consistency; and consider in more detail the complex or borderline cases. These groups of nine are responsible collectively for forming recommendations to the TEF panel.

- **at stage 3** the full TEF panel meets to agree the outcomes. Final decisions are therefore taken collectively by the full panel.

TEF results are due to be published in May 2017. A provider can appeal the TEF outcome but only on the basis of a significant procedural irregularity in the consideration of
Its TEF application. Any provider wishing to appeal will have to do so no later than noon on 15 June 2017. So any appeal will be after the publication of the outcome. It is noteworthy that there is no provision for a challenge before the outcome is published given the possible consequences for the reputation of the institution that this could entail.

The chair and members of the appeal panel will be individuals who were not TEF panel members or assessors or otherwise directly involved in the TEF decisions. If the appeal panel concludes there was an irregularity that could potentially affect the outcome, the original decision will be reconsidered, in the light of that procedural irregularity. An eligibility decision or data amendment request will be reconsidered by the HEFCE Chief Executive. A judgement on the rating will be reconsidered by at least three TEF panel members, none of whom were originally involved in assessing the submission, overseen by the TEF Chair.

TEF outcomes from Year 2 (which will include the overall rating and a brief statement of findings) will be published by HEFCE and will also be available on the UCAS website and on Unistats (or equivalent). A copy of the provider’s core and split metrics and its submission will also be published.

The award made in Year 2 of TEF will be valid for up to three years, although providers who are dissatisfied with the award that they have received in Year 2 will be able to apply again in Year 3 and/or future years.

The Government has said it intends to carry out a lessons learned review of Year 2 and the Department for Education will seek advice from HEFCE, QAA and the TEF panel as well as sector representatives about potential improvement for Year 3. It is expected that the assessment for Year 3 will, however, follow the same broad framework as in Year 2.

*Is this all going to happen as planned?*

The Bill has had a somewhat rocky passage through the House of Lords with 516 amendments being tabled in relation to the six days scheduled for debate at the committee stage between 9 and 25 January 2017. A number of these proposed amendments deal with the nature of the ratings, the sources of data, the link to tuition fees and the potential use of TEF ratings to assess an institution’s ability to recruit international students who need a visa to study in the UK. Given this, the degree to which TEF will escape unscathed by the time the Bill becomes an Act remains to be seen but the Lords, by convention, do not obstruct measures which have been set out in a winning party’s manifesto (and TEF did appear in the Conservative Party’s 2015 manifesto).

*Issues for institutions*

Assuming, however, that Year 2 is introduced in the manner which the Government is currently anticipating, there are a number of issues which institutions will need to consider.

It is important for institutions to decide who is going to have ownership of the TEF process and consider the rating. This is likely to sit at Governor and Senior Management level within the institution. Any institutions who are unhappy about the rating they receive may, after an appeal, want to consider whether they wish to try and bring a legal challenge against the rating. This would be a strategic decision taking into account the possible adverse impact on the institution of the rating (on, for example, student applications and conversion rates; the recruitment and retention of talented staff), the prospects of success (given that an important part of the decision making process is based on metrics), the reputational consequences of being seen to challenge a measure which is about teaching excellence, the timescales involved and legal costs. Alternatively institutions may take the view that the best thing is just to apply again the following year, although it is worth noting that ratings could go down as well as up.

In any event, institutions will need to establish a clear strategy for dealing with a possible adverse outcome, including carefully considering its PR/communication strategy, as a disappointing rating could affect the morale of existing students as well as discourage those who are considering applying to the institution in the future. Finally, such a rating may also make the institution think long and hard about its teaching provision and whether there is any work that needs to be done there in terms of enhancing the performance of its staff.

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Charity fundraising

Considerations for institutions

Charities’ fundraising operations are in the spotlight, with the new Fundraising Regulator riding high and the Information Commissioners Office issuing fines to over a dozen charities for regulatory breaches. Institutions that raise funds from their alumni base are likely to be caught by the new approach.

Last July, the Fundraising Regulator for charities in the UK opened its doors to a brave new world of fundraising standards. This year sees a renewed focus on charity fundraising, with regulators keeping a close watch on sector practices and tightening up fundraising rules. This article explains the changed fundraising landscape in England and Wales and sets out what institutions who are charities can expect from the new Fundraising Regulator and vice versa.

The new regulatory framework

There has been talk of voluntary regulation in the charity fundraising world as far back as 1986, when a working party report titled ‘Malpractice in Fund-raising for Charity’ called for self-regulation by charities within a strong statutory framework.

Now, the underpinnings of a voluntary regulatory regime have been put in place and the duties of charities that engage in fundraising have been tightened. Four notable changes have been made to charity fundraising regulation in the past 12 months.

Firstly, and perhaps most significantly, a new Fundraising Regulator has been established. Set-up of the new Regulator began in January 2016 and it officially launched on 7 July 2016. The new body regulates charity fundraising practices on a voluntary basis. The Fundraising Regulator has started the New Year as it means to go on, by organising a “Fundraising and Regulatory Compliance Conference” to be held jointly with the Charity Commission and the Information Commissioner’s Office (“ICO”) in Manchester.
Secondly, the ICO has indicated it is taking a tougher approach to charity fundraising practices. In December, the ICO fined the RSPCA and the British Heart Foundation £43,000 in total for breaking data-protection rules through participating in a data-sharing scheme. The ICO followed this up with a New Year announcement of fines for 11 charities that breached the Data Protection Act as part of their fundraising operations. The fines come off the back of an update to the ICO’s Direct Marketing Guidance in Summer 2016, with a section of the guidance being specifically addressed to charities. The ICO has the power to issue monetary penalties of up to £500,000 for certain breaches. Charities suspected of breaching the law on marketing during their fundraising activities can be referred to the ICO by the new Fundraising Regulator.

Thirdly, The Charities (Protection and Social Investment) Act 2016 was passed last year and contains provisions to amend charities’ agreements with professional fundraisers and commercial participators. The Act also creates a statutory framework allowing the Government to establish a compulsory charity fundraising regulator, in the event that voluntary regulation doesn’t work as well as anticipated, so the threat of further government intervention is very real.

Finally, the Charity Commission in England and Wales published an updated version of its fundraising guidance (CC20). The Commission’s updated guidance emphasises that trustees are ultimately responsible when it comes to a charity’s fundraising compliance.

**What colleges can expect from the new Fundraising Regulator**

A key aspect of the new fundraising regulatory regime is that it is voluntary.

Funding for the new Fundraising Regulator has come from the sector itself: charities that spend over £100,000 on fundraising activities annually were asked to pay a levy to help cover the Fundraising Regulator’s costs. Going forward, the Regulator will also be funded by a fee which charities will be asked to pay on a voluntary basis, a ‘fundraising promise’.

The Fundraising Regulator is set up to investigate cases where there is public concern and adjudicate on such cases. In the event that members of the public complain about a charity’s fundraising practices, the Regulator will investigate. The Regulator’s first adjudication is on the case of fundraising agency Neet Feet, which hit the headlines for its aggressive sales techniques and went into voluntary liquidation in Summer 2016.

The Fundraising Regulator will recommend best practice on charity fundraising, and will take proportionate remedial action against charities where necessary. The Regulator has entered into Memoranda of Understanding (‘MOUs’) with the Charity Commission and the ICO, and will refer charities to these regulators for breaches when it considers this is appropriate.

The Fundraising Regulator is also tasked with operating a Fundraising Preference Service (‘FPS’) in future. The FPS will work alongside the Telephone and Mail Preference Services to ensure that members of the public (including alumni) only receive fundraising communications that they want and need.

**One regulator fits all?**

The Fundraising Regulator is set up to oversee fundraising by charities in England and Wales. It will also regulate charities based in England or Wales which are fundraising in Scotland.

However, the Fundraising Regulator will not regulate Scottish charities which raise funds in England. Although it will not regulate the fundraising practices of charities based in Scotland, it is anticipated that the Fundraising Regulator will enter into an MOU with OSCR (the Scottish charity regulator).

The regulation of charity fundraising in Northern Ireland is still being discussed.

**What institutions should do now?**

Institutions should revisit any agreements they have with professional fundraisers or commercial participators, whether these relate to fundraising from the alumni base or the general public. These now need to comply with the requirements of the Charities (Protection and Social Investment) Act 2016. Institutions should review their data protection practices in the context of fundraising to check they are compliant, as these are on the ICO’s radar at present.

The new Fundraising Regulator has a number of projects in the pipeline, including the FPS, detailed above, which is expected to launch later this year. The Fundraising Regulator’s detailed paper on its plans for the FPS is required reading for institutions that rely on or regularly ask for donations from the public (including alumni).

Institutions should consider responding to the Fundraising Regulator’s consultation on the Code of Fundraising Practice which closes on 28 April 2017.

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Can you dismiss for reputational damage?

We are frequently asked to advise institutions where they perceive that the conduct of one of their employees has damaged or might damage its reputation. In the more serious cases, the institution may even be contemplating dismissing the employee. Whilst it is important to act fairly and proportionately, even if action short of dismissal is being contemplated, the area of greatest risk involves dismissal. Therefore, this article sets out the key issues which institutions will wish to take into account when considering whether a dismissal would be lawful.

**Contractual considerations**

Regardless of the length of service, the employee enjoys the right to statutory or contractual minimum notice, unless the conduct of the employee constitutes a serious breach of contract. In that situation the institution is entitled to dismiss without notice or making a payment in lieu of notice. In assessing whether summary dismissal would be lawful, the institution should consider the precise wording of any contractual provisions which relate to dismissal for causing or creating a risk of reputational damage. We recently dealt with a case where the wording defined gross misconduct as bringing the institution into “serious disrepute.” This is a difficult test to satisfy, since it does not refer merely to the possibility of damage to reputation, and moreover refers to “serious” disrepute.

**Unfair dismissal**

The right not to be dismissed unfairly applies ordinarily only to those employees who have at least two years of continuous service as at the effective date of termination of employment. In such a situation the institution must first demonstrate that the reason for dismissal was a potentially fair reason within section 98 of the Employment Rights Act 1998 (“ERA”). In cases involving damage to reputation the reasons most commonly relied upon are conduct or some other substantial reason (“SOSR”) of a type which could justify dismissal. The institution then needs to show that it acted reasonably in dismissing for that reason.

The institution needs to give careful consideration to properly identifying the reason for dismissal, since the steps to be taken will depend on whether the institution treats the matter as one of conduct or SOSR. Historically there has been a tendency for employers to rely on SOSR in cases of damage to reputation (as the process has been perceived as less onerous than effecting a misconduct dismissal) or simply to categorise the matter as amounting to a breakdown in trust and confidence. However, in recent cases the courts have been critical of attempts by employers to rely on the notion of breakdown of trust and confidence as justifying dismissal under SOSR, where in reality the concern of the employer relates to the conduct of the employee. Therefore if the damage to reputation relates to the employee’s conduct (as it often will) it is advisable for the institution to dismiss for conduct rather than SOSR.

Nevertheless there will be cases of damage to reputation where the employer can properly rely on SOSR (rather than conduct), particularly if the employee is not in a position to make a determination that, on the balance of probability, the employee is guilty of the conduct alleged against him or her. An example of this is the case of Leach v OFCOM. In this case the employee was dismissed from a senior position within OFCOM, after his employer had received from the Metropolitan Police evidence that the Police believed demonstrated that he had been involved in offences of child abuse whilst living in Cambodia.

The employer was unable to undertake its own investigation into these allegations, but was nevertheless concerned that if it continued to employ Mr Leach, and the allegations were publicised, this could cause a serious damage to the reputation of the organisation. It therefore dismissed him, relying on SOSR, describing the reason for dismissal as “a breakdown in the relationship of trust and confidence which is a fundamental part of your employment contract”. The Employment Tribunal concluded that this was a fair dismissal for SOSR, which decision was upheld on appeal by both the EAT and the Court of Appeal.

However, the EAT (with whom the Court of Appeal agreed) said that it had not found the terminology of “trust and confidence” particularly helpful and that it was necessary to identify more particularly why OFCOM could not continue to employ Mr Leach. It concluded that the particular reason for dismissal had been the risk of reputational damage to OFCOM and that the risk of such reputational damage had been a sufficient justification for the dismissal of an employee against whom nothing had in fact been proved. This was clearly an extreme case, and in most situations the matter potentially affecting reputation will not be of such severity.
Factors to consider

The following factors should be taken into account in considering whether a dismissal (whether for conduct or SOSR) would be fair:

- the mere fact that the employee’s behaviour constitutes a criminal offence, will not be in itself justify dismissal - see paragraph 31 of the ACAS Code of Practice on Disciplinary and Grievance Procedures. Consideration needs to be given to what effect the charge or conviction has on the institution’s reputation and/or the employee’s continued suitability to do the job and their relationship with the institution, work colleagues and students.

- was the conduct of the employee closely connected with their work? For example, was the employee representing the institution at a conference or external meeting, or a social or sporting event?

- at the event where the conduct took place, was the employee present in his/her capacity as an employee of the institution, or were they merely there as a private citizen?

- was any person who was detrimentally affected by the conduct of the employee a person who is connected with the institution? For example was the person a fellow employee, student or supplier?

- has the employee published, whether on social media or otherwise, comments about his or her workplace, or students or fellow employees? If so, what do those comments say? Has the employee contravened any social media policy of the institution, and has the policy sufficiently been brought to the attention of the employee?

- what level of publicity, if any, has the conduct or comments of the employee attracted? If in fact there has been no damage to reputation how strong is the risk that this will now occur?

- what is the level of seniority of the employee within the institution?

- would any decision by the institution to dismiss the employee constitute an improper infringement of the qualified rights of the employee to a private life or to freedom of speech under articles 8 or 10 of the Human Rights Act 1998?

- what is the disciplinary record of the employee and have they been warned about such conduct in the past?

Conclusion

As with all unfair dismissal cases, it can be difficult to predict what view an Employment Tribunal will take of particular facts. However, if institutions take into account the matters identified above, that will certainly go some way to helping them to determine if a dismissal will be fair. As mentioned it is crucial that an institution determines whether it is taking action for conduct or SOSR and then follow its procedures for misconduct or SOSR. An institution automatically assuming that any action by an employee which risks damage to its reputation will justify dismissal for SOSR is likely to have to answer some searching questions if the employee brings a claim to an Employment Tribunal.

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Eversheds Sutherland has unrivalled experience in the education sector for the provision of legal advice both within the UK and internationally. Details of our offices are set out below but if you do have any questions arising from this issue of InStep, or you would like to talk to us to explore how we can help you with your requirements, please do contact me.

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