

Strikes, Ts and Cs and structural compensation



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Industrial action

- Strikes likely to continue and intensify
 - Lost learning opportunities
 - Worse assessment outcomes
 - Wider impacts on students - disappointment, inconvenience
- Marking boycott lingers on
 - Invented degree outcomes
 - Delayed degree outcomes
 - Wider impacts - progression, lack of feedback
- Student group claim!
- Group complaints?

Central rights (in principle)

- To experience what was promised
- To have that end of the bargain carried out with reasonable care and skill
- If depending on a force majeure clause to not or partially carry it out, was cause genuinely uncontrollable and or unforeseeable?
- Has the provider done all it can to mitigate the impacts?
- If depending on academic judgement, was the marking carried out with RCAS and in line with appropriate policies (in principle and in practice)

Key approaches to handling action

- Do nothing and deny students' complaints on the basis of previous
- Direct students to make individual complaints - assess individual impacts
- Sieve on basis of confidence and time (initial, appeal, OIA)
- Invite student intel over impacts and informally compensate in bands
- Deliver universal compensation (ie £500 vouchers or payments for those impacted by the MAB)

Getting concerns addressed

- Individual complaints?
- Group complaints?
- Institutional level interventions and settlements
- Legal action individually?
- Student group claim?
- Campaign on wider underpinning issues?

The basis for decision making

- What's best for the academic standing of the university
- What's best for students and the student experience
- What facilitates growth in numbers (or proxies that we think lead to growth)
- What are the standards that the regulators expect us to meet?
- What are the biggest current crises and what would reduce risk?
- Reduce risks or reframe them as normal?
- (ie When does compensating students properly become riskier to avoid than to deliver?)

**Decision making now not about what's
best but least worst option.**

**Insurers, risk managers and legal
advisors playing a key role.**

Types of approach

Consumerist

- Students have consumer protection law rights and the SU's role is to promote, enforce and extend them. Paying more for less etc. "Right wing".

Trad political

- Solidarity with UCU, support strikes, engage in mitigation discussion (ie unpaid wages go into hardship funds). "Left wing".

Tactical

- If universities had to more consistently uphold those rights then they would have settled the dispute by now.
- If doing so would bankrupt the sector the government would find the money (show on the road).
- Take steps to set out beliefs in both of above and address the legal/regulatory/risk issues

Legal/regulatory risk

Contract

- Provider sets out what a student can expect
- Expectations also drawn from standard industry practice
- Has to deliver on those expectations

Unless:

- It has a fair clause that allows it to not deliver or make changes in event of something outside of its predictive control
- It obtains individual consent for a change that is freely given

What if it can't

- If a provider can't deliver its side of the promised bargain, the legislation gives students the right to “repeat performance” or (in certain circumstances), a refund.
- If it is impossible to repeat the service or it has not been done within a reasonable time and without significant inconvenience to the student, the student has the right to a price reduction which may in some circumstances be the full amount of the price.
- It also remains open to the student to claim common law remedies for breach of contract, which could include damages for loss.

Non or substandard performance

- These are terms seeking to limit the HE provider's liability for failure to comply with their contractual obligations
- In particular where HE providers provide something different to their contractual obligations, or in cases of non-performance or sub-standard performance.
- (Operating on a “non-profit” basis (which may include it having charitable status) is not a defence)

Variation clauses

- When a student is given information about the service (in writing or orally), if it is taken into account by the student when deciding to enter the contract (or when making a decision about the service after entering the contract) it is likely to be treated as a term of the contract and to be legally binding.
- An unfair term like to be one which allows the trader to decide the characteristics of what is supplied after the consumer is bound.
- Includes rules, regulations, policies or ordinances, regardless of the document name “if it contains terms or notices that students are bound by then those documents will be subject to unfair terms legislation.”
- If you anticipate that there may be changes to the content and delivery of the courses described in this information, including the possible withdrawal of courses, it is important that you make prospective students aware of the likelihood of, and scope for, such changes.

What is material?

- eg whether [teaching] will be in person, online or a mix of blended learning
- general information about the experience or status of the staff involved in delivering the course, for example professor, senior lecturer or postgraduate student.
- There is likely to be other, non-course-related information, that students consider important and is likely to impact on their decision-making.
- The location of likely or possible work placements, and information about course composition and how the course will be delivered.

Misleading

- A misleading omission could include a failure to provide information both about total tuition fees and any additional course costs up front, in a timely way, or at all.
- Misleading actions misleading actions includes where an HE provider gives a misleading impression about the number of optional modules that will be available.
- HE providers cannot contract out of the delivery obligation, any wording purporting to do so is automatically unenforceable.
- Any attempts by HE providers unreasonably to limit liability for inaccurate website information, particularly where this may constitute pre-contract information under the CCRs is particularly concerning.

Important Information

Whilst the University will make every effort to offer the modules listed, changes may sometimes be made arising from the annual monitoring, review and update of modules. Where this activity leads to significant (but not minor) changes to programmes and their constituent modules, the University will endeavour to consult with students and others. It is also possible that the University may not be able to offer a module for reasons outside of its control, such as the illness of a member of staff. In some cases optional modules can have limited places available and so you may be asked to make additional module choices in the event you do not gain a place on your first choice. Where this is the case, the University will inform students.

If it says it can change things

- In particular it must enable students to foresee the circumstances, nature and extent of any changes.
- It would not be sufficient for information about possible changes to be added to the “small print”.
- Where a provider doesn’t make appropriate provision in the pre-contract information itself for variation, any changes which are made to the issues covered in it are liable to be ineffective “unless the student expressly” (and individually) agrees to it.

19. The University will use all reasonable endeavours to deliver the course in accordance with the description applied to it in the University's prospectus for the academic year in which you begin the course. However, the University will be entitled to make reasonable changes to the course where that will enable the University to deliver a better quality of educational experience to students enrolled on the programme. Such changes may be to:

- (a) the content and syllabus of course, including in relation to placements;
- (b) the timetable, location and number of classes;
- (c) the timing, content or method of delivery of courses of study; and
- (d) the examination and assessment process.

So this is banned...

- The University may alter the timetable, location, campus, amount of contact time, how the course is delivered, the course content and assessment of any course, provided such alterations are reasonable. The University may also withdraw courses before they have started.'
- We will make all reasonable efforts to deliver the programme as described in the prospectus and on the website. However, it is important to keep programmes up to date. We therefore reserve the right to make alterations to the programme, including to the timetable, content, location and delivery methods so as to meet operational demands.'

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10.2.1 **MINOR**: i.e. they will not in our view materially change how the Course or related services or facilities are provided to you; or

10.2.2 **MAJOR**: i.e. they will have a more significant impact on the way that we teach and provide the Course and other services and facilities to you.

9.3 Changes may be minor or major changes.

9.3.1 Examples of minor changes, may include, but not limited to:

1. altering the timetable, location, and number of classes for your course;
 2. reasonable changes to the content and syllabus of your course, including in relation to optional placements, to ensure that the course remains current and relevant;
 3. changes to assessments as a result of student or external examiner feedback.
- at any time to make non-substantial alterations to the timetable applicable to you, to alter the number of classes relating to the Course, alter the methods by which the Course is delivered and to alter the location of delivery of the Course, such changes not to be considered substantial unless they would alter the study mode, academic classification, or eligibility for benefits, immigration status or Council tax credit purposes of the course;

Plus...

- Where applicable, you should also provide information on who the student is contracting with. For example, where there are third parties involved in franchise, validation or joint course arrangements or if third parties are responsible for delivering significant aspects of the educational service.
- CMA is saying that providers must make it absolutely clear to students, where responsibility lies for the delivery, or aspects of the delivery, of the educational service – which rather rules out the old kneejerk response to complaints about placements by pointing at external parties and saying “oh blame them not us”.
- Terms which seek to limit liability for problems caused by a HE provider’s suppliers or subcontractors, for example third parties used to support students by providing specialist equipment or training, will also be regarded in the same way.

Plus

- It would not be acceptable to add a statement to a term stating that statutory rights are unaffected without explanation.
- A term which seeks to exclude or limit liability ‘so far as the law permits’ or ‘to the extent permitted by unfair contract terms law’ may be unfair and open to objection because their practical effect is unclear and uncertain

Examples of limitation of liability terms that may be open to challenge

'If the University fails to or is not able to provide the educational services, and this is a result of its own default, the liability of the University shall not exceed the amount of one year's course fees.'

16.1 Our liability to you: We will use reasonable care and skill to carry out our obligations under these Terms. Subject to 16.2 below, our total liability to you in respect of any claims or losses shall not in aggregate exceed the amount of your Programme Fees in any one year.

New MI or Ts and Cs each year?

- Widespread during the pandemic was taking a student's re-enrolment as a signal of consent to course changes. On this, the regulator says:
 - The CMA would be concerned if an HE provider were to say that a student had accepted or had to accept that there would be a new contract at re-enrolment for each year of study.
 - Such a term could be interpreted or used as a means to bypass the requirements to obtain express consent to changes under the CCRs and/or as a way to vary terms of the contract (see paragraphs 5.18 to 5.33).
 - In the CMA's view, this may breach consumer protection law.

Each year, we review our student terms and conditions for new and returning students in consultation with the Students' Union.

As part of the registration process for the next academic year, you will be asked to confirm your agreement to the updated terms and conditions.

More on variation

- Variation terms which seek to give HE providers a wide discretion to change important aspects of the educational service for unclear, imprecise and potentially broad reasons (such as ‘for reasons outside their control’ without any further explanation) are unlikely to be fair.
- Such a term is more likely to be fair if it sets out clearly when it may apply and is restricted in scope to limited circumstances genuinely outside a HE provider’s control.
- ...the right to cancel must be a genuine right exercisable in practice without loss or serious inconvenience. For instance, the existence of any practical difficulties in finding an alternative HE provider is likely to be relevant to how ‘genuine’ the right to cancel is.

about any changes that are required. If the University changes your course and you are not satisfied with the changes, you will be offered the opportunity to withdraw from the course, move to another course and, if required, reasonable support to transfer to another provider.

Strikes

- Terms limiting liability are more likely to be regarded as fair where they are restricted in scope to problems unavoidably caused by factors beyond the trader's control.
- The relevant circumstances should be clearly and specifically described, and in the CMA's view there should be no listing of matters that could be within the trader's control – for example industrial disputes with the trader's own employees.

Plus

- The University will not be liable to you for any failure to carry out the agreed Contractual obligations, where that is caused by events that are outside its control (known as a ‘force majeure’ event). This includes, but is not limited to staff illness or industrial action, the acts or failings of third parties employed by us, a public health emergency (for example pandemics) or acts of God.

Enforcement?

- CMA interpreters and can take to court, but not a definitive interpreter of law
- OfS requires providers to pay regard to advice, similar but weaker provisions in Scotland, Wales and NI

Reasonable care and skill

- Significantly, in considering whether an HE provider has provided a service “with reasonable care and skill” CMA says it would expect a court to have regard to:
 - ...the standards of the sector in question, since that may be regarded as the level of care and skill that is generally considered reasonable for providers in the HE sector.

Care and skill

- Would a workload model that gives a lecturer 20 minutes to read, mark and write feedback on a 1500 word essay be considered “reasonable”?
- And how about all those changes providers are making to moderation (the “get out of jail free” card that enables academic judgement to be so sacrosanct) or drafting in lecturers unfamiliar with a programme to get the marking done this summer?
- Marking boycott - was grading RCAS?

Care and skill

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OfS on valid and reliable

- An assessment that results in differences in the marks awarded to students demonstrating the same achievement.
- For example, different marks awarded to projects
- or dissertations where students have worked on different topics but have demonstrated
- the same level of achievement suggest that the assessment design may not be reliable.

So what next?

- Note silent war over interpretation
- Check, using the CMA checklist
- Challenge internally
- (Small?) group complaint that specifically addresses the problematic term(s) to OIA
- Trading standards/CMA/OfS notification
- Consider respective roles of voice and advice
- To what extent should you pursue/build confidence?

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