

PODCAST SCRIPT FOR ADMISSIONS TUTORS, AGENTS AND STAFF AT OPEN DAYS

J: Hello and welcome to today's podcast in which we're going to look at some of the legal issues involved in student recruitment, specifically in the context of contract and consumer law. My name is Joanna Forbes and I'm a Legal Director in the Education Team at Shakespeare Martineau solicitors. I'm joined by my fellow Legal Director, Geraldine Swanton.

As a result of recent changes in the law and an enhanced focus on the legal status of students as consumers by the Competition and Markets Authority many universities have reviewed their pre-enrolment interactions with prospective students to try to manage the legal risks. Gerry, what are the key elements of the relevant legal framework?

G: The starting point is that student/university relationship is a contractual one consisting of legally binding rights and responsibilities on both parties. Staff involved in recruitment and admissions processes are likely to be considered to have "ostensible authority" to make binding legal commitments on behalf of the University, because they are engaged in processes which are key to students choosing whether to enter into a contract with the University.

J: These binding legal commitments can be made both in writing and orally, can't they?

G: That's right. Written express terms are those set out in the University's prospectus, rules and regulations and other documents produced by or on behalf of the University. Oral express terms are those agreed orally between members of staff, recruitment agents and other representatives of the University, and a prospective student. The law also implies terms into the contract, which relate to the standard to which the University must deliver the services and facilities that make up the contract, and to the time in which the service must be delivered. Services must be delivered to a reasonable standard and within a reasonable time.

J: So, if the University fails to deliver the service in accordance with the terms agreed or implied, what can students do?

G: Well many will complain to the OIA. But if they choose to take legal action, there are a range of legal remedies available to them. From this October, students will be able to seek the right to a repeat performance of the service so that it does comply with the agreed terms. It is not yet clear how the courts will interpret what a repeat performance means in the university context; it could be the repeat of a part of a module, the whole module or the course itself. Alternatively they can seek a discount on the fees paid to reflect how far short of the agreement the service fell. These remedies are in addition to a right to damages to compensate for any losses suffered as a result of the failure to deliver the promised service. In addition, recent changes in the law makes it more likely than previously that a court will order specific performance i.e. an order of the court that the University must deliver a service that complies with the terms.

J: Is there any other action a student can take if they feel they have been misled by statements made during the recruitment process?

G: Students may have a claim for misrepresentation. To succeed in this, students will have to identify a false statement of material fact made (in writing or orally) by the University to the student before or at the time the contract is entered into. The student must have reasonably relied on the false statement as one reason, but not necessarily the sole reason, for entering into the contract. If the student is able to show that there has been such a misrepresentation, then he or she may be able to treat the contract as rescinded (i.e. set aside, as if it had never been made) or claim damages.

J: Other than claims for breach of contract and misrepresentation, are there any other legal risks that recruitment staff should be aware of?

G: Yes. Students are legally regarded as consumers and so universities need to be wary of two further things. First, misleading actions (for example false information or misleading omissions) which are a significant factor in a potential student's decision to enter into the contract with the University. There is no need to show that it was the only or main factor. And secondly, aggressive commercial practices, defined as practices which significantly impair or are likely to significantly impair the

average consumer's freedom of choice (e.g. harassment, coercion, undue influence) and/or which cause the consumer to make a transactional decision s/he wouldn't otherwise have made. Students who believe that they have been induced to enter into their contract with the University as a result of a misleading action or an aggressive practice can, in certain circumstances, seek to set aside the contract. Alternatively, they can seek a reduction on the fees paid, as well as damages including for distress, anxiety and inconvenience. It is also a criminal offence to engage in misleading actions or aggressive practices.

J: Given that there are very many areas that might be discussed at an open day or other recruitment related activity, are there particular issues where the risk of subsequent challenge is higher?

G: Yes, there are a few and they are basically those areas that are likely to be of most importance to prospective students. First of all, course content. If a member of staff states that a course will include certain modules, or be taught by certain individuals, when it doesn't and isn't, that could give rise to a claim. Prospects for graduates is another area where misstatements about graduate employment rates might be challenged. A perennial problem is course accreditation, so claiming that a course has a particular accreditation when it has not. The location or timing of a course may be particularly relevant to, say, part-time students. Care needs to be taken when making statements about costs, particularly when and how fees might be increased and whether there are any "hidden" costs for field trips, placements or equipment. Finally, staff need to take care when discussing any bespoke arrangements a student might require because of a disability or other circumstances such as caring responsibilities.

J: What steps could staff take to mitigate these legal risks?

G: The University has gone through an exercise of reviewing all its written information to ensure that its offer to prospective students is clear and deliverable. Staff should ensure they are familiar with the written documents and wherever possible refer prospective students to written sources of information. Staff should avoid being drawn into answering questions to which they don't know the answer and should refer prospective students to specialist sources of information where appropriate, such as disability services. When providing additional information to prospective students, try to qualify statements as being examples, or a reflection of past practice, rather than promises about the future. Thinking about the language they are using is a good idea: if they describe things as "excellent" or "world class" need to be capable of some sort of objective justification. If staff do agree special or bespoke arrangements with a prospective student on any matter relating to their application to the University, then they should make a clear contemporaneous note of it. Finally, and this goes almost without saying, staff should never make a statement they know to be false or exaggerated.

J: Thanks Gerry. That's the end of the podcast. We hope you found it useful and thanks very much for listening.