

Unpicking strikes, tuition fees, and (possible) refunds

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There is much in the media about students seeking a partial refund of tuition fees where UCU strike action has denied them delivery of teaching. There's also some suggestion that universities might try to argue that such partial non-delivery is beyond their control and covered by a force majeure clause implied into the student-university contract – to educate. But what's the technical and legal position exactly?

Wither the contract?

Egregiously, most students “buying” (for example) undergraduate degree courses at £27,000 – £36,000 have no detailed contract to which they can refer. Hence the courts would need to imply fair terms in line with the Consumer Rights Act 2015 (CRA15).

This lack of a standardised student – university contract (covering teaching and also assessment/examining) needs urgently addressing by the higher education sector as a matter of self-regulation: or, failing that, by OfS as the new regulator acting (as its name implies) “for” students.

It is clear that the contractual relationship between the student and the university is a business-to-consumer (B2C) contract under the Consumer Rights Act – where indeed, in the language of the act, the university is a “trader”.

Meanwhile, it may need a High Court case – perhaps by way of (almost literally) a class action at a particular university – to establish case law as to whether universities can invoke such a clause or have to pay compensation for what is only partial delivery.

Such a case would also helpfully clarify how such compensation is to be calculated as a refund for services not delivered, plus possibly any damages for distress and hassle along with potential damages for losses caused by delays to degree results that impact on employability.

It just might be a fairly simple case in that arguably under CRA15 the student has a new statutory right to require a “price reduction” of an “appropriate amount” where the “trader” fails to deliver part or all of a “service” – and the trader is unable in the B2C contract to require the consumer to contract out of such CRA rights.

How does the Consumer Rights Act 2015 impact upon the student– university contract?

Under CRA15 the student-university relationship is simply a B2C contract, the university is a “trader” providing a “service” (teaching and assessment/examining) that is to be delivered “with reasonable care and skill” and “within a reasonable time” to the student who in return can be asked to pay “a reasonable price”.

If the university fails to deliver a service in conformity with the contract, the student has a new “statutory right” that is “the right to a price reduction” – and similarly if the delivery of the service is delayed beyond a reasonable time. And the student can use CRA15 to call for “a right to require the trader to perform the service again” and to do so “within a reasonable time” as well as “without significant inconvenience to the consumer”.

The student can, however, still pursue “other remedies” which may include “claiming damages”, “seeking specific performance”, “exercising a right to treat the contract as at an end”. In effect, CRA15 does not prevent the consumer utilising rights under general contract law within the common law.

The “right to a price reduction” includes a reduction “by an appropriate amount” – which may be by way of “a refund” which the university/trader must give “without undue delay”.

But how would “an appropriate amount” be calculated? In theory, that calculation and amount are agreed between the student(s) and the university, with the university not proceeding too slowly. The students(s) will probably claim that, say, 15% of lectures have been lost, and hence 15% of the £9,250 tuition fee needs to be refunded; the university is unlikely to agree.

So, off to the court to apply CRA15?

But how might student S enforce their statutory rights against the university?

Step one is to raise them with the university. If a student gets nowhere via the university’s complaints processes, they could take the matter to the OIA which might, eventually, adjudicate in favour of them.

Or the student could go to the local trading standards department for the university. After trying a direct “appropriate consultation” with the “trader” and failing to agree that the university will give an “undertaking” to cease infringement of CRA15, trading standards could seek from the court an “enforcement order” as a “public enforcer” under Part 8 of the Enterprise Act 2002. Such an order would aim at stopping the infringement, with (at the court’s discretion) financial penalties upon the university for not complying with due expediency.

And the Consumers' Association is a "designated enforcer" – so the student could also ask Which? to step in, and it, in turn, could approach the university and then the court as above. Indeed it may do so of its own accord to gather consumer complaints, given its strong interest in the student-university contract, tuition fees and value for money.

But a specific university would have to be targeted. Which? may take a more nationwide view of any seeming harm to the "collective interests of consumers" (students as the public "buying" the HE service) – whereas local trading standards take, by definition, a local perspective.

If it is a nationwide test – a case or action brought by, say, Which?, then the relevant court is either the County Court in the area of the university or the High Court (Chancery division).

The defendant is likely to be the vice chancellor along with the university as the body corporate. It is not necessary for individual students to give evidence; those bringing the case can simply refer to consumer complaints. Any enforcement order made by the court could specify how compensation due under CRA15 to the student should be calculated.

The court can order the trader to publicise the order. And ignoring of the order would be contempt of court – the university is fined, and the vice chancellor goes to jail.

For further reading, try Palfreyman & Tapper *Reshaping the University: The Rise of the Regulated Market in Higher Education* and Palfreyman & Temple *Universities and Colleges: A Very Short Introduction*.

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PS. So, assuming the CRA15 applies and the S wins a 'refund' and also assuming that the U can't invoke a force majeure limitation/exclusion clause because the CMA and/or the Court deems the clause to be unfair under the CRA15 (it is, say, too deeply buried in the small print and has not properly been brought to the attention of the S when entering into the U-S B2C contract), then the next question is how is the 'appropriate amount' for the refund to be calculated.

The S may well assert that the £9250 'buys' barely 20 teaching weeks in his/her Humanities or Social Studies subject and hence, since the strike has wiped out two weeks of teaching, there should be a refund of £925.

The U will counter that the £9250 funds, inter alia, c£1000 for access/widening-participation initiatives, and also pays for administration, physical infrastructure, the library, various student support services, etc - and hence that the amount spent at the chalkface is, say, £5000. Moreover, that £5000 anyway covers the availability of academics over the 30 week academic year and also assessment/examining.

The U, therefore, might offer a refund of £300 - £3000 as the actual 'value' or cost of the direct teaching time divided by 20 weeks over which it is delivered and times the 2 weeks lost to strikes.

Indeed, the U might even claim it spends even less on the direct cost of such teaching - it uses casual teaching very cheap adjunct labour! So, it offers a nominal £100.

But even £100 to each of perhaps the 10,000 affected by the strikes from the U's 25,000 UGs - plus a bit more proportionately for those UGs paying tuition fees at the international student rate - could add up to some £1.25m. And the refund to PGTs paying even more by way of fees could add quite a bit more.

Depending on the amount of 'appropriate' refund and in the number of Ss affected, it is not entire fanciful to contemplate the typical U paying out £5-10m...

The above does not allow for what might happen if exams and marking are delayed, degree results decided late, employability affected: there will then be consequential financial losses besides any question of a refund. And there might be the award by a court of disappointment damages as in a narrow range of breach of contract cases.