



7<sup>th</sup> February 2020

Dear BUCU committee

The University is responding formally to your email to the Provost dated the 27<sup>th</sup> November 2019 at 13.29, enclosing an open letter from various Professors of Human Rights Law and Labour Law from various Universities. The note below provides detail behind Gillian McGrattan's email to you on the 18<sup>th</sup> December.

The email to the Provost levelled two accusations at the University - that it had introduced a total prohibition on rallies and demonstration on campus, and that the University was wrong to say that pickets were required to remain off campus whilst picketing. The rationale for these 'charges' was that the University is bound by the Human Rights Act 1998.

The University took the request to review the legal position seriously. As you would expect, we have also obtained external advice from an eminent QC with expertise in this field, and have, with permission, incorporated some of her advice into our response.

As we indicated in December, we do not accept the accusations levelled against at the University, for the reasons as set out below. The University's position is fully supported by the QC's advice.

Firstly, we will look at the Human Rights question, and then it is important to both set out the relevant correspondence that preceded the strike, and the framework within which the University operates.

## 1. THE LEGAL FRAMEWORK

### 1.1 Section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") provides under the heading "*Peaceful picketing*":

*(1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend –*

*(a) at or near his own place of work*

*... for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.*

### 1.2 Central government's Code of Practice on Picketing provides:

22. The expression “at or near his own place of work” is not further defined in statute law. The provisions mean that ... lawful picketing must be limited to attendance at, or near, an entrance to or exit from the factory, site or office at which the picket works.

...

26. The law does not protect anyone who pickets without permission on or inside any part of premises which are private property. The law will not, therefore protect pickets who trespass, or those who organise such trespass, from being sued in the civil courts.

1.3 UCU’s guidance on picketing provides:

1.4 ... the union and its pickets are not protected from legal action if they engage in such activities as: ... trespassing on private property

...

3.1 ... Ensure that you have sufficient pickets to cover all main entrances to the workplace ...

1.4 UCEA’s guidance on picketing provides:

5.2 ... Picketing on the HEI<sup>1</sup> campus or property, unless this is specifically authorised by the HEI, is likely to be trespass.

1.5 Section 43 of the Education (No. 2) Act 1986 (“EA”) provides, under the heading “Freedom of speech in universities, polytechnics and colleges”:

- (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
- (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, as far as reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with –
  - (a) the beliefs or views of that individual or any member of that body; or
  - (b) the policy or objectives of that body.
- (3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out –
  - (a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation
    - (i) of meetings which are to be held on premises of the establishment and which fall within any class of activity so specified; and
    - (ii) any other activities which are to take place on those premises and which fall within any class of activity so specified; and
  - (b) the conduct required of such persons in connection with any such meeting or activity; and dealing with such other matters as the governing body consider appropriate.

1.6 Section 6 of the Human Rights Act 1998 (“HRA”) provides:

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<sup>1</sup> Higher Education Institution

*(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

*(2) Subsection (1) does not apply to an act if—*

*(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

*(3) In this section “public authority” includes—*

*(a) a court or tribunal, and*

*(b) any person certain of whose functions are functions of a public nature,*

*but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*

*(4) . . .*

*(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.*

1.7 Article 10 of the ECHR provides:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

1.8 Article 11 of the ECHR provides:

*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

1.9 Article 1 Protocol 1 of the ECHR provides:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance*

*with the general interest or to secure the payment of taxes or other contributions or penalties.*

1.10 It is relevant to the question of whether there has been a breach of Articles 10 and 11 if those seeking to invoke those rights can carry on their activities elsewhere (*Appleby v UK* (2003) 37 EHRR 38, cited in *Mayor of London v Samede* [2012] EWCA Civ 160, ). More generally, the Court of Appeal in *Samede* held that the limits of such rights will normally depend upon “a number of factors” including “the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protestors, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public” . Moreover, such rights must be balanced against the right of the owner of the property upon which individuals wish to assemble and protest.

1.11 The framework in *Samede* was applied in *Manchester Ship Canal Developments Limited v Persons Unknown* [2014] EWHC 645 (Ch). In that case the court emphasised that the Article 1 Protocol 1 ECHR ( A1P1) rights of the owner of the property are “powerful factors” to be weighed against the Article 10 and 11 rights of protesters. It also weighed in the balance the fact that “there is absolutely nothing to prevent the protesters from carrying on their protest elsewhere and/or by other means that does not involve interfering with the A1P1 rights of the Claimants, their licensees and visitors”.

1.12 In *Ziegler*, following *Samede*, the Court also held that Article 10 is not a “trump card” entitling a protestor to circumvent any usual rules, but rather the question should be whether any interference with the right pursuant to such rules was proportionate or not . Where Articles 10 and 11 are invoked as against other rights, for example to use the highway, the Court said “it is not helpful to refer to either right as being the “primary right”. Rather the exercise which has to be performed is to assess the proportionality of any interference with the Convention rights and, in particular, whether a fair balance has been struck between the different rights and interests at stake.”

1.13 It is therefore clear from the position above that the University was correct in using the statutory framework, in accordance with the Education (no2) Act 1986, to define procedures for the organisation of meetings, and other activities, and that Article 10 rights are not to be used as a trump card, particularly where the proposed activities could be carried out elsewhere nearby.

1.14 In addition it is also clear that picketing on campus is not permitted under TULRA, since picketing must take place ‘at or near’ the place of work, not on it.

1.15 The correct and only method of arranging a rally, protest, meeting or demonstration on campus is therefore to complete the appropriate application form, and risk assessment under the Code of Practice on Freedom of Speech and External Speakers. This has been confirmed by our Leading Counsel’s advice.

## **2 CORRESPONDENCE**

2.1 The UoB Briefing, which was a high level, general guidance for all staff, issued on the 22nd November, included the following reference (emphasis added):

“Guidance for striking staff and line managers

If you decide to take strike action please remember that because you are on strike (and not at work) you should not come onto University land or property for any purpose. The University is private land and therefore picketing or any other strike related activity (such as a rally) will be unauthorised and held to be trespass.”

This was based on the fact that at that point in time BUCU had not previously applied for consent to hold a rally or demonstration on campus during the strike days, and such an application would have been out of time, and therefore not be granted. It was not considered that the high level, general guidance to all staff was the appropriate place to discuss the failure of BUCU to apply for permission to hold a rally or demonstration on campus within the designated time frame.

- 2.2 However in addition, on the same day guidance was given to BUCU. The correspondence dated the 22th November 2019 to BUCU says

“Rallies: The University does not permit those taking strike action to enter University land between the 25th November and 4th December for the purposes of holding a rally or a meeting. In all cases permission to hold a rally or event on campus must be obtained via the University’s Freedom of Speech Code of Practice **as we have discussed previously**. Furthermore, as no application for such an event has been received and that any submission received now would not comply with the 15 day criteria required within the Code of Practice, no rallies are permitted regardless of whether those attending are on strike or not.”

- 2.3 Together with the guidance dated the 22<sup>nd</sup> November, the University also resent a memo that had been sent on the 20<sup>th</sup> November to the BUCU committee, which included the following:

“Pickets must be outside the campus boundary, and those on strike are not permitted to enter the University campus on the days on which they are taking strike action, unless there is explicit permission to do so. We note from communications to your members that you have announced daily rallies on campus; permission for any such gathering must be sought in advance ...”

### 3 UNIVERSITY LEGISLATION

The University, as an autonomous legal person, is governed by its Royal Charter, Statute, Ordinances, Regulations and Codes of Practice. It holds land in accordance with the Charter and statutes with full power and capacity as a private land owner.

- 3.1 The key internal piece of legislation is the University’s Code of Practice on Freedom of Speech and External Speakers (“the University’s Code”) pursuant to section 43 of the Education (No. 2) Act 1986. It includes the following:

#### *Part 1 – General Principles*

##### *1. Background*

*1.1 Universities in England and Wales have a statutory duty under the Education (No. 2) Act 1986 Section 43 to secure freedom of speech within the law for staff, students and visiting speakers, reflecting their mission as placed where new ideas can be advanced and where open and free debate can take place. In addition, freedom of thought, freedom of expression and freedom of assembly and association is enshrined within the law.*

1.2 However, free speech is not an unqualified privilege, and universities are subject to a range of legislation and obligations to ensure the safety and well-being of students, staff and the wider community. For example:

...

- Due regard of other legal responsibilities, such as those relating to ... the health, safety and welfare of employees, students, external speakers and visitors.

...

1.9 The principles set out in this Code of Practice will be particularly relevant to the following activities ...

- public meetings, arranged internally or externally;
- demonstrations or marches on campus

...

*Part II – Application of this Code of Practice to meetings and events*

*2. General principles*

2.1 The general principles set out above in this Code of Practice will apply to all demonstrations, events and meetings held on campus ...

...

2.3 The University has established the following policies and procedures for the management of debates, demonstrations, meetings and events (“event”).

...

2.3.2 Events to be held outdoors on University premises are subject to the procedure for holding an outdoor event on University premises.

...

2.5 So far as is reasonably practicable, no access to, or use of land or buildings of the University shall be denied to any individual or body of persons on any grounds solely connected with: (i) the beliefs or views of that individual or of that body; or (ii) the policy or objectives of that body, always providing that the University takes account of the general law such as that relating to unlawful ... assemblies ...

3.2 The University’s procedure in relation to outdoor events includes the following:

*All events on campus organised by individuals, groups, internal departments or student societies require approval from the Director of Hospitality and Accommodation Services (or their designated deputy).*

*This includes:*

...

- *Strikes, protests or rallies*

...

*Applying to hold an event*

*A minimum of 21 days’ notice is required. (In exceptional circumstances approval may be given without the required notice period.) Granting of approval rests with the Director of Hospitality and Accommodation Services (or their authorised deputy).*

*Please ensure that the application form is signed and dated, and that you have provided a contact email address.*

...

*Additional requirements*

*Some events also require you to complete additional forms.*

*Event Health and Safety Risk Assessment Form*

#### **4 CONCLUSION**

- 4.1 From the correspondence above and the detail of the Code it is plain that any allegation that the University told BUCU that there was a total prohibition on rallies or picketing on campus is totally inaccurate and misleading.**
- 4.2 If BUCU had applied to the Director of Hospitality and Accommodation Services as required in the Code (as to the terms of which see above) in order to hold an event related to the industrial action, for example a rally, on the campus then that would have been considered by the University under the Code in the ordinary way. If the requirements of the Code were fulfilled, for example, in relation to notice, health and safety, and stewarding, it is anticipated that the University may well have agreed to such a rally, with any necessary safeguards for the protection of students, staff and other visitors to campus that day, such as the restriction of load hauled which disturb teaching and learning, or the postponement of an event which clashes with an existing major event, or involves under 18s.
- 4.3 It is clear from the legislative framework set out above that the right to picket is limited to the employees attending 'at or near' (not on) their place of work.** The University was therefore correct in saying that any activity relating to the industrial dispute which the BUCU wished to carry out on campus, could only occur with consent of the University. As required by the Education (no 2) Act 1986 the University is obliged to have a process for approval of such activity, which applies to all staff, students and visitors. The University acts fairly and in an even-handed manner when applying the Code, to both staff and students, and it would not be fair or appropriate to permit rallies or marches on campus that have not submitted a duly completed form, including a risk assessment.
- 4.4 The University continues to take very seriously its obligation to uphold the right to free speech, debate and academic challenge within the law, and as such is willing to continue supporting lawful demonstration on campus. However, this must be within the statutory framework set out within the Code of Practice on Freedom of Speech and External Speakers in order to ensure the health, safety and wellbeing of all those who use the campus.

Yours sincerely



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Director of Legal Services**