

A summary of the law and general guidance relating to the impact of the industrial action on students

Office for Students, 11 April 2018

This guidance note provides clarification about the protection that might be available to students in the context of current Universities Superannuation Scheme (USS) industrial action. It is general guidance and does not constitute legal advice, and in particular does not represent legal advice for individual students, who are each likely to have different remedies available to them dependent on the specific contractual arrangements between each student and their university, the extent of the disruption they have experienced, and their own individual circumstances. If a student does wish to explore their legal options they will need to take their own legal advice.

1. The Consumer Rights Act 2015 (CRA) will apply in most cases to the relationship between a student and their university because there is a contract between the university (the trader) and a student (who will in most cases be a consumer) for the university to supply services.
2. The rights available to students under the CRA as a result of any disruption caused by the USS industrial action will depend on the terms of their contract with the university. Students will also have rights under their own individual contracts with the university. This means that their rights will vary from university to university and also between students on different courses at each university, and even students on the same course. This is because the CRA incorporates certain information provided by the university to the student into the contract between any student and the university. The terms of any individual contract will therefore depend on exactly what information is provided to that particular student.
3. Whether any loss of teaching or other disruption as a result of strike action will be a breach of contract may depend on the existence, and fairness, of any terms that allow the university to vary course provision or depart in any other way from information provided to the student (a 'variation clause'), as well as any force majeure clause (which to be enforceable is also subject to the same fairness test).
4. A term is unfair under the CRA if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. This is determined taking into account the subject matter of the contract, all the circumstances existing when the term was agreed, and all the other terms of the contract. The CRA also requires a written term of a contract to be transparent and transparency is fundamental to the fairness test.
5. Part 1 of Schedule 2 to the CRA contains an indicative and non-exhaustive list of the types of terms in a consumer contract that may be regarded as unfair. Whether any particular term is deemed unfair will depend on the specific wording of that term, in particular the extent of the discretion to vary the term. A term allowing variation that gives a university too wide a discretion to make changes to the detriment of a student can upset the balance between the university's and student's rights and obligations. Guidance published by the CMA sets out

circumstances in which a variation term is less likely to be open to legal challenge on grounds of unfairness¹.

6. If a term that was designed to allow the university to make changes to course provision and/or assessment was found to be unfair, it would not then form part of the contract and a university would be unable to rely on it. This means that a variation from what the student was told about course provision or assessment would be a breach of contract.
7. A force majeure clause is a term which generally provides that a party shall not be in breach of an agreement, or liable for failure to perform of its obligation under an agreement, if a 'force majeure' event happens. Force majeure is normally defined as an act, event or circumstance beyond the reasonable control of the party concerned. Contracts will typically provide a non-exhaustive list of acts that will constitute a force majeure event; industrial action may be included in this list by some universities.
8. If a contract does not specifically list industrial action as a force majeure event, in normal circumstances it may not be considered beyond the reasonable control of the university, as the university could often avoid industrial action. Therefore the university could not rely on industrial action to justify non-performance of its contract with students. However, in the circumstances of this industrial action, because the industrial action is sector-wide and relates to a decision by USS and not by individual universities, it is arguably beyond the reasonable control of any one individual university.
9. Whether or not industrial action is specifically listed as a force majeure event, the clause must still meet the fairness requirement in order to be enforceable.
10. The CRA provides for two special remedies which are available where a service does not conform to a term included in the contract by virtue of the CRA:
 - repeat performance; and
 - price reduction.
11. These remedies are only likely to be available to the extent that the industrial action does not fall within the scope of a valid force majeure clause, or the disruption caused constitutes a variation outside the scope of any valid variation clause.
12. Price reduction is only available where a student cannot require repeat performance because completing performance in accordance with the contract is impossible, or they have required repeat performance but the university is in breach of the requirement to do it within a reasonable time and without significant inconvenience to the student. Universities may not be able to make up for lost teaching and it may be difficult for them to do so within a reasonable time as the end of the academic year is approaching. In these circumstances, if students requested repeat performance the university would therefore be unlikely to fulfil the requirement to perform within a reasonable time and without significant inconvenience to the student. Students would therefore be able to request a price reduction instead. Students may

¹ 'UK higher education providers: Advice on consumer protection law', available at <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>. Please note that the CMA guidance was published prior to the entry into force of the CRA; however, similar considerations as to unfair terms still apply under the CRA

also be able to argue that repeat performance is impossible and request a price reduction in the first instance.

13. Students may also claim damages for breach of contract (the CRA does not prevent a student seeking other remedies in addition to the statutory remedies, but not so as to recover twice for the same loss). The general rule is that damages should seek to place the student in the same position as if the contract had been performed. This would normally entitle students to any losses (including consequential losses) that are caused by the breach of contract, that were reasonably foreseeable at the time the contract was entered into, and that could not have been avoided by the student taking reasonable steps to mitigate their losses. Under English law, claimants are not normally entitled to 'disappointment damages' for a breach of contract. However, there are some limited categories of cases where such damages are recoverable. These are where a major or important object of the contract is pleasure, relaxation, peace of mind or freedom from non-molestation. It is potentially arguable that disappointment from loss of learning or knowledge falls within, or is at least analogous to, these categories of cases. However, it is not at all clear that such damages would be recoverable.