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# Ten practical tips for universities handling judicial review cases

11 October 2024 Matthew Alderton

Universities and other higher education providers regularly face judicial review challenges to their decisions, policies and practices. These can come from a variety of sources – students, staff, guest speakers and lobby or special interest groups. These challenges can have a substantial impact on the organisation – draining financial resources and staff time, as well as carrying reputational risks.

In our experience when acting for universities in a variety of judicial review challenges, the following practical considerations can help to alleviate this impact.

**1. Do you need more time to respond?**

Under the pre-action protocol for judicial review, a defendant should usually respond within 14 days. However, this is not a strict limitation period and further time can be requested if the request is made reasonably. The claimant may face costs sanctions if they do not agree to a reasonable request.

The key consideration here will be the three-month time period allowed for the claimant to commence proceedings, as this is not affected by any agreement to extend the time for responding to the pre-action letter, and the claimant will need sufficient time to prepare their claim within this limitation period.

If proceedings are commenced, the defendant has 21 days to respond to the claim as discussed below. This 21-day period cannot be extended by agreement between the parties.

**2. Should proceedings be stayed?**

Many judicial review challenges brought by students against universities will be done in parallel to the student making a complaint of the Office of the Independent Adjudicator (OIA). Indeed, if the student does not pursue the OIA route the defendant university may be able to argue that the student has failed to pursue all other avenues of redress (judicial review being a remedy of last resort).

The student may wait for the OIA process to conclude but this requires the court to extend the time allowed for commencing proceedings.

If parallel proceedings are commenced, it is therefore recommended that universities agree to a stay of the judicial review proceedings until the OIA process has concluded.

**3. What is the Claimant seeking by way of relief?**

Judicial review is at its core a mechanism for obtaining particular relief, such as an order quashing a decision or requiring a public body to take some action. It is rare for damages to be awarded – in the higher education sector this will often arise in connection with claims for discrimination under the Equality Act 2010, which should instead be brought in (or transferred to) the County Court.

If the relief sought by the Claimant is wrong or misguided, then the university is on strong ground when asking for permission to be refused.

**4. Are there any interested parties?**

It may be appropriate to name another public body as an interested party. For example, if the challenge relates to action taken by a university pursuant to a policy issued by a central government department then it may help the university's prospects of defending the challenge if the relevant department also gave evidence or made legal submissions.

**5. Should you make a new decision?**

As discussed above, judicial review is mechanism for obtaining particular relief. This means that claims can become academic if the relief sought is no longer needed. This includes where the defendant has made some new decision which effects the claim or has subsequently taken the action sought – for example, undertaking an equalities assessment to comply with the public sector equality duty if this had been overlooked previously. Taking such action to correct any clear errors in the decision-making process can serve to bring a swift end to the proceedings.

**6. Understand your disclosure obligations**

There is no general duty disclosure in judicial review proceedings – instead the parties have a special duty of candour and cooperation with the Court. This means that parties must disclose relevant information or material facts which either support or undermine their case.

Often this will require disclosure of the source document rather than just providing a summary of the factual position. This duty is a continuing one as it applies throughout the judicial review procedure (including pre-action) – although has its most force when the Defendant is filing its detailed grounds of defence and evidence. There are strict rules for making any redactions.

**7. Do you need to resist the granting of permission?**

The filing of an acknowledgment of service is not mandatory unless ordered by the court. This means a defendant can simply sit back and wait to see whether the court grants the claimant permission on the papers to proceed. This approach does, however, have three main consequences. Firstly, it means the defendant loses the opportunity to persuade the Court to knock out the claim at an early stage before significant costs are incurred, or to correct any inaccuracies.

Second, if permission is refused and the claimant applies for the matter to be reconsidered at an oral hearing, the defendant does not have the right to attend. Third, there could be costs consequences if the claim is dismissed at a final hearing based on a point that the defendant could have raised at the permission stage. It is for these reasons that it is rarely advisable for universities to decide not to file an acknowledgement of service.

**8. Think about costs.**

It's important to think of costs in 3 stages. First are the pre-action costs, which will be borne by each party unless proceedings are subsequently commenced. Second are the costs of contesting permission when filing an acknowledgement of service (known as the Defendant's "Mount Cook" costs) – these costs will usually be recoverable if permission is refused on the papers (the Defendant cannot usually recover the costs of subsequently attending the oral renewal hearing).

Third are the costs of proceeding to trial after permission is granted. For defendants, it is this third stage where the vast majority of costs will be incurred (in many cases at least 75% of the total).

**9. Finding the right witness**.

Where the resolution of a factual dispute is necessary, the court usually proceeds on an assessment of the written evidence only. It is extremely rare in judicial review proceedings for the court to allow cross-examination.

However, it remains the case that the witness statement must contain a statement of truth and the witness must be able to speak to the facts contained in the statement or explain the source of the knowledge. Ultimately it is a matter of who is "best placed" to explain the decision-making process that is under challenge.

**10. Managing publicity and reputational damage.** Judicial review proceedings are closely followed by the media – particularly those that proceed to trial. Reputational risks are therefore something that need to be carefully considered at the outset of the proceedings, particularly an understanding of whether negative judicial comments or the disclosure of embarrassing materials could severely harm the reputation of the university.

Browne Jacobson's public law team regularly defends public bodies in complex and high-profile judicial review proceedings. Please contact us with any questions about this article or if you require advice on how to respond to a threatened judicial review challenge.

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