Universities and Colleges Employers' Association (UCEA)
Submission to BTC Inquiry – Make Work Pay: Employment Rights Bill – 6 December 2024

Inquiry - Employment Rights Bill ("the Bill")

The Universities and Colleges Employers' Association **UCEA** represents **169** Higher Education (HE) employers, providing them with advice and guidance on employment and reward matters.[1]

Universities are a source of advantage to the UK; however, many face considerable financial uncertainty. Despite this, the sector provides a good employment package:

- The majority of UCEA's members participate in sector collective pay bargaining.
- UCEA's Benefits of working in HE report highlights good employment practice in the sector.

UCEA welcomes the opportunity to submit evidence to this Inquiry. However, information that is critical to representing our membership has not yet been published. Our response is therefore based on the information currently available; detailed Regulations are required to provide a more complete response. We look forward to responding to future consultations.

1. Unfair dismissal

1.1 In the absence of final Regulations, it is difficult to comment on the removal of the two-year qualification period for unfair dismissal. A concern is it will increase litigation in an overburdened tribunal system – where an argument is made that the employer is in breach of the procedure that should be followed during the initial period of employment. It is critical that Regulations are unambiguously clear on the procedure that will apply during the "initial period", including the length and the process to follow.

1.2 While the existing qualification period might appear excessive, in HE, a reasonable period (e.g. a full academic year) to assess performance is necessary for some roles e.g. teaching. Some activities may require a longer period e.g. producing world-leading research.

2. Parental and Paternity Leave

2.1 Removing the qualification periods for Parental and Paternity Leave is positive and should enable greater participation in employment by balancing these important responsibilities.

3. Bereavement

3.1 The right to at least one week's unpaid bereavement leave is welcome; Regulations that outline how the wider category of relationship will be defined are necessary.

4. Pregnancy and new mothers

4.1 Enhanced protection during maternity and for new mothers is important for delivering fairness and equality. Regulations that provide the timeframe and clarify the limited "specific circumstances" that should apply to dismissal, particularly in the protected period following return to work (e.g. for gross misconduct or loss of qualification) will be essential.

[1] *The terms "HEI(s)" (Higher Education Institution(s)) and "university/universities" are used interchangeably throughout to describe UCEA's membership which consists of Higher Education providers which are active in teaching, research and scholarship including universities, colleges, and conservatoires, and associated organisations.*

5. Gender Pay Gap / Menopause Reporting

5.1 UCEA members already engage in significant activity to reduce gender pay gaps. In 2022-23, the median gender pay gap in HE (10.0%, ONS) was lower than the wider economy (14.3%, ONS).

5.2 UCEA welcomes proposals that require the publication of equality action plans that demonstrate action to address gender inequality in pay gaps and support for employees during the menopause as important for addressing inequality and supporting participation at work.

6. Flexible working

6.1 Although proposals to make flexible working the default should enable greater participation in employment, given the existing 'Day one' entitlement to flexible working, it is unlikely to have a significant impact. We understand that employers in HE already act reasonably and explain their decisions clearly when accommodating or refusing a request using the unchanged lawful reasons.

7. Zero-hours contracts

7.1 The use of zero hours contracts in the HE sector (1.2%, December 2022, HESA) is lower than their use in the wider economy (3.5%, ONS).

7.2 The sector accepts the general position that permanent contracts with fixed hours should be the general form of employment relationship; however, there are legitimate reasons for the use of 'other contractual' arrangements.

7.3 It is critical to have sight of the Regulations relating to the conditions around the regularity and number of hours worked to trigger the right for zero hours workers to be offered guaranteed hours, along with the duration of the reference period. This also applies to those who work under contracts that require employers to offer work up to a maximum number of "low" hours but who regularly work more hours.

7.4 A potential consequence of these proposals is that universities will limit work that is offered, for example, opportunities for students to work (e.g. as Graduate Teaching Assistants[2]), to a shorter duration than is identified in the reference period due to potential additional costs, administrative burden, and because the steps to avoid an inadvertent case of automatic unfair dismissal are likely to be significant.

7.5 A regrettable outcome could be that fewer opportunities are offered to those trying to gain valuable work experience. In HE, some people want flexible contracts, e.g. hourly paid industry experts. The Bill's proposals have the potential to create unnecessary burden and cost for these essential arrangements. For these reasons, it is critical that the reference period is not too short, and the thresholds for hours worked are not restrictively low.

[2] *Postgraduate research student who works in a teaching and knowledge sharing capacity to gain experience.*

8. Sick Pay

8.1 The majority of HE employers pay contractual sick pay. Amendments to SSP should balance fairness and financial sustainability, as a safety net to provide support to cover basic living expenses, without disincentivising returning to work. Being concerned about affording necessities could exacerbate illness and prolong absence.

9. Harassment

9.1 The sector takes complaints relating to harassment seriously. The strengthened mandatory proactive duty for employers to take 'all' reasonable steps to prevent sexual harassment of employees in the course of their employment, and the re-introduction of liability for third-party harassment (for all protected characteristics) are important. In HE, third-party harassment could be from students or where staff are outside of the university's control e.g. at a conference. These types of situations will require guidance.

10. Trade Union law

10.1 The proposals regarding Trade Union law are, in some places, very concerning. The consultation 'Creating a modern framework for industrial relations' does not cover all aspects of reform in the Bill.

- ***Industrial action***

10.2 Removing the requirement for a 50% turnout threshold in a ballot for industrial action is a significant concern. In 2023, University and College Union launched action short of strike in the form of a marking and assessment boycott. This was on the basis of a 56.4% turnout. For some students, the impact was severe with consequences including not being able to graduate in time, graduating without classification, and losing graduate job opportunities. In some cases, this affected visas. Even where these consequences did not materialise, the risk created significant anxiety for students.

10.3 In a statutory ballot for industrial action in November 2023 over the same areas of dispute, the turnout fell to 42.59%. Abolishing the threshold would have meant a further mandate would have been secured, exposing students to the consequences of the most damaging possible form of industrial action, potentially impacting onward academic progress, as happened in 2023.

10.4 This highlights a further concern. If the mandate period i.e. the time during which trade lawful industrial action could be taken was to increase beyond six months, as illustrated in the above example, industrial action could have continued despite a loss of support amongst union members.

10.5 We also note an extended mandate period could lead to a loss of intensity in dialogue to resolve a dispute, or its protraction where there is no prospect of a resolution. UCEA places importance on the efforts of all sides working to resolve disputes, and notes there is already an existing provision to extend the mandate period to nine months which we believe is sufficient.

10.6 We note the intention to introduce electronic balloting. This is a proportionate step that could address a concern that postal voting has been a barrier to trade unions securing the 50% ballot threshold.

10.7 A further concern relates to the proposal to shorten the notice period before the start of industrial action. Registered HE providers are under an obligation to the OfS to take reasonable steps to avoid or limit the impact of industrial action.

Shortening **the notice period** has two obvious effects:

1) It lessens the window during which parties can engage in meaningful dialogue to avert damaging industrial action.
2) It lessens the time available to plan and take steps to mitigate the impact of industrial action on students.

10.8 We consider that 14 days' written notice before the first day of industrial action is a minimum requirement.

10.9 Linked to the preceding point, the reduced information that trade unions will be required to provide in the notice of industrial action and ballot paper (under the Bill and the proposals being consulted on) will also have the effect of giving HE employers less time to mitigate the impact of industrial action on students.

10.10 Given the purpose of industrial action is to apply pressure to employers, we recognise that a requirement to provide all information that will enable an employer to fully mitigate the impact of industrial action would not be balanced. However, we consider it important that certain information is provided such as the form that industrial action will take e.g. whether it will be continuous or discontinuous action short of strike and if so, what form of action, in addition to information on union membership by category and workplace which allow the HE employer to sufficiently identify the areas of the university that are likely to be particularly impacted. This is fundamental to ensuring HEIs can comply with their obligations to the OfS and, importantly, to lessen the damaging effect on students.

- ***Collective Bargaining***

10.11 The Bill significantly reduces the threshold for a union to apply for statutory recognition for collective bargaining on pay, hours of work and holidays. Applications would be accepted by the CAC on the sole requirement that 10% of the workers in the proposed bargaining unit are members of the requesting union, removing the current additional requirement that the union can evidence that a majority of workers in the bargaining unit are likely to favour that union being recognised to negotiate on their behalf.

10.12 The Bill grants the Secretary of State a power to reduce this threshold at the application stage, possibly to as little as 2% of membership in the bargaining unit. If, later in the process, the question of recognition is put to a ballot, the requirement that 40% of the bargaining unit vote in favour of recognition would be removed and the issue decided by simple majority.

10.13 We would also highlight that an imbalance would be created between the threshold for recognition and the threshold for any application by the employer for de-recognition. The latter requires the employer to show at the outset that at least 10% of the workers constituting the bargaining unit favour an end to the bargaining arrangements, and that a majority of them would be likely to favour derecognition. No changes are proposed to those rules. If a derecognition ballot is held, this would (as now) not be decided by simple majority – at least 40% of the bargaining unit would have to vote for derecognition.

10.14 Overall, these changes could have the effect that employers will be required to negotiate on important matters with trade unions that may represent only 10% of the workforce, or even less, and are therefore not sufficiently representative of the employees they are negotiating on behalf of.

- ***Workplace Access***

10.15 The Bill creates a new right for unions to request the right to access workplaces to meet, represent, recruit or organise workers (whether or not they are members of a trade union). HE employers typically have existing voluntary recognition arrangements which cover the vast majority of their workforces, and we would anticipate that, in the main, HE employers and their recognised unions will be able to reach agreement on workplace access.

10.16 However, there are aspects of the Bill which cause concern. In particular, non-recognised unions will also be able to make access requests, subject to conditions which are to be set out in Regulations. This raises the prospect of non-recognised unions with small numbers of representatives being able to apply to the CAC for access, which could undermine existing relationships with recognised unions and agreements already reached with those recognised unions in relation to access. This scenario is one which we would be concerned to ensure was addressed through Regulations, particularly with regard to the condition in relation to the level of membership within a workplace which a non-recognised union should have before statutory access rights can be pursued.

10.17 Another issue with the provisions in the Bill is that if an access agreement is reached between union and employer, and is jointly notified by them to the CAC, or the CAC determines the terms on which access is to be provided, there appears to be no mechanism in the Bill by which those arrangements could be terminated or varied except via a joint notification by union and employer to the CAC. Employers would not be able to serve notice on the arrangements or apply to the CAC for a variation or termination of the arrangements, for example if circumstances have changed and the access arrangements are no longer appropriate. This risks employers' being permanently "locked into" legally enforceable access arrangements which are no longer fit for purpose.

11. 'Fire and Rehire'

11.1 It is concerning that high profile examples of poor employment practice have been used as a basis for legislative reform. A letter from The Rt Hon Bridget Phillipson MP Secretary of State for Education on 4 November references a requirement for a more fundamental re-examination of business models and resources. In some cases, this is likely to involve contractual changes.

11.2 The Bill's proposals assume that the only lawful and legitimate reasons an employer might have to seek to impose a contract variation is where there is a need to do so 'to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the dismissal were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business'.

11.3 Dismissal and re-engagement in HE is rare and will be used where there is a **principal reason** (such as redundancy or a business reason which is sufficiently cogent to be 'some other substantial reason') to make a change that cannot be agreed that outweighs the case for not making the change. This is **not restricted** to situations where employers are in immediate financial dire straits; indeed, this will mostly not be the case – for example, changes might be necessary to patterns of work for academic delivery purposes to support students.

11.4 The effect of the changes under the Bill is such that an employer will not be able to make **any** contractual variation to which the employee (or a union with negotiating rights) does not agree; including, for example, where an employee has a contractual shift pattern which the employer needs to change for good reason, since dismissal without agreement would be automatically unfair. This

has the potential to significantly undermine the employer's bargaining position in negotiations on changes with a strong business rationale. A sensible amendment would be to add 'technical or organisational reasons' to the circumstances in which a dismissal will not be automatically unfair (with fairness in those excepted cases determined as set out in the Bill).

11.5 It could also have an indirect and costly impact in the context of outsourced service provision, for example, where a university needs to change its operating hours, but service provider contracts have fixed shift patterns.

12. Collective redundancy

12.1 Most universities operate as one employer from one geographical location so the requirement for an employer to consult collectively wherever redundancies are proposed across the university's operations in the UK, rather than at one establishment, is unlikely to be significant. Practice in the sector is also to consult collectively with unions even where the s188 obligations are not triggered.

12.2 The proposed remedies (that also apply to fire and rehire) will have a significant impact. HEIs take redundancy and consultation obligations seriously. In collective redundancy, this requires parties to engage in meaningful consultation with a view to reaching agreement. The basis for increasing the cap on a maximum protective award, from 90 to 180 days, or removing it entirely, (left to the determination of the tribunal) is unclear, will potentially have significant financial consequences and, if enacted, should be reserved to the most egregious of breaches (defined clearly in legislation or guidance) and taking into account the conduct of all parties' engagement in meaningful consultation. Otherwise, if the cap was removed entirely, tribunals would have no reference points for deciding the length of the protective award, leading to potentially diverging outcomes in similar cases decided by different tribunals.

12.3 The proposal to introduce interim relief, for both a protective award and unfair dismissal for fire and rehire, is concerning and disproportionate. The delays in claims reaching tribunal hearings, also needs to be considered. The tribunal system is already under pressure and the Bill is likely to exacerbate this, which would only increase the cost of interim relief orders. In the wider economy, s188 breaches can range from the technical, inadvertent or minor through to the most extreme cases of deliberate and wilful breaches. Interim relief would only appear proportionate and justified, if at all, in the most serious cases of default, which should be clearly defined. That would avoid the unjust scenario of an employer that has breached s188 in a minor or technical manner facing the same severe penalties as an employer that has decided to ignore its obligations.

Conclusion

Although many proposals in the Bill are welcome; we foresee other aspects will have a significant unwelcome impact with potential to undermine required sector reform. We look forward to responding to further proposals in the Bill in due course.