

Legal Safeguarding for Work-Based Learners in Creative Educational Models

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This article considers the extent to which the legal framework of Higher Education in the UK (2000-2010) responded to the needs of the professional work-based student, while in both employment and study.

Drawing on Case Law, Education Law and the body of literature on Work-Based Learning (WBL) it discusses the context of the professional student and the relationship between the learner, the employer and the HEI, primarily from a legal perspective.

Professional work-based students usually gain highly work-applicable learning through creative academic and experiential methodologies, however they are situated between the provisions of education law and employment law without specific legal protection for their position.

This article argues for a more creative approach to brokering an innovative, ethical and productive relationship between the HEI, the employer and the employee as a work-based learner. More effective relationships between these key stakeholders would enable the proper recognition, accreditation and safeguarding of a highly creative way of adult learning.

Keywords: Work-Based Learning (WBL), Higher Education, Flexible Study, Legal Framework, Education Law, Professional Student

Introduction and Background

Work-Based Learning (WBL) is a creative means of learning using neoteric tools and in-work applications to encourage novel adult participation, however the concept has always reflected the complexity of the relationship between working and learning, and the benefits of learning in the workplace. Government papers, such as '21st Century Skills: Realising our Potential' (DFES, 2003) and the Leitch Report (2006), have focused the attention of Higher Education providers to engage more fully with employers in the design and development of awards (Braham & Pickering, 2006),

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albeit without obligating employers to reciprocate.

It was always believed that the government regarded an increased emphasis on flexible WBL and other non-traditional modes of study, as important mechanisms for meeting the country's skills agenda and improving economic growth. To meet the needs of this constantly growing demand, HE needed to embrace a different approach to learning and teaching, which enabled students to, for example, learn through presentation of individual portfolios including a unique reflective account of the student's experiential and creative narrative of learning, through the experience of their work and studies.

The Emergence of Professional Work-Based Learning

It was understood that this approach amounted to a requirement to change from purely traditional modes of study to an increase in work-based or work-related study. Higher Education Institutions (HEI) across the UK were recognising that knowledge could be created outside of academia and that Universities were no longer seen as the exclusive providers of learning. There seemed to be an appetite amongst professionals for recognition of value of their non-traditional study, in the form of claiming academic credit. Furthermore, employers were more and more recognised as relevant and appropriate partners in learning programmes, rather than just recipients of University designed courses (Harvey, 1990).

Meanwhile, employers themselves were increasingly allocating time and budget to establishing in-house educational bodies (e.g. academies, institutes) through which Work-Based Learning could be provided and internally accredited. While historically this kind of Work-Based Learning was largely limited to apprenticeships and practical work, now professional employees could enrol and complete courses which were closely related to the practice of their profession and could only be defined as Work-Based Learning. Since there was no formal distinction between all these types of learning regardless of where or by whom they were delivered, a wide legal 'grey-area' was opened-up.

For some professional areas, stronger links between employers and HEIs were emerging and it has been acknowledged by authors such as Medhat (2008), that more intense discussions were required between the two parties, in order to fully understand the principles of WBL and transfer

the language of higher education to the workplace. In addition to the flexibility afforded by the WBL route, a number of key benefits are shared by the student, the employer and the University through the introduction of WBL programmes. These include 'a reduced pattern of attendance; a reduction in time away from work; and a reduction on the strain of facilities for the University.' (Johnson, 2001, Braddell, 2007). The progression in WBL by the professional student, needed to be viewed in terms of how they and the traditional student's situations were similar or contrasting.

The traditional student could for example, attend 'full-time' at University and may or may not have found 'part-time' work, with no relevance to the HEI. However, the professional student in 'full-time' employment, would usually be in at least some way sponsored by the employer, and this would have informed a different understanding of academic progression. The employer in this case, would have a vested interest in the studies and potentially also in the HEI attended. As a consequence, the employer would also, it was assumed, have a close interest in the skills, knowledge and attitudes which the learner would develop, resulting in greater competence transferred into the workplace.

The Professional Learner in the Work Context

Typically, the professional student came from a technical organisation, and their learning was related to industrial, technical and scientific development and training. Development was mainly assessed through examinations and accreditation gained through the process of empirical research and/or hard evidence of compliance with a specific standard of pre-set criteria.

Work-Based Learning was situated within the context of the paradigm shift from an industrial to a knowledge society (Nikolou-Walker, 2004). Work-Based Learning had no single definition, but some of those tendered argued that WBL could be seen as 'a result of changes from an elite to a mass model of higher education' (Light & Cox, 2001) to a more creative, learner-centred and experienced-led model (Baud & Solomon, 2001). WBL was based upon the premise of a relationship between the HEI, the student and the employer, but the predominant question remained: who had a duty of care to whom? This question as to the nature of their status, usually 'opened' the legal debate on HEIs, and it was frequently followed by questions such as: was the relationship between the WBL stakeholders, (i.e. the HEI, the student and the employer) purely consensual, contractual or a hybrid of both?

Quality in a Creative Learning Approach

At this juncture it is important to acknowledge the emergence of employer-provided professional education since it offered employers the ability to define both what would be learned and how. They were able to choose who delivered learning programmes and had full control over the nature of the learning contract, the enrolment criteria for employees, how much of their work-time would be allocated to learning, and crucially, measures to evaluate the impact and return on investment of the learning undertaken. Since none of this required negotiation with an academic body, it appeared a relatively simple way to provide learning opportunities to employees. It also offered the opportunity to branch out into more creative, experiential learning environments and modalities, designed specifically to fit the requirements of the workplace rather than the structures of academic curricula.

While for HEIs, any deviations from the traditional method of study had to be proven to be as good as, or better than the organisational 'norm', employers were becoming more concerned with achieving specific workplace 'impact', as a result of the learning undertaken. For HEIs the challenge of providing relevant, learner-centric and experience-led models of learning in non-traditional settings might be extensive, but for employers it was relatively easily overcome, since employer-provided education was largely governed – where relevant - through employment law. In contrast for HEIs, the shift from an industrial to a knowledge society demanded new approaches to learning and development, creating an innate difficulty in affording adequate support when providing for the professional student embarking upon an innovative WBL programme.

Legal Protection for the Student

The professional student had also to be considered by the HEIs as an equal with their colleagues drawn from the traditional student body, so for example equality laws made it necessary for the HEIs to ensure that they fully considered aspects of equality that had rarely affected their historic student pool, such as family circumstances and related pressures or complexities. Thus, as *R v Birmingham City Council exp Equality Commission (1989)* ruled, direct discrimination on grounds of sex (i.e. treating a woman less favourably than a man), was or would be treated as unlawful with the motivation being irrelevant. Another landmark case regarding direct discrimination, was

in *Cooke v University of Nottingham and Iacovetti (1995)*; whereby Cooke's successful application was based upon discrimination due to Cooke's having children.

The Education Laws revolved around the governance of the HEIs and their respective roles, responsibilities of and appointment to their Boards (i.e. 'Board of Governors', 'Head Teacher', 'Library Boards', etc.), so had little to do with 'supporting' the professional student. Within workplaces the governance structures of internal education providers, while sometimes being labelled 'Faculty', by no means automatically followed the model or roles and responsibilities of HEI boards legislated for through the Education Laws, which for HEIs primarily ensured compliance with accounting procedures, the setting and collecting of student fees, loans and financial support. These had no impact on employer-provided education which was in any case only loosely governed by Employment Law.

Meanwhile the developing educational law was attempting to transform access to the Higher Education sector, making it more inclusive. For example, according to current Law, any form of proven disability is now supported by the Disability Discrimination Act (which is also fully applicable to the workplace) and education for young workers is facilitated through apprenticeship schemes. However, there is still no accommodation in Education Law for the mature student in professional employment.

This trend might have provided the evidence that the evolving education law, was more concerned with establishing HEIs as business entities (thus, making them competitors with employer-established offerings), than promoting the potential benefits of WBL as a creative and academically worthy approach to learning in the workplace and through work. WBL was here primarily envisioned through enhancing the HEI-Employer relationship, with the employer as a key stakeholder, or customer, and the work-based learner being educated in both HEI and work environments, and therefore positioned – perhaps awkwardly - in the space overlapping two entities.

Legal Status of Higher Education Institutions

To determine the HEI status as either public or private bodies was crucial to this argument, and as both European and domestic case law has proved, this was still difficult. For example, in *Turpie v University of Glasgow* (1986), an Industrial Tribunal ruled that the University [Glasgow] was not an organ of the State [public body] although some 80% of its funding came from the State.

However, in *Foster v British Gas Pie* (1990), another Tribunal ruled that Universities were indeed public. A specific example is in this case, offered regarding freedom exercised in organising, for instance, teaching and research. This however, was subsequently overturned by the European Court of Justice (ECJ) - the latter stated, that no one test of a University's status could be used as a determinant, instead it seemed to be the case that the State had a legal right to control the policy of the body concerned. For example, the 'Education' (section on 'Student Support') Regulations (Northern Ireland) 2009, adopted the ECJ rationale and expressed this in regulation 6 (5c) and Section 65(3a), of the Further and Higher Education Act, 1992.

The Human Rights Act (2000) however, took a different approach and considered Universities to be 'hybrid' institutions. A hybrid institution was actually determined by Lord Woolfe in *Poplar Housing v Donaghue* (2001). In this case, demarcation between whether the body and its functions were public or private was, indeed, one of fact and degree.

This discussion was relevant because private bodies were governed by a different legal regime. It can be argued that Universities were indeed 'public'; despite their historic independence and control of subject matter (e.g. 'course content', ability to award degrees etc.), they were ultimately controlled by laws of the State, as well as Acts and Orders which determined how such institutions should behave and ultimately, comply with the rules and regulations set down by the Government in Parliament. Albach (2000), argued that 'these trends in massification, accountability, privatization, marketization, and an unprecedented level of participation have caused a shift in the boundary between public and private sectors'. The Further Education and Training Act (2007) extended to England and Wales, with few sections applicable to Northern Ireland (NI). This Act facilitated the empowerment of local bodies (Department of Education [DE] in the NI context), with powers which up until now had resided with the Secretary of State.

These institutions, in turn, placed a duty on the HEIs to consider consulting on any decisions that may have affected current and potential students, [Regulation 22 S(1) and employers 22(2)]. Regulation 11 of this Act was applicable to the Secretary of State, the Learning and Skills Councils (England), the Welsh and Scottish Ministers. NI Departments, persons or bodies wholly, or partly funded from public funds, (that have had functions relating to education and training) and persons or bodies specified, (or of a description specified), by order made by the appropriate national authority for the purpose of this section.

Thus, it may be suggested that the professional student in 'full-time' employment could, in fact, be protected through the application of the latter two sections. Adopting this would, perhaps, have provided an opportunity to further promote the concept of WBL (as it fitted best with this category of student). It could also be argued that this may have promoted the role of the employer (i.e. persons or bodies specified).

Further opportunities may have existed under Regulation 28 of the Act, which referred to the power of the Regulatory Bodies in England, Wales and Northern Ireland, (in order to make an order, or regulation, using Statutory Instruments). Section 6, however, explicitly stated that such powers involved the inclusion of making different provision for different cases/areas. It could be suggested that, these could, in fact, refer and protect, the employer (different cases), Work-Based Learning (different areas) and the professional student (specific cases).

Despite the 156 Regulations, the Learning and Skills Act (2000), referred only to three which applied to Northern Ireland (and another five to all of the UK). The applicable sections governed the controls around finances and account management by the HEIs and any suggested amendments should have been under the consent of the Secretary of State. In addition, there was no mention of the WBL context and nothing in the Regulations appeared to be directly applicable to the Work-Based Learning area.

The dearth of direct legal provision or guidance for the work-based learner seemed to give a rationale to the notion that employers were well-placed to provide professional study programmes, and indeed that this offered a relatively simple and potentially highly flexible solution to the prospective work-based learner. In addition since even under the limited powers of the Higher Education (Northern Ireland) Order, 2005 there was no reference to 'handling' and/or

management of the mature/vocational student in 'full-time' employment; and furthermore the 'full-time' employed student (unlike the 'traditional' student), could not apply for loans or support under the Regulation 5(c) of the Education (Student Support) Regulations (NI), 2009 (the Regulation stated that a person was not an eligible student for a loan after the age of 18, or when an agreement for a loan had been made and not ratified under the age of 18), outside of the workplace the professional student would need to bear personally the financial burden of studying, if eligible to enrol with an HEI.

The Challenge of Accrediting Work-Based Learning

In contrast, the major challenges faced by the providers of 'in-house' learning were that in the absence of a partnership with an academic institution, they were largely unable to offer a transferrable award or accreditation no matter how much study an employee had undertaken, nor how academically valuable that learning was considered to be. Secondly, employers could effectively commission whoever they liked (or could afford) to deliver educational programmes, without any obligation to make academic credentials a mandatory criterion. Thus, in attempting to put the learner at the centre and deliver highly profession-relevant, innovative, experiential learning, employers were potentially placing significant demands on learners without being able to meaningfully validate their learning.

Legal Status of Partnerships

It would seem obvious to look for a solution in better-defined roles for both employer and HEI, working in partnership. However here too, the law did not adequately provide for, or protect the employer, but rather appeared to lay a rather onerous burden of liability. For example, in the promotion and development of WBL, the Teaching and Higher Education Act (1998) did not include any safeguards, enhancements, or even any possible 'list' of roles or liabilities for the employer. Instead, all references to the employer were financial and centred around the repayment of loans by students who defaulted (with provision made for the recovery of the outstanding balance, from monies paid to the student by the employer).

The Education and Skills Act, (2008), though only applicable to England and Wales, did not explicitly contain a role for the employer (which could have been conducive within WBL), although

the employer was required to allow the individual learner to participate fully in the relevant offering of training and education; usually through ensuring their eligibility (working twenty hours or more per week) and adapting their working pattern to meet the needs of the course. While this flexibility fully reflected the benefits of WBL by satisfying the needs of the student/employee, optimising 'study-time' and minimising time away from work and disruption to the operations of the employer, it could be seen as a missed opportunity to fully embrace the model of WBL where student, learner and HEI are aligned in collaboration. Equally, although the 'willingness' of the employer to participate was sometimes enforced (with punitive measures), enforcement notices where they occurred, usually failed to result in compliance. This was a distinct deviation from the spirit of WBL, which had the flexibility to address the employer's needs, and reset the parameters of study to respond to operational pressures.

The fact that the above legislation did not adequately provide for a better and/or 'higher profile' for the employer, could be viewed as giving credence to 'the very notion [that] combining education and the workplace [could be] problematic.' (Costley, 2000). However, Tasker and Peckham (1994), Barnett (2000), and West (2006), all suggested that academic and industrial values were incommensurable and that it was only through mutual respect that collaboration could be fruitful.

Student Well-being for the Professional Work-Based Learner

From the perspective of student well-being, it would be generally expected that the working professional might be more likely to have to balance the pressures of domestic and working life with the addition of academic study, leading to a variety of stresses and undoubtedly, competing priorities. Whereas in employer-provided and sponsored learning, it would be within the prerogative of the employer to require that the student defer or exit the program of study if a significant negative impact was noticed, for the HEIs legislation such as, 'The Disability Discrimination Act' (2005), placed them in a more precarious position in terms of their obligation to student well-being, as the Act removed the need for mental disorders (e.g. 'depression' etc.), to be clinically recognized before the HEIs needed to act. In some instances the HEIs might have focused on the role of 'knowledge' and may, for example, have demonstrated that they 'did not know and could not reasonably have been expected to know.' (The Disability Discrimination Act (2005), s285(4).) Yet in instances where positive relationships between HEIs and employers

existed, the facilitation of information-sharing could have gone a long way towards supporting the work-based learner. In addition, the typically close relationship between the Work-Based Learning tutor and the student, could have enabled the tutor to advocate for support for the student within both the workplace and the HEI. In contrast, in employer-provided learning, this 'brokering' role would most likely have been played by the programme lead, and the evaluation of the impact of the additional burden of study would have formed a critical component of the approval process for the student to undertake the learning programme.

The HEI, it could be argued, would benefit greatly from employer relations enforced by law. The employer could secure the student's agreement to inform the HEI regarding any current workplace adjustments made for their employee. This would provide the HEI with the information needed to optimise their participation in the learning and increase integration with other students.

The Nature and Value of a 'Learning Contract'

Since, Education Law in itself appeared to have made inadequate provision, or protection for the employer, if the HEI and employer brokered an effective relationship to promote the merits of Work-Based Learning, could this constitute the basis of a contract and therefore may it ultimately be in contract law, that the 'remedy' could be found? The elements of a legally binding contract were 'agreement', 'intention' and 'consideration'. Within the process of application, acceptance and enrolment onto HEI courses, the payment of course fees, as listed in the prospectus was in legal terms, viewed as the 'consideration' (Elliott & Quinn, 2003). Therefore, the contract was between the HEI and the student. In *Dunlop v Selfridge (1915)*, which was the leading case to define 'consideration', Pollock stated that 'an act of forbearance of one party, or the promise thereof, (was) the price for which the promise of the other (was) bought, and the promise thus given for the value is enforceable.'

It was also accepted that the HEI-student relationship was based on the establishment of a contract between two competent parties. However, 'employer supported', or 'sponsored courses', may well have challenged this, as they added an extra dimension: The employer defined the workplace involvement, despite the fact that the student may have identified the course, and authorisation or approval from the employer was then sought in order to fund the course. The employer may then have formally applied to the HEI on the student's behalf, or the student(s) may

have done this directly. It can be argued that the new element of this type of arrangement was the emerging tripartite relationship that intellectually started developing between the student, tutor and employer. The first two parties belonged to the 'traditional' form of learning offered thus far by the HEI's , whereas the addition of the employer began to 'muddy the waters' both from a legal perspective, as well as the definition of the exact role that the employer's presence was going to have regarding the nature of the overall 'contract'.

Once accepted, it was the employer who would pay the fees and not the potential student. Using this definition it could, perhaps, be deemed that the contract was constituted between the HEI and the employer and not the student. However, the only contract that seemed to be formulated within the HEI was that with the student. Thus, the HEI would usually have neither rights, nor obligations in respect of the employer.

In addition to this, the student may have been prohibited to formally agree acceptance onto a specific course, unless they could demonstrate compliance with their employer's educational policy. The formulation of the contract had also to have been completed by authorised officers, which typically limited the range of HEIs the student could apply to. On the part of the HEI this was an officer directly employed by the HEI, while in the workplace final approval tended to rest with a senior figure in the Human Resources or Learning & Development departments. This brokering of sorts, could be considered to support the idea that the employer should have had a (more) prominent role within the education process, although it could also be argued that these employer representatives might have been in a position too far removed from the student to advocate for truly learner-centred education.

Knowles (1986), advocated the use of 'learning contracts' as an alternative way to structuring a learning experience, replacing a 'content' plan with a 'process' plan. Knowles defined the 'learning contract' as

'a formal written agreement between a learner and a supervisor which detailed what was to be learnt, the resources and strategies available to assist in learning it, what would be produced as evidence of the learning having occurred and how that product would be assessed.' (1986: p163).

This definition excluded the employer from the contract since 'supervisor' here referred to the learning – rather than the workplace - supervisor. However, Stephenson and Laycock's (1993)

redress followed by defining a 'learning contract' as 'agreements negotiated between students and staff and, where appropriate employers' (1993: p17).

Knowles (1986) also recognised that the formal terminology and use of the word 'contract' contributed to his notion of andragogy (Greek for 'man-led'), i.e. the mature student accepted responsibility for, and set the direction of their own learning. This demonstrated a divergence from the previously accepted norm for study, i.e. pedagogy (Greek for 'child-led'), where the teacher assumed responsibility for the learning and therefore, accordingly, 'plotted' the course of study for the student. However to take this concept of contract and responsibility to its logical conclusion, the student themselves would have the additional challenge of taking the lead in brokering arrangements between the HEI and their employer, with no guarantee of success.

Anderson et al (1996), Boud and Solomon (2001), Rhodes and Shiel (2007), and Lester (2007), frequently substituted and interchanged the words 'contract' and 'agreement', 'softening' the formal language in use. This could be viewed as a tacit acceptance of Knowles andragogy theory. These scholars saw this phenomenon as a shift from one where redress and appeals could be induced by aggrieved parties; to one where the HEI retained the power to determine how the WBL would be managed and organised. However, Stephenson and Laycock's (1993) theories went even further, one could argue, with a play on semantics as they denied that 'learning contracts' were 'contracts' at all!

In the workplace meanwhile, 'Personal Performance Agreements' (PPA) had begun to be introduced between staff members and their 'Line Manager' to establish learning needs which directly related the learning to the requirements of the work. This process produced a 'Personal Development Plan' (PDP) which was considered to be an illustration and timeline for when these needs were to be satisfied.

Successfully Brokered Partnerships

A successful example of partnership was within the Northern Ireland Civil Service (NICS), where professional disciplines used structured career paths agreed with HEIs, for their staff to complete. A framework, for example, could be an agreement between a University and the Central Procurement Directorate (CPD) within the NICS. This agreement usually encompassed a specific

development structure which was pursued by the individual staff member. The structure was also agreed between the University and the Employer and meetings and feedback sessions were held between the two parties to discuss the effectiveness of the framework against the originally set and agreed organisational objectives.

This approach was supported by Garnett (2000), who stated that 'for the agreement to work properly, the employer needed to be an active partner and the organisation's culture ought to be clearly understood and managed by the HEI.'. Others (Nikolou-Walker & Garnett, 2004) argued that the distinctive feature of any Work-Based Learning process was the link between an external organisation and an education authority.

In the above example, the HEI appointed a 'course leader', to whom staff could go to discuss issues /concerns, regarding the content and pace of learning. The core content of the course was fundamentally shaped by the organisation's objectives and the completion of the framework of study usually led to recognition by the organisation. This example demonstrated the mutual benefits that learning agreements and WBL could bestow on both the HEI (which had an agreed pool of learners) and the employer (whose organisational objectives for staff learning were being externally supported in an academically rigorous fashion).

The development of further similar agreements frequently resulted in the HEI maintaining a position of power, however were the number of potential students from the employer to diminish, HEIs had to fill places on the course by offering it to other students, since it was critical for the HEIs to attract appropriate quotas of students and ensure the respective payment of fees, to ensure the economic viability of each course.

Opportunities and Benefits of Stronger Collaboration

It could also be argued that the HEIs often missed out on the opportunity to attract new students, as there was little evidence that they actively maintained and strengthened relationships with employers of their 'current' students. As the workplace changed, an adaptive approach was critical in ensuring the relevance of the HEIs offer to working professional students, requiring HEIs to take a proactive approach to understanding the needs of the workplace and employer. Similarly, contact between the student and the HEI was rarely sustained once the course was completed.

With the adoption of the continued contact prevalent in the WBL approach, there was a greater opportunity for a HEI to share in the success and the credit when a student, applying their newly acquired knowledge, found a solution to unresolved problems within their organisation. For example, a major exercise for the employer may have contained within it a discrete, specific piece of work, the completion of which would simultaneously satisfy the needs of the employer, the University and accredited learning. (Costley et al., 2010). This was a demonstrably significant benefit to all parties of an effective working relationship between the student, the employer and the HEI, yet none of the legislation framing the education sector in general included roles and responsibilities for the employer, nor allowed for HEIs to follow student's progress once their studies had been concluded. Costley et al. (2010), state that a tripartite (HEI/student/employer) discussion usually assisted on congruent outcomes for all parties.

This article attempted to unravel the complexities of a myriad of different and varying legislation applying to an area of continuing study: Work-Based Learning. The body of legislation has had no single easily-read piece of law which can be applied, and arguably because of the adversarial nature of this particular legislation, it may continue inadequately to respond to the need for the brokering of innovative relationships between professional students, employers and HEIs. A flexible, adaptive approach is urgently required from employers and HEIs in order to support the work-based learner, and for that student's creative learning pathway and achievements to have their full value and impact from both a professional and an academic point of view.

Is it not regrettable, that today in 2020 there has been no significant advance in the interests of the work-based learner from the legislation passed over a decade ago?

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