

**Guidance note on employment practices towards
elected student representatives and students' association
staff in the college sector**





Table of Contents

CHAPTER 1 – THE PURPOSE OF THIS GUIDANCE	3
CHAPTER 2 – THE LEGAL STATUS OF PAID STUDENT OFFICERS	6
CHAPTER 3 – SCOPING GROUP OUTCOMES	11
CHAPTER 4 – THE LEGAL APPROACH TO "EMPLOYMENT"	18
CHAPTER 5 – EMPLOYMENT BY STUDENTS' ASSOCIATIONS	26
CHAPTER 6 – SUMMARY/CONCLUSION	28
APPENDIX 1	29



Chapter 1 – The purpose of this guidance

- 1.1 In 2012 the Government commissioned Griggs¹ report brought questions over the role of students' associations within Colleges into sharp focus. Fundamentally, the report recommended that "Student participation and representation become a commitment across the College sector. Students' associations should be strengthened and become appropriately funded, autonomous and sustainable."
- 1.2 Since then, questions have been raised by various stakeholders in the College sector as to the employment status of elected sabbatical officers and the employment practices surrounding both elected students' association officers and staff or workers employed to support the students' association, in the discharge of their functions. The sharp rise in sabbatical officers, and part time paid officers as part of the development of students' associations – from 19 in 2011/12 to 50 in 2014/15 – has also required Colleges who previously had only volunteer officers to grapple with this issue. Across the sector, Colleges, students' associations, elected student officers and those working in this area, have developed very different working and HR practices in relation to student officers, and to a lesser extent towards the employment or engagement of students' association support staff/workers, giving rise to questions as to their legal status and therefore as to their rights.
- 1.3 There are, however, certain key principles which are common to all associations and Colleges, and which therefore underpin this guidance. These principles arise from the sector-agreed **Framework for the Development of Strong and Effective College Students' Associations in Scotland**². In order to be able to fulfil this purpose student officers must be able to speak and act autonomously of their College, and must be accountable in their role as student officers.
- 1.4 Also relevant are the following requirements in legislation:

¹ Report of the Review on Further Education Governance in Scotland, Professor Russel Griggs OBE, 20 January 2012

² <http://www.saframework.co.uk/>



(a) **Further and Higher Education (Scotland) Act 1992**

The effect of paragraphs 3(2)(e), 3A(2)(e), 5(2)(b) and 5(2G) of Schedule 2 is to require the board of management of every incorporated College to include two members nominated by its students' association and that student board members serve until 31 August following their appointment (or until they cease being a student, whichever comes first). As sabbatical officers may be nominated to be student board members, care should be taken to align where possible their election as sabbatical officer with any appointment to board membership. Arrangements should also ensure that sabbatical officers retain student status with the College.

(b) **Further and Higher Education (Scotland) Act 2005**

Section 7(2) in effect requires Colleges to have suitable arrangements for the purpose of seeking to ensure that the interests of their students are represented by a students' association.

(c) **Education Act 1994**

Section 22 of the Education Act 1994 places duties on the board of management of every incorporated College to take such steps as are reasonably practicable to secure that any students' union for students at the establishment (such as a students' association) operates in a fair and democratic manner and is accountable for its finances, including:

- The appointment to major union offices by election in a secret ballot in which all members are entitled to vote;
- elections are fairly and properly conducted;
- a person not holding sabbatical union office, or paid elected union office, for more than two years in total at the establishment.

(d) **Post-16 Education (Scotland) Act 2013**

This Act in the main amends two earlier Acts – the Further and Higher Education (Scotland) Act 1992 and the Further and Higher Education (Scotland) Act 2005. The effect of sections 5 and 8 require consultation and collaboration with students' associations in relation to particular matters and sections 6 and 11 require 2 students who are elected by the students' association to sit on the Board of management of the College and on a Regional Board.



- 1.5 In the light of questions raised (which we discuss in more detail at Chapter 3) NUS Scotland through the Partnerships for Change project sought legal advice on these issues and particularly the employment status of elected student officers. We then set up four scoping group meetings and invited stakeholders from all areas of the sector to attend and share their views. These took place in the summer of 2014 in Glasgow, Stirling and Edinburgh. Outcomes from those meetings, summarising different issues groups across the sector have been experiencing, are discussed in more detail in Chapter 3.
- 1.6 This guidance has been commissioned by NUS Scotland in order to provide further information and clarity around some of the difficulties that have been experienced to date by all relevant stakeholders. The guidance will help students' associations, students' association officers, Colleges, their management, and staff members as well as HR practitioners working in the sector. There is a high degree of variation between students' associations, Colleges, and current working practices which make it difficult to put forward a 'one size fits all' solution. There is, however, value in establishing a common understanding of employment practices in relation to paid student officers and association staff as it enables institutions to share knowledge and experience, and to build understanding of this complex area.



Chapter 2 – The legal status of paid student officers

- 2.1 NUS Scotland sought legal opinion on the legal status of paid student officers in 2014. Whilst not determinative, this gave clear guidance that the law in the UK could in many circumstances relevant to the College sector, consider Paid Student Officers as ‘employees’ whether this was intended or not. As we explain in this chapter, various different factors in any given situation would be considered relevant in answering this question.
- 2.2 The question of whether or not a student officer is an employee is context dependent. All student officers should normally be regarded as ‘office holders’, with some being legally classed as employees depending on the approach taken by a College and association and the intention between the parties.
- 2.3 Ideally, our view is that students’ association Colleges should seek to agree the status of paid officers, with a view to avoiding some of the issues addressed in this guidance and which could arise from inadvertently creating an ‘employment’ relationship if it is not intended. Failure to address this issue can lead to conflicts in viewpoints and between the systems and procedures of Colleges and the association. Such conflicts risk damage to both the autonomy and accountability of student officers, and the associations, and to the partnership between the students’ association Colleges. It is therefore in our view essential that each College and association partnership has clarity on their approach to the employment status of their paid student officers, and particularly on the disciplinary and performance management procedures which apply to them. It should be noted that whilst this agreed approach would be taken into account by Courts and Employment Tribunals considering the circumstances, it would not necessarily be upheld by them.
- 2.4 The legal status of student officers will be dependent upon a range of factors. As became very clear from our Focus Group discussions, some Colleges prefer to treat paid student officers as “employees” for arguably very good reasons. Aside from potential complications in doing so, in terms of contravening the Griggs recommendations, it is important that Colleges, students’ associations and paid student officers are aware of the rights and liabilities that creation of employment contracts can give rise to once established, whether intended or not. We summarise these in appendix 1. It should be noted that these are not rights which would ordinarily be available to a paid student “officer” in the traditional sense of them being an ‘office holder’ as opposed to an employee.



- 2.5 Based on the outcomes from our focus groups and legal principles discussed in Chapters 4 and 5, we recommend the following key factors should be considered in assessing whether or not, in any given situation at a particular College, a paid student officer would be regarded as “an employee”. These are:
- (a) The approach by the College, its staff and indeed the student officer (him or herself) to those matters we consider at Chapters 4 and 5. For example, whether a contract of employment has been issued and/or whether the paid student officer is subject to a degree of control, in various respects, equivalent to employees of the College generally etc;
 - (b) The various “tests” for employment as set out in Chapter 4 including mutuality of obligation, control, the use of contracts, organisational integration and so on.
- 2.6 Legal opinion sought on this question by NUS Scotland is clear in its view that it is not possible to offer a “one size fits all” answer to this question. This is because of the diverse range of approaches currently taken by Colleges and the other parties involved across the country, discussed in Chapter 3.
- 2.7 It is clear that current practices which have been adopted by some Colleges in relation to the engagement of paid student officers could very clearly point towards an employment relationship. Whilst no one element identified from the focus group meetings would in itself be determinative of the question, we consider the following would, either taken alone or together with some other factors, be very likely by the Courts and Employment Tribunals in Scotland, to point towards an employment relationship:
- (a) Issuing employment contracts between the College and paid student officer. Please note that this, above all else, would be very difficult in our view for any party to challenge once entered into and would strongly suggest the paid student officer becomes an employee of the College in question;
 - (b) Remunerating the paid student officer via College pay roll using headed College stationary;
 - (c) Making the paid student officer (either as part of a contract of employment issued or otherwise) subject to the College discipline, grievance and/or other policies and procedures. We recommend particular awareness here where these policies and procedures are applied in the same way to College employees;



- (d) Providing equivalent induction training and other support for paid student officers, again in a manner consistent with similar offerings to College employees. Note that where other issues do not appear to cause any risk of an employment relationship we would suggest this alone is unlikely of itself to support an argument of an employment relationship being created;
- (e) Subjecting paid student officers to clear managerial control/supervision by College management either in terms of performance management or objective setting without, at the very least, making some clear contractual provision that this should not be taken to amount to an employment relationship;
- (f) Offering paid student officers the same entitlements and benefits, for example holiday pay and sick pay etc. as are made available to College employees.

2.8 Participants in the focus groups approached the above issues in very different ways although most, if not all, Colleges approach aspects of the criteria above in a manner which appears to be consistent with the creation of an “employment” relationship with paid student officers. We understand that for some and perhaps all Colleges, these practices are simply unavoidable. For example, students’ associations rely upon College infrastructure in most cases to ensure paid student officers are properly remunerated on time. Provided clear documentation is in place around the use of College infrastructure and perhaps other resources for this reason, we do not think complications should arise in this pointing towards the employed status of a paid student officer.

2.9 In the event that Colleges, paid student officers and/or students’ associations prefer to avoid the creation of employment relationships, all of the other factors we have outlined should be given serious consideration, with a view to minimising that risk of these practices ‘tipping the scales’ in favour of the finding that an ‘employment relationship’ has been established.

2.10 **Models for Paid Student Officers**

- (a) As the elected officers of a representative body, student officers should in our view not be considered College staff members. However, they receive remuneration from public funds through the students’ associations. Our view is that Colleges have a right and responsibility to ensure that the funding is used for the purpose it was intended.
- (b) Whatever model students’ association and College adopt therefore must be consistent with the Students’ Association Development Framework and employment law.



- (c) Each model will need to be considered for the extent to which it meets or does not meet the legal tests for employment set out in this Guidance and for its:
- Impact on student officers' ability, or willingness, to speak autonomously and act as a critical friend to the College.
 - Sustainability over time. The model should not be dependent upon individuals, or upon relationships.
 - Reinforcement of student officers' accountability to their students and the democratic processes of the students' association.
 - Ability to ensure that student officer accountability structures will function when students do not engage with democratic structures, and when it would not be appropriate to put issues through democratic procedures. E.g., in cases of gross misconduct.
- (d) Support given to the student officer to enable them to fulfil their role. An employment relationship can put students' association autonomy at risk. Student officers may not feel comfortable or confident that they can act as a critical friend to the College and that may change their behaviour in response to perceived or actual College pressure. An employment relationship does not necessarily mean that the association would not be autonomous, but robust safeguards would be necessary to ensure the association's autonomy is protected. Furthermore, if the student officer is employed then all legal employment responsibilities apply.

2.11 **Proposed Model 1: Non-Employment With Trustee or Constituted External Advisory Board**

- Elected Officers are issued with a Service Level Agreement by the College setting out the duties of the role. This might include meetings that it has been agreed by the College and the association the officer should attend.
- A Trustee Board, or Constituted External Advisory Board, monitors the student officers' performance against the Service Level Agreement and the associations' democratically agreed priorities. This might include a strategic plan.
- There are processes in place by which students can hold a vote of no confidence in an officer.
- Student officer receives mentoring and support from the students' association staff member and/or an appropriate member of College staff. Performance issues will be dealt with informally as part of this relationship.



- In the case of persistence or severe performance issues the issue will be referred to the Trustee Board, who will arrange a Capability Hearing. This Hearing will be a staged process; at Stage 1 an Improvement Note will be issued. If, after the appropriate processes have been followed, there is no improvement a Stage 2 Capability Hearing will be held and a final warning issued. If there is no improvement the issue will be referred to the appropriate democratic body for a vote of dismissal.
- In the case of Gross Misconduct the College's processes will be followed.
- There is an agreement in place whereby the association is able to borrow the College's HR processes for tasks such as issuing payslips without this being construed as suggesting an employment relationship.

2.12 **Proposed Model 2: Employed by College**

- Elected Officers are issued with an employment contract by the College setting out the duties of the role. This should set out the student officers' right to act autonomously when fulfilling their responsibility to speak and act on behalf of students.
- There are processes in place by which students can hold a vote of no confidence in an officer.
- Student officer receives mentoring and support from the students' association staff member and/or an appropriate member of College staff. This should be different to a traditional line management relationship. Staff member supports the student officer to define their own objectives based on the association's democratically agreed priorities, strategic plan, etc. Performance issues will be dealt with informally as part of this relationship.
- In the case of persistent or severe performance issues a Capability Hearing should be arranged. The Hearing should include at least one student member. This Hearing will be a staged process; at Stage 1 an Improvement Note will be issued. If, after the appropriate processes have been followed, there is no improvement a Stage 2 Capability Hearing will be held and a final warning issued. If there is no improvement the issue will be referred to the appropriate democratic body for a vote of dismissal. In the case of Gross Misconduct the College's processes will be followed.



Chapter 3 – Scoping Group outcomes

3. Scoping Group meetings were arranged in the summer of 2014. The meetings were held in Glasgow, Stirling and Edinburgh and included a broad cross-section of interested parties including representatives from students' associations, College management, elected student representatives and HR practitioners. The sessions provided a very clear outline of the practical difficulties being experienced across the sector. Below, we outline some of the key areas in which problems are being experienced, the approaches being taken, and the implications of these for the employment status of student officers.

As of 2014/15 all thirteen Scottish College regions have full time sabbatical and/or part time paid College student officers. A number of smaller Colleges in the Highlands and Islands region do not have paid officers, but a number do. The majority of students' associations also have staff support but the way in which this is delivered varies considerably. A number of students' associations have full time dedicated support staff while others receive support from staff who also hold other College roles. Of the first category some may be formally employed by the association and others by the College.

3.1 Discipline and Grievance

Key Issue

- (a) **Student Officers:** A diverse approach is taken across College and students' association partnerships with respect to the application of College disciplinary and grievance procedures to elected students' association officers. In some cases Colleges and their management prioritise maintaining what is perceived as a necessary degree of control over the student officers and the College's staff procedures are applied. In other cases it is recognised that, as elected officials, student officers are not intended to be, and are not treated as, "employees" of Colleges. Some Colleges, therefore, have had student officers sign contracts of employment with applicable disciplinary and grievance procedures. Others have chosen to enforce student officers' status as elected officials accountable to their members and have left the question of discipline and grievance to the student body, and relevant democratic processes. In some other cases, the College's own disciplinary policies and procedures as they apply to students as opposed to 'employees' are applied to elected student officers.



Key Awareness

- (b) As discussed in Chapter 4, applying disciplinary and grievance procedures to individuals represents a high degree of “control”. This will generally strongly point to the establishment of an “employer/employee” relationship between a College and students’ association officer. This may not be intended but could give rise to either unintended or unanticipated employment rights, with potentially expensive legal consequences. In addition, the strict application of College staff disciplinary and grievance procedures to student officers could impinge upon the necessary “autonomy” of students’ association officers. In the event of Colleges exerting too much ‘control’ over the exercise of a student officer’s functions, their ‘autonomy’ or ability to speak and act on behalf of their student members can be limited, meaning that their ability to fulfil their legal purpose as student representatives is curtailed.
- (c) We recommend that Colleges give serious consideration to the application of their College staff disciplinary and grievance procedures to students’ association officials. Colleges should ask whether this is necessary and to what extent? Alternatives should be considered in order to avoid the risks mentioned above. These might include alternative reporting mechanisms to the students’ association and/or alternative forms of policies/procedures applying to student officers only. Simply making student officers subject to the comprehensive range of staff policies and procedures should generally be avoided. NUS Scotland suggests students’ associations and Colleges should have separate policies for dealing with gross misconduct issues and performance issues. Whilst Colleges might consider having policies regulating gross misconduct issues, student associations should in our view have procedures in place to manage performance. This approach would in our view safeguard both accountability and autonomy.
- (d) Students’ associations themselves did not appear to have significant problems in terms of the application of disciplinary and grievance procedures to their own members of staff. However, students’ associations should be clear in the application of their own policies and procedures to their own members of staff as opposed to utilising College headed documents and procedures.



3.2 Contracts, Terms and Conditions

Key Issue

- (a) Again, broad ranges of approaches are adopted in respect of the contracts and terms and conditions which would be used in relation to student officers by Colleges. Practices ranged from issuing clear contracts of employment in the name of particular Colleges, some having specific agreements in relation to the position of student officers and some having no terms and conditions in place between the College and student officers at all. Some Colleges see using employment contracts as essential in order to ensure there is some monitoring of the discharge of student officer functions. Others take a very different view, seeing the imposition of contracts as inappropriate given their 'elected' status.
- (b) Students' association employees would generally be issued with terms and conditions of employment by the students' association itself although in some cases, the students' association would rely on the infrastructure of the College in order to manage that relationship, for example the College payroll system, issuing payments on College branded payslips.

Key Awareness

- (c) Issuing clear contracts and terms and conditions may be strong evidence of an employment relationship. That is particularly so, where the contract itself is clearly stated to be an "employment" contract. However, there is no need for a contract to state this in order for the law to view it as such. Whilst clear contracts will provide Colleges with a degree of control seen as necessary to monitor conduct, etc. of student officers both Colleges, students' associations, and officers themselves should be aware of the strong possibility of the creation of employment relationship. This can give rise to unanticipated legal responsibilities such as holiday/sick pay and leave, etc. as well as impinging upon the autonomy of paid officers as envisaged in the Griggs recommendations.
- (d) Students' associations are reminded not to issue contracts headed by Colleges themselves as opposed to students' associations, where they themselves prefer to employ individuals.



3.3 Recruitment and Selection of staff whose work supports that of the students' association

Key Issue

- (a) Individuals are often recruited using the recruitment policy of the College, notwithstanding that they may be employed by the students' association. All correspondence and documentation issued as part of the recruitment process is often on College headed paper. This could be indicative of the College engaging and employing that individual, rather than the students' association.

Key Awareness

- (b) If the students' association is recruiting any support staff or other employees they should ideally seek to implement and use their own recruitment policies and procedures and should ensure that correspondence which is issued is not on College letter headed paper. Using the College's own recruitment policies will not in itself be enough to point to the College being the employing entity, rather than the students' association, however it can be a factor which the Courts and Employment Tribunals can take into account if the individual seeks to contend that the College is the true employer. It could also cause confusion as to who the employer is. It is recommended that if the College's policies and procedures are used then the students' association should make it clear in any contract of employment that they are the employing entity and that the use of the College's procedure and letter headed paper should not be used to imply an employment relationship with the College and nor is it a factor which the individual can rely upon.

3.4 Induction, Training and Support

Key Issue

- (a) Student officers at some Colleges are subject to the same, sometimes rigorous, induction and training processes as College employees. Furthermore, some Colleges provide student officers with the same ongoing support which is available to College employees. This in itself does not create any problems. However, taken together with other aspects of the College's approach to student officers, could support the conclusion of an employment relationship being established. The more "organisational integration" which takes place in relation to any individual in the workplace, the greater the likelihood that the law would consider that an employment relationship has been entered into. Again, this could give rise to unforeseen or unintended consequences for both Colleges and student officers alike.

Key Awareness



- (b) Whilst Colleges should not be discouraged from making every support available to student officers in the discharge of their functions, this must be done with an awareness of the other elements addressed in this guidance, particularly given that this could contribute to the unintentional establishment of an employment relationship. Colleges should give consideration to whether particular induction processes are necessary and/or whether other training and/or support mechanisms offered are necessary for student officers in the discharge of their functions. It is open to Colleges to offer only those elements of induction, training and support which are relevant to the student officer's role.

3.5 Performance Management and Objective Setting

Key Issue

- (a) A major concern expressed during the scoping group meetings was the ability of Colleges to monitor the conduct and performance of paid student officers. Opinions ranged from Colleges having the duty to do so to them having no standing to do so given the elected status of student officers and the need for students' associations to have autonomy in order to fulfil their legal representative role as the critical friend of the College. Whereas some Colleges appear to have adopted the approach of issuing contracts of employment containing clear performance management provisions and applicable disciplinary procedures, others take the view that performance management is a function which properly sits with the student body, governed by the students' association's constitutions and schedules.

Key Awareness

- (b) Exercising control of this nature over an individual's performance could potentially contribute to the unintended creation of an employment relationship. This is particularly true for Colleges where the same processes and procedures are adopted as are in place with College employees. For this reason, we would suggest consideration is given to alternative monitoring and reporting procedures which may involve creating clear communication links and procedures to be followed with students' associations themselves in respect of any particular issues of concern and/or specific agreements to be entered into with student officers, clearly stating their agreed legal status. Whilst NUS Scotland recognises there are divergent practices to this extent across the sector, in our view, student officers should be accountable only to their student members for their priorities and decisions. However, they will also need to have robust governance structures which can ensure that they are held accountable to the requirements of their role if democratic processes are not able to function. The students' association may invite the College, as their partner, to play a role in this.



- (c) Students' associations should again ensure that they have policies and procedures in place in respect of their own staff as opposed to using College policies and procedures, which tend to suggest a direct relationship between the member of staff and College, as opposed to the students' association.

3.6 **Payment and Reward**

Key Issue

- (a) Generally, Colleges appear to remunerate student officers via their own payroll procedures and in many cases using College branded payslips in the same way as those issued to employees. Some Colleges also offer student officers the same additional rewards/benefits as are made available to other members of staff. Whilst there is no difficulty in approaching these issues in this way itself, again, taken in conjunction with some of the other factors set out in this guidance, these could point towards the existence of an employment relationship where that was not intended either by the College or student officer.
- (b) Where students' associations have opted to employ staff directly for their own purposes, those staff will again usually be paid via Colleges using College branded payslips. Likewise, this itself does not create a major difficulty but could, taken together with other factors addressed in this guidance, contribute to a conclusion that an employment relationship exists between the College and that member of staff, rather than the students' association.

Key Awareness

- (c) We would suggest that Colleges give consideration to potential alternative payment structures, for example, using "unbranded" remuneration documentation. Alternatively, consideration could be given to appropriate documentation expressly stating that the existence or granting of any reward and/or use of College stationary/infrastructure (including payment via a College) shall not be taken to contribute towards an employment relationship.
- (d) Students' associations should ensure that where College infrastructure and branded documentation is used in connection with the remuneration of staff, adequate alternative documentation is available expressly addressing the status of that member of staff as an employee of the students' association as opposed to the College itself.



Clearly worded contracts of employment between the students' association and member of staff should be sufficient to deal with this, particularly where these specifically refer to the students' association's reliance on College infrastructure and the fact that this should not be taken for any purposes to point towards an employment relationship between the College and that member of staff.

- 3.7 As discussed in Chapter 4, all of the above are issues that Employment Tribunals and Courts in the UK will take account of in assessing whether, for legal purposes, individuals are "employees".



Chapter 4 – The legal approach to “employment”

4. The Definition of "Employee"

There is no universally accepted definition of ‘employee’ in the UK. Generally speaking, however, the status of workers is divided between ‘employees’ and ‘independent contractors’. In an employment situation, a worker may be said to undertake to serve whereas contractors do not. In employment relationships, the law defines this as a contract "of service". In contracting situations, the law refers to those situations where a contract "for services" is in place. There are also some types of workers within the UK, who enjoy a unique status including apprentices, crown employees, parliamentary staff and some "office holders" etc.

4.1 The Tests for Employment

In assessing whether a particular relationship qualifies as one of "employment" or otherwise, the Courts and Employment Tribunals in the UK will take into account a number of factors. We set these out below together with some key observations in terms of the current practices of various stakeholders in the College sector:

(a) Personal Service

Where an individual is required to provide his or her services *personally*, this would generally point towards an employment relationship although, as can be seen below, this is not necessarily determinative in itself. Personal service would weigh heavily in the legal assessment of all of the circumstances. Where a worker is entitled, for example, to send along a "substitute" to perform his or her duties, that may be sufficient to demonstrate that the relationship is not one of "employment".

Key Observations

- (i) Clearly, student officers are elected to provide their services on behalf of the student body *personally*. That is clear, given the nature of their election. However, this would not generally be sufficient in itself to establish an employment relationship. Where other factors exist which are consistent with an employment relationship, for example by the College and student officer entering into express terms of contract that describe the relationship as one of "employment", it is highly likely that an employment relationship would be established taking personal service of the duty officer’s duties into account.



- (ii) Insofar as workers directly employed by students' associations are concerned, they would generally be regarded as employees where they are required to provide their services to the students' association personally usually under a clear contract of employment directly with the students' association, as opposed to the College.

(b) **Mutuality of Obligation**

"Mutuality of obligation" exists where there is an obligation upon a purported "employer" to provide work to the worker, mirrored by a similar obligation upon the "worker" to accept that work. This is often referred to as the "irreducible minimum" of a "contract of employment". Without this, no contract of employment can be said to exist. It should be noted that the Courts and Employment Tribunals can find this within clear written terms of contracts entered into or indeed they may imply this from the circumstances before them for consideration.

Key Observations

- (i) In cases where a direct, clear written contract is entered into between Colleges and student officers, it is highly likely that this minimum requirement would exist whether or not the contract is expressed as one of "employment". The particular terms would clearly have to be considered before any clear opinion could be formed.
- (ii) Where no written contract, whether stated as "employment" or otherwise is entered into by the College and student officer, Courts and the Employment Tribunals are able to imply the "irreducible minimum" of "mutuality of obligation" depending largely on the specific circumstances in place in any particular case. This would take account of the behaviours and expectations of the parties. Where College management regularly monitors and supervises the conduct of student officers, such that the officer 'expects' to take certain actions at the request of College management, particularly where he/she is paid using College payroll functions, this could be sufficient.



- (iii) Our view is that where no clear written contract has been entered into between a student officer and the College, it is unlikely that the so called "irreducible minimum" of "mutuality of obligation" would exist unless the College has effectively managed, supervised or otherwise monitored the activities of the student officer in much the same way as an employee such as to bring this about. This is also interlinked with the question of "control" which is considered below.
- (iv) Where students' associations employ staff directly, there is less likely to be any dispute over the status of the employee concerned for this reason. Sufficient 'mutuality of obligation' would ordinarily exist in terms of any contracts in place.

(c) **Control**

In order to be considered "the employer" of a worker, that entity has to exercise a significant degree of control over the worker's performance of his or her duties.

This would include:

- stipulating the place of work, working days and working times of the worker;
- making the worker subject to the employer's policies and procedures and, particularly, disciplinary policies and procedures;
- issuing frequent directions to the worker in terms of the conduct of their duties.

Conversely, a worker may be regarded as a self-employed contractor or for most purposes of this guidance, an office holder, where they are normally:

- not subjected to the same degree of control, supervision, reporting or management that the employer would exercise over its "employees";
- more flexible in determining their own working locations, days and times;
- subject to a far lesser degree of instruction from the purported employer in terms of the proper exercise of the duties and functions of the individual in connection with the role concerned.

Key Observations



- (i) In several cases, it is clear that Colleges exercise a significant degree of control over the activities of student officers. Clear contracts of employment are on occasion issued which are for most purposes very similar, if not identical, to those which are issued to College members and College "employees". In these cases, there is little doubt that student officers would be considered for legal purposes "employees" with all of the appropriate rights and liabilities that accrue to them. It is important to stress that where Colleges actively monitor the conduct of student officers in the manners and in the respects set out above, even without clear written contracts in place, this may still lead to the conclusion that a contract of "employment" has been established.
- (ii) In cases where students' associations employ their own members of staff under clear contracts of employment between themselves and those individuals, there is unlikely to be any question over their status as "employees". It should be noted however that where College management exerts a substantial degree of control over the activities of individuals concerned, it may be open to a Court or Employment Tribunal to imply an employment relationship directly between the College and that individual regardless. Complications of this nature could arise where students' association staff are reliant upon the infrastructure of the College concerned and are actively managed by College management as well as for example, paid via the College using College branded pay slips.

(d) **Organisational Integration**

The degree to which an individual worker is integrated into the entity with whom he or she works will rarely be determinative itself of their status but may "tip the scales" of a Court or Employment Tribunal's assessment of the circumstances before it. Examples may include providing a designated desk or telephone extension for the worker; providing access to the entity's grievance and disciplinary procedures; providing the worker with specific equipment for the purposes of discharging their duties; allowing the individual access to benefits ordinarily reserved for "employees" and so on.

Key Observations



- (i) It is clear that some Colleges have opted to provide access to their grievance procedures and/or to render student officers subject to their disciplinary policies and procedures. In addition, as addressed above, paid officers are often remunerated via College payroll systems and processes using College branded stationery. In most cases student officers will be provided with designated accommodation/desk space, contact numbers and email addresses etc. by the College. Some Colleges will also provide access to the full range of employee benefits for student officers during their tenure. It is important to understand that approaching matters in this way could well support the conclusion of Courts and Employment Tribunals that student officers are properly to be regarded as "employed" by Colleges.
- (ii) Whilst some degree of "organisational integration", for example the provision of desk space, telephone numbers and email addresses etc. are doubtless necessary given the context of the student officer's elected role, Colleges would be well advised in our view to go no further than is necessary in integrating student officers into the College organisation. For example, Colleges should question whether there is any purpose to be served in allowing student officers access to College grievance procedures. Quite clearly, student officers would have the ability to complain to College management regarding any concerns they have. They are able to do so without having full recourse to College staff procedures in the same way as College employees.
- (iii) Where workers are directly employed by students' associations, clear contracts should be put in place in order to clearly designate the students' association as an individual's employer. In the event that reliance is made upon College infrastructure for any purposes, for example payroll services and use of College branded stationery for this purpose etc., these matters should be clearly addressed in the contract of employment (between the worker and the students' association) as being agreed as not being considered evidence of an "employment" relationship between the College and the individual concerned. Provided clear contracts of employment are in place and line management responsibility falls to the students' association, there should be far less likelihood of any challenge to that employee's status as an employee of the students' association.

(e) **Pay and Financial Risk**



Who is obliged to pay a "worker" is an important factor in the legal assessment of the status of that individual. It would be generally unusual for an employment relationship to be established where the worker is paid exclusively by a third party. In addition, where the worker is him or herself subject to any degree of economic outlay or risk, there is less likelihood of a conclusion being reached to the effect that an "employment" relationship has been established. Contractors, for example, may be required to invest some of their own funds prior to undertaking work for another party. The same is usually not true of an "employee" except in some cases to the limited extent of incurring expenses which they will often be permitted to reclaim.

Key Observations

- (i) Colleges are the conduit through which student officers are often remunerated. That being said, we think that there is some risk where Colleges remunerate paid officers directly through their own payroll systems using College branded stationery, of a Court or Employment Tribunal taking the view that this payment effectively comes from the College itself. The same may be said of situations where directly employed students' association staff are remunerated via College payroll systems. Whilst we do not think this in itself would be likely to lead to a conclusion that a "contract of employment" is in place with the College in either case, again this is something that, all things considered, could be considered to "tip the scales" and support such a finding as part of the overall assessment of circumstances in place.
- (ii) Student officers generally do not undertake or accept any direct economic risks. Although this is not conclusive to the question of employment status it is one factor which can help tip the scales against or for an employment relationship. Often if the student officers are taxed as any other salaried members of staff this could be indicative of an employment relationship if they pay NIC through PAYE.

(f) **Written Contractual Terms**



What is contained within any written contractual terms can factor into the legal assessment as to the employment status of that individual. The written terms themselves would not be determinative of the employment status but is a factor which the Courts and Employment Tribunals can place weight on to establish whether the individual concerned satisfies the test of having the status as an “employee”. Stating within the written terms that the individual is an ‘employee’ and that the terms constitute a ‘contract of employment’ will almost certainly indicate a relationship of employment. This is particularly so if the contract also sets out e.g. that the individual is subject to control mechanisms including grievance and disciplinary procedures. Conversely, specifically stating in the written terms that the individual is not an employee and the terms are not intended to form a contract of employment will go some way to showing that the relationship is not one of employer and employee. The Courts will however look to the actual nature of the relationship between the parties and the factors already discussed in this chapter in order to identify whether the individual is in reality an employee, notwithstanding that the written terms may state that he or she is not.

Key Observations

- (i) As set out above, where Colleges have entered into written contracts with student officers which are stated to be "contracts of employment", there is a very high likelihood, subject also to some consideration of the other factors set out above, of a Court or Employment Tribunal taking the view that an employment relationship has been entered into between those two parties. That is notwithstanding the elected status of the student officer or the nature of their role. It should be noted that the same might also be said where written contracts have been entered into even where there is no specific reference to "employment". The fundamental questions here would be the degree of "control" over the student officer's activities expressed in the contract entered into and whether there is sufficient "mutuality of obligation" in place between the parties (i.e. a duty to discharge functions by the student officer and a duty to offer work/remuneration by the College). Those involved, who may prefer to avoid inadvertently establishing an employment relationship, should give careful consideration to the actual terms in place.

- (ii) Colleges are free to enter into agreements with student officers either as employees or office holders, depending on what the circumstances require. Either way that agreement should be carefully drafted in order to clearly define



the relationship as being in respect of the elected "office holding" or "employment" of the student officer. It should also be noted that the Courts and Employment Tribunals in the UK are entitled to depart from clear terms of contract which state the relationship to be something other than employment. This would particularly be the case where in the Court or Employment Tribunal's view, assessing all relevant factors, the relationship is in reality one of employment despite the terms of contract in place.

4.2 **Summary**

In summary, the Courts and Employment Tribunals in the UK will assess all of the factors set out above in reaching a conclusion as to the legal status of student officers and perhaps, if any question arose, the employed status of individuals engaged directly by students' associations (although we think there is less likely to be any question in that context). Whilst no one aspect of the relationship addressed above is considered determinative, it is fair to say the Courts and Employment Tribunals in the UK consider the presence of "mutuality of obligation", personal service and degree of control to which an individual is subject as fundamentally important.

All interested parties should carefully consider the above in terms of the particular arrangements in place for them. In the event that there is any concern over the unintended creation of an employment relationship, serious consideration should be given to entering into alternative arrangements which lessen this risk. Above all, Colleges should carefully consider the degree of control they realistically require over the discharge of student officers of their elected functions and whether it is necessary to integrate those officers into the College structure in the same way or to the same extent as College employees.



Chapter 5 – Employment by Students’ Associations

- 5.1 Our Focus Group discussions clearly highlighted very different approaches across students’ associations in terms of employing staff directly. This varies across students’ associations depending on their resources and particular circumstances.
- 5.2 In terms of potentially directly employing paid student officers, whilst we take the view this would not involve any contradiction of the Griggs proposals, unlike direct employment by Colleges, we would recommend that students’ associations should also consider the remainder of our guidance at Chapter 4 carefully. Employment involves a host of responsibilities and potential liabilities that must be taken into account before being entered into, aside from the obvious requirement to have appropriate management structures, procedures and resources in place.
- 5.3 Where students’ associations decide to directly employ individuals in any other capacity, they should ensure that they utilise clear and accurate documentation for this purpose and should adopt appropriate policies and procedures in doing so. There is again a range of different approaches across the sector in terms of the degree to which students’ associations will rely on the infrastructure and managerial support of Colleges in the monitoring and management of their own members of staff. We recommend students’ associations should have particular regard to:
- 5.3.1 Issuing accurate and up-to-date contracts of employment with the students’ association clearly named as the “employer” of the intended employee. These should ideally contain or be accompanied by clear ‘job descriptions’ and reporting lines;
 - 5.3.2 Ensuring appropriate and up-to-date policies and procedures accompany contracts of employment. These would include disciplinary and grievance procedures and should again clearly be tailored to the students’ association itself, as opposed to the College;
 - 5.3.3 Ensuring an awareness of responsibilities in connection with the recruitment and selection of candidates for employment in a manner compliant with employer obligations;
 - 5.3.4 Provision of appropriate induction processes and training where required;



- 5.3.5 Provision of appropriate management and supervision including objective setting by the students' association as opposed to College management. Alternatively, where College management is used, clear documentation should be put in place acknowledging this fact but obtaining the employee's agreement that this shall not be taken to contribute to or amount to the creation of an employment relationship with the College (although students' associations should be aware that Courts and Employment Tribunals in the UK can disregard such arrangements entirely should they have good reason to do so);
- 5.3.6 Provision for payment and reward for the employee via the students' association's resources and infrastructure where at all possible. It is acknowledged, however, that in many cases this is impractical and that students' associations will rely on the resources of Colleges for these purposes. Again, appropriate documentation should be considered acknowledging this fact and that this should not be taken, by agreement with the employee, to point towards or to support any suggestion that an employment relationship has been created between the College and the students' association's employee.
- 5.4 As became clear in our Focus Group discussions, it is common across the sector for Colleges to employ staff for the purposes of providing support to the students' association. In these situations, Colleges would ordinarily have clearly set out contracts of employment between themselves and those employees. Their employers' policies and procedures would apply in the usual manner and their performance assessed as an employee of the College itself. These situations should rarely give rise to any complications in terms of the 'status' of those employees.
- 5.5 It is difficult to be prescriptive in terms of the documents that students' associations might consider using in order to deal with the risk of arguments being raised to the effect that employees engaged directly by them are or have through time become employees of Colleges. However, we would suggest that where any of the factors we address in this guidance might be taken to arguably point towards an employment relationship these should be specifically addressed in a contract of employment including appropriate wording setting out the express agreement of employees that these factors may not be relied upon to suggest an employment relationship with Colleges. As we have set out above, this is not an absolute solution given that Courts and Employment Tribunals in the UK can, if they see good reason to, disregard these and reach a different conclusion. This would provide some protection against such arguments nonetheless.



Chapter 6 – Summary/Conclusion

- 6.1 There is no ‘one size fits all’ approach for Colleges and students’ associations. What is important is that each organisation applies a carefully thought out process and gives due consideration as to the type of relationship which it intends to enter into with its elected sabbatical officers, students’ association officers and staff or workers engaged to support the students’ association.
- 6.2 Colleges and students’ associations should carefully consider the key principles common to all associations and Colleges. Student officers must be able to speak and act autonomously of their College and must be accountable in their role as student officers. There are several different potential models for engagement of paid student officers. Whatever model students’ associations and Colleges adopt must be consistent with the Students’ Association Development Framework and employment law. When each College and/or Students’ Association considers its own model it should also consider whether or not the elected student officers are employees of either the College or the students’ association or whether they are engaged through a Service Level Agreement.
- 6.3 Careful consideration of what rights and obligations are placed on an employment relationship should be had prior to the parties considering and formalising the nature of their relationship. How the relationship operates in practice can often be the deciding factor, notwithstanding what any contractual terms state. It is therefore important for the parties to continually assess the nature of their relationship to ensure that the status of that relationship is clear.
- 6.4 Whether or not a particular College or Students’ Association elects for an employment relationship or otherwise is entirely its choice. The important factor is ensuring compliance with the autonomy required as set out in the Griggs report.



APPENDIX 1: EMPLOYEE V OFFICE HOLDER RIGHTS

It is important that Colleges, students' associations and paid student officers are aware of the rights and liabilities that creation of employment contracts can give rise to once established, whether intended or not. These are summarised in this appendix. It is important that Colleges and students' associations carefully consider the true nature of the relationship with the individual using the guidance and tests set out in Chapter 4 above in order to identify whether the individual is an "employee" and therefore qualifies for employment rights. It is not enough to simply name the relationship as one of an 'office holder'. It is important to consider the true nature of the relationship and treat the individual accordingly.

Contractual Rights

Statutory right	Legislation	Employee	Office Holder
Written particulars of employment	Section 1, Employment Rights Act 1996 (ERA 1996)	✓	✗
Statutory sick pay (SSP)	Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) and Social Security Contributions and Benefits Act 1992	✓	✗
Protection against unlawful deduction from wages	Section 13, ERA 1996	✓	✗
Itemised pay statement	Section 8, ERA 1996	✓	✗
Guarantee payments	Section 28, ERA 1996	✓	✗
Certain payments on insolvency	Part XII, ERA 1996	✓	✗
Remuneration during suspension on medical grounds	Section 64, ERA 1996	✓	✗
National minimum wage	Section 1, National Minimum Wage Act 1998	✓	Usually not but may depend on circumstances.
Paid annual leave	Regulation 13, Working Time Regulations 1998 (SI 1998/1833) (WTR)	✓	Usually not but may depend on circumstances.
Rest breaks	Regulation 12, WTR	✓	Usually not but may depend on circumstances.



Maximum working week	Regulation 4, WTR	✓	Usually not but may depend on circumstances.
Protection on the transfer of undertakings	TUPE	✓	✗
Right to be accompanied at a disciplinary or grievance hearing	Section 10, Employment Relations Act 1999	✓	✗
Protection for making a protected disclosure (whistleblowing)	Part IVA, ERA 1996	✓	Usually not but may depend on circumstances.
Vicarious liability of the employer for the employees' delictual acts	N/A	✓	Depending on circumstances.
Not to be refused employment because of membership or non-membership of a trade union	Sections 137 and 138, TULRCA	✓	✗
Protection under the Data Protection Act 1998	Data Protection Act 1998	✓	✓
Right of shop and betting workers to refuse to work on a Sunday	Part IV, ERA 1996	✓	✗
Right to pension contribution from employer under the auto-enrolment scheme	Pensions Act 2008	✓	✗

Note 1: "qualifying employees" are more widely defined in this context than under the normal employment status tests and include all those whose earnings are liable for class 1 National Insurance contributions. Therefore a 'worker' could qualify.



Family rights

Statutory right	Statutory reference	Employee	Office Holder
Statutory Maternity Pay (SMP)	Social Security and Benefits Act 1992	✓	✗ However, see note 2
Statutory paternity pay (SSP)	Social Security and Benefits Act 1992	✓	✗
Statutory adoption pay (SAP)	Social Security and Benefits Act 1992	✓	✗
Parental leave	Regulation 13, Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312)	✓	✗
Ordinary maternity leave (OML)	Section 71, ERA 1996	✓	✗
Additional maternity leave (AML)	Section 73, ERA 1996	✓	✗
Statutory paternity leave	Sections 80A-E, ERA 1996	✓	✗
Statutory adoption leave	Sections 75A-D, ERA 1996	✓	✗
Request flexible working	Sections 80F-I, ERA 1996	✓	✗
Not to be suspended on maternity grounds	Sections 66-68, ERA 1996	✓	✗

Note 2: the definition of "employee" for SMP purposes is wider than the standard definition in the Employment Rights Act 1996.



Equal opportunities

Discrimination legislation gives the term "employee" a wider definition than most employment legislation. It incorporates those individuals that would qualify as 'employees' and workers under the ERA 1996, as well as some individuals who would not qualify as either, including office holders.

Statutory right	Statutory reference	Employee	Office Holder
Right not to be treated less favourably because of age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation	Section 13, Equality Act 2010 (EqA 2010)	✓	✓
Right not to be treated unfavourably because of pregnancy or maternity	Section 18, EqA 2010	✓	✓
Right not to be indirectly discriminated against in relation to age, disability, gender reassignment, marriage or civil partnership, race, religion or belief, sex or sexual orientation	Section 19, EqA 2010	✓	✓
Right not to be treated unfavourably because of something arising in consequence of a disabled person's disability	Section 15(1), EqA 2010	✓	✓
Right not to be discriminated against by a failure to comply with a duty to make reasonable adjustments	Section 21, EqA 2010	✓	✓
Right not to be harassed by unwanted conduct related to age, disability, gender reassignment, race, religion or belief, sex or sexual orientation	Section 26(1), EqA 2010	✓	✓
Right not to be sexually harassed	Section 26(2), EqA 2010	✓	✓



Right not to be treated less favourably for rejecting or submitting to sexual harassment or harassment related to gender reassignment or sex	Section 26(3), EqA 2010	✓	✓
Right not to be victimised because of a protected act	Section 27, EqA 2010	✓	✓
Right as a part-time worker not to be treated less favourably than a comparable full-time worker	Regulation 5, Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	✓	Usually not but may depend on circumstances.
Right as a fixed-term employee not to be treated less favourably than a comparable permanent employee	Regulation 3, Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	✓	✗
Right to a sex equality clause (equal pay for equal work)	Section 66, EqA 2010	✓	✓
Right to a maternity equality clause	Section 73, EqA 2010	✓	✓



Protection against detriments

Statutory right	Statutory reference	Employee	Office Holder
Not to suffer detriment for exercising rights as a part-time worker	Regulation 7, Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	✓	Usually not but may depend on circumstances.
Not to suffer detriment for exercising rights as a fixed-term employee)	Regulation 6, Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	✓	✗
Not to suffer detriment for exercising rights in respect of the Working Time Regulations 1998	Section 45A, ERA 1996	✓	Usually not but may depend on circumstances.
Not to suffer detriment for exercising rights in respect of a protected disclosure	Section 47B, ERA 1996	✓	Usually not but may depend on circumstances.
Not to suffer detriment for exercising the right to be accompanied at a disciplinary or grievance hearing	Section 12, Employment Relations Act 1999	✓	✗
Not to suffer detriment for exercising rights in respect of health and safety cases	Section 44, ERA 1996	✓	✗
Not to suffer detriment for exercising rights in respect of Sunday working	Section 45, ERA 1996	✓	✗
Not to suffer detriment for exercising rights as a pension scheme trustee	Section 46, ERA 1996	✓	✗
Not to suffer detriment for exercising rights in respect of acting as an employee representative	Section 47, ERA 1996	✓	✗



Not to suffer detriment for exercising rights in respect of taking time off for study or training	Section 47A, ERA 1996	✓	✗
Not to suffer detriment for exercising rights in respect of trade union membership	Section 146, TULRCA	✓	Usually not but may depend on circumstances.
Not to suffer detriment for exercising rights in respect of family and domestic leave	Section 47C, ERA 1996	✓	✗
Not to suffer detriment for requesting the right to flexible work	Section 47E, ERA 1996	✓	✗
Not to suffer detriment as a result of jury service	Section 43M, ERA 1996	✓	✗
Not to suffer detriment for performing functions of a representative on a European works council	Regulation 31, Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323)	✓	✗
Not to suffer detriment for exercising rights in respect of the national minimum wage	Section 23, National Minimum Wage Act 1998	✓	Usually not but may depend on circumstances.
Not to suffer detriment for performing functions of a representative under a negotiated information and consultation agreement or the standard information and consultation provisions	Regulation 32, Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	✓	✗
Not to suffer detriment for exercising prescribed rights as an agency worker	Regulation 17, Agency Workers Regulations (2010/93)	✓	✗



Time Off

Statutory right	Statutory reference	Employee	Office Holder
Time off for antenatal care (unpaid)	Section 55, ERA 1996	✓	✗
Time off for dependants (unpaid)	Section 57A, ERA 1996	✓	✗
Time off for trade union duties (paid)	Sections 168 and 168A, TULRCA	✓	✗
Time off for trade union activities (unpaid)	Section 170, TULRCA	✓	✗
Time off for public duties (unpaid)	Section 50, ERA 1996	✓	✗
Time off to look for work or arrange training in the event of redundancy (paid)	Section 52, ERA 1996	✓	✗
Time off for pension scheme trustees (paid)	Section 58, ERA 1996	✓	✗
Time off for employee representatives (paid)	Section 61, ERA 1996	✓	✗
Time off for young people to undertake study or training (paid)	Sections 63A-C, ERA 1996	✓	✗
The right to request time off to study or undergo training (unpaid)	Section 63D, ERA 1996	✓	✗
Time off for members of a national works council (paid)	Section 27, Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	✓	✗
Time off for members of a European works council (paid)	Regulation 25, Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323)	✓	✗



Termination of employment or office

Statutory right	Statutory reference	Employee	Office Holder
Statutory minimum notice period	Section 86, ERA 1996	✓	✗
Written statement of reasons for dismissal	Section 92, ERA 1996	✓	✗
Not to be unfairly dismissed	Section 94, ERA 1996	✓	✗
Statutory redundancy payment	Part XI, ERA 1996	✓	✗
Collective redundancy consultation	Section 188, TULRCA	✓	✗