Neutral Citation Number: [2020] EWHC 2978 (QB)

Case No: QB-2019-003966

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before:

HUGH SOUTHEY QC (Sitting as a Deputy Judge of the High Court)

- -

Between:

AB **Claimant**

- and –

THE UNIVERSITY OF XYZ **Defendant**

- -
- -

Simon Butler (instructed by **Simon Butler**) for the **Claimant**
Paul Greatorex (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 20 – 22 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 6 November 2020.

Hugh Southey QC:

INTRODUCTION

1. There is a reporting restriction in place in this matter by reason of an order dated 19 March 2020 made by Margaret Obi (sitting as a Deputy Judge of the High Court). This judgment is intended to reflect that order.

2. This judgment is concerned with disciplinary proceedings brought against the Claimant while he was a student at the University of XYZ. In particular, it raises important issues regarding the procedural rights of students facing disciplinary proceedings. The judgment addresses the following matters:

   i) The procedure adopted in light of the COVID-19 crisis.

   ii) The approach that I have adopted to factual findings.

   iii) The factual background.

   iv) Contractual provisions.

   v) Summary of the parties' arguments.

   vi) Law regarding contractual interpretation.

   vii) Law regarding natural justice.

   viii) Conclusions regarding the issues.

   ix) Relief.

PROCEDURE

3. This matter was initially listed for an in-person hearing. In light of the Government's decision that London should become a high alert/Tier 2 area for COVID-19, I was concerned that an in-person hearing was unnecessary and contrary to Government guidance on working from home. As a consequence, I indicated that I proposed to hear the matter remotely unless I was provided with some good reason for needing to go ahead in-person. The only reason that I was provided with for holding an in-person hearing was that the parties had previously agreed to an in-person hearing. In light of the Government guidance, that did not appear to me to be a good enough reason for an in-person hearing. I invited further representations regarding an in-person hearing and was willing to hear oral representations regarding that issue if necessary. However, I received no further representations. In light of that this, the hearing proceeded remotely using Microsoft Teams.

4. I am grateful to the parties for the efforts that they made to ensure that the trial was effective and fair. I am satisfied that the parties suffered no prejudice from my decision to hear the trial of this matter remotely.

APPROACH TO FACTUAL FINDINGS

5. When reaching the findings below I have taken account of all of the evidence, whether it is written or oral. I have also taken account of the written and oral submissions summarised below. To the extent that matters below were in dispute (and many matters were not), I have reached findings applying the balance of probabilities. That means I have considered whether matters are more likely than not. I have explained my reasons for those findings below.

FACTUAL BACKGROUND

6. The Claimant was, until the conclusion of the disciplinary proceedings, a student at a university that will be referred to in this judgement as the University of XYZ and the Defendant. The University of XYZ is a prestigious university that forms part of the Russell Group. He started his studies in October 2016 in the School of Modern Languages and Cultures.

7. On or around 10 September 2018 the Claimant travelled to a European Union ('EU') state as part of the Erasmus programme, which is an EU student exchange programme. The placement was between 10 September 2018 and 25 January 2019. The Claimant studied at a university that will be referred to in this judgment as the University of ABC. He lived at a property that he arranged for himself and which was not part of the university campus. The property was owned by a private landlord and the Claimant shared the apartment with two other persons.

8. While studying overseas the Claimant made a number of new friends including the person who was subsequently to complain about the Claimant's conduct. The complainant was studying at a university located in England that was not the University of XYZ. She was also studying at the University of ABC.

9. On 13 November 2018 the Claimant met a group of friends for drinks. During that evening the Claimant met the complainant. At around 3:30am on 14 November 2018 another friend of the complainant asked the Claimant if he would walk the complainant back to her accommodation. On route to the complainant's accommodation, she asked to use the Claimant's toilet as his flat was nearer than hers. While in the Claimant's flat, the complainant appeared to pass out. The Claimant removed her coat and backpack. He subsequently climbed into bed with the complainant. What followed is not agreed. The Claimant states that what followed was consensual sexual activity. The allegation made by the complainant is that she did not consent.

10. On 1 February 2019 the Claimant received notification that an investigation would be undertaken in respect of a complaint that he had committed a sexual assault in the early hours of 14 November 2018. The e-mail notification stated that a sexual assault would normally be regarded as a major disciplinary offence under section 1.4 of the Defendant's regulation 23.

11. On 6 February 2019 the Claimant sent an e-mail stating that he did not require support and that he was receiving support from an outside source. In oral evidence he admitted that was not true.

12. An investigation was subsequently conducted by Dave McCallum, an independent sexual misconduct investigator. The Claimant agreed to engage in the investigation process. The particulars of claim complain that Mr McCallum did not ask the Claimant to approve the accuracy of any documents prepared by him and that the Claimant was given the impression the investigation was informal. It appears to me that neither complaint has merit:

    i) An e-mail from McCallum dated 12 February 2019 demonstrates that the Claimant was asked to approve notes of a meeting that he had with the Claimant. In oral evidence, the Claimant accepted that the complaint that he was not given an opportunity to approve documents was inaccurate.

    ii) The e-mail dated 1 February 2019 referred to the relevant disciplinary regulations. It also used the language of "formal investigation". Further, the Claimant sent an e-mail on 5 February 2019 asking if there was a real chance of expulsion. He received nothing to suggest that was not the case. As a consequence, he had every reason to believe that his future at the University of XYZ was in issue.

13. On 4 April 2019 an e-mail was sent to the Claimant by the Defendant notifying him that a report had been sent by Mr McCallum to the Defendant. In light of that it had been decided that the matter would be referred to a disciplinary committee.

14. There then followed significant delay in the matter progressing. The evidence of RG, the Director of Legal and Compliance Services at the Defendant, explained that delay. Essentially the Defendant had faced problems with its policies for dealing with sexual misconduct. That led to an independent review of how it handled allegations of sexual misconduct. That recommended, among other matters, that:

> *… in formulating processes and procedures, and in every case, active consideration must be given to how to secure fairness both for any complainant/witness and the respondent.*

15. On 9 October 2019 the Claimant received a letter informing him that a disciplinary committee would be convened on 23 October 2019 at 10am to hear an allegation against him. The allegation was said to be:

> *On 14 October 2018 [sic] you committed sexual misconduct against a fellow Erasmus student in [ABC].*
>
> *Section 2.2 of Regulation 23 expresses that an offence committed under the University's Sexual Misconduct Policy will be dealt with under Regulation 23.*

In context, it is clear that the letter was referring to a 2019 version of regulation 23 (see below). That is because it was the 2019 version of regulation 23 that referred to the sexual misconduct policy. The letter also stated that:

> *You should be aware that any accompanying person will be present <u>in a supporting capacity only</u> and you will be expected to speak on your own behalf.* [Emphasis in the original]

16. On 10 October 2019 the Claimant's legal representative emailed the Defendant raising a number of issues about the procedure. That e-mail stated:

> *My client is entitled to be properly represented at the Disciplinary Committee hearing. Para 3.4 of Regulation 23 cannot, as a matter of law, restrict my client to only be [sic] accompanied by a person in a supporting capacity.*

17. On 11 October 2019 the Defendant's Assistant Registrar (Student Disciplinary Committee) emailed the Claimant's legal representative in response to his e-mail dated 10 October 2019 stating:

> *Your client is entitled to have one person with him during the disciplinary meeting. This would normally be a fellow student, University member of staff or a representative from the Students Union. Should your client wish you to attend then I will seek the permission of the Chair of the Disciplinary Committee.*
>
> *As the Disciplinary Committee meeting is not a legal proceeding you are only permitted to attend in a support capacity. Throughout the process, students are normally expected to speak on their own behalf unless, for example, communication aids are required due to a disability.*

18. On 14 October 2019 the Claimant's legal representative emailed the Defendant indicating that he intended to send a pre-action letter.

19. On 16 October 2018 the Claimant's legal representative sent a letter headed "Letter Before Claim" asserting, among other matters, that the alleged sexual misconduct did not fall within the sexual misconduct policy. The letter asserted that the claimant was entitled to submit evidence and be legally represented at the disciplinary hearing. That letter was e-mailed to the Defendant on 17 October 2018.

20. On 18 October 2019 the Defendant confirmed the scheduled hearing would be postponed. The Defendant suggested that the hearing could take place on 12 November and sought agreement to this.

21. On 20 October 2018 the Claimant's legal representative sent a further letter headed "Letter Before Claim" asserting, among other matters, that the hearing could not go ahead unless the issues raised in the letter of 16 October 2018 had been resolved.

22. On 22 October 2019 the Defendant sent an email stating that the disciplinary committee would now take place on 12 November 2019. The email stated that the sexual misconduct policy applies because section 3(ii) of the policy expressly states it applies when misconduct:

> *... occurs whilst a student is engaged in any University or Student Union related activity (including placements and trips).*

It was said that:

> *Your client was representing the University [of XYZ] on an Erasmus International Exchange programme, which is covered under the point noted above.*

The email also stated that the disciplinary process was "not a legal process". As a consequence, it was stated, among other things, that any person accompanying the claimant could only accompany them in a support capacity. It was stated:

> *It is not the role of an accompanying person to present the case, or answer questions on the students behalf. The accompanying person does not have the right to advocate for the student or cross examine any members or attendees during the meeting.*

23. It appears to me that the e-mail summarised above is consistent with the evidence of GV, the Deputy Pro Vice Chancellor (Student Learning Experience) of the Defendant, who chaired the disciplinary committee in the Claimant's case. She states:

> *If I had been asked to consider this by [the Claimant], then I would have allowed his barrister to attend as an accompanying person. The disciplinary process is not a legal process, so I deem it important that permission is sought for a legal advisor to attend as an accompanying person, so the Reporter can be prepared and consideration can be given to whether the Panel and/or Reporter need their own legal advisers present to ensure fairness.*
>
> *I would not have allowed [the Claimant's] barrister to advocate for [him] and [the Claimant] would have been expected to present his own case and answer all questions put to him by the panel.*

24. GV's oral evidence addressed the issue of who had decided that the Claimant's legal representative could not act as a representative in this case. She said that was a decision for the Registrar but she had been consulted. She did not think that it would have been right for the Claimant to be legally represented. It would have made the process much more adversarial. She commented that there were 2 students to whom the university owes a duty of care. Representation of the Claimant would have raised issues as to whether complainant and university should be represented.

25. On 22 October 2019 the Claimant's legal representative emailed the Defendant stating that he had instructions to issue proceedings in the High Court in order to resolve the dispute.

26. On 25 October 2019, the Defendant's Legal and Compliance Services sent a letter stating among other matters that:

i) Whether or not section 3(ii) of the sexual misconduct policy applies, section 3(iv) would apply. As a consequence, the behaviour in issue was misconduct.

ii) There was no right for the claimant to be legally represented at the disciplinary hearing.

27. On 5 November 2019 the Claimant's legal representative was provided with the papers for the forthcoming disciplinary committee meeting. The Claimant's legal representative responded by email dated 6 November 2019 stating that the hearing could not go ahead for reasons set out in the correspondence.

28. On 6 November 2019 the Defendant wrote to the Claimant's legal representative stating that at present it was unable to understand the legal claim made against it. As a consequence, the issue of proceedings was said to be premature.

29. On 8 November 2019 the Claimant sent the Defendant an unsealed copy of the claim form in these proceedings as well as an unsealed application notice.

30. On 11 November 2019 the Defendant confirmed in an email that the hearing before the disciplinary committee would be proceeding on 12 November 2019.

31. The disciplinary committee hearing took place on 12 November 2019 as scheduled. The Claimant did not attend. The complainant did attend and gave oral evidence.

32. There are a number of points that are clear from the evidence and that are relevant to the decision of the disciplinary committee to proceed on 12 November:

    i) The papers that had been prepared for the disciplinary committee demonstrated that the key issue was likely to be whether the complainant had consented to sexual activity. That meant that oral evidence was likely to be of importance to the outcome.

    ii) The Claimant did not provide an explanation for his decision not to attend. His evidence is that he did not attend as he did not feel he had the confidence, experience or knowledge to defend the complaint. He states he is a reserved and timid person who has suffered from anxiety, stress and depression since the commencement of the disciplinary proceedings. However, that could not have been known by the committee. The only reference in the correspondence before the committee meeting to this appears to have been in an e-mail dated 10 October 2019, which states:

> *I need to arrange a conference in Chambers with my client, which [sic] is currently suffering from significant stress and anxiety.*

    iii) There were a number of procedural steps that could have been taken by the Claimant to protect his own interests. For example, he could have submitted a statement or representations. He could have had someone accompany him. He did not exercise any of these procedural rights. It is, however, important to note that one procedural step that could not have been taken was direct cross-examination. GV was clear that she would filter questions that a party wished to ask for relevance. She would then ask those questions.

33. On 12 November 2019 the Defendant confirmed that:

> *I want to make you aware that the Disciplinary Committee found the allegations against your client proven, based on the balance*

> *probabilities. There will now be a process to consider mitigation before a sanction is determined.*
>
> *Your client will be provided with a formal outcome letter and a copy of the minutes from today's meeting within six University working days.*

34. The outcome of the disciplinary proceedings was confirmed in a letter from the Defendant dated 19 November 2019. This stated that:

> *The committee noted you were given the opportunity to submit written evidence and appear before the committee in order to substantiate your rejection of the allegation. No written evidence was provided, and you were not in attendance to present oral testimony at the meeting.*

35. On 17 December 2019 the Defendant wrote to the Claimant to inform him that it had been decided that he would be withdrawn from the University of XYZ with immediate effect. That letter confirmed that the Claimant could appeal to the appeals committee of the university's senate on grounds that included that:

> *… there was a material irregularity or failure in procedure in the conduct of the original hearing.*

36. The Claimant did not exercise his appeal right. He was unable to explain his reasons for not appealing.

37. The Claimant's evidence is that his expulsion from the University of XYZ resulted in job offers being withdrawn. However, he has obtained a place at another university that he says is less prestigious. Unlike the University of XYZ, it is not a Russell Group university.

CONTRACTUAL PROVISIONS

38. In 2016 the Claimant and the Defendant entered into a contract entitled "University of [XYZ] Full Time Undergraduate Programmes Condition of Offer" ('the Contract'). The Defendant's ordinances, regulations, rules, codes, policies and procedures were expressly incorporated into the contract. In particular, clause 9 of the Contract provides:

> *By accepting the offer of a place at the University you agree to comply with the provisions of all the University's Ordinances, Regulations, Rules, Codes, Policies and Procedures that apply to enrolled students from time to time ("the Regulations"). The Regulations can be found here [redacted]*. [Emphasis added]

39. Clause 10 of the Contract provides:

> *Key provisions of the regulations of which you should be aware include: … The University's expectations of student behaviour, as set out in Regulation 23. Breach of these rules could result in a disciplinary process and the imposition of sanctions, including expulsion from the University.*

40. Clause 11 of the Contract provides:

> *The University reserves the right to add to, delete or make reasonable changes to the Regulations where in the opinion of the University this will assist in the proper delivery of education. Changes are usually made for one or more of the following reasons:*
>
> *(a) To review and update the Regulations to ensure they are fit for purpose. ...*

41. Clause 13 of the Contract provides:

> *Any changes will normally come into effect at the start of the following academic year ... The University will take all reasonable steps to minimise disruption to students wherever possible, for example, by giving reasonable notice of changes to regulations before they take effect, or by phasing in the changes, if appropriate.*

42. Regulation 23 of the Defendant's regulations, in effect from the 1st of October 2018 ('the 2018 Regulations'). It included the following provisions:

i) Paragraph 1.1 provides:

> *Misconduct is defined as improper interferences in the broadest sense with the proper functioning or activities of the institution, or with those who work or study in the institution, or action which otherwise damages the institution <u>whether on University premises or elsewhere</u>.* [Emphasis added]

ii) Paragraph 1.2 provides:

> *Misconduct is classed as either minor or major depending on the seriousness of the alleged offence, and the specific procedures for each are set out below.*

iii) Paragraph 1.4 provides:

> *Examples only of what would normally be regarded as major offences are:*
>
> *... sexual misconduct, including but not limited to: sexual intercourse or engaging in a sexual act without consent , attempting to get engage in sexual intercourse or engaging in a sexual act without consent, sharing private sexual materials of another person without consent, kissing without consent, touching of a sexual nature through clothes without consent, inappropriately showing sexual organs to another person, repeatedly following another person without good reason, and/or making unwarranted unwanted remarks of a sexual nature.*

iv) Paragraph 3.3 provides:

> *A student who is charged with a disciplinary offence under this regulation will always be specifically informed of the details of the alleged offence and given the opportunity to defend themselves...*

v) Paragraph 3.5 provides:

> *A student charged with a minor offence may be accompanied at any meeting with the authorised officer or any disciplinary or appeal hearing by another student from the University or a member of staff from the University or Students' Union. A student charged with a major offence may be accompanied at any meeting with the Investigating Officer or any disciplinary hearing by any one other person. The student will normally be expected to speak on their own behalf in their own defence.* [Emphasis added]

vi) Paragraph 3.6 provides:

> *Where a student does not appear on the day appointed for a hearing under this Regulation, and the authorised officer or committee is satisfied the student has received notice to appear and has not provided a satisfactory explanation for their absence, the authorised officer or committee may proceed to deal with the case and if appropriate, impose an appropriate penalty in the absence of the student.*

vii) Paragraph 3.7 provides, among other matters:

> *The Discipline Committee or the Appeals Committee will also be subject to any further University guidelines approved by the Senate. Subject to the terms of this Regulation and any such guidelines, an authorised officer or committee has the power to determine their own procedure for hearing a case, provide always providing that they observe the rules of natural justice at each stage...* [Emphasis added]

viii) Paragraph 3.8 provides:

> *Both the student and the University may call witnesses to give evidence at any disciplinary hearing, provided that the details of the witness (and copies of any written evidence or other documents) are provided typically at least five working days in advance of the hearing. Witnesses may be questioned by both parties and the authorised officer or committee hearing the case.* [Emphasis added]

The evidence of RG was that in practice direct questioning of witnesses did not take place. In fact questioning had been through the chair.

43. Regulation 23 was amended with the amendments taking effect from 21 September 2019 ('the 2019 Regulations). It appears that these changes were made, at least in part, to address perceived problems with the procedures regarding sexual misconduct. There is an issue that I need to address as to which version applied in the Claimant's case.

44. Relevant provisions of the 2019 Regulations include the following:

i) Paragraph 1.1 provides:

> *Misconduct is defined as improper interference in the broadest sense with the proper functioning or activities of the institution, with those who work or study in the institution, or action which otherwise damages the institution whether on University premises or elsewhere.*

ii) Paragraph 2.2 provides:

> *Where an offence committed under any Ordinance or Regulation, Policy or Code is considered as falling within the definition of misconduct set out in section (1) 1.1 it will be dealt with under this Regulation. This will include, but is not limited to misconduct under the following... Sexual Misconduct Policy …*

iii) Paragraph 3.4 provides:

> *Where an allegation of misconduct has been made against the student they may be accompanied at any meeting with the authorised officer, the Investigating Officer, or any disciplinary or appeal hearing by another student from the University or a member of staff from the University or Students' Union who has not been part of the complaint/case. The student will normally be expected to speak on their own behalf. <u>The accompanying individual is there in a support role not as an advocate</u>.* [Emphasis added]

iv) Paragraph 3.5 provides:

> *Where a student has been given due notice of the hearing and without prior notification does not appear and has not provided a satisfactory explanation for their absence, the committee may proceed to deal with the case and if appropriate, impose an appropriate sanction in their absence.*

v) Paragraph 3.6 provides:

> *The Discipline Committee or the Appeals Committee will also be subject to any further University guidelines approved by the Senate. Subject to the terms of this Regulation and any set procedural guidelines, the Chair of the Committee has the*

> *power to determine their own procedure for hearing a case, always providing that they observe the rules of natural justice at each stage. The Chair of the Committee may postpone, continue or adjourn the case at their discretion.* [Emphasis added]

vi) Paragraph 9.2 provides that parties may appeal to the discipline appeals committee of the Defendant's Senate. Paragraph 9.2.2 provides that a ground appeal is:

> *… that there was a material irregularity or failure in procedure in the conduct of the original hearing*

45. The Defendant's "Student Sexual Misconduct Policy" entered into force at the same time as the 2019 Regulations. It provides:

> *Our University guiding principles make clear that we do not tolerate sexual misconduct, violence or abuse (Principle 3). They also make clear that we are committed to providing a campus environment in which all members of our community feel safe and are respected ...*
>
> *Sexual misconduct covers a broad range of inappropriate and unwanted behaviours of a sexual nature. It covers all forms of sexual violence, including sex without consent, sexual abuse (including online and image-based abuse), non-consensual sexual touching, sexual harassment (unwanted behaviour of a sexual nature which violates your dignity; makes you feel intimidated, degraded or humiliated or creates a hospital hostile or offensive environment), stalking, abusive or degrading remarks of a sexual nature, and a vast range of other behaviours. …*
>
> *This policy covers all students of the University of [XYZ] ...*
>
> *It will apply to sexual misconduct which:*
>
> ● *occurs whilst a student is engaged in any University... related activity (including placements and trips) ...*
>
> ● *in the view of the University poses a serious risk or disruption to the University or members of its community.*

46. In advance of the Claimant commencing study at the University of ABC, he signed a "Study Abroad Student Protocol". It is admitted that this formed part of the contract. This provided, among other things that:

> ● *You will behave in a way that will not jeopardise the future of the programme or jeopardise the opportunity for other students to experience study abroad;*
>
> ● *You will at all times behave in a way that respects the rights and dignity of others ...*

> ● *You will behave in a way that will not compromise your personal safety and security or that of others which may arise, for example, through consumption of alcohol or use of drugs ...*
>
> *Any form of behaviour which offends others, puts you and/or others at risk or in danger, or seriously disrupt or prejudices the work or study of others, or could be deemed to, will not be tolerated.*

SUBMISSIONS OF THE PARTIES

47. In the course of oral submissions, the parties agreed that the issues are:

    i) Whether the Defendant applied the correct set of disciplinary regulations.

    ii) Whether there was a breach of contract when the Claimant was denied legal representation before the disciplinary committee.

    iii) Whether there was a breach of contract because the Claimant was told that the complainant could not be questioned directly.

48. Mr Simon Butler, who appeared on behalf of the Claimant, argues that the Defendant erred by applying the wrong version of disciplinary regulations because the Contract and/or a legitimate expectation did not permit the 2019 Regulations to be applied. In addition, the Contract entitled the Claimant to "natural justice". It was a breach of "natural justice" to refuse to permit the Claimant to be legally represented and/or to cross-examine the complainant.

49. Mr Paul Greatorex, who appeared on behalf of the Defendant, argues that the Defendant was entitled to amend the disciplinary regulations because the Contract included an express power to amend the regulations. The Defendant does not dispute that the Claimant was entitled to "natural justice". However, "natural justice" did not entitle the Claimant to the rights that he claims.

50. The submissions of the parties are addressed in detail below.

THE INTERPRETATION OF THE CONTRACT

51. In *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 Lord Clarke (who delivered the judgment of the Supreme Court) held that when interpreting a contract, the Court must apply the unambiguous language of the parties [23].

52. In *Wood v Capita Insurance Services Ltd* [2017] AC 1173 Lord Neuberger held that when interpreting a contract:

> *The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.* [10]

53. In *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 Baroness Hale concluded that:

> *Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.* [18]

This led to a conclusion that powers such as that in issue had to be exercised on the basis of a decision making process that is "lawful and rational in the public law sense" [30].

54. Contractual provisions providing for a disciplinary process will generally include an implied term that the process will be fair (*R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909).

55. In *Bradley v The Jockey Club* [2007] LLR 543 Richards J cited an unreported interlocutory judgment of the Court of Appeal in *Modahl v British Athletic Federation Ltd* delivered on 28 July 1997. Lord Woolf MR stated that:

> *I can see no reason why there should be any difference as to what constitutes unfairness or why the standard of fairness required by an implied term should differ from that required of the same tribunal under public law.*

NATURAL JUSTICE

56. In *R v Secretary of State ex p Doody* [1994] 1 AC 531 Lord Mustill held:

> *… the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair.* (at p560H)

57. In *R (Osborn) v Parole Board* [2014] AC 1115 Lord Reid identified several points of general application when procedural fairness is in issue:

    i) Firstly, it is for the Court to determine for itself whether a fair procedure was adopted [65].

    ii) Secondly, procedural fairness has 3 objectives:

a) It is liable to produce better decisions [67].

b) Justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions [68].

c) Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions [71].

iii) The requirements of procedural fairness cannot be assessed by reference to the prospects of a person succeeding with their arguments if a particular procedure is adopted [2(v)].

58. In *R v Board of Visitors of HMP The Maze ex p Hone* [1988] AC 379 it was held that whether the common law gave rise to a right to legal representation would depend upon the circumstances. There was no right to legal representation in every case (p392D).

59. In *ex p Hone* the House of Lords cited with approval the judgment of Webster J in *R v Secretary of State for the Home Department ex p Tarrant* [1985] QB 251. In that judgment Webster J identified factors to be considered when deciding whether to permit legal representation in the context of prison disciplinary proceedings:

i) The seriousness of the charge.

ii) Whether any points of law are likely to arise.

iii) The capacity of the prisoner to understand the case against him.

iv) Procedural difficulties.

v) The need to avoid delay.

vi) The need for fairness between the prisoner and those making allegations.

The Court proceeded to find that it would be unreasonable to deny representation in context of particularly serious charges (p287).

60. Consistent with *ex p Tarrant*, the courts have continued to recognised that legal representation may be required in particular cases. For example, in *R (Dr S) v Knowsley NHS Primary Care Trust* [2006] EWHC 26 (Admin) Toulson J held that:

> *It may be that in many cases legal representation would be unnecessary, but the question in each case must be whether the doctor can reasonably be expected to represent himself or whether legal representation is necessary in order to enable him to be able properly to present his case. I do not see that this can be a matter of presumption but must depend on the circumstances, including particularly the complexity of the allegations and the evidence.* [101]

61. The Defendant places great weight on the judgments of the Supreme Court and the lower courts in *R (G) v Governors of X School* [2012] 1 AC 167. At first instance, the issue in that case was whether the criminal limb of article 6 of the European Convention on Human Rights ('article 6') applied to disciplinary proceedings brought against a teaching assistant who was accused of an inappropriate relationship with a 15 year old. However, an alternative argument was that:

> *... the disciplinary proceedings are not in respect of a "criminal charge", they nevertheless involve the determination of the Claimant's civil rights and obligations under art 6(1), and, in view of the gravity of the allegations and of the consequences of a s142 direction, legal representation at the disciplinary hearings was and is, in any event, required as a commensurate measure of procedural protection* (*R (G) v Governors of X School* [2009] LGR 799 at [35(3)])

This was the argument that succeeded at High Court and Court of Appeal level but failed at Supreme Court level.

62. At High Court level, Mr Stephen Morris QC (sitting as a deputy Judge of the High Court) concluded that gravity of the allegations as well as their implications for the claimant's working life that entitled him to representation by reason of the application of the civil limb article 6 [69]. In the Court of Appeal Laws LJ appears to have adopted a similar approach (*R (G) v Governors of X School* [2010] 2 All ER 555 at [52] – [53]). In the Supreme Court, Lord Dyson (whose judgment was endorsed by a majority) concluded that article 6 did not apply as the Independent Safeguarding Authority ('the ISA') would ultimately determine whether the claimant could continue to work in his chosen profession [84]. However, he commented:

> *... if article 6 did apply in the disciplinary proceedings, then the claimant was entitled to the enhanced procedural protection (normally associated with criminal proceedings) of the right to have legal representation at the disciplinary hearing.* [71]

Lord Hope agreed with Lord Dyson but noted the disadvantages of permitting legal representation in disciplinary proceedings. He commented that:

> *... there is a serious risk that, if [representation were to be permitted], disciplinary proceedings in the public sector would be turned into a process of litigation, with all the consequences as to expense and delay that that would involve. The burden that this would impose on employers, and its chilling effect on resort to the procedure for fear of its consequences, is not hard to imagine.* [95]

63. Given the nature of the arguments, it is clear that the issue of common law fairness was not directly before the courts in *G*. That is clear from the judgment of Laws LJ in the Court of Appeal who commented that:

> *I should note that it has not been suggested by the claimant that there would be any entitlement to legal representation in the disciplinary proceedings other than by force of art 6. I do not for my part think it necessary to investigate the possibility that the common law might*

> *itself, on the facts, confer such a right (though I do not mean to imply that in no case would the common law produce that result).* [27] [Emphasis added]

It appears to me that the underlined words recognise the possibility that the common law may entitle a person to legal representation. I have seen nothing that suggest the Supreme Court disagreed with that.

64. The Defendant also relies on a series of cases concerned with Legal Aid and/or legal representation (*R (Gudanaviciene) v Director of Legal Aid* [2015] 1 WLR 2247, *Pine v Law Society* [2002] EWCA Civ 1574, *MacPherson v Law Society* [2005] EWHC 2837 (Admin) and *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244). I heard limited submissions about these cases but none of them appear inconsistent with the basic principle that fairness may concern legal representation in particular circumstances. For example, in *Pine* the Court of Appeal commented that:

> *It is clear … that, at least in proceedings in which a party may appear in person, the requirements of Article 6 with respect to legal advice and representation depend on the facts of any given case.* [14]

65. In *Goldberg v Kelly* (1970) 397 US 254 Brennan J described the value of an oral hearing:

> *… written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.* [31]

This was cited with approval by Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350 at [31].

66. In *G* in the Court of Appeal Laws LJ noted the potential benefits of an advocate appearing for a party. He commented that:

> *… a professional advocate might properly make a great deal of difference to the flavour and the emphasis [of conclusions reached by a disciplinary body]; and if there were any contest as to the primary facts, to that also.* [50]

67. The Office of the Independent Adjudicator is established under the Higher Education Act 2004. Its Good Practice Framework for Disciplinary Procedures states:

> *Students who have access to well-trained and resourced student support services will not normally need to seek legal advice, although they may wish to in serious cases. It is good practice for providers to permit legal representation in complex disciplinary cases, or where the consequences for the student are potentially very serious.* [23]

68. In *R (Bonhoffer) v GMC* [2012] IRLR 37 Stadlen J held:

> *It is axiomatic that the ability to cross-examine … is capable of being a very significant advantage. It enables the accuser to be probed on matters going to credit and his motives to be explored.* [44]

69. In *Mungavin v The Commissioners for HM Revenue and Customs* [2020] UKUT 0011 (TCC) Nugee J held:

> *… it seems to me that the proper purpose of cross-examining a factual witness is two-fold: first, to seek to undermine or qualify or mitigate the effect of evidence they have given which is adverse to the cross-examining party – for example by challenging the credibility or reliability of the witness, or otherwise testing the completeness or accuracy of their evidence – and second, to elicit further factual testimony helpful to the cross-examining party.* [82]

70. A right to cross-examination does not mean that a person has an unrestricted right to question another. For example, when vulnerable witnesses are cross-examined in a criminal context, best practice is to ensure that there are agreed limits on cross-examination before the witness gives evidence (e.g. *R v YGM* [2019] 2 Cr App Rep 39 at [21]).

71. There appears to be an increasing recognition that the objectives of cross-examination can be achieved without a party questioning a witness directly. For example:

    i) Section 34 - 39 of the Youth Justice and Criminal Evidence Act 1999 enables the Crown Court to prevent defendants acting in person in sexual cases from questioning witnesses directly.

    ii) Rule 10 of the Inquiries Rules (SI 2006/1838) provides that the default position is that a witness before a public inquiry will be questioned by counsel to the inquiry and the panel rather than the parties.

CONCLUSIONS REGARDING THE ISSUES

The Applicable Contract Terms

72. The terms of the Contract are clear. Students are subject to the Defendant's ordinances, regulations, rules, codes, policies and procedures that apply 'from time to time'. Clause 11 of the Contract expressly provides that the Defendant may update regulations. That is hardly surprising. Universities have to safeguard the interests of large numbers of students, staff and others who may have contact with the University. Their success depends upon their good name. That good name depends, at least in part, upon them demonstrating a capacity to safeguard. From time to time, there will

be a need to update ordinances, regulations, rules, codes, policies and procedures to address problems that have been identified that may undermine safeguarding. That is why clause 11 of the Contract expressly anticipates updates to ensure they are fit for purpose.

73. It appears to me that it is perfectly understandable that the University of XYZ would want to update its policies regarding sexual misconduct. Sexual misconduct is an extremely serious matter. A failure to deal with sexual misconduct in an appropriate manner is likely to result in a university being criticised. These matters mean that it was reasonable for the Defendant to seek to review how it handles allegations of sexual misconduct and implement changes.

74. Mr Butler suggested that there was some restriction on the powers of one party to a contract to unilaterally change the terms of the contract. No authority was cited for that proposition and it appears to me to be inconsistent with the basic principle the starting point when interpreting a contract is the unambiguous language of the contract (*Rainy Sky SA*). If the contract provides for one party to unilaterally change the terms of the contract there is nothing unlawful in that. The terms of the Contract are unambiguous and permit the Defendant to change its terms. In addition, those terms are unsurprising when account is taken of the context (*Wood*).

75. My analysis conclusions in the paragraph above do not mean the defendant has an unrestricted right to change contract terms. There is plainly an implied term that any changes must be reasonable (*Braganza*). Nothing that I have seen suggests that the changes made here were unreasonable. As already noted, there was a good reason for the changes. It was plainly concluded that the sexual misconduct policy was inadequate.

76. There is a further restriction upon the power to change contract terms. Any change will also need to comply with clause 13 of the Contract. However, there is no basis for claiming that the Claimant was not given proper notice of the change. As already noted, the letter dated 9 October 2019 plainly referred to the 2019 Regulations.

77. The Claimant argued that the e-mail sent to him on 4 April 2019 generated some sort of legitimate expectation that he would be dealt with in accordance with the 2018 Regulations. I fail to see this. There was no express statement that the 2018 Regulations would be applied. Obviously the e-mail was sent at a time when the 2018 Regulations applied. It recorded the fact that the matter would be referred to a disciplinary committee. These are matters relied upon by the Claimant to argue that there was an expectation that the 2018 Regulations would continue to be applied. However, those facts need to be set in the context of the express contractual provision allowing regulations to be changed. Nothing suggest that contractual right to change regulations would not be applied in appropriate cases.

78. I should add that there was nothing unfair in the Defendant waiting until the 2019 Regulations entered into force before convening the disciplinary committee. As already noted, there was good reason to update the sexual misconduct policy. It should be noted that the review that led to the updated policy emphasised the importance of fairness. It was not intended to prejudice the Claimant or other students. The Claimant and/or the complainant could have felt a legitimate sense of

grievance if they were not treated in accordance with improved procedures developed following the review.

79. I should add that it appears to me that it would make no difference if I were to conclude that the University erred by failing to apply the 2018 Regulations. At times during his submissions Mr Butler appeared to suggest that a failure to apply the 2018 Regulations was in some sense significant simply because the Defendant misunderstood the basis of its jurisdiction. I fail to see how this can be correct unless it is possible to point to a material difference between the regulations. The only material difference that I can see is that paragraph 3.8 of the 2018 Regulations states that "[w]itnesses may be questioned by both parties". However, it appears to me that this provision cannot literally mean that a respondent to a complaint can directly question the complainant in all circumstances. Such an approach would permit, for example, the abusive questioning of a complainant. It appears to me that it must be possible to restrict questioning providing that is done in a manner that complies with the obligation within the regulations to comply with "natural justice". Ultimately, "natural justice" is so important that express provision would be required to exclude it. Here there is no such provision. Instead the contract makes express provision for "natural justice" (see below).

80. The amended particulars of claim allege that the "complaint could not have amounted to misconduct". The Claimant's skeleton argument argues that the complaint did not amount to misconduct as the incident occurred in private premises in Spain and the complainant did not attend the University of XYZ. It appears to me that this argument lacks merit. Paragraph 1.1 of the 2018 Regulations makes it clear that misconduct can occur anywhere. That is hardly surprising as misconduct is defined as including "action which otherwise damages the institution". Plainly damage can be caused to the defendant by conduct outside of the University premises. Further, the "Study Abroad Student Protocol" makes it clear that the Claimant was required to behaviour in an appropriate manner when on the Erasmus programme. In fairness to Mr Butler he did not pursue this argument orally.

81. In light of the matters above, it appears to me that there is no merit in the argument that the Defendant applied the wrong regulations.

Legal Representation

82. It appears to me to be clear that both paragraph 3.7 of the 2018 Regulations and paragraph 3.6 of the 2019 Regulations make it clear that a disciplinary committee must comply with "natural justice". Were this not the case, there would be an implied contract term that the disciplinary process be fair (*ex p Aga Khan*). That was not in dispute.

83. The standards of procedural fairness applicable in this context are no different to those applicable in a public court law context (*Bradley*). It seems to me that this principle is particularly relevant where the Defendant was providing publicly subsidised education that is provided as a public service. That means that this context is close to a public law context. That implies that it is for the court to determine what fairness requires (*Osborn*).

84. It appears to me that at times in this case the arguments have failed to distinguish between the issue of whether there was an automatic right to legal representation because of the nature of the proceedings and whether there was a right to legal representation in the specific circumstances of this case.

85. In general courts have been reluctant to find an entitlement to legal representations in broad classes of cases. So, for example, it has been held that there is no right to representation in all prison disciplinary cases (*ex p Hone*). As a consequence, I have no doubt that there was no right to representation simply because these were disciplinary proceedings.

86. However, it appears to me to be clear that in principle there can be individual cases where fairness requires legal representation. That was recognised in *ex p Hone*. The conclusion in *ex p Hone* appears to me to be consistent with the approach to procedural fairness adopted in *Osborn*. That demonstrates that procedural fairness is a flexible concept that takes account of matters such as the sense of injustice that a person will feel if an unfair procedure is adopted. None of the authorities relied upon by the Defendant appear to me to undermine that conclusion. In particular, in *G* the manner in which the case was argued meant that the Supreme Court's finding that article 6 was not engaged was determinative of the claim to be entitled to legal representation. As Laws LJ noted, the courts were not ruling on the common law and Laws LJ left open the possibility that the common law may entitle a person to legal representation. The remarks of Lord Dyson in *G* when he noted that he would have found a right to legal representation if article 6 applied demonstrates the importance of considering the particular circumstances of a case when a claim is made for legal representation.

87. In light of the matters above, it appears to me that the Defendant misinterpreted its contractual obligations. Although both the 2018 and 2019 Regulations appear to provide for a student to be accompanied by someone rather than represented by them, those provisions do not exclude the need to ensure "natural justice" and so need to be read in light of the overriding duty to ensure "natural justice". As a consequence legal representation could be required when that was necessary for fairness. However, that does not mean the contract was breached unless the failure to permit legal representation was a breach of natural justice on the facts. That means that I need to consider what natural justice required.

88. In my opinion *ex p Tarrant* remains the best guidance as to the factors to be taken into account when deciding whether legal representation is required in a particular case. Indeed, it is of interest the evidence before me shows that a university unconnected with this claim, the University of Salford, has a policy of applying the *Tarrant* criteria when deciding when whether legal representation should be authorised in the course of disciplinary proceedings. However, it does appear to me that in applying those criteria one needs to take account of the remarks of Lord Hope in *G* about the dangers of allowing legal representation. Those remarks were consistent with the evidence of GV who was concerned that disciplinary proceedings should not become too adversarial. Permitting legal representation should not be routine.

89. It appears to me there is one obvious difficulty applying the *Tarrant* criteria in the circumstances of this case. The Claimant did not clearly articulate the reasons why legal representation was required. The correspondence appears to me to suggest the

Claimant believed he had an automatic right to legal representation, which is not correct. However, it was not just the Claimant who misunderstood the legal position. As noted above, the Defendant also appears to have wrongly proceeded on the basis that there were no circumstances in which representation would be permitted. The Defendant made that clear to the Claimant. As a consequence, the Claimant did not articulate a claim to legal representation based on the specific circumstances of the case and the Defendant did not invite such a claim. Given that it is for the court to determine what fairness requires (*Osborn*), it appears to me that I should assess what fairness required on the basis of matters that would have been clear had thought been given by the parties to the *Tarrant* criteria.

90. Applying the *Tarrant* criteria:

i) The allegation in this case involved serious criminal conduct. In particular it involved an allegation of sexual misconduct that is likely to be viewed by others as abhorrent. It obviously had the potential to cause the Claimant to be withdrawn from the University. Mr Greatorex argues that the court should not speculate about the potential long-term consequences of that. It appears to me that that is unrealistic. The University of XYZ is a prestigious university. Society ranks graduates on the basis of the university they attended. While the Claimant has been able to obtain a place at another university, it is unrealistic to think that he has not lost a substantial benefit by being withdrawn from the University of XYZ. That is without taking account of the lost year of studies and the courses fees for the year during which the Claimant was withdrawn.

ii) Despite lengthy written submissions on this subject drafted by Mr Butler, it appears to me that any points of law that were likely to arise were unlikely to be complex. The key issue in the case was whether the complainant had consented to sexual activity. Consent is a relatively straight forward concept. The Claimant's legal representative may have been seeking to raise issues of jurisdiction. However, as I have already indicated it appears to me that those arguments regarding jurisdiction lacked merit and so the Claimant has not been prejudiced by being unable to advance them. In any event the correspondence demonstrates how that issue could be addressed in writing.

iii) The Claimant was a student who had been at the university for a number of years. He had clearly coped with his studies and so there was little reason to believe he had problems understanding the case against him. In this litigation he has raised issues about his mental state. However, there is little evidence to demonstrate that his mental state was likely to be a significant factor in preventing him presenting his case. In particular, there is no medical evidence. I do accept that it should have been clear that any student would have been found the disciplinary process stressful.

iv) It appears to me that there were procedural issues that were likely to arise. For example, I have concluded below that in principle there was no reason why questions could not be filtered by the chair of the disciplinary committee. However, the entitlement to "natural justice" prevents filtering questions in an unfair way. That meant that there was the potential for representations to be required regarding questions.

v) Delay appears to me to be a factor of limited significance. The Claimant had a legal representative available. They could have been required to attend the scheduled disciplinary hearing. There is no reason to believe that there was insufficient time for other legal representation to be obtained if that was regarded as necessary. The Defendant had already caused significant delay (albeit for good reason).

vi) I have been particularly concerned by the need for fairness between the Claimant and the complainant. There is an obvious risk that complainants maybe deterred from making and pursuing complaints if they fear being subject to an overly formal procedure involving lawyers. However, it appears to me that the dangers of this should not be overstated. A lawyer may act as a buffer between a respondent to disciplinary proceedings and the complainant. It is difficult for a victim to have to face someone who they allege assaulted them. It also appears to me the dangers of a complainant being intimidated by a lawyer can be limited by effective chairing of the disciplinary committee. For example, limiting questioning is an important way of protecting complainants. In particular cases fairness may even require the complainant to be legally represented. I have no way of knowing whether legal representation of the complainant was required in this case as I know little about her. For example, I do not know whether she would have wanted legal representation if it had been offered to her. However, it does not appear to have been impractical to arrange legal representation. It is of note that the evidence of GV anticipated legal representation being arranged for the complainant had the Claimant been accompanied by a lawyer.

91. There is one matter that is not identified in *Tarrant* that appears to me to be relevant. That is the absence of any reconsideration process analogous to the ISA in *G* that will enable the Claimant to be legally represented. It is true that there is an appeal to the Defendant's Senate but the grounds of appeal are limited. Key findings of fact are made by the discipline committee. The 2019 Regulations do not suggest that a different approach to legal representation would be adopted in the course of an appeal.

92. In light of the matters above, I have concluded that the Claimant was entitled to legal representation. It appears to me that while not every factor identified above points towards legal representation, a number of significant ones do. In particular, it appears to me that in this case the significance of what was in issue strongly points towards the need to for legal representation. It appears to me that that conclusion is consistent with the guidance produced by the Office of the Independent Adjudicator. That guidance appears to me to be particularly significant given the adjudicator can be expected to have expert knowledge of universities. It also appears to me that that conclusion is consistent with the principles identified by Lord Reid in *Osborn*. In particular, this is a context where the Claimant has a legitimate sense of injustice at being denied legal representation in the disciplinary proceedings. The concerns of Lord Hope in *G* can be addressed by making it clear that the decision to permit legal representation is based on the circumstances of this case.

93. In reaching the conclusion that there was a right to legal representation, I have taken account of the fact that there were a number of procedural safeguards in place that were intended to protect the Claimant. However, it appears to me that none of them mean that legal representation was not required. In particular:

i) Although I accept that there can be value in a student facing disciplinary proceedings being accompanied by a lawyer, it appears to me that there is a significant difference between being accompanied by a lawyer and being represented by a lawyer. Indeed, if that were not the case it is difficult to see why the Defendant would have distinguished between a student being accompanied by a lawyer and a student being represented by a lawyer. Although the remarks of Brennan J in *Goldberg* are not directly applicable, it does seem to me that he identifies the key benefit of a representative being able to make submissions directly. The representative will be able to mould their argument to meet the arguments of other parties or the concerns of the disciplinary committee expressed during the course of argument. For example, a representative will be able to address the committee directly if it is unwilling to allow questioning regarding a particular subject. A person accompanying will have his advice delivered by a person who may not even fully understand the points being made to him by his advisor. I should add that the remarks of Brennan J seem to chime with the remarks of Laws LJ in *G*. Further, all professional advocates know that it takes training and experience to talk with confidence and clarity during a hearing.

ii) The other safeguards identified are all of more limited value without legal representation. For example, the ability to suggest questions to be asked is of less value if a lawyer cannot engage with the disciplinary committee when it has concerns about the questions that a student wishes to have asked. Similarly representations to the committee are less likely to have effect if the writer of those representations cannot engage with the disciplinary committee in relation to concerns they may have.

94. I have considered the failure of the Claimant to appeal. I can see no good reason for this failure. It would have been open to the Claimant to argue that the procedure adopted was unfair because he was denied legal representation. In principle, an appeal might have avoided this litigation albeit that may be unlikely in light of the Defendant's interpretation of the 2019 Regulations. However, it seems to me that this failure does not undermine the complaint that there has been a breach of contract because the Claimant was prevented from obtaining representation. At most, it is relevant to relief. Similarly, it appears to me that the failure of the Claimant to attend the hearing and make representations does not mean that there has been no breach of contract. It is relevant to relief.

Cross-examination

95. The first basis upon which it is said that there was a right to cross examine in paragraph 3.8 of the 2018 Regulations. I have already concluded that this paragraph the 2018 Regulations did not apply. In addition, this provision did not give the Claimant a right to question the complainant directly (see above).

96. Turning to "natural justice", I accept that it was important that the complainant was questioned on behalf of the Claimant. I have already made it clear that the issues before the disciplinary hearing were going to be determined on the basis of oral evidence. There was a need for the evidence of the complainant to be tested to see whether answers could be obtained that undermined her or supported the Claimant (*Bonhoffer* and *Mungavin*). However, the question in this case is whether chair of the

disciplinary committee was entitled to filter the questions and then ask them on behalf of the Claimant. There was no suggestion at any stage that the Defendant would prevent questions being put on behalf of the Claimant.

97. I have no doubt the chair of the disciplinary committee was entitled to filter the questions to be asked of the complainant. Protecting witnesses to ensure that they give best evidence has generally been recognised as important. This was a witness complaining about a serious sexual assault who was having to face the person who she alleged assaulted her. It was obviously important to ensure that the questions to be asked did not unduly distress her. There is no evidence that the filtering would have prevented appropriate questions being asked.

98. I also fail to see how fairness is undermined by the questions being asked by the chair of the disciplinary committee. The questions can still cover relevant areas. Indeed, if the Claimant was to be legally represented, it might be thought that requiring questions to be asked by the chair was a safeguard against the complainant being denied "natural justice" by being questioned by lawyer when she had no lawyer representing her. I have seen nothing that suggests there is a fundamental right to choose who asks questions. To the contrary there appears to be an increased recognition that questions can be asked by someone other than a party where that is necessary to ensure natural justice.

RELIEF

99. I have considered whether I should invite further submissions on specific performance as suggested by Mr Greatorex. However, the evidence of RG is that it would be practical to hold a fresh disciplinary committee and the urgency of this matter, in light of the possibility of the Claimant resuming his studies in January 2021, means that it is appropriate for me to rule on relief at this stage.

100. In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 Lord Hoffman held

> *Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy.* (at p11F)

101. The extent to which a second stage procedure can cure unfairness at the first stage of a process was considered by Toulson J in *Dr S*. He held that:

> *If there is a duty of fairness at the first stage, in my judgment it must be enforceable by the court as a matter of jurisdiction.* [71]

102. In principle it appears to me there is good reason why specific performance should be ordered in this case. There is no realistic way to assess damages because it is impossible to know whether the same outcome would have been reached if the Defendant had complied with its contractual obligations and permitted the claimant to be legally represented. That is a key factor and points to this being an exceptional case where specific performance should be ordered (*Co-Operative Insurance Society Ltd*). As already noted, the evidence was that it would be practical to hold a fresh disciplinary committee. The evidence of RG was that if that committee were to make findings that permitted the Claimant to resume his studies with the Defendant, that could happen in January 2021 subject to any academic concerns.

103. The one matter that troubles me about specific performance is the failure of the Claimant to appeal. It would have been possible for him to complain about the fact he was denied legal representation on an appeal. It is impossible to be certain about the outcome of such an appeal. Although all the evidence points to the Defendant believing that there was no legal right to legal representation, it is impossible to know how it would have reacted to detailed arguments of the sort advanced before me. It is clearly a matter of regret that there was no appeal as that may have avoided the costs of this litigation. However, none of that means that the claimant cannot point to a breach of contract that can now be remedied. As Toulson J held in *Dr S* the Claimant's rights to natural justice must be enforceable.

104. Mr Greatorex has also pointed to other procedural rights open to the Claimant that he failed to take advantage of to advance his case. He also points to the fact that the Claimant failed to seek an injunction. As already noted, it is regrettable that steps were not taken that might have avoided the need for this trial. However, none of these matters mean that the Claimant did not suffer a breach of contract that can be remedied.

105. In light of the matters above, I will order that a further disciplinary committee is held. I hope the parties can agree the precise terms of the order.

106. I have heard no submissions about costs. It may be that the failure to appeal and exercise other procedural rights can be properly marked by the costs order. However, it would not be appropriate for me to say more about that until I have received submissions.