

Legal representation and cross-examination in university disciplinary proceedings and specific performance as a remedy

- *AB v University of XYZ*

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The High Court has handed down judgment in *AB v University of XYZ* [2020] EWHC 2978, a case concerned with disciplinary proceedings brought against the claimant whilst he was a student at the University of XYZ. The disciplinary proceedings related to accusations of non-consensual sexual activity with a student of another English university during the Claimant's Erasmus year abroad.

One issue in the case was that the University had applied university regulations and a sexual misconduct policy which had come into force almost a year after the incident which was the subject of the complaint. The Court held that it was perfectly understandable that the University would want to update its policies regarding sexual misconduct, and there was an unambiguous term of the student contract which permitted the University to change its terms, although that was subject to an implied term that such changes must be reasonable (*Braganza v BP Shipping Ltd*). In any event the Court did not see a material difference between the earlier and later regulations, finding that both covered a situation where the alleged conduct occurred outside of the University premises.

A central issue in the case concerned the Claimant's right to legal representation in the disciplinary proceedings. The University regulations appeared to provide for a student to be *accompanied* by someone rather than *represented* by them. However, the Court found that the University regulations made it clear that a disciplinary committee must comply with "natural justice". If that were that not the case, there would still be an implied contract term that the disciplinary process be fair (*ex p Aga Khan*). The Court went on to hold that the standards of procedural fairness applicable in this context are no different to those applicable in a public law context (*Bradley*) and this principle was particularly relevant where the University was providing publicly subsidised education that was provided as a public service. This means that

this context was close to a public law context and implies that it was for the court to determine what fairness requires (*Osborn*). In general courts have been reluctant to find an entitlement to legal representation in broad classes of cases, so there was no right to representation simply because these were disciplinary proceedings. However, in principle there can be individual cases where fairness requires legal representation. The student contract was breached if the failure to permit legal representation was a breach of natural justice on the facts. The Court considered that *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. In that judgment Webster J identified factors to be considered when deciding whether to permit legal representation in the context of prison disciplinary proceedings: the seriousness of the charge, whether any points of law are likely to arise, the capacity of the prisoner to understand the case against him, procedural difficulties, the need to avoid delay, the need for fairness between the prisoner and those making allegations. Applying those criteria, the Court concluded that the Claimant was entitled to legal representation. The allegation in this case involved serious criminal conduct which obviously had the potential to cause the Claimant to be withdrawn from the University. Any points of law were unlikely to be complex, however: the key issue in the case was whether the complainant had consented to sexual activity, consent is a relatively straight forward concept, and the arguments advanced regarding jurisdiction lacked merit and so the Claimant had not been prejudiced by being unable to advance them in the disciplinary proceedings. There was little reason to believe the Claimant had problems understanding the case against him and although he had raised issues regarding his mental state there was little evidence to demonstrate that his mental state was likely to be a significant factor in preventing him presenting his case. However, there were procedural issues that were likely to arise, for example regarding the filtering of questions to the complainant by the chair of the disciplinary committee. Delay appeared to be a factor of limited significance. The need for fairness between the Claimant and the complainant was a concern. 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 appeared to the Court 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, and the dangers of a complainant being intimidated by a lawyer can be limited by effective chairing of the disciplinary committee.

While not every factor identified above pointed towards legal representation, a number of significant ones did: in particular, it appeared to the Court that in this case the significance of what was in issue strongly pointed towards the need to for legal representation, and that

conclusion was consistent with the guidance produced by the Office of the Independent Adjudicator.

A related issue was whether there was a right to cross-examine the complainant. On the basis of “natural justice”, the Court accepted that it was important that the complainant was questioned on behalf of the Claimant. However, the Court considered that the chair of the disciplinary committee was entitled to filter the questions and then ask them on behalf of the Claimant. Protecting witnesses to ensure that they give best evidence has generally been recognised as important, and 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 was no evidence, in the Court’s view, that the filtering would have prevented appropriate questions being asked. The Court also considered that 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. The Court held that there is no 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.

What relief was ordered? The Claimant, who had been excluded from the University for the disciplinary offence, sought a fresh disciplinary hearing as a matter of urgency with a view to resuming his studies as soon as possible. The Court observed the general principle that specific performance will not be ordered when damages are an adequate remedy. In principle there was a good reason why specific performance should be ordered in this case, as there was no realistic way to assess damages because it was 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 was a key factor and pointed to this being an exceptional case where specific performance should be ordered (*Co-Operative Insurance Society Ltd*). The evidence was that it would be practical to hold a fresh disciplinary committee and 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. A factor that troubled the Court was that the Claimant had not appealed the Stage 1 disciplinary outcome: it would have been possible for him to complain about the fact he was denied legal representation in a stage 2 appeal. The Court also considered the fact that the Claimant failed to seek an injunction. However, the Court concluded that although it was regrettable that steps were not taken that might have avoided the need for the trial, none of those matters meant that the Claimant did not suffer a breach of contract that could

be remedied. Consequently, it ordered that a further disciplinary committee be held, and hoped the parties could agree the precise terms of the order.

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