Neutral Citation Number: [2023] EWHC 1162 (KB)

Case No: QB-2021-002486

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2023

**Before** :

**MR JUSTICE FREEDMAN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**AB** **Claimant**

**- and –**

**XYZ** **Defendant**

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**Simon Butler** (instructed by **Direct Access**) for the **Claimant**
**Paul Greatorex** (instructed by **Legal and Compliance Services**) for the **Defendant**

Hearing dates: 27 & 28 March 2023

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# Approved Judgment

**This judgment was handed down remotely at 10.00am on Tuesday 16 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.**

**This judgment is subject to an anonymity order which contains detailed provisions in order to preserve the anonymity of the parties**

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**MR JUSTICE FREEDMAN:**

## I Introduction

1. This is a claim in which AB, the Claimant, a former student of the University of XYZ ("the University"), claims a declaration of a breach of contract on the part of the University and an order setting aside a decision of a Disciplinary Committee and a Disciplinary Appeal Committee. The University denies the breach of contract. The issues between the parties arise because of allegations on the part of the Claimant that the disciplinary process was tainted by breaches of natural justice, in particular, in admitting hearsay evidence of the Complainant and thereby admitting the evidence without an opportunity for cross-examination of the Complainant. The subject matter of the complaint comprised very serious allegations of a sexual nature which were challenged by the Claimant. The result of the disciplinary process was that the Claimant was expelled from the University and was therefore unable to complete the last year of his degree and to obtain a degree from the University.

## II Factual background

2. The factual background has been set out in detail in the judgment of Mr Hugh Southey KC sitting as a Deputy Judge of the High Court dated 6 November 2020 at paras. 6 – 37. Its neutral citation number is [2020] EWHC 2978 (QB). This judgment has been the subject of applications for permission to appeal before Laing LJ on 18 November 2020 and then permission for a second appeal before David Richards LJ (as he then was) on 20 December 2020, and both applications were dismissed with relatively full reasons considering that these were applications for permission.

3. I do not intend to rehearse the history save in the briefest summary. Whilst still an undergraduate at the University, the Claimant had travelled to the university of ABC in the EU as part of a student exchange programme between 10 September 2018 and 25 January 2019. Whilst there, he made new friends. On 13 November 2019, he was with friends for drinks and met the Complainant. She was at the time an undergraduate of a different university in the UK.

4. At around 3.30am on 14 November 2019, he was asked to walk the Complainant back to her accommodation. En route, she asked him if she could use the toilet at the Claimant's flat. There is an issue as to whether the Claimant passed out or appeared to pass out. The Claimant removed her coat and backpack. They subsequently went into the Claimant's bed. There is a stark conflict of accounts of what happened from then until sometime after 10am when the Complainant left the flat whilst the Claimant was still asleep. In essence, the Claimant says that they had consensual sexual activity. The allegation made by the Complainant is that she did not consent.

5. I shall return to the events of that night in due course. I shall first refer to the disciplinary process. 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 stated that a sexual assault would normally be regarded as a major disciplinary offence under section 1.4 of the University's Regulation 23. An investigation was subsequently conducted by Mr

David McCallum, an independent sexual misconduct investigator. By an e-mail dated 12 February 2019, Mr McCallum asked the Claimant to approve notes of a meeting that he had with the Claimant. On 4 April 2019, an e-mail was sent to the Claimant by the University notifying him that a report had been sent by Mr McCallum to the University and that it had been decided that the matter would be referred to a Disciplinary Committee.

6. On 9 October 2019 the Claimant received a letter informing him that a Disciplinary Committee would be convened. On 23 October 2019, the allegation was that he had committed sexual misconduct against another student, and this would be dealt with under Regulation 23. Whereas Regulation 23 only allowed a person in the position of the Claimant to be accompanied by a person in a supporting capacity, he claimed that he was entitled to be represented properly at the Disciplinary Committee hearing. In response to an e-mail from the Claimant dated 10 October 2019, it was stated on behalf of the University that a representative could only attend in a support capacity. In an e-mail of the University dated 22 October 2019, it was stated that it is not the role of an accompanying person to present the case or answer questions on the student's behalf. It was stated that the accompanying person does not have the right to advocate for the student or cross-examine any members or attendees during the meeting.

7. There was then an impasse between the parties. Draft proceedings were served by the Claimant on the University. The University confirmed in an e-mail dated 11 November 2019 that the Disciplinary Committee would be proceeding. On 12 November 2019 the hearing took place. The Claimant did not attend. The Complainant did attend remotely and gave oral evidence. The reason for the non-attendance of the Claimant was not explained at the time. His subsequent evidence was that he did not attend as he did not feel that he had the confidence, experience or knowledge to defend the complaint. 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. In the words of Mr Southey KC (at para. 32 i), *"that meant that oral evidence is likely to be of importance to the outcome"*.

8. On 12 November 2019 the Disciplinary Committee in the absence of the Claimant found the allegations against the Claimant proven on the balance of probabilities. That was confirmed in a letter from the University dated 19 November 2019 on 17 December 2019, the University wrote to the Claimant to inform him that it had been decided that he would be withdrawn from the University with immediate effect there was a letter stating that he had a right of appeal if there was a material irregularity or failure in procedure in the conduct of the original hearing. The Claimant did not exercise that right.

9. According to Mr Southey KC's judgment at para. 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."*

## III The claim before the High Court

10. The Claimant brought a claim before the High Court claiming an entitlement to a declaration that he had a right to legal representation and an order for specific performance to have a further disciplinary hearing. In giving judgment, Mr Southey KC found that:

(i) The Claimant had a contract with the University. Under the relevant Regulations, it was stated that a Disciplinary Committee had to comply with "natural justice". The standards of procedural fairness applicable were no different from those applicable in a public law context, particularly where the University was providing publicly subsidised education as a public service.

(ii) In general, courts had been reluctant to find an entitlement to legal representation in broad classes of cases. There was no right to representation simply because the case involved disciplinary proceedings. However, there could be cases where fairness required legal representation.

(iii) The provisions that a student had a right to be accompanied by someone, rather than represented by them, needed to be read in light of the overriding duty to ensure "natural justice". It was important to consider the particular circumstances of a case when a claim was made for legal representation.

(iv) The best guidance on the factors to be taken into account when deciding whether legal representation was required in a particular case was that given in *R. v Secretary of State for the Home Department Ex p. Tarrant [1985] Q.B. 251, [1983] 11 WLUK 71*. Permitting legal representation should not be routine. Applying the *Tarrant* criteria, the Claimant was entitled to legal representation. While not every factor pointed towards legal representation, the significance of what was in issue strongly pointed towards the need for legal representation. There was an obvious risk that Complainants might be deterred from making and pursuing complaints if they feared being subject to an overly formal procedure involving lawyers. However, a lawyer might act as a buffer between a respondent and a Complainant, and the dangers of a Complainant being intimidated by a lawyer could be limited by effective chairing of the Disciplinary Committee: see the judgment of Mr Southey KC at paras. 83-92.

(v) In relation to "natural justice", it was important that the Complainant was questioned on behalf of the student as there was a need for her evidence to be tested. The chair of the Disciplinary Committee was entitled to filter the questions to be asked of her. There was no evidence that filtering would prevent appropriate questions being asked or undermine fairness: see the judgment of Mr Southey KC at paras. 95-98.

11. Taking the view that damages would not be an adequate remedy, it was held that specific performance was an appropriate remedy, and it followed that an order would be made for a further disciplinary hearing.

## IV The contractual provisions

12. Having regard to the extensive setting out of the contractual provisions by Mr Southey KC, it is not necessary for this Court to rehearse all of this. It suffices to say the following, namely that the parties entered into a contract in 2016 in respect of undergraduate programmes. A key provision of the contract was Regulation 23 which was expressly incorporated into the contract.

13. Regulation 23 of the University's regulations, which were in effect from 1 October 2018 ('the 2018 Regulations'), 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 whether on University premises or elsewhere."* [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, 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 Defendant's evidence was that in practice direct questioning of witnesses did not take place. In fact, questioning had been through the chair.)

14. Regulation 23 was amended with the amendments taking effect from 21 September 2019 ('the 2019 Regulations). Relevant provisions of the 2019 Regulations include the following:

(i) 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…"*

(ii) 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. The accompanying individual is there in a support role not as an advocate."* [Emphasis added]

(iii) 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."*

(iv) 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*

<u>*at each stage*</u>*. The Chair of the Committee may postpone, continue or adjourn the case at their discretion*." [Emphasis added]

(v) Paragraph 9.2 provides that parties may appeal to the discipline appeals committee of the University'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."*

15. The University'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."*

16. In advance of the Claimant commencing study at the University of XYZ, 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."*

## V The second disciplinary hearing

17. Following the hearing before Mr Southey KC and the unsuccessful attempts to seek permission to appeal from the Court of Appeal, there was convened a further

disciplinary hearing before a panel differently constituted. On 11 January 2021, a Disciplinary Committee hearing was convened for 3 February 2021. On 1 February 2021, the Claimant was notified by email that the Complainant may not be able to attend the hearing. At the commencement of the hearing on 3rd February 2021, the Claimant was informed that the Complainant had said that she may not attend. It was then said after numerous conversations and email exchanges that she felt unable to attend and re-live what had happened to her again. The University had no power to compel the Complainant and the hearing proceeded without her. The Claimant was represented by counsel.

18. On 5 February 2021 the Claimant attended the hearing with his legal representative and was notified that the allegation had been proved on 18 April 2021. The Claimant lodged an appeal against the Disciplinary Committee's decision on 10 March 2021. The Disciplinary Committee notified the Claimant that he would be permanently withdrawn from the University with immediate effect on 1 April 2021 the University notified the Claimant that there is no prima facie case for the appeal on 28 June 2021. The Claimant issued these proceedings.

19. The Claimant's case in paragraphs 3.6 and 3.7 of the amended particulars of claim is that the University had to exercise its contractual power to exclude in a way that was not Wednesbury unreasonable and had to make a decision that was fair and complied with the rules of natural justice. Subject to questioning how the allegation of fairness added to the application of natural justice, the amended defence admitted this allegation.

## VI Natural justice

20. In the judgment of Mr Southey KC, he referred to applicable principles of natural justice from the House of Lords/Supreme Court at paras. 56-59:

> *"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 in *ex p. Tarrant* proceeded to find that it would be unreasonable to deny representation in context of particularly serious charges (p287).

21. It will be noted that in the instant case, Article 6 of the ECHR does not apply, but the issue has been considered by reference to the common law principles about natural justice which were incorporated into the contract expressly or by implication.

## VII Authorities about admission of hearsay/cross-examination in disciplinary proceedings

22. The Claimant submits that absent the Complainant, the evidence against the Claimant amounted to hearsay, which was inadmissible in the circumstances of this case, relying on lengthy citation from Phipson on Evidence 20th edition at paras. 28-02, 28-03, 28-09, 28-11 and 28-12. A concern about relying upon out of court statements is that it is not possible to cross-examine or confront the maker of the statement, and thereby expose the dangers of faulty memory misperception, deliberate invention and ambiguity.

23. The purpose of being able to cross-examine was summarised in *Mungavin v The Commissioners for HM Revenue and Customs* [2020] UKUT 0011 (TCC) where Nugee J stated at para. 82:

> *"… 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."*

24. In *R (Sim) v Parole Board for England and Wales* [2003] EWCA Civ 1845, [2004] QB 1288, Keene LJ emphasised that everything turns on the circumstances of each case. At para. 57, he said the following:

> *"Merely because some factual matter is in dispute does not render hearsay evidence about it in principle inadmissible or prevent the Parole Board taking such evidence into account. It should normally be sufficient for the board to bear in mind that that evidence is hearsay and to reflect that factor in the weight which is attached to it. However, like the judge below, I can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination before it is taken into account at all. As so often, what is or is not fair will depend on the circumstances of the individual case."* (emphasis added)

25. A number of cases were cited in connexion with disciplinary bodies where the courts had found that it was unfair to proceed with allegations without the opportunity for cross-examination those cases included *Nursing and Midwifery Council v Ogbonna*

[2010] EWCA Civ 1216 especially per Rimer LJ at 23 and 25; *R (on the application Bonhoeffer) v The General Medical Council* [2011] EWHC 1585 (Admin) per Stadlen J at paras. 44-45 and 129

> *"44. It is axiomatic that the ability to cross-examine in such circumstances 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. It is no less axiomatic that in resolving direct conflicts of evidence as to whether misconduct occurred the impression made on the tribunal of fact by the protagonists on either side and by their demeanour when giving oral testimony is often capable of assuming great and sometimes critical importance.*
>
> *45. In this case the disadvantage to the Claimant of being deprived of the ability to cross-examine his accuser is incapable of being in any way mitigated by the FTPP being able to study the demeanour of witness A when he was being interviewed by the MPS. The audio and video tapes of the interviews which constitute the centrepiece of the hearsay evidence sought to be adduced by the GMC have been lost as a result of admitted incompetence by the MPS."*

26. At para. 109, Stadlen J analysed the cases, including *Ogbonna* and the cases under the Criminal Justice Act 2003 and Article 6 ECHR, and summarised the principles in relation to the "right to cross-examine" as follows:

> *"i) Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance.*
>
> *ii) In criminal proceedings there is no 'sole or decisive' rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant.*
>
> *iii) In proceedings other than criminal proceedings there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d).*
>
> *iv) However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them.*

> *v) The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.*
>
> *vi) Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article 6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal.*
>
> *vii) The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.*
>
> *viii) In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser."*

27. At para. 129, Stadlen J continued:

> *"[N]o reasonable Panel in the position of the FTPP could have reasonably concluded that there were factor outweighing the powerful factors pointing against the admission of the hearsay ... The means by which the Claimant can challenge the hearsay are ... not ... capable of outweighing those factors .... The reality would appear to be that the factor which the FTPP considered decisive in favour of admitting the hearsay was the serious nature of the allegations against the Claimant coupled with the public interest in investigating such allegations and the FTPP's duty to protect the public interest in protecting patients, maintaining public confidence in the profession and declaring and upholding proper standards of behaviour ... It is of course self-evidently correct that the greater is the gravity of allegations, the greater is the risk to the public if there is no or no effective investigation by a professional body such as the FTPP into them. However, that factor on its own does not ... diminish the weight which must*

> *be attached to the procedural safeguards to which a person accused of such allegations is entitled both at common law and under Article 6 …. The more serious the allegation, the greater the importance of ensuring that the accused doctor is afforded fair and proper procedural safeguards. There is no public interest in a wrong result."*

28. In addition to *Bonhoeffer*, in *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin) at para. 45 (and cited with approval in *El Karout v Nursing and Midwifery Council* [2020] EWHC 3079 by Linden J), Mr Andrew Thomas KC sitting as a Deputy Judge of the High Court drew together the principles as follows:

> *"1.1 The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before determining the evidence.*
>
> *1.2 The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.*
>
> *1.3 The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.*
>
> *1.4 Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that the evidence is demonstrably reliable, or alternatively that there will be some means testing of its reliability."*

29. At para.56, Mr Thomas KC indicated that the considerations which should have been taken into account in the *Thorneycroft* case were as follows:

> *"Ms 1 and Ms 2. The decision to admit the witness statements despite their absence required the panel to perform careful balancing exercise. In my judgment, it is essential in the context of the present case for the panel to take the following matters into account:*

> *(i) whether the statements were the sole or decisive evidence in support of the charges;*
>
> *(ii) the nature and extent of the challenge to the contents of the statements;*
>
> *(iii) whether there was any suggestion that the witnesses had reasons to fabricate their allegations;*
>
> *(iv) the seriousness of the charge, taking into account the impact which adverse findings might have on the Appellant's career;*
>
> *(v) whether there was a good reason for the non-attendance of the witnesses;*
>
> *(vi) whether the Respondent had taken reasonable steps to secure their attendance; and*
>
> *(vii) the fact that the Appellant did not have prior notice that the witness statements were to be read."*

## VIII The nature of the allegations

30. It is now important to summarise the contested events of the night in question. This is done in order to give greater understanding of the objection taken to the admission of hearsay evidence in this case.

31. The Complainant did not provide a written signed statement. However, she did provide information to the investigators which is contained in a complaint by email dated 12 December 2018, in supplementary information and in interview notes.

### (a) The Complainant's account

32. The Complainant's information can be summarised as follows:

    (i) The Complainant and the Claimant had become friendly on a platonic level in September 2018 whilst studying in the EU at the ABC University as part of an international exchange programme. On Tuesday 13 November 2018, the Complainant met with several friends for drinks and drank heavily. By 2.55am, she was mentally aware but physically struggling. She described the Claimant as also intoxicated but less than her.

    (ii) One of the Complainant's friends asked the Claimant to walk her home, and the Complainant was happy about this, knowing that the Claimant had a girlfriend. The Complainant needed the toilet and asked if she could use the bathroom of the Claimant. She entered the bathroom and sat down for about 10 minutes. She says that after that time, the Claimant knocked on the door, she did not

reply, and he entered. He then asked if she was OK before carrying her or dragging/helping her to the bed in his bedroom.

(iii) Once on the bed, the Claimant helped the Complainant to remove her coat and she lay on the bed, otherwise fully clothed. She heard conversations between the Claimant and mutual friends in which he told them that she had passed out on his bed and asking if it would be acceptable for him to sleep next to her. She heard a response to the effect that it would be alright as long he trusted himself not to do anything. She believed that there were messages with others.

(iv) The Complainant then said that the Claimant turned off the light and went into bed with her. He began stroking her all over her body and then under her clothing, she tried to move away but he just moved closer. He removed her clothing. She only recalled flashes of this and could not provide details of how it happened. She felt unable to stop it in part because of alcohol and in part because of shock. All her clothes were removed, and his clothes were also removed.

(v) In addition to touching her body, he inserted fingers into her vagina. He got up to get a condom and tried to penetrate her vagina with his penis, but he did not manage, although she did feel the tip of his penis against her vagina several times during the night.

(vi) At some point, the Complainant fell asleep, and she recalls waking up at about 10.00am. He then awoke and the sexual activity resumed including his trying to put his fingers in her vagina and masturbating himself. She felt shocked and stressed about what had happened. She climbed out of bed and picked up her clothes and got dressed and left the room. Nothing was said.

(vii) The Complainant says that the Complainant did not consent to any sexual activity, she did not say or do anything to indicate consent and she felt unable to resist what he did to her. At about 12 noon on 14 November 2018, the Claimant sent two text messages saying, *"I'd like to apologise for last night/ this morning"* and *"It was not appropriate behaviour and I can guarantee it will never happen again."*.

(viii) The Complainant did not suffer any physical injury and her clothing was not damaged. However, she said that she suffered emotional harm and had flashbacks and nightmares, and she had become more wary in the company of male friends.

**(b) The Claimant's account**

33. The Claimant's account was provided in interview to the interviewing officer and also in a witness statement to the Committee. His account can be summarised as follows:

(i) The Claimant said that in the course of that night, he was 'wobbly' but he knew where he was going. The Complainant was not very intoxicated. He did not know the way to her accommodation, so he relied on her to direct him. He believed that he had been asked to walk with her for reasons of personal safety. They did walk closely together for reasons of warmth in the middle of a cold night.

(ii) He stopped to get money out of a cash machine which he needed for monthly rent. The Complainant asked to use the Claimant's toilet. She was sitting on the toilet seat for about 2-5 minutes. He then went to his bed still wearing a coat and a backpack. She had laid down apparently because of tiredness rather than intoxication. He said that she had 'passed out' asleep on his bed. At that point, he intended to sleep on a sofa in the living room.

(iii) The Claimant then made contact with four of his friends by text or phone. He was worried about the situation. He referred to the Complainant having passed out on his bed and asked if it was OK to sleep next to her. He was told that it would be OK so long as he trusted himself and suggested putting a pillow between them. Another said that it was OK because "It's not like you're going to do anything." She advised sleeping 'top to tail' or putting some cushions between them. Another was told by the Claimant that the Complainant had passed out on his bed and had advised him to allow her to stay in his flat. "It's not like you're going to do anything." She advised sleeping 'top to tail' or putting some cushions between them. The Claimant said that he made these calls because he was intoxicated and he was thinking poorly but he thought that he could trust himself. He climbed into bed with the Complainant, but still clothed.

(iv) The Claimant said that they started off on their left sides facing in the same direction, but then the Complainant rolled over in bed so that they were face to face. They touched and then started kissing each other: it was a "mutual thing." When asked why this occurred, the Claimant said that he had been drunk and was not thinking clearly. He was in a two-year relationship with someone else and had not been sexually attracted to the Complainant.

(v) The Claimant said that he had initiated the removal of clothing and they ended up naked in bed together. He referred to the sexual activity including his licking her vagina and her taking his penis into her mouth. He said that the Complainant had been an active participant in the sexual activity.

(vi) He said that there was no conversation during this activity until there was discussion regarding protection. At this point, the Complainant got out of bed and got a condom out of her backpack and placed it on his penis which was not erect. There was then an attempt to have full vaginal intercourse which did not take place because he could not achieve an erection, whereupon they fell asleep.

(vii) The Claimant woke up at about midday on 14 November 2018, feeling groggy. He panicked because he woke up alone and had a vague recollection of being

in bed with someone who was not his girlfriend. He saw the condom on the floor and "started to piece the night together". He said that he did not see the Complainant in the morning, and she left whilst he was still asleep. Not knowing what had happened at that stage, he sent the texts at about midday. Subsequently, he was able to recall far more, and hence the account of what had occurred.

34. The University emphasises areas common to both accounts including:

(i) the Complainant and the Claimant were intoxicated, albeit that the level of intoxication is contested;

(ii) there was reference by the Claimant to the Complainant passing out (but the Claimant says that from the rest of the account, and from her account, this does not mean that she was unconscious during the sexual acts);

(iii) the Claimant understood enough to make the calls and send the texts which he did to friends before the sexual acts, and despite this the sexual acts took place;

(iv) when the Claimant woke up and the Complainant was not present, the Claimant sent two texts apologising and promising that it would not happen again.

35. Within the interview of the Claimant, the University drew attention to an apparent contradiction between the Claimant explaining behaviour on the basis of on the one hand being drunk and not thinking clearly and on the other hand his detailed refutations of what occurred. He says that the details subsequently came back to him, but there is the danger in this of reconstruction. His evidence about his being drunk and not thinking clearly has to be balanced against the evidence that (a) he was asked by the Complainant's friend to walk home the Complainant, (b) he obtained money from a cash machine, and thereafter (c) he contacted friends and took advice when the Complainant was sitting on the toilet. Following the encounter, he wrote the messages admitting inappropriate conduct, which might mean that the Claimant acted without the consent of the Complainant and without any reasonable belief that she consented.

36. A question arises whether this material gave rise to a case against the Claimant which a Disciplinary Committee, could consistent with natural justice and the principles set out above evaluate in such a way as to find (a) that the hearsay evidence could be admitted without injustice, and/or (b) there would be no Wednesbury unreasonableness in the Disciplinary Committee proceeding to make a finding against the Claimant.

37. Despite the foregoing, the testimony of the Claimant contains evidence capable of supporting a case about the absence of consent or the absence of reasonable belief that consent was given and in particular the following:

(i) the account of how they came to be intimate involving consensual behaviour;

(ii) his account is completely at odds with the account of the Complainant of his dragging her to the bed.

(iii) the account of how the Complainant went to her bag to retrieve a condom is evidence consistent with consent as well as of conduct of someone who is conscious and able to make a rational decision;

(iv) there is a complete conflict of evidence of what further sexual contact at about 10am before the Claimant left the bedroom;

(v) the explanation of the Claimant in respect of the text messages at about midday are tenable. Context is everything, and their interpretation depends on the context, such that by themselves they do not prove what is alleged to have occurred.

**(c) The state of affairs after the hearing before Mr Southey KC**

38. In the light of that decision and the unsuccessful attempts of the University to reverse the decision on appeal, the University was bound by the decision that to conduct a disciplinary hearing on the facts of this case without the Claimant having the opportunity to have legal representation was a breach of natural justice. With legal representation went the ability of the Claimant to test the evidence of the Complainant by cross-examination, and the questions could be filtered through the chair. Although there had been attempts to revisit that decision in this case, either that should not be done as a matter of principle because it has been decided in this case, or the decision of Mr Southey KC was right and there is no reason to depart from it.

39. The issue before this Court was whether it made a difference in the instant case that the Complainant did not attend the second Disciplinary Committee. There was a contractual right to question witnesses who were called: see para. 3.8 of Regulation 23 before amendment as cited above. The assumption when the matter was before Mr Southey KC was that the Complainant would attend at least remotely before the Second Disciplinary Committee. It was in that context that Mr Southey KC considered the ability to ask questions, which could be filtered through the Chair: see paras. 95 – 98.

40. Without the attendance of the Complainant, the question arose as to whether the Disciplinary Committee could receive the hearsay evidence of the Complainant and give it such weight as it thought fit. This now turned upon not an express contractual right to ask questions, but upon the express or implied obligation to conduct the Disciplinary Committee in accordance with natural justice: see para. 3.7 of the Regulation 23 before amendment and para. 3.6 after amendment as cited above. Was it a breach of natural justice in circumstances where the Complainant did not attend for the second Disciplinary Committee to admit the hearsay evidence and/or to attach sufficient weight to the same to find the allegation proven?

41. At the outset of the hearing, Mr Butler Counsel on behalf of the Claimant made an objection to the admission of the hearsay evidence of the Complainant. The minute of the meeting read as follows:

> ***"RECONVENED: 11:05***
>
> *"The Chair responded to the legal representative of the respondent that the committee appreciated the fact that he was there to represent his client and, that the committee wanted to be as fair as possible to both parties. The Chair was clear that the university had a duty of care to both parties – the reporter and the respondent – and on that basis the meeting would continue. At the point at which the committee members had heard all the evidence the Chair would ensure that during their deliberations they attributed appropriate weight to the evidence given by both the reporter (through the Investigating Officers report) and the respondent.*
>
> *The University legal representative stated that Simon Butler had sent through a series of cases on behalf of his client that related to Fitness to Practise statutory hearings where hearsay evidence had been admitted into the proceedings in lieu of oral testimony. In those cases it was decided that it was unfair to reach a decision on the basis of the hearsay. There was no general prohibition on relying on hearsay evidence in internal disciplinary cases (to which the strict rules of admissibility of evidence did not apply). The panel however had to act fairly and reasonably. It was reasonable to continue and at the deliberation stage all committee members would be required to attribute appropriate weight to the reporter evidence and understand that the reporter evidence could not be fully tested by questioning.*
>
> *The Chair reiterated that at the deliberation stage of the meeting he would ensure that the committee attributed appropriate weight to the reporter evidence and therefore the meeting would proceed.*
>
> *Simon Butler responded by stating that he disagreed with the decision to continue on the grounds that there would be no direct evidence given by the reporter. He advised the committee that they could not attach any weight to the reporter evidence and that when dealing with sexual misconduct cases there were consequences for the respondent whether the case was found proven or not. He wished for his objections to be noted for the record."*

42. In short, Mr Butler for the Claimant submitted that the hearsay evidence should be ruled inadmissible absent direct evidence from the Complainant. The Disciplinary Committee's view was that the evidence was admissible, but it was up to it to decide what weight to give to the evidence of the Complainant, bearing in mind that it "*could not be fully tested by questioning"*.

43. Having decided to proceed, the University Officer who was presenting the case stated as follows:

(i) It was agreed that the Complainant was drunk and but that she felt safe with the Claimant who had a girlfriend, and that the Complainant wished to use the toilet at the Claimant's flat.

(ii) The Claimant stated that the Complainant was walking on her own, but she claimed that she was too intoxicated to know where she was going.

(iii) After the Complainant went to the toilet, the Complainant said that she was led or carried into the Claimant's bedroom, but the Claimant said that she walked into the bedroom by herself.

(iv) It was agreed that the Complainant lay on the bed fully clothed. According to the Claimant, the Complainant tried to take her coat and bag off, and the Claimant helped her with this, and she pulled a blanket over herself, and then according to the Claimant, she passed out.

(v) The Claimant then sought the advice of four friends by phone or facebook, and he received advice to allow her to stay and to put pillows between them and to lie top to tail, whereupon the Claimant climbed over her to get into bed.

(vi) When questioned as to why he did not get a mattress or use other sofas and why he contacted his friends, the Claimant said that he was drunk and not thinking clearly.

(vii) There was a conflict of evidence as regards who initiated the kissing and who provided the condom. The Claimant said that it was mutual and that she obtained the condom from her bag. He believed that she had the capacity to consent and had done so. The Complainant said that it was not mutual, she was aware of what was happening, she had tried to move away but felt unable to react and stop it. She did not cry out because she was psychologically too traumatised.

(viii) There was disagreement as to what had happened in the morning around 10am. The Complainant said that the sexual activity had started again, and she pushed him away and left. The Claimant has no recollection until waking up around midday by which time the Complainant had left.

(ix) The apologetic text was referred to by the Claimant to the investigating officer as written in panic and fear of what had happened, whereas in his statement to the committee, the Claimant described the events as an error.

(x) It was submitted by the University Officer that the Claimant did not understand consent. He contended that consent was given because she did not tell him to stop, and she could have left at any time. The absence of objection was not sufficient to infer consent, and the Claimant did not appreciate that consent

included there being agreement by choice, with the freedom and ability to consent.

44. Mr Butler, Counsel on behalf of the Claimant, made points including the following:

(i) The Complainant knew what she was doing as they were walking home and as she asked to use his toilet. She had originally said that he had dragged her from the bathroom to the bedroom, but changed this later to say that she made her own way to the bedroom.

(ii) There was nothing unreasonable about asking friends for advice.

(iii) The evidence was that the sexual activity was consensual, she knew well what was happening, and even intoxicated, she was able to consent. The Complainant could have walked away at any time.

(iv) A condom was taken out of the Complainant's bag by the Complainant.

(v) The texts at midday were courteous because he had a girlfriend, and he was apologising for the fact that they had casual sex which should not have happened.

(vi) There was no complaint to the local police or to the University in the EU country in which they were studying.

45. Mr Butler did not ask any questions of the University Officer or the Investigating Officer since they were not witnesses of fact. In answer to the question as to what attempts had been made to get the Complainant to attend, a Student Liaison Officer had had *"numerous conversations and email exchanges"* and the Complainant *"felt unable to come and re-live what had happened to her again."*

> ***"RECONVENED: 12:02***
>
> *(c) The Chair reconvened the meeting and invited questions from the committee to the respondent, [the Claimant].*
>
> *The panel asked [the Claimant] what he understood by consent, whether the reporter had the capacity to consent, why he contacted friends to ask for advice, why he had not followed the advice given and why he had sent the text message on 14 November 2018 after the reporter left his flat.*
>
> *[The Claimant] responded by stating that:*
>
> *(i) Consent was being able to freely agree to having sexual activity and that this could be verbal or non-verbal alongside*

*having the capability to make that decision. It could be conveyed by body language.*

*(ii) The [Complainant] had been awake on the bed even though her eyes had been closed. She had heard the phone conversation and could recall it. She was awake and engaging. She had six/seven layers of clothing on and consented to removing her clothing. Her clothing was not damaged.*

*(iii) He had described her as having 'passed out' because her eyes were closed and perhaps his judgement had been wrong at that point.*

*(iv) He had had some alcohol, but he had not misjudged consent as when someone turns over and kisses you that was not misjudged.*

*(v) He had not slept on either of the sofas as they were occupied by two dogs who were large, and he had not wanted to wake his flat mates by disturbing the dogs. The same was true for moving the mattress from a cupboard that was the other side of the flat.*

*(vi) He had not slept 'head to toe' as he did not want to kick her head.*

*(vii) The door to his bedroom had been open all night and the reporter could have left at any time. He had purposely slept closest to the wall to allow her to leave whenever she wanted.*

*(viii) The reporter had turned over in bed and kissed him, she had initiated it.*

*(ix) The text message that he had sent was apologetic because he was in a relationship at that time, and he thought that it had been an error on both of their parts. He did not want her to think that they could have a relationship.*

***SCHEDULED BREAK FOR LUNCH: 12:15***

***RECONVENED AT: 12:47***

*(d) The Chair reconvened the meeting and permitted the University Officer to question the respondent.*

*The University Officer had three questions for clarification that related to who started the kissing as accounts varied in the original statement given by [the Claimant] to the Investigating*

> *Officer (app 6, page 5 of DC.PB.6/20-21) and his current witness statement about who had started the kissing, who instigated the removal of clothing and why he hadn't slept on one of the two sofas.*
>
> *[The Claimant] responded:*
>
> > *(i) The reporter had turned over and kissed him and then they started kissing together. The reporter had started it.*
> >
> > *(ii) That his original statement about the instigation of the removal of clothing was not correct. He had instigated taking off the first layer of clothing but that the reporter actively removed her clothing.*
> >
> > *(iii) That there were alternative sleeping arrangements but that the dogs were massive, and he did not want to wake the neighbours at that time in the morning as the dogs would not want to be woken up."*

46. In closing, the University Officer submitted that (i) the Claimant's actions were at odds with his statement that he was not thinking clearly because he stopped at an ATM to collect money on his way home and he contacted his friends for advice, (ii) he had chosen not to take the advice despite other options for him to sleep elsewhere, and (iii) he did not seek consent from the Complainant.

47. In closing Mr Butler for the Claimant submitted among other things that (i) there was no suggestion that the Claimant started anything, (ii) the Complainant said that she had paralysis but she was taking part in a physical act and she was capable of moving, (iii) none of her clothing was damaged and she was not bruised, (iv) the Complainant had not attended the meeting whereas other Complainants attended court: the inference was that she knew that the Claimant would be represented and her inconsistencies would be found out, (v) there was no corroboration of her version of events, (vi) it had not been put to the Claimant that he was lying, and (vii) the Complainant did not report the matter to the police.

48. Questions were asked from the Committee as to why the Claimant thought the Complainant had not attended the meeting and why the Claimant had not attended the meeting of the first Disciplinary Committee. Mr Butler reminded the Disciplinary Committee that he had been refused legal representation and that the High Court had subsequently ruled that he ought to have been allowed legal representation.

49. On 5 February 2021, the Disciplinary Committee announced its finding that the Claimant had been guilty of sexual misconduct against a fellow student. In particular, it found as follows:

> *"(d) Whilst the reporter did not attend the meeting in person the Committee was satisfied that the University had taken sufficient*

*steps to seek to secure her attendance and that the reasons she adduced for not attending were reasonable in the circumstances.*

*(e) The Committee acknowledged that hearsay evidence did not have the same probative value as personal testimony and that it did not afford the opportunity to question and therefore to test fully the written evidence. The Committee however found the reporter's initial witness statement in particular to be an honest and compelling account and that, in the context of internal University proceedings to which the strict rules of evidence did not apply, weight could generally be attached to it. During its deliberations, the Committee considered the various points made on behalf of the respondent about areas where he disputed the reporter's version of events and its findings of fact in relation to these are set out below in the resolutions reached."*

50. The specific findings of fact of the Committee were as follows:

*RESOLVED:*

*"(i) That the committee made the following findings of fact when reaching their decision that the case was proven:*

*(1) Sexual activity occurred in the early hours of the morning of 14 November 2018*

*(2) The reporter did not have capacity to consent to sexual activity in the early hours of the morning of 14 November 2018 and therefore did not consent.*

*(3) The respondent did not reasonably believe that the reporter consented.*

*Element (1)*

*That sexual activity had occurred in the early hours of 14 November 2018 was not disputed by either party.*

*The respondent disputed that further sexual activity had taken place later that morning and, in view of the fact that the reporter was not present to answer questions, the Committee concluded that there was insufficient evidence to be satisfied that, on the balance of probabilities, further sexual activity occurred.*

*Element (2)*

*The reporter's account was consistent with diminished capacity as a result of intoxication and her friend was sufficiently concerned in view of her intoxication to ensure that she did not walk home alone.*

*The Committee placed particular weight on the fact that the reporter sat on the toilet in the respondent's flat to "get herself together" and the respondent's description of her as "passed out" shortly thereafter.*

*The reporter's motor functions (i.e., her ability to walk) were not considered by the committee to be indicative of having capacity to consent.*

*Element (3)*

*The Committee did not find credible the respondent's account of impaired judgment by reason of intoxication. He was not too intoxicated to be relied upon by the reporter's friend to walk her home.*

*He stated that he stopped at an ATM to withdraw money to pay his rent which was due for payment the next day.*

*Further, he had the presence of mind to contact a number of friends to ask for advice about sleeping in the bed with the reporter, though he did not follow that advice.*

*He had weighed up in his mind that it would be too noisy to move the mattress from the cupboard on the other side of the flat to sleep on. He had also considered moving the two dogs so that he could sleep on one of the sofas but again decided that it might also disturb his flatmates as the dogs were 'massive' and might be upset by being woken up at 4:00 a.m.*

*These were not the actions and deliberations of a person so intoxicated that their judgment was impaired.*

*The photographs of the flat provided by the respondent clearly show a narrow bed that it would have been difficult for two people to sleep in. There were alternative sleeping arrangements for him to make, given his concerns about sleeping in the same bed as the reporter, for example, he could have slept on the floor. The Committee concluded that the respondent knew he did not have the reporter's consent to sleep in the same bed, where close physical proximity was inevitable.*

*The Committee noted that the respondent said he got into the bed because he thought he could trust himself (i.e., not to engage in sexual activity with the reporter). The Committee therefore concluded that when he got into bed next to the reporter, without her consent, he had recognised the possibility that proximity to her might present the opportunity for sexual activity.*

*The Committee concluded that though the respondent stated he got into bed with the reporter because he thought he could trust*

> *himself, the respondent took advantage of the reporter's incapacity and knew that he had done so. He sent the reporter an apology for his behaviour later that day and the Committee was not convinced by his explanation that he was feeling guilty because he had a girlfriend and did not wish the reporter to have a false hope for a longer-term relationship with him."*

51. There then ensued an appeal to the Disciplinary Appeal Committee which found that there was no prima facie case for appeal and specifically that:

    (i) The reporter is not required to attend. The cases relied on by the Claimant relate to fitness to practice cases associated with external statutory bodies, whereas the university disciplinary process is an internal process.

    (ii) The minutes of the meeting demonstrate a detailed consideration of the evidence from the reporter and directly from the Claimant, paying particular attention to inconsistencies of the Claimant. The minutes also show that the Committee was aware of the limitations of the value of hearsay evidence and the limitations in their ability to test the Complainant's evidence. There was no indication that unreasonable weight was given to the hearsay evidence and careful consideration was given to the inconsistencies in the Claimant's case.

    *(iii) "There is nothing to suggest that they weighted the reporter's evidence inappropriately. They did clearly focus attention on both consistencies and inconsistencies in all of the evidence available and sought to mitigate the hearsay evidence by focusing on issues highlighted by the respondent's evidence."*

    (iv) As regards the suggestion that the Committee had failed to cross-examine the Claimant, it was up to the Committee to determine what questions and issues to raise, and there is nothing to suggest that they failed to clarify any material issues.

## IX Submissions of the University

52. The University submits that it was a matter for the second Disciplinary Committee to decide whether to refuse to admit her evidence. There was no rule of law preventing a disciplinary body from admitting such evidence: see *Bonhoeffer* above. The Disciplinary Committee had taken into account (i) the attempts to get the Complainant to attend, (ii) the reason given for non-attendance (not wanting to re-live what had happened to her again), (iii) the attempts and the reason had in the view of the Disciplinary Committee been reasonable, and (iv) it considered the detailed submissions on behalf of the Claimant and kept them in mind in its decision.

53. The University submitted that the Claimant is unable to show that the decision to admit the evidence and the consideration of the issues was Wednesbury unreasonable and/or procedurally unfair or that as a matter of law it was obliged to dismiss the case.

54. The University submitted that the hearing was of a different order from a disciplinary proceeding of a regulator which were capable of affecting a person's income or livelihood or ability to pursue a chosen profession or career. Further, the proceedings were confidential unlike disciplinary proceedings of a regulator.

55. The University submitted that its position was reinforced by the existence of a good reason for the Complainant's non-attendance. She had been willing to attend the first disciplinary hearing. There was no power to compel her to attend, nor could it reasonably be expected that pressure would be put on her to attend for a second time.

56. The University submitted further that the decision was not based on the Complainant's evidence in that (i) it did not uphold one of the elements of the alleged sexual misconduct, the resumption of the conduct at about 10am, because the Complainant was not present to answer questions, and (ii) it referred to the Claimant's own evidence and admission in upholding the other elements.

57. It was said to be relevant that the Claimant did not indicate to the second Disciplinary Committee what questions the chair would have been requested to ask the Complainant if she had attended. It was also said to be relevant that the further disciplinary hearing followed an earlier one where (i) the Complainant had attended, (ii) no questions were submitted by the Claimant, and (iii) misconduct was found, and expulsion was ordered.

## X Discussion

58. The starting point is that the High Court has held in this case that there was an entitlement to legal representation. In so doing, notwithstanding that this was not a criminal case or a disciplinary case before a regulator, not only did it hold that the principles of natural justice applied, but specifically the Court held that under the contract between the parties and on the facts of the instant case, there was a right to legal representation. There were specific reasons why these were regarded as part of natural justice in the instant case including the following:

   (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."* (para. 90(i))

(ii) the significance of what was in issue strongly points towards the need for legal representation. There would be a legitimate sense of injustice about being denied legal representation in the disciplinary proceedings. The decision to permit legal representation was *"based on the circumstances of this case"*: see para. 92.

59. A central feature of this in the instant case was for the purpose of being able to ensure that proper questioning could take place of the Complainant. This was expressed by reference to the obligation to apply natural justice at each stage. This would enable the evidence of the Complainant to be tested by questioning including for the legal representative to make submissions as to appropriate questions for the Chair to put to the Complainant. Mr Southey KC expressed this at para. 96 as follows:

(i) *"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 (Bonhoeffer and Mungavin)."* (para. 96);

(ii) The questions could be filtered through the chair. A major reason for having legal representation was in order for those questions to be formulated by the legal representative. It did not suffice for a list of questions to be provided in advance of the hearing. Mr Southey KC at para. 93 referred to:

> *"i)…a key benefit of a representative being made 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....*
>
> *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."*

(iii) *"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."* (para. 90(iii))

60. There is a part of the judgment of Mr Southey KC which has particular resonance in the events which have subsequently happened, namely the refusal of the Complainant to attend. This is what he said at para. 90(vi), appearing criteria from the Tarrant case. He said:

> *"I have been particularly concerned by the need for fairness between the Claimant and the Complainant. There is an obvious risk that Complainants may be 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."* (emphasis added).

61. I respectfully agree with the reasoning of Mr Southey KC in his judgment including that compliance in the disciplinary process with the rules of natural justice was incorporated into the contract. That included a right in the circumstances of the contract to be legally represented and to the participation of the legal representative in the process including a right to make submissions including about appropriate questions to be put to witnesses. The assumption in the circumstances of this case was that this included the right to provide questions to be asked of the Complainant, albeit that this was on the assumption that the Complainant would be in attendance.

62. I am fortified in my agreement with the judgment of Mr Southey KC not only by the quality of the reasoning, but also by the fact that the judgment was the subject of not one, but two applications for permission to appeal which were both rejected with relatively detailed reasoning for such applications. The first was to Laing LJ who found that the principles of natural justice applied on the parties' approach to the contract. The Judge had carefully examined the right to cross-examine in paras. 56-71 of the judgment. On the facts of the instant case, it would be a breach of natural justice to bar

legal representation: see the references above to para. 90 of the judgment. Laing LJ particularly drew attention to the importance of safeguarding the position as set out at para. 93 of the judgment (as quoted above). This was particularly important because of the assumption that any cross-examination would be filtered through the chair, but with the legal representative having the opportunity to make representations in respect of such concerns as there may be.

63. The second was an attempt to have a second appeal pursuant to the provisions of CPR 52.30 before David Richards LJ (as he then was). This was among other things in respect of the decision of Laing LJ that the decision of the Judge was wrong because it could not be reconciled with the decision of the Supreme Court in *R (G) v Governors of X School* [2012] 1 AC 167. Laing LJ at para. 6 had found that the Supreme Court had not considered what the common law required in the contractual context of this case. David Richards LJ rejected the submission that Laing LJ had not adequately distinguished the case of G. Before this Court, there has been a further attempt to say that the decision of Mr Southey KC's decision was wrong because it was inconsistent with G. I reject that submission in the light of the reasoning of Mr Southey KC and the reasoning of Laing LJ and David Richards LJ. Para. 6 of the decision of Laing LJ read as follows:

> *"A's complaint is that Judge's decision is 'unprecedented and impossible to reconcile with existing case law', in particular, the decision of the Supreme Court in R (G) v Governors of X School [2012] 1 AC 167. The Supreme Court held that article 6 did not apply to an internal disciplinary hearing which led to the dismissal of a teaching assistant because the Independent Safeguarding Authority ('the ISA') would ultimately decide whether the Claimant could continue to work as a teacher, so that the decision of the governors was not a determination of his civil rights and obligations. The Supreme Court did not consider what the common law might have required, as that issue was not before it. The issue was whether article 6 would require legal representation both at the internal disciplinary hearing and before the ISA (judgment, paragraphs 32 and 33). It was accepted that legal representation was permitted in the ISA procedure. The decision in G does not arguably show that the Judge's conclusion in this case was wrong. It does not show that article 6 does not require legal representation and it simply does not deal with, still less decide, the content of the rules of natural justice at common law in the contractual context of this case."*

64. It therefore follows that as matters stood at the outset of the hearing of the second Disciplinary Committee that the right to funnel questions of the Complainant through the chair had been established, as had the right to legal representation. This included the protection for the Claimant of the legal representative making submissions as the case progressed as to the questions being asked and thereby ensuring that the Claimant's position was protected so that his case was put. I intend to follow the decision of Mr Southey KC in his findings about the application of natural justice and the right to legal

representation and the right of the legal representative to make submissions and to advance questions to be asked of the Complainant.

65. The University submits that this Court is not bound by the reasoning of Mr Southey KC because a different issue arose consequent upon the non-attendance of the Complainant. There was therefore no possibility of questioning of the Complainant at that hearing. The question was whether the interviews and documents of the Complainant were admitted as hearsay evidence, and, if admitted, what weight was given to them. That was a different issue from the matters which had been engaged by Mr Southey KC.

## XI Failure to give proper or adequate consideration to the question of admissibility

66. In my judgment, the second Disciplinary Committee did not give proper or adequate consideration to the question of admissibility. This can be seen in part from the advice that was given to the second Disciplinary Committee. The Chair confirmed that the second Disciplinary Committee had received advice from the legal adviser in the following terms *"there was no general prohibition on relying on hearsay evidence in internal disciplinary cases to which the strict rules of admissibility of evidence did not apply: the panel had to act fairly and reasonably"*.

67. In context, this was inadequate. It was literally true that there was no general prohibition, but this gave the wrong emphasis to the second Disciplinary Committee. The judgment of Mr Southey KC had specifically recognised the right to legal representation including for the purpose of making submissions about questions to the Complainant. The judgment did so not because of general rights, but specifically due to the facts of the instant case, particularly having regard to (a) the egregious nature of the allegation, (b) the fact that the allegation turns solely or principally upon the hearsay evidence, (c) the potential consequences to the degree and career of the Claimant, (d) the fact that the allegation was hotly contested. The admission of the evidence without the opportunity to test it by questioning was capable of depriving the Claimant of a fundamental protection indicated in the judgment of Mr Southey KC. This being the case, it was necessary for the second Disciplinary Committee to consider whether it could still be fair and reasonable to admit hearsay evidence of the Complainant when it could not be tested. This is a very different emphasis from the way in which it was expressed in the advice of the legal adviser.

68. The second Disciplinary Committee did not put the question in this way. Instead, the issue of admissibility was considered by the second Disciplinary Committee in a relatively cursory manner. Following submissions by the Claimant, the Chair informed the Claimant that the University had a duty of care to both parties and the hearing would continue with or without the Complainant. It did not follow from any duty of care (if one existed) that there was a duty to admit evidence which could not be tested to save the process. Even allowing for that to be the case, the central issue was not seeking to do right to both parties, but seeking to have a process that was fair and reasonable. In the words of Stadlen J at para. 129 of *Bonhoeffer "There is no public interest in a wrong result."*

69. The Chair informed the Claimant that it was reasonable to continue and the second Disciplinary Committee would attribute weight to the Complainant's evidence. This

ignored the fact that in some cases, it will not be an answer that reduced weight is given to the statements: see the citations from Keene LJ in *Sim* and from Stadlen J in *Bonhoeffer* above. There are cases on their own facts where the hearsay evidence should be rejected altogether as inadmissible since fairness cannot be achieved by their admission. The advice received and/or the decision of the second Disciplinary Committee had the effect that the hearsay was admitted subject to the weight to be attributed to the statements instead of giving anxious consideration as to whether justice could be done by admitting the statements at all if they could not be tested.

70. This consideration about admissibility was particularly required in the light of *Sim, Bonhoeffer* and *Thorneycroft* in particular where:

(i) the statements were the sole or decisive evidence in relation to the allegations;

(ii) the allegations were egregious and were capable of having a serious effect on the Claimant and his career;

(iii) the allegations were the subject of real challenge, in this instance, by the account of the Claimant;

(iv) the evidence was not demonstrably reliable and there was no means of testing reliability other than by cross-examination of the maker of the statements.

71. The submission on behalf of the University is that the evidence of the Complainant was neither the sole or decisive basis of the case against the Claimant. It was submitted that in part at least the case stood on the inconsistencies in the evidence of the Claimant. The case of the University is that having heard from the Claimant, the second Disciplinary Committee was entitled, as it did, to find the case against the Claimant proven on the balance of probabilities. This involves consideration of inconsistencies of the Claimant as to his judgment being impaired by reason of intoxication whereas in other aspects of his account, he gave evidence about (a) being able to walk home the Complainant, (b) going to an ATM to withdraw money to pay his rent, (c) having the presence of mind to text and call friends to ask for advice, and (d) weighing up that it was too noisy to move the mattress or to move the dogs from the sofas. He also must have recognised the opportunity for sexual activity because of the narrowness of the bed. Further, the apology was interpreted as being for his behaviour and the second Disciplinary Committee was not convinced by the Claimant's explanation.

72. These are matters to consider in the context of the case as a whole. However, they were far from decisive of the case. They did not alter the fact that the central issue was the evaluation of whose evidence was preferred as between the Complainant and the Claimant. They were only aspects of the Claimant's evidence, and it fell very far short of considering the totality of the evidence of the Claimant about the intimacy including how the kissing and touching started and continued, how the undressing occurred, who got the condom from the Complainant's bag and much more. In my judgment, these were matters which could not be evaluated fairly and reasonably without hearing questions addressed to the Complainant as well as to the Claimant.

73. The fact that the Claimant's evidence was capable of drawing questions and possible inferences against him does not mean that the decisive evidence was not the uncorroborated evidence of the Complainant about what had occurred. The second Disciplinary Committee recognised that this evidence had had an important effect on their considerations because it found it to be an *"honest and cogent account."* It is apparent from element (2) of its decision, that it placed weight on her account as being consistent with diminished capacity and on the evidence about her sitting on the toilet and the reference of the Claimant to her passing out thereafter.

74. In my judgment, this is very telling. It was not fair or reasonable for the second Disciplinary Committee to treat the Complainant's evidence as being *"honest and cogent"* in circumstances where there had been no questioning by the chair on her account. The first purpose identified above of cross-examination in *Mungavin* above is *"to seek to undermine or qualify or mitigate the effect of evidence they have given…for example by challenging the credibility or reliability of the witness, or otherwise testing the completeness or accuracy of their evidence"*. In circumstances where that is reasonably required, it is not possible on the facts of this case to ascertain whether the evidence is honest or cogent without questioning of the Complainant. Neither the honesty nor the cogency could be tested because the Complainant was not willing to attend and to be asked searching questions. Experience of cross-examination is precisely that an account which appears to be honest and cogent frequently appears following questions to be thoroughly unsatisfactory. For the second Disciplinary Committee to have arrived at the conclusion that the untested evidence of the Complainant was *"honest and cogent"* was in my judgment a demonstratable breach of natural justice and a characterisation of the evidence which was Wednesbury unreasonable.

75. A criticism made by the University of the Claimant was that there were not prepared questions for the cross-examination with the implication that this was a theoretical construct. It could have been undertaken to prepare such a list, and it might have been forensically effective to make the point. It was not fatal that it was not done. It was obvious what kind of questions would have been put. It suffices by way of example only to identify areas which required detailed probing were whether and how:

(i) the Complainant made her way to the Claimant's bedroom (there were contradictory accounts of the Complainant saying that she was dragged from the bathroom to the bedroom but withdrawing that allegation, whereas the Claimant's account was that she made her way from the bathroom to the bed, and the change of account needed to be probed);

(ii) the Complainant removed her coat and bag (it was necessary to test whether this was by the Claimant knowing that the Complainant had passed out, and it was taking advantage of a person unable to consent on the Complainant's case or assistance proffered to someone who wished to be assisted);

(iii) the Claimant and the Complainant removed each other's clothes (the opposing account of the Claimant needed to be put to the Complainant including that there was no tearing of garments or bruising to the Complainant);

(iv) both parties touched each other including private parts and/or orally stimulated each other (the versions of the parties were at odds, and it was necessary to test the Claimant's version of events against that of the Complainant);

(v) the Complainant got up from the bed and removed a condom from her backpack (it was of great importance in working out whose version was more likely to be correct whether as the Claimant suggests, the Complainant pulled out the condom from her own backpack);

(vi) the Complainant engaged actively in the sexual acts;

(vii) the Complainat was awake throughout and was conscious and aware of what was going on;

(viii) the Complainant did not stop the Claimant or tell him to stop.

76. A further unsatisfactory matter is the concentration on the inconsistencies of the Claimant. Although at one point, there was reference to the inconsistencies of the parties, only inconsistencies of the Claimant were identified. The fact that the Complainant's account was said to be *"honest and cogent"* shows that there was no identification of inconsistencies of the Complainant. Yet it was necessary to identify inconsistencies of the Complainant including but not limited to the following:

(i) As noted above, the Complainant had originally said that the Claimant had dragged her from the bathroom to the bedroom, but changed this later to say that she made her own way to the bedroom. There was no opportunity to test this change of account in questioning.

(ii) The finding that the Complainant was too intoxicated to provide consent was despite the very specific recollections of the Complainant in interview to the Investigating Officer about the sexual activity, and the sequence of events. Assertions about being too psychologically traumatised to do anything about it required to be tested by cross-examination through the chair.

(iii) The Complainant referred to finding a condom lying around which told her something about what had happened. However, this was in contradiction to her evidence that he got up to get a condom and tried to penetrate her vagina with his penis. This inconsistency was something which was capable of indicating that the account of the Complainant that she was not a willing participant was unreliable. Whatever the Complainant's evidence; this was contradicted by the Claimant's evidence that it was the Complainant who got the condom from her bag. None of this was tested in questioning.

77. This was a case where the evidence of the Claimant fundamentally contradicted the evidence of the Complainant, and where it was essential for the purpose of fairness to have an opportunity to test it.

78. It therefore follows that in breach of contract and contrary to natural justice and in a manner which was Wednesbury unreasonable, the second Disciplinary Committee:

(i) admitted hearsay evidence when it was unfair and unreasonable to do so;

(ii) gave weight or disproportionate weight to the account of the Complainant, even finding that her untested evidence was *"honest and cogent"*.

79. The second Disciplinary Committee acted on inadequate legal advice. It acted on the evidence of the Complainant when it was not fair and reasonable to admit the evidence or to attach weight to the evidence in circumstances where she did not attend in person or remotely to be questioned on her account.

80. Although there were important matters to consider before and after the sexual activity, it was critical to appraise and evaluate the competing accounts of activity from the moment that the Complainant lay on the bed. It was in my judgment critical to have the Complainant to answer questions such that it was not a fair process to find that this could be dispensed with by reliance on hearsay evidence in this case. In relying on the hearsay evidence and dispensing with cross-examination consequent on the non-attendance of the Complainant, the second Disciplinary Committee acted in a manner which was Wednesbury unreasonable, that is to say that it acted in a way that no reasonable tribunal would act and deprived the Claimant of the opportunity adequately to defend himself.

## XII The issue of whether there was a good reason for the non-attendance of the Complainant.

81. I find that this is dispositive of the case even if there were a good reason for the non-attendance of the Complainant and even if the University had done everything reasonably possible to procure the attendance of the Complainant. It is right to record that the Courts attach importance to the quality of the reason for the non-attendance of the maker of the hearsay statement. The case of *Bonhoeffer* (cited above) refers to the quality of the reason for the non-attendance of the Complainant. In that case, consideration was given to the safety of the witnesses who might be made to suffer for their evidence from certain people in Kenya. On this basis, if there is a good reason given for the non-attendance, that might be an important factor in rendering the hearsay evidence admissible. Likewise, it has been said that even without a good reason, the evidence may be admissible.

82. In my judgment, it must depend on the facts of each case. Even if a good reason will sometimes suffice for the admission of the hearsay evidence, there must also be cases where even if a good reason is established, it cannot be fair and reasonable to admit the evidence without the opportunity to question the maker of the hearsay statement. In my judgment, the analysis of the case above is such that even if there was a good reason

for the non-attendance of the Complainant, it is not fair and reasonable to rely upon the Complainant's evidence without having the opportunity to test her evidence by cross-examination.

83. In any event, I am not satisfied that a good reason for the non-attendance of the Complainant has been established. In its findings, the second Disciplinary Committee found, as noted above, that whilst the Complainant did not attend the meeting:

(i) the University had taken sufficient steps to seek to secure her attendance; and

(ii) the reasons the Complainant adduced for not attending were reasonable in the circumstances.

84. There was no or no adequate reasoning to support this. On the contrary, it was not demonstrated that the University had taken sufficient steps to secure her attendance. Prior to and at the outset of the hearing the Claimant was not provided with any reason for the Complainant failing to attend at the commencement of the hearing the Claimant was not given any explanation other than that the Complainant had contacted the University Officer and informed her that she may not attend.

85. At 11.40am, the Chair asked the University Officer what attempts had been made to get the Complainant to attend the hearing. The minutes record the following.

> *"The University Officer responded to say that both the reporter and respondent in such cases were offered a Student Liaison Officer (SLO). The reporter in this case had an SLO who had been in touch with her and had had numerous conversations and e-mail exchanges. The reporter had felt unable to come and re-live what had happened to her again."*

86. There are a number of shortcomings in the foregoing. In particular:

(i) the alleged good reason was not proven or shown to the Claimant: there was no identification of what the numerous conversations were, how and when they took place and what was said, nor were the email exchanges produced;

(ii) the reason given of not feeling able to come and re-live what had happened to her could not be appraised as to whether the inability was due to trauma or to wishing to avoid having her evidence tested, challenged and undermined by questioning prompted by a legal adviser;

(iii) there was no evidence of what attempts, if any, had been made to persuade the Complainant to attend including informing her of the real possibility or likelihood that without her attendance, the complaint may not proceed;

(iv) there was no evidence that the Complainant was offered her own legal representative. Bearing in mind that this had been canvassed in para. 90(vi) of the judgment of Mr Southey KC, it was not too much to expect that this ought to have been offered or at least there was no reason why this could not have been offered or would not have been appropriate. Since there was no evidence that it had been offered, there was no evidence as to the reaction of the Complainant to such an offer.

87. The argument on behalf of the Claimant was that the reason for the refusal of the Complainant to attend was unsatisfactory. There are many cases where a Complainant has to give evidence more than once (e.g., because a trial collapses or a jury does not agree first time round). The Claimant submitted that it meant that the Complainant was concerned to have her case tested, which was consistent with a lack of veracity of her account. The University submitted that the reason given to the second Disciplinary Committee about not wishing to relive the experience was a genuine and a good one.

88. I do not accept without more the submission of the Claimant. Nor do I accept without more the submission of the University. There is simply a paucity of evidence to establish the full reason for the non-attendance of the Complainant and as to whether could reasonably have been done to attempt to procure her attendance. It follows that whilst a good reason for non-attendance was not on the facts of the case an answer to the application to admit hearsay evidence, a good reason has not been established.

89. What then is the answer to the concern of the second Disciplinary Committee that it owed a duty of care to a complainant who feels overcome by the process? The answer is that the real duty of care is to have a fair process which does not lean towards one side or the other. Mr Justice Stadlen's dictum about affording fair and proper procedural safeguards has a particular resonance in the instant case as does his pithy statement that *"there is no public interest in a wrong result."* Each case must be appraised on its own merits and not by floodgate arguments about cases in general.

90. The solution for a university might be to do more than was done in this case to seek to procure the attendance of the Complainant. It is not to have a process which protects and makes allowances for a reporter at the expense of procedural safeguards required for a fair process on the facts of a particular case. In the instant case, it is not fair to look at parts of the evidence, which is to fasten in on inconsistencies of the Claimant and not those of the Complainant. Nor is it fair to fasten in on aspects of the account before or after the critical events whilst not looking at the totality of the events: in this case, looking at the conduct before and after the Complainant was in the bedroom without having a detailed examination of the competing accounts of what happened in the bedroom.

## XIII Conclusions

91. On the basis of the decision of the High Court (Mr Southey KC) with which I have expressed my respectful agreement, natural justice required the Claimant to have a full opportunity to defend himself including by asking questions through the chair. The reason for non-attendance of the Complainant and the steps taken to procure her

attendance have been assumed to be correct, but there is no evidence that they have been examined with any rigour. On this basis, there has been a failure of natural justice because on the basis of the decision of the High Court, there ought to have been an opportunity to question the Complainant at least through the chair. Without this, the process was unfair.

92. If, contrary to the foregoing, the reason given was sufficient to amount to a good reason for non-attendance, and sufficient was done in order to procure the attendance of the Complainant, it was still a breach of natural justice for the hearsay evidence to be admitted. The reasons for this are as follows:

(i) The evidence against the Claimant depended on the veracity of the Complainant's testimony. There was no corroboration.

(ii) The case was capable of being damaging to the Claimant in respect of graduating and career prospects.

(iii) The more serious the allegation, the greater the importance of ensuring that fair and proper procedural safeguards were in place.

(iv) If the account of the Complainant was to be admitted, it was critical that her evidence could be tested. Without the Complainant being at the hearing in person or remotely, that vital safeguard was missing. There were numerous disputed issues referred to above.

(v) The very matters on which the second Disciplinary Committee relied were not capable of being decisive without appraising the above points. The significance of the messages and calls to friends or the evidence about the availability of a mattress or whether to accept the account of the Claimant about the messages at 12 midday could not be appraised without a rigorous examination of the inconsistencies of the Complainant's evidence and the conflicts between the Complainant's and the Claimant's accounts.

93. There was no or no adequate consideration as to how the case could fairly continue without the Complainant being available to answer questions and in particular the following:

(i) Even if there had been a good reason for the Complainant's non-attendance and even if all was reasonably done to secure her attendance, the second Disciplinary Committee did not consider whether the case could fairly take place without the Complainant being available in person or remotely to answer questions.

(ii) The numerous areas of contradiction and conflict between the Complainant's and the Claimant's accounts could not be properly assessed without questioning designed to enable findings to be made.

(iii) This could not be avoided by the finding of the evidence of the Complainant to be "an honest and cogent account": that was to reach a conclusion not available without the evidence being properly tested and considered, and the finding itself was therefore evidence of a flawed process.

(iv) The failure to highlight inconsistencies in the evidence of the Complainant (and only highlighting inconsistencies in the evidence of the Claimant) as above demonstrates that there was an uneven treatment in the evidence as a whole such that the process was unfair and unreasonable.

94. In the event that contrary to the foregoing, the second Disciplinary Committee was entitled in the circumstances to admit the hearsay evidence and give it appropriate weight, the second Disciplinary Committee has acted in a Wednesbury unreasonable manner by giving the hearsay statements weight far outside what could reasonably and fairly be given to them. Whilst it purported to say that it would give appropriate weight to the statements, the second Disciplinary Committee erred in at least the following respects:

(i) Having regard to the numerous areas of contradiction and conflict between the Complainant's and the Claimant's accounts, the 'honest and cogent' finding went beyond the weight that could reasonably be given to the Complainant's account without the opportunity for challenge.

(ii) As noted above, there was an unfair and unreasonable failure to have regard to (a) inconsistencies of the Complainant's evidence, and (b) the fundamental and untested contradictions between the Complainant's account and the Claimant's account.

(iii) It followed that even if proper weight could be given to the hearsay statements, in the instant case, a Disciplinary Committee properly directed could not fairly and reasonably find the case proven without the opportunity for questioning of the Complainant.

95. The University relies upon the fact that the further sexual misconduct of 10am was not upheld without the Complainant being present to answer questions. The difference may have been that the Claimant did not accept that this had occurred and so there was no confirmation from the Claimant's evidence of sexual activity in respect of this element of the allegation. This does not show that the second Disciplinary Committee gave sufficient weight to the inability to cross-examine the Complainant. On the contrary, it simply added to the points above as to how the Complainant not being present to answer questions should have been a barrier to the case of sexual misconduct being treated as proven.

96. There are wide ranging declarations sought by the Claimant, but this judgment is limited in its ambit. Whilst accepting various of the submissions of the Claimant, and rejecting various of the University, about the failure to follow a fair and a reasonable process, this Court is not making findings about what did or did not occur on the night

in question. In particular, it is not for this Court to make conclusions as to whether the Complainant had capacity or was able to give consent. The very criticisms of the failure to have a fair and reasonable process preclude this Court from being able to assess the matters without questioning of the Claimant and the Complainant.

97. The conclusion here is limited to the fact that the findings occurred due to the admission of the hearsay evidence and/or to attaching unfair and unreasonable weight to the hearsay evidence of the Complainant. In the circumstances of this case, without such evidence being properly tested, it was not possible to find the case against the Claimant proven, such was the nature and extent of the inconsistencies and contradictions which required to be tested.

98. Another limb of the case of the Claimant was that the second Disciplinary Committee should have cross-examined the Claimant in respect of a number of important disputed issues and that their failure so to do must be treated as an acceptance of the truth of his evidence. I do not accept this as an independent complaint. That is to impose too heavy a burden on a Disciplinary Committee and it is falsely to equate its position with that of a party in adversarial litigation. It is nonetheless a part of an overall picture in this case which is that the second Disciplinary Committee reached views without the evidence as a whole having been fairly and reasonably scrutinised in a balanced manner. One feature of this was that the evidence of the Claimant was not subjected to any rigorous examination such that he stood to be condemned by his own oral responses.

99. I have therefore concluded that the Claimant's case succeeds to the effect that the decision of the second Disciplinary Committee was in breach of contract as amounting to a breach of natural justice and/or was unfair and unreasonable. For the reasons which I have given, so too was the decision of the Discipline Appeal Committee which did not correct the breaches of natural justice to which I have referred above.

100. A point is taken by Counsel for the University that the remedy sought in addition to a declaration of an order setting aside the decisions of the second Disciplinary Committee and the Disciplinary Appeal Committee should not be granted because they are remedies in judicial review. I have not been addressed in any detail in respect of this. The failure to follow natural justice by the first Disciplinary Committee led in effect to the first decision being treated as having set aside or as having no effect in that there was an order of specific performance which involved retrying the case. The consideration at this stage is how to give effect by way of a declaration to the conclusion that the decision of the second Disciplinary Committee was in breach of contract as amounting to a breach of natural justice and/or was unfair and unreasonable. The precise form of relief is to give effect by a declaration or otherwise that the decisions made should have no effect. If the parties cannot agree a form of relief, then as part of the consequentials and with further short submissions on the point, I shall adjudicate on this point.

101. For all these reasons and to the extent set out above the case of the Claimant succeeds.