

Neutral Citation Number: [2020] EWHC 206 (QB)

Case No: QB-2019-003966

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19 March 2020

**Before :**

**Ms Margaret Obi**

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**Between :**

**AB**

**Claimant**

**- and -**

**University of XYZ**

**Defendant**

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

Hearing date: 17 January 2020  
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**APPROVED JUDGMENT**

## **Ms Margaret Obi:**

### **Introduction**

1. This is the public version of my judgment relating to the Claimant's application for an interim mandatory injunction.
2. On 16 December 2019, the Claimant was expelled from the University of XYZ (the University) following a finding of sexual misconduct. The allegation was found proved at an earlier hearing which took place on 12 November 2019. The Claimant did not attend either of the hearings.
3. At the time of his expulsion the Claimant was a final year student; he was due to complete his studies in June 2020. The Claimant seeks an order permitting him to return to the University to continue his studies with immediate effect until further order of the Court.
4. The Claimant alleges that the University did not have the contractual right: (i) to consider the complaint; (ii) commence the investigation; or (iii) determine the complaint including the imposition of the sanction. There are two limbs to the Claimant's argument. First, the University did not have jurisdiction to determine the complaint based on contract law principles. Secondly, the Claimant was entitled to be represented at the disciplinary hearing due to the seriousness of the allegation and the impact it would have on his future career in accordance with the principles of fairness and natural justice.
5. The application is of critical importance to both parties. If the Claimant is not permitted to return to the University to resume his studies, he will not graduate in 2020. He will have to repeat his final year either at the University or some other higher education institution depending on the outcome of his substantive claim and any fresh disciplinary hearing. The University, on the other hand, has found the allegation of sexual misconduct proved. A mandatory order, requiring the University to allow the Claimant to resume his studies, has the potential to undermine the disciplinary process. The University raised additional consequences which are addressed below.
6. An anonymity order was granted, in respect of both parties, by John Bowers QC (sitting as a Deputy High Court Judge) on 19 December 2019. At the outset of this hearing a representative of the press made an application for the anonymity order to be lifted. Although I refused the application, I made it clear that the anonymity order would be reviewed once my judgment was handed down.

### **Background**

#### Overview

7. On or around 10 September 2018, the Claimant travelled to another European city as part of the Erasmus Programme, which is a European Union Exchange programme. His placement was between 10 September and 25 January 2019.
8. As part of the exchange programme the Claimant studied at University A. He arranged his own accommodation and rented a private apartment in the city. The apartment did not form part of the campus and was not owned or managed by University A. The property was owned by a private landlord and the Claimant shared the apartment with a fellow student.
9. During the Claimant's time at University A he met a number of new friends, including the Complainant. The Claimant was introduced to the Complainant on or around September 2018 by a friend. The Complainant is not a student of the University of XYZ; she attended another university in the UK but was also studying at University A.

### The Complaint

10. On 13 November 2018, the Claimant met a group of friends for drinks; they attended a number of bars. At around 23.00, the Claimant met the Complainant at a pub with other fellow students. The Claimant, his friends and the Complainant had all consumed alcohol.
11. After midnight, on 14 November 2018, the Claimant decided to join a group of friends, including the Complainant, for drinks at a nightclub. At around 03.30 one of the Complainant's friends asked the Claimant if he would walk the Complainant back to her accommodation. The Claimant agreed. On the way to the Complainant's accommodation, she asked the Claimant if she could use his toilet as his apartment was nearer. The Claimant agreed. At the Claimant's apartment the Complainant used the toilet. She remained in the bathroom for a considerable period of time. When she left the bathroom, she lay down on the Claimant's bed.
12. The events which followed led to the complaint of sexual assault. The Claimant became aware of the complaint on or around 3 December 2018, following receipt of documents from the University.
13. On 1 February 2019, the Claimant received notification that an investigation would be undertaken in respect of the complaint. The Claimant agreed to engage in the investigation process.
14. As part of the investigation the Complainant was interviewed. She stated that the Claimant lay down beside her on the bed touched her sexually, stripped her of all her clothes and attempted to have sexual intercourse with her without her consent. She explained that she felt unable to prevent what happened to her as a result of a combination of her intoxicated state and the effects of the trauma of what was happening. She stated that they subsequently fell asleep until late morning. When they woke later that morning the Claimant attempted further non-consensual sexual activity. The Complainant pushed him away, got dressed, and left the apartment.

15. The Claimant was also interviewed. His version of events was very different. He stated that he lay down bedside the Complainant on his bed and they kissed consensually. They removed each other's clothing and engaged in other sexual activities. The Complainant was a willing and active participant throughout. They fell asleep. The Claimant denied that there was any further sexual activity. The Complainant left the apartment before the Claimant woke up. The Claimant provided a similar account in his first witness statement dated 7 November 2019.

### The Investigation

16. The investigation was conducted by an independent sexual misconduct investigator. As part of the investigation the investigator had access to a number of text messages that were sent from the Claimant to his friends in the early hours of 14 November 2019 and a text message from the Claimant to the Complainant after she left his apartment. The investigator, in addition to interviewing the Complainant and the Claimant obtained information from a number of their mutual friends. The investigation report is dated 28 February 2019.
17. On 9 October 2019, the Claimant received a letter from the University which stated:

*“Following a review of the investigation findings, it has been determined under Section 6.1.2 of University Regulation 23: Regulation Governing Student Misconduct and Disciplinary Committees, that a Disciplinary Committee should be convened to hear the allegation made against you:*

*On 14 October 2018 you committed sexual misconduct against a fellow Erasmus student...”*
18. The letter went on to state that section 2.2 of Regulation 23 provides that an offence committed under the University's Sexual Misconduct Policy will be dealt with under Regulation 23. The University confirmed that the Student Disciplinary Review Panel decided that the complaint fell within the University's Sexual Misconduct Policy and therefore it should be heard by a Disciplinary Committee. The Claimant was notified that the disciplinary hearing had been scheduled to take place at the University on 23 October 2019.
19. On 16 October 2018, the Claimant's legal representative sent a Letter before Claim. The letter stated that (i) the alleged sexual misconduct did not fall within the Sexual Misconduct Policy and (ii) the Claimant was entitled to submit evidence and be legally represented at the hearing. The legal representative went on to state that the Claimant was “...not in a position to attend the hearing on 23 October 2019, due to the fact that he wishes to prepare evidence with a statement of truth and also wishes to be represented.” The University was informed that an injunction would be sought to prevent the hearing from proceeding on 23 October 2019.
20. On 18 October 2018, the University notified the Claimant's legal representative that the hearing would be postponed to allow additional time for the Claimant to prepare.

21. The Claimant was notified of the new date for the disciplinary hearing on 20 October 2019. On 22 October 2018, the University sent an email to the Claimant's legal representative which stated:

*"We considered the request for a later Disciplinary Committee and we have been able, with the agreement of the reporting party, to use another date. The Disciplinary Committee will take place on 12 November 2019 and we have invited your client to attend.*

*In terms of the jurisdiction of the [University's]...Student Sexual Misconduct Policy Section 3(ii) of the policy states that the policy applies when sexual misconduct 'occurs whilst a student is engaged in any University or Student Union related activity (including placements or trips).' Your client was representing the University...on the Erasmus International Exchange Programme, which is covered under the point noted above.*

*This is not a legal process. We have alleged that your client has breached the [University's] regulations. The points raised about the application of the policy are dealt with in order below.*

- *Your client can submit evidence for the Disciplinary Committee to consider. This was detailed in our letter to your client on 9 October 2019, and confirmed in our email to you on 11 October 2019. We will require any written evidence that your client may wish to present in rejection of the allegation by Monday, 4 November 2019.*
- *Your client has also had the opportunity and provided a witness statement to the Investigating Officer...during an investigation meeting on 7 February 2019.*

*Our policy states that your client may have an accompanying person with them in a support capacity only. As previously explained should your client wish you to attend in this role then we will seek the permission of the Chair of the Disciplinary Committee. It is not the role of the accompanying person to present the case, or answer questions on the student's behalf. The accompanying person does not have the right to advocate for the student or cross examine any members or attendees during the meeting."*

22. On the same date (22 October 2019), the Claimant's legal representative responded by email. He stated that he did not agree with the construction of the Sexual Misconduct Policy and expressed concern that the University did not consider it necessary to comply with the rules of natural justice in respect of legal representation.
23. On 25 October 2019, the University's Legal and Compliance Services sent a letter to the Claimant's legal representative. The letter stated, amongst other things, that:
- i. The Letter of Claim is not compliant with the pre-action protocol.

- ii. Notwithstanding the parties differing interpretations of section 3(ii) of the Sexual Misconduct Policy (*‘occurs whilst a student is engaged in any University or Students’ Union related activity (including placements and trips)’*) of the Sexual Misconduct Policy, section 3(vi) (*‘in the view of the University poses a serious risk of disruption to the University or members of its community’*) is also engaged. In the view of the University the serious nature of the sexual misconduct complained of poses a risk of disruption to the University or members of its community. Jurisdiction is not, therefore, an issue.
  - iii. There is no legal right for the Claimant to be legally represented at the disciplinary hearing.
24. On 5 November 2019, the University sent a copy of the papers for the Disciplinary Committee to the Claimant and his legal representative.
25. On 11 November 2019, the University (having received a sealed copy of the Claim Form filed by the Claimant) confirmed in an email that the hearing before the Disciplinary Committee would be proceeding on 12 November 2019.

#### The Disciplinary Committee

26. On 12 November 2019, the Disciplinary Committee convened to consider the allegation. The Agenda states:
- i. That the allegation, if proved, is a direct breach of the University’s Sexual Misconduct Policy.
  - ii. That the Claimant has rejected the allegation.
  - iii. That questions between the Claimant and the Complainant will be directed via the Chair of the Committee.
27. The Claimant did not attend the hearing. He notified the University in advance that he would not be attending.
28. On 12 November 2019, the University sent an email timed at 17.09 which states:
- “...the Disciplinary Committee found the allegation against your client proven, based on the balance of probabilities. There will now be a process to consider mitigation before a sanction is determined.*
- Your client will be provided with a formal outcome letter and a copy of the minutes from today’s meeting within six University working days.”*
29. The formal outcome letter was sent to the Claimant on 19 November 2019 and enclosed typed minutes of the disciplinary hearing.

30. The Claimant was notified on 2 December 2019 that the mitigation hearing had been scheduled to take place on 16 December 2019. The Claimant did not attend. The Disciplinary Committee proceeded in the Claimant's absence and determined that he "...should be permanently withdrawn from the University, with immediate effect."

### **Procedural History**

31. On 7 November 2019, the Claimant filed a Claim Form with the Court. A copy of the unsealed claim form was served on the University. The claim was for a declaratory judgment that the University had breached the implied contractual term that requires it to act fairly and in accordance with the rules of natural justice. In addition the Claimant sought a prohibitory injunction to prevent the Disciplinary Hearing scheduled on 12 November 2019 from proceeding on the basis that (i) the University did not have a contractual right or power to do so, and (ii) the Claimant is entitled to be legally represented at the hearing.
32. On 8 November 2019, the Claimant filed an application on notice, a draft order and a witness statement with the Court. A copy of the unsealed application was emailed to the University on the same date.
33. On 11 November 2019, a copy of the sealed Claim Form was served on the University by email. The Claim Form was properly served on 15 November 2019.
34. On 20 November 2019 the University was served with the Claimant's Particulars of Claim. The application for an injunction was issued on 24 November 2019.
35. The injunction application was listed for hearing on 19 December 2019. The application was formally served on 5 December 2019 and the University filed and served a defence on 12 December 2019.
36. On 18 December 2019, the day before the application had been listed for hearing, the Claimant gave notice of his intention to amend his application and seek a different interim relief, namely a mandatory order compelling his return to University. At the hearing on 19 December 2019 permission to amend was granted but due to the very late notice of the fundamental change in the application, the hearing was adjourned with direction and an order that the Claimant pay the University's costs thrown away.
37. In accordance with the directions made on 19 December 2019, the Claimant served an amended application, a second witness statement and a witness statement from his mother. The University then served a witness statement and the Claimant served a third witness statement in reply.

### **Relevant Contractual Terms, Regulations and Policies**

#### **Contractual Terms**

38. The parties entered into a contract at the start of the 2016/2017 academic year. The contract entitled ‘University of XYZ Full Time Undergraduate Programmes Conditions of Offer’ states that:

*“Any offer of a place made to you by the University is on the basis that in accepting such an offer you agree to the following terms and conditions, which form part of the contract between you and the University...”*

39. Clause 9 of the contract provides that:

*“By accepting the offer of a place at the University you agree to comply with the provisions of all the University’s Ordinances, Regulations, Rules, Codes, Policies and Procedures that apply to enrolled students from time to time. ...”*

40. Clause 10 draws specific attention to key provisions of the Regulations. Clause 10(d) refers to:

*“The University’s expectations of student behaviour, as set out in Regulation 23. Breach of these rules could result in a disciplinary process and the imposition of sanctions, including expulsion from the University.”*

41. Clause 11 provides that:

*“The University reserves the right to add to, delete or make reasonable changes to the Regulations where in the opinion of the University this will assist in the proper delivery of education. Changes are usually made for one or more of the following reasons: ...”*

42. The reasons listed in Clause 11 include (i) to ensure the Regulations are fit for purpose, (ii) to reflect changes in the external environment (including legal or regulatory changes), and (iii) to aid clarity or consistency of approach.

### Regulation 23

43. Regulation 23 which governed Student Disciplinary Offences from 1 October 2018 provides at section 1.1. that:

*“Misconduct is defined as improper interference 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.”*

44. Section 1.2 of Regulation 23 (October 2018) classifies misconduct as either “minor” or “major” depending on the seriousness of the alleged offence.

45. Section 1.4 provides examples of major offences which includes;



*“sexual misconduct, including but not limited to: sexual intercourse or engaging in a sexual act without consent, attempting to engage in sexual intercourse or engaging in a sexual act without consent...kissing without consent, touching of a sexual nature through clothes without consent...”*

46. Section 2.2 of Regulation 23 (October 2018) defines the jurisdiction. It states that:

*“This Regulation deals with student misconduct as defined in section 1 above . Offences under Ordinances and other Regulations, Codes and Policies may be dealt with under this Regulation where stated in those Regulations and Code. Those include, but are not limited to:...”*

47. Section 2.2 (October 2018) provides a non-exhaustive list of Ordinances and Regulations relating to matters such as cheating in a University test, use of computing facilities and dignity. There is no reference to a sexual misconduct policy.

48. Regulation 23 which governed Student Disciplinary Offences from 21 September 2019 provides at section 1.1 the same definition of misconduct as provided in the previous version. There is no classification of offences.

49. Section 2.2 of Regulation 23 (September 2019) defines the jurisdiction. It states that:

*“Where any 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: ...[a non-exhaustive list of Ordinances, Regulations and Policies is provided]”*

50. The non-exhaustive list relates to matters such as cheating in a University test, use of computing facilities and dignity. It also includes a Sexual Misconduct Policy.

### Sexual Misconduct Policy

51. The Sexual Misconduct Policy came into force on 21 September 2019. It defines sexual misconduct as:

*“...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 hostile or offensive environment), stalking, abusive or degrading remarks of a sexual nature, and a vast range of other behaviours.”*

52. The Sexual Misconduct Policy defines consent and the circumstances when an individual may lack the capacity to consent to a sexual activity. It states that:

*“Consent is the agreement to participate in a sexual act where the individual has both the freedom and capacity to make that decision. Consent cannot be assumed on the basis of a previous sexual experience or previously given consent, and consent may be withdrawn at any time. ...*

*Capacity to consent: Free consent cannot be given if the individual does not have the capacity to give consent. Incapacitation may occur when an individual is asleep, unconscious, semi-conscious, or in a state of intermittent consciousness, or any other state of unawareness that a sexual act may be occurring. Incapacitation may also occur on account of a mental or developmental disability, or as a result of alcohol or drug use.”*

#### Study Abroad Student Protocol

53. The Study Abroad Student Protocol was signed by the Claimant and is dated 31 July 2018.

54. The Study Abroad Student Protocol states that the University expects:

*“[the student] will behave in a way that will not compromise [their] 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 disrupts or prejudices the work or study of others, or could be deemed to, will not be tolerated. Following investigation, behaviour of this nature may lead to [the student] being withdrawn from the Programme, and also may result in action taken under the University’s Disciplinary Regulations.”*

#### The University Disciplinary Procedure

55. The disciplinary procedure is contained within the document entitled “Process for Responding to Disclosures and Formal Complaints of Sexual Misconduct” (Sexual Misconduct Complaints Process).

56. Paragraph 12.22 of the Sexual Misconduct Complaints Process states that:

*“At no point during the Discipline Committee hearing will the Reporting Party and Responding Party be present at the same time. Where appropriate, audio and/or video links will be made available.”*

57. Paragraph 12.23 of the states that:

*“Throughout the Disciplinary Process, students are normally expected to speak on their own behalf”*

## Key Legal Principles

### Interim Injunctions

58. The key legal principle governing the power of the Court to grant an interim injunction is whether it is just and convenient to do so. It was common ground that the well-known case of American Cyanamid v Ethicon Ltd (No1) [1975] 1 A.C. 396 established a useful guideline, namely:

- a) is there a real prospect of succeeding in a claim for a permanent injunction at trial (serious issue to be tried)?
- b) would damages be an adequate remedy?
- c) does the balance of convenience favour the grant of an injunction?

59. In Series 5 Software v Clarke [1996] 1 All ER 853 Laddie J held that the proper approach to whether there is a serious issue to be tried is as follows:

*“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view that the court may reach as to the relative strength of the parties’ case.”*

60. As stated in Evans Marshall v Bertola [1973] 1 WLR 349 and cited in the current (33<sup>rd</sup>) edition of *Chitty on Contracts* at § 27-015:

*“The standard question..., ‘Are damages an adequate remedy?’ might perhaps, in the light of the recent authorities in recent years, be rewritten: ‘Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?’”*

61. In American Cyanamid (§ 408G) Lord Diplock advised that:

*“Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.”*

62. The Court of Appeal in Zockoll Group Ltd v Mercury Communications Ltd [1998] F.S.R. 354 approved the observations made by Chadwick J, in the case of Nottingham Building Society v Eurodynamics Systems PLC [1993] R.S.R. 468 where he stated:

*“Firstly, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’*

*Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.*

*Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.*

*But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."*

### Implied Terms - Fairness and Natural Justice

63. There was no dispute that a term can only be implied where it is necessary to give efficacy to the contract, where it is obvious and where it is capable of clear expression - see Marks and Spencer plc v BNP Parabis Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72.
64. In the context of decision-making powers there is an implied term that the procedural requirements will be exercised fairly. However, the requirements may differ from body to body depending on factors such as size and resources - see Dymoke v Association for Dance Movement Psychotherapy UK Ltd [2019] EWHC 94 (QB). For example, legal representation in internal proceedings is not a universal right. In R v Board Visitors of HM Prison (the Maze) ex parte Hone 1988 1 AC 379, which was an application for judicial review, it was held that the applicants who were charged with breach of prison discipline and were refused legal representation before the board of visitors were not entitled as a matter of natural justice to legal representation as of right in every case concerning a disciplinary charge; everything depended on the circumstances of the case.
65. There is a separate implied term that arises as a matter of law specifically in the context of the exercise of a contractual discretion. For example, the discretion to determine whether a person should be entitled to legal representation. It is an implied term that such a discretion will be exercised reasonably, fairly, not arbitrarily, capriciously or irrationally - see Braganza v BP Shipping Ltd [2015] UKSC 17.

### **Submissions**

#### Serious issue to be tried

66. The submissions made by Mr Butler, on behalf of the Claimant, can be summarised as follows:
- i. Contracting parties must mutually agree to vary any terms of the contract. Variations to a contract cannot have a retrospective effect unless the parties have agreed such a term and any variation must provide consideration. As a consequence, the Sexual Misconduct Policy was not in force or effective at the time of the alleged conduct; it came into effect at the same time as Regulation 23 (September 2019) almost 12 months after the alleged misconduct took place. The University had no right or jurisdiction to proceed with the disciplinary hearing under the provisions contained within the Sexual Misconduct Policy.
  - ii. The alleged misconduct could not, on any construction, fall within section 1.1 of Regulation 23. The alleged misconduct took place in Europe. The incident involved a student from a different university and occurred in a private residence. Therefore, what took place could not interfere with the proper functioning or activities of the University, or with those who work or study in the University.
  - iii. The allegation of misconduct, even if proved, following a hearing which complies with the rules of natural justice, is not action which has damaged the University or conduct which could interfere with the proper functioning or activities of the University.
  - iv. The alleged misconduct did not fall within the provisions contained within the Study Abroad Student Protocol.
  - v. The contract contained the implied term that where the University has received a report from the Investigating Officer, the Claimant is entitled to make written representation before determining whether the allegation should be heard by a disciplinary committee or whether a sanction can be applied without the case being heard.
  - vi. In the event that the complaint proceeded to the Disciplinary Committee the University would conduct the hearing in accordance with the rules of fairness and natural justice which included: (a) the right to submit a witness statement; (b) the right to submit character evidence; (c) the right to legal representation (due to the seriousness of the allegation and the impact it would have on his career); (d) the legal representative's right to cross-examine the Complainant; (f) the legal representative's right to examine the Claimant in chief; (f) the right to re-examine the Claimant; (g) the legal representative's right to make submissions; and (h) the legal representative's right to sum up the evidence and the law etc.
  - vii. The University was aware that it could not determine the complaint under Regulation 23 (October 2018). It therefore varied the contract unilaterally to give effect to the Sexual Misconduct Policy. It could not reasonably be asserted by the University that the amendment was effected to assist in the proper

delivery of education. Furthermore, the decision to proceed with the disciplinary hearing on 12 November 2019 even though a sealed copy of the Claim Form had been sent to the University by email the day before.

67. Submissions (i) – (iv) are collectively referred to in this judgment as the ‘jurisdiction’ point.
68. Mr Greatorex, on behalf of the University, submitted that there is not a serious issue to be tried. He submitted that the definition of misconduct is the same in both versions of Regulation 23. Mr Greatorex contended that even if Regulation 23 (October 2018) is the applicable version it would not make the Claimant’s position any stronger because it provides that sexual misconduct is an example of a major offence and makes clear that expulsion is one possible penalty for a major offence. He further submitted that the jurisdiction point is weak and is unarguable in light of the Study Abroad Student Protocol which was signed by the Claimant.
69. Mr Greatorex challenged the assertion that the University introduced the Sexual Misconduct Policy to circumvent Regulation 23 (October 2018). He relied on the witness statement of the Legal Director of the University. The Legal Director stated that in early 2019, the University conducted a review of its student disciplinary and appeals processes following a ‘previous incident’. Mr Greatorex referred the Court to an email from the University to the Claimant, dated 12 August 2019, which states:
- “You may be aware that the University commissioned an external review into its disciplinary processes and as a result took the decision to postpone all as-yet-unscheduled major disciplinary hearings involving cases of sexual misconduct until after the outcomes of the review were known and its recommendations could be implemented.”*
70. Mr Greatorex accepted that the rules of natural justice apply to University’s disciplinary process. He stated that the University complied with all but two of the requirements of natural justice relied upon by the Claimant. He submitted that the disciplinary hearing was the Claimant’s opportunity to answer the charge and natural justice did not require an intermediate stage of representations. With regard to legal representation, he referred the Court to the judgment in *R(G) v X School Governors* [2012] 1 AC 167 where the contention that there was a right to legal representation during disciplinary proceedings was rejected by the Supreme Court.

### Damages

71. It was submitted by Mr Butler that damages would not be an adequate remedy. He submitted that that if the Claimant remains excluded and succeeds at trial he would lose (i) the opportunity to graduate in June 2020; and (ii) the opportunity to commence work. He also invited the Court to conclude that damages could not compensate the Claimant for the inconvenience and disruption that would ensue if he was unable to resume his final year of studies.

72. The Claimant offered to give a cross undertaking in damages.
73. Mr Greatorex submitted that damages would be an adequate remedy for the Claimant. He stated that any financial loss caused to the Claimant can be compensated in damages and would not be difficult to assess. He submitted that all that would be required is a comparison of the Claimant's financial situation once he obtains his degree, after repeating the year, with the financial situation as it would have been if he completed it this year. He further submitted that any damage to the Claimant's reputation has already been done and will not be ameliorated by the grant of the mandatory injunction sought.
74. Mr Greatorex submitted that the cross undertaking in damages would not compensate the University if it was required to permit the Claimant to resume his studies, and at trial it was decided that the injunction had been wrongly granted.

### Balance of Convenience

75. Mr Butler submitted that the balance of convenience lies in favour of granting the mandatory injunction. He contended that the granting of the injunction would not be determinative of the complaint or the entire dispute between the parties; there will need to be a further hearing to determine the issues and in the meantime the Claimant should be permitted to resume his studies unrestricted or by way of distance learning. The Claimant in his witness statement, dated 9 January 2020, stated that the University's conduct had caused him upset and distress.
76. Mr Greatorex submitted that the Claimant's decision (i) not to pursue his application for a prohibitory injunction before the injunction on 12 November 2019 and 16 December 2019; and (ii) not to attend the hearings on 12 November and 16 December 2019 has fatally weakened his case. He further submitted that point (i) is aggravated by the fact that it remains unexplained. With regard to point (ii) he submitted that no good reason has been provided for not attending the hearings with his barrister in attendance as a supporter.
77. Mr Greatorex submitted that it is highly likely that if the injunction is granted the Claimant will withdraw his substantive claim once he has graduated. In those circumstances, the University's only recourse would be to strip the Claimant of his degree; such a measure is rarely taken and may well be challenged. Mr Greatorex invited the Court to conclude that it should not accede to the request to make a mandatory interim order. He submitted that in light of the 'incident' it is likely that a mandatory order would impact on (i) the safety and wellbeing of the University community; (ii) cause financial loss; (iii) cause reputational damage; and (iv) will undermine the disciplinary process.

### Analysis and Decision

78. Mr Greateorex observed that there appeared to be an inconsistency between the Claimant's third witness statement, dated 9 January 2020, and his pleaded case. In the Claimant's third witness statement he asserted that Regulation 23 (October 2018) was the '*correct*' version and '*applicable*' at the time of the alleged misconduct. However, the pleaded case is based on Regulation 23 (September 2019) and the Sexual Misconduct Policy which was introduced at the same time. The difference was not explained. However, it was my understanding based on Mr Butler's oral submissions that his primary position, on behalf of the Claimant, was that Regulation 23 (September 2019) was not in force and neither was the Sexual Misconduct Policy; alternatively, if they were in force the alleged misconduct did not fall within their provisions. It was on that basis that I considered the jurisdiction point.
79. My consideration of the application was based on the issues raised by Mr Butler in his skeleton argument. Before setting out my conclusions, it is important to make clear that I am making only provisional and interim findings based on the evidence before the Court at this stage. At this point, I am deciding only whether the Claimant has satisfied me that he has an arguable case of sufficient strength to justify the grant of a mandatory injunction. My conclusions should be read subject to that important qualification.

#### Serious issue to be tried

#### Which version of Regulation 23 is applicable?

80. Mr Greateorex adopted a neutral stance with regard to the status of Regulation 23 (October 2018); he neither accepted nor denied that this was the version which was in force at the time of the alleged misconduct. Had he attempted to persuade me that the later version, which came into effect in September 2019, applied to the events which took place in Europe almost 12 months earlier, he would have had some difficulty given the well-established contractual principles outlined by Mr Butler during his submissions.
81. There was no dispute that Clause 9 (agreement to comply with the University's provisions that apply to enrolled students from time to time) and Clause 11 (the University's right to make reasonable changes to the Regulations which will assist in the delivery of education) give the University the power to make appropriate amendments to the Regulations and Policies. The revision to Regulation 23 was approved by the University Council at the meeting held on 9 October 2019, with changes taking effect from 21 September 2019. There is no evidence that Regulation (September 2019) was intended to apply to events that took place in 2018 and no evidence that there was an agreement between the parties that its retrospective effect would reach back that far. Any such power to override contractual rights would be remarkable and is not the sort of power that would ordinarily arise from generally worded powers as set out in Clause 9 and Clause 11. The Sexual Misconduct Policy came into effect on the same date as Regulation 23 (September 2019) and the same



issues apply. It is not clear on what basis the University relied on the Sexual Misconduct Policy other than by reference to Regulation 23 (September 2019).

82. There can be no dispute that the relevant regulation at the time of the alleged misconduct was Regulation 23 (October 2018). It is strongly arguable that it remains the relevant regulation, as neither Regulation (September 2019) nor the Sexual Misconduct Policy were in force at the time.
83. The impact of this conclusion is dealt with below.

*Did the alleged sexual misconduct complaint fall within Regulation 23 (October 2018)?*

84. Despite Mr Butler's best efforts he was unable to persuade me that the events which took place on 14 November 2018, fall outside the remit of the University.
85. During his oral submissions, Mr Butler characterised the events which took place in the early hours of 14 November 2018, as a private matter between consenting adults in a private apartment. That is not what the University was dealing with; the University investigated and subsequently determined a complaint of sexual misconduct. Section 1.1 of Regulation 23 (October 2018) makes clear that improper conduct and behaviour is capable of amounting to misconduct whether it takes place on University premises 'or elsewhere' and Section 1.4 explicitly states that sexual misconduct is an example of a major offence.
86. Furthermore, section 1.1 of Regulation 23 (October 2018) makes specific reference to "...improper interference in the broadest sense with the proper functioning or activities of the institution...or action which otherwise damages the institution...[emphasis added]." A reasonable person, credited with the background knowledge of the nature and purpose of higher educational establishments, would expect and understand that the University's obligations extend beyond the provision of education. Furthermore, the Office for Students (OfS) is the independent regulator for higher education in England. All universities which are regulated by OfS must meet certain conditions which, over and above a high quality academic experience, includes ensuring that the safety, welfare and interests of all students are protected while they study. This includes protection from sexual misconduct. The 'action' in the context of this case was the alleged sexual misconduct. The University had no choice but to take the complaint seriously and to investigate it; anything less would have undermined trust and confidence in the University's ability to protect the interests of its students. The fact that the Complainant was a student from another university is irrelevant.
87. The Claimant was studying at University A, as part of his undergraduate studies at the University. As Mr Greatorex stated, during his oral submissions, the Claimant was not on a private holiday. Whether the Claimant was in the UK or in Europe, attending a student union event or a private engagement with friends, in student halls of residence or in a private apartment, as an enrolled student of the University, there was a legitimate expectation that he would adhere to appropriate standards of behaviour. The Claimant

agreed to be bound by these standards when he enrolled as a student in 2016. If there was sufficient evidence that he had failed to do so, the University was duty bound to investigate the matter in accordance with its disciplinary procedures.

88. For these reasons, it is unarguable that the complaint does not fall within Regulation 23 (October 2018).

*Did the alleged sexual misconduct of fall within the Study Abroad Student Protocol?*

89. There was no dispute between the parties that the Claimant had agreed to be bound by the terms within the Study Abroad Student Protocol. There was also no dispute that the Study Abroad Protocol had contractual force either as a stand-alone contract or by express incorporation into the contract.
90. Mr Butler's submission that the alleged misconduct did not fall within the Study Abroad Student Protocol was unpersuasive. The Study Abroad Student Protocol clearly states that *'[i]t recognises students as responsible adult learners and as such expects standards of behaviour appropriate to representatives of the University.'* It then goes on to outline the expectations in broad terms. Sexual misconduct is clearly behaviour which offends others, puts others at risk, and has the potential to prejudice the work or study of others and unsurprisingly the Study Abroad Student Protocol states that such behaviour would not be tolerated.
91. It is unarguable that the complaint does not fall within the Study Abroad Student Protocol.

*Did reliance on the wrong regulation and policy amount to a procedural irregularity? If so, was it serious?*

92. The University made it clear in its correspondence with the Claimant that the Disciplinary Hearing on 12 November 2019, was being convened to hear the allegation under Regulation 23 and the Sexual Misconduct Policy. It is reasonable to infer that the University was referring to the most recent version of Regulation 23. The Agenda also referred to the Sexual Misconduct Policy. Furthermore, the minutes of the Disciplinary Committee mitigation meeting reported that the offence was a breach of the Sexual Misconduct Policy.
93. As stated above, Regulation 23 (October 2018) is the relevant regulation. Therefore, the Disciplinary Committee proceeded under the wrong regulation. This was a procedural irregularity. However, to amount to a breach of contract the procedural irregularity must be sufficiently serious.
94. In accordance with section 3.3 of Regulation 23 (October 2018) a student charged with a disciplinary offence is entitled to be informed of the details of the alleged offence and

be given an opportunity to defend themselves. The student will be notified that they are under investigation and that they should approach Wellbeing Support Services and/or the Students' Union Advice Centre for advice. The student will also be advised of other sources of support for advice relating to academic progress and/or potential mitigation. Section 3.5 states that a student charged with a major offence may be accompanied at any meeting with the investigating officer or any disciplinary hearing by another person. It also states that the "...*student will normally be expected to speak on their own behalf in their own defence.*" which is reiterated in paragraph 12.23 of the Sexual Misconduct Complaints Process (as quoted in paragraph 55 above). Section 3.7 states that the Disciplinary Committee "...*has the power to determine their own procedure for hearing a case.*"

95. Regulation 23 (September 2018) contains very similar provisions to Regulation 23 (October 2018) including the expectation that the student would speak on their own behalf. However, section 3.4 of the September 2019 version also explicitly states that, "*[t]he accompanying individual is there in a support role not as an advocate.*"
96. The Sexual Misconduct Policy states that its purpose is to (i) provide a campus environment in which all members of the community feel safe and are respected, (ii) set out the expectations around the unacceptability of sexual misconduct; (iii) support students who have experienced any form of sexual misconduct; (iv) respond to disclosed incidents which breach this policy. Although the Sexual Misconduct Policy was not in force at the time of the alleged misconduct, it is clear that the objective is to promote consistency and transparency, with regard to the investigation and determination of allegations of sexual misconduct. The aims of the policy are consistent with the approach of any reasonable higher education institution.
97. Having reviewed both versions of Regulation 23 and the associated guidance I am not satisfied that there is any material difference between the procedure that was followed, and the procedure that would have been followed, if the disciplinary hearing had been brought under the correct regulation. In my judgment the procedural irregularity was very minor and to the extent that Mr Butler suggested that this amounted to a breach of contract, I reject that submission.

*Was there a breach of the implied terms of fairness and natural justice?*

98. There was no dispute that the contract between the University and the Claimant contained an implied term that the decision-making powers would be exercised fairly and that the rules of natural justice applied to the disciplinary process.
99. Mr Butler submitted that the contract contained the implied term that the Claimant was entitled to make written representations before determining whether the allegation should be heard by the Disciplinary Committee or whether a sanction can be applied without the case being heard. I reject that submission. It was open to the Claimant to make written submissions at any stage. It may well be that a university that receives such submissions would be well-advised to give them fair consideration. However, I

am unable to conclude that it can legitimately be inferred that the parties had an unexpressed intention that there would be an intermediate process between the end of the investigative stage and the start of the disciplinary hearing process. I accept the submission made by Mr Greateorex that the Claimant was given the opportunity to say whatever he wanted during the investigation interview and if he had attended the Disciplinary Committee hearing he would have been given a further opportunity to respond to the allegation.

100. The Claimant, in his third witness statement dated 9 January 2010, made allegations that the University acted in bad faith. The Claimant stated that *‘it would appear that the [University] drafted and then adopted the Sexual Misconduct Policy on 9 October 2019, along with amendments to Regulation 23 to give effect to the new policy, to encapsulate the alleged conduct. It is for this reason that I must have received the letter on the very same day making an allegation that I had breached the terms of the Sexual Misconduct Policy.’* The Claimant referred to the Legal Director’s witness statement in which it was stated that the outcome of the disciplinary hearing had spread *‘like wildfire’*. He stated that it is his *“firm belief”* that members of the Disciplinary Committee, or staff working at the University, intentionally disclosed the outcome of his hearing. He suggested that the motivation was to use the fact that the outcome was known on campus to resist the granting of a mandatory order. The Claimant was also critical of the University for proceeding with the hearing on 12 November 2019, in full knowledge that he intended to challenge the University’s jurisdiction to determine the complaint and the decision that his legal representative could attend as a support person only.
101. The alleged bad faith formed part of Mr Butler’s submission that the conduct of the University and the disciplinary process was unfair. I reject that submission. I am satisfied that the Sexual Misconduct Policy was introduced to address the ‘incident’ and wider concerns about the disciplinary and appeal processes in sexual misconduct cases. The Claimant was put on notice that the independent review was the reason for the delay and there is no factual or evidential basis for concluding that the policy was introduced to unfairly target him. The Claimant is also critical of the University for not explaining how the outcome of his disciplinary hearing became known by students on the campus. As I stated during Mr Butler’s submissions this may be because the University does not know. There are a number of possible explanations; a deliberate attempt by the Disciplinary Committee or University staff to sabotage the Claimant’s application is the least likely explanation and there is no factual or evidential basis for concluding otherwise. Furthermore, the criticism of the University for proceeding with the disciplinary hearing on 12 November 2019 is without merit. Although it was within the gift of the University to delay the hearing on receipt of the application notice, there was no requirement for it to do so. The University was entitled to proceed with the hearing.
102. The central dispute between the parties was the right to legal representation including the right to cross examine the Complainant. The Claimant was entitled to take legal advice in advance of the hearing, to submit any legal argument as part of his response to the allegation and to ask any questions (provided they were not unfair, oppressive or

irrelevant) through the Chair of the Disciplinary Committee. He could also be accompanied by someone in a support capacity. The University in an email, dated 11 October 2019, made it clear that if the Claimant wanted the support person to be his legal representative permission for that would be sought from the Chair of the Disciplinary Committee. However, the Claimant did not make a request. The question is whether the procedure adopted by the University was sufficient to ensure a fair hearing.

103. There was no dispute between the parties that legal representation in internal proceedings is not a universal right. The entitlement to legal representation will depend on the circumstances, including the nature and complexity of the hearing and the capacity of the person accused to present his or her own case. The (G) v X School Governors case (supra) concerned an allegation that *G*, a teaching assistant, had formed a sexual relationship with a 15 year old boy - *M*. It was asserted on behalf of *G* that Article 6 (right to a fair hearing) applied, as there was a risk that he would be barred from teaching, and therefore he was entitled to be represented by a solicitor. Article 6 rights apply to proceedings which determine a civil right (including the right to practise a chosen profession) and obligation or a criminal charge. Although there is no general right to legal representation, even where Article 6 is engaged, such cases are more likely to require enhanced procedural rights normally associated with criminal proceedings. The Supreme Court held that as the Independent Safeguarding Authority was required to make its own findings of fact and bring its own independent judgment to bear as to the seriousness of the allegations before deciding whether it was appropriate to place the claimant on the barred list and as there was no reason to hold that it would be influenced profoundly, or at all, by the governors' opinion of the primary facts, Article 6 did not apply to the governors' disciplinary hearing. It is unlikely that the outcome would have been any different if it had been argued on natural justice principles.
104. Mr Greateorex suggested that I need look no further than the R (G) v X School Governors case. I disagree. *M* does not appear to have been a witness in the case. The Court of Appeal judgment in relation to *G* [see [2010] EWCA Civ 1] states "...that at no point during the School's investigation (or at the subsequent disciplinary hearing) were any questions asked of *M* in respect of the allegations concerning the Claimant [§ 10]. Therefore, it is reasonable to infer that *G* was not required to cross examine *M* either directly or through the Chair. Furthermore, although the allegation *G* faced was serious it did not raise any complex issues. The request for legal representation was on the basis of the '*potential repercussions of an adverse finding.*'
105. The prospect of having to cross examine the Complainant (albeit through the Chair) and the issue of consent are the key features which distinguish this case from *G*'s case. As Mr Butler stated that there is a body of case law in respect of consent, capacity to consent, reasonable belief in consent and evidential presumptions. In my view, it would not be appropriate for the disciplinary hearing to become lengthy and legalistic. However, some exploration of these issues will almost certainly be required, and the question is whether the Claimant could fairly be expected to deal with them. It is arguable that he could not.

106. The argument based on the entitlement to legal representation is the only serious issue to be tried.

*Are damages an adequate remedy?*

107. Although not a perfect remedy, in the event that the Claimant remains excluded and succeeds at trial, the loss of the opportunity to graduate in 2020 and commence work could be addressed by a financial award. However, the disruption and overall impact on the Claimant's life would be difficult to assess.
108. Cross undertakings in damages will not compensate the University if the Claimant resumes his studies, in accordance with an interim injunction, but loses at trial.
109. Damages would not be an adequate remedy for either party.

*Where does the balance of convenience lie?*

110. The consequences for the Claimant if his application for a mandatory injunction is not successful are clear and obvious. The consequences for the University if the application is successful are less clear and less obvious.
111. The Legal Director in her witness statement, dated 7 January 2020, outlined from the University's perspective the difficulties likely to be caused if the Claimant were to return to his studies. For example, she stated that a significant proportion of the student body within the Claimant's former school have become aware of the outcome of the disciplinary process. She was informed by her colleagues that between the hearing on 12 November 2019 and the hearing on 16 December 2019, at least seven students have raised concerns about the nature of the allegation and the fact that the allegation has been found proved. She stated that "[a]mong the students who raised concerns...levels of antipathy towards the Claimant were high. This antipathy is likely to be heightened ...because of the fallout over the...[previous]incident." Six of the seven students have expressed concern that their academic work would be affected by the presence of the Claimant in their classroom. The seventh student was concerned about the Claimant's own wellbeing. . A "major concern" of the University is the cross-over between students affected by the 'previous incident' and students from the Claimant's former school. The Legal Director also stated that the University incurred significant costs and expenditure as a consequence of the 'previous incident' including security and wellbeing costs. The University anticipates that if the injunction is granted the financial losses would be higher if the reaction is on a greater scale.
112. Although throughout this judgment I have referred to the substance of the complaint as the alleged misconduct that is solely on the basis that there is a serious issue to be tried. However, the status quo is that the allegation against the Claimant *has* been found proved and he *has* been excluded.

113. A mandatory order will cause the University some, if not all, of the difficulties outlined by the Legal Director. Collectively, the University's concerns may be the worst-case scenario. However, I accept that the concerns are legitimate. Although the Claimant believes that following the hearing on 12 November 2019, he continued his studies without any problems, he is not in the best position to know what the fall out would be if he was permitted to return.
114. A refusal of the application for a mandatory order will maintain the status quo. Assuming the Claimant proceeds with his substantive claim, it is likely that the disciplinary hearing will have to take place again, if his claim is successful. The outcome may or may not be the same, but either way the Claimant will have to repeat his final year.
115. In my judgment there are four interrelated deciding factors.
- i. First, an injunction in the terms sought is likely to determine the claim. Mr Butler stated that the interim injunction would not be determinative of the complaint or the entire dispute between the parties. However, once the Claimant has graduated it is likely that he will withdraw his claim in order to focus on his career and the next stage of his life. The Claimant may genuinely believe that he would pursue his claim but the way in which this case has been conducted strongly indicates that his primary concern is to obtain his degree (see ii below). No doubt in deciding whether to continue his claim the Claimant will take into account the fact that, even if the disciplinary charge is re-heard, the outcome will not necessarily be different.
  - ii. Secondly, there has been unreasonable delay. The Claimant's application for interim relief was prepared on 8 November 2019. The application sought a prohibitory injunction preventing the University from proceeding with the hearing on 12 November 2019. However, no steps were taken to have that application determined as a matter of urgency. The Claimant may have hoped that the notification of the intention to seek an injunction would halt the disciplinary proceedings but there was no guarantee that it would have the desired effect. If an injunction had been applied for prior to 12 November 2019, it may have had a higher chance of success. If it had been granted on or before 11 November 2019, the hearing would not have gone ahead. The Claimant also took no steps to have the application determined before the mitigation hearing on 16 December 2019. Furthermore, it was stated on the Claimant's behalf that an application for summary judgment would be made following receipt of the defence; to date no such application has been made. No explanation has been provided by way of evidence. The delays are not long, but they are significant. In my judgment, it is not the length of the delay which matters but the circumstances in which it occurred and, to a significant extent, the reason why it occurred. The delays were avoidable by sensible and proper steps. To permit the Claimant to return to his studies, in circumstances where he did not progress his application in a timely fashion, did not attend the hearings, and waited until the ultimate sanction was imposed, would be unjustly favourable.

- iii. Thirdly, the consequences for the University would have been significantly less if an injunction was applied for and granted before the allegation had been determined. I have no doubt that the University will be significantly harmed if an injunction is granted. The reputational damage to the Claimant of which he speaks in his first witness statement, would have been minimised by an early injunction.
- iv. Although the Claimant has an arguable case with regard to the entitlement to legal representation, I am not satisfied that there is a high degree of assurance that he will be able to establish this right at trial. It is certainly not high enough to justify the relief sought. In the circumstances of this case, the risk of not granting a mandatory injunction is outweighed by the risk of granting it.

## **Conclusion**

- 116. The grant of a mandatory injunction would not be just. This conclusion is sufficient to resolve the application in favour of the University. The claim for a mandatory injunction is dismissed.
- 117. The parties should seek to agree terms of an order that reflects my conclusions and deals with any other consequential matters including costs. In the absence of agreement, the parties are at liberty to make an application in writing within 14 days following the formal hand-down of this judgment (for which the parties need not be present). If such an application is made, the opposing party will have another 7 days to respond in writing. If there are any consequential matters, they will be determined without a hearing.

## **Addendum**

- 118. Following the circulation of the draft judgment on 31 January 2020, both parties requested a hearing to determine the issues relating to the anonymity order and costs. I acceded to the request.
- 119. On 19 March 2020 (the date this judgment was handed down) a telephone hearing took place. I granted anonymity to both parties and granted costs in favour of the University.