



Reflections on disciplining sexual misconduct and racial harassment

Geraldine Swanton
Legal Director

Disciplinary proceedings

- ⌘ Interference with orderly and safe functioning campus/campus
- ⌘ Sexual misconduct is a species of misconduct
- ⌘ Context of sexual misconduct poses greater challenge for panels



Conduct regulations/policy

- # HEI's domestic legislation
- # Student contractually bound to comply
- # Misconduct – not criminal offence but breach of contract
- # Disciplinary process
 - # is not a criminal prosecution
 - # enforces code of conduct (domestic legislation)



Disciplinary process

- # Must be conducted:
 - # with reasonable care and skill
 - # fairly, reasonably and proportionately (natural justice)
 - # in accordance with the HEI's procedures



Investigation

- # Investigator is not a prosecutor
- # Investigation must be conducted objectively
- # Investigator is not the decision maker

Panel & standard of proof

- # Panel decides whether all the elements of the charges have been proven
- # On balance of probability i.e.
 - # more likely than not (51:49)
 - # on overall assessment of the evidence as presented
 - # whether the facts/misconduct as alleged occurred
- # If 50:50 – not proven



Panel & standard of proof

- ⌘ Standard of proof lower than criminal standard
- ⌘ More than simply believing that the facts as alleged are likely to be true
- ⌘ Must be based on evidence



Natural justice & fairness

- ⌘ Presumption of innocence – the burden of proof is the University's
- ⌘ The right of the accused to know the case against him/her
- ⌘ Case to be proven is confined to the charges as drafted on the evidence as presented

Natural justice & fairness

- # Right of accused to defend him/herself – to make representations on his/her own behalf
- # Impartial panel
- # Moral disapproval – should not influence judgment
- # Proportionality



Evidence

- # Strict rules of evidence (admissibility) do not apply
- # Panel decides relevance and weight to be attached
- # Relevant – if evidence relates to the facts at issue or to circumstances that make those facts probable or improbable
- # Weight – the reliance that can properly be placed on the evidence

Types of evidence

- ⌘ Direct (e.g. “*I saw Tim punching John*”) (best evidence)
- ⌘ Hearsay (e.g. “*Jan told me that she saw Tim punching John*”) (less probative value)
- ⌘ Circumstantial: a combination of circumstances, no one of which would raise a reasonable belief or more than a mere suspicion, but the whole, taken together, may create a conclusion of guilt

Means of giving evidence

- # Oral testimony
- # Witness statements/hearsay
- # Documents e.g. copies of text messages
- # Objects
- # Demeanour? (Often tenuous basis; beware stereotypical assumptions)
- # Anonymity?

Challenges – OIA

- # OIA will consider whether:
 - # procedures complied with
 - # the HEI acted reasonably



Challenges – judicial review

- ⌘ Court will not consider the merits of the panel's decision (unless irrational)
- ⌘ Court scrutinises decision-making process
- ⌘ If challenge successful – could be asked to take the decision again

Grounds of challenges

- # Procedural unfairness
- # Material considerations
- # Irrationality
- # Proportionality
- # Failure to provide reasons



Racial harassment

- # Same disciplinary principles apply as for sexual misconduct
- # WhatsApp – saying the unsayable, thinking the unthinkable
- # Balancing privacy/freedom of expression and mutual respect and tolerance

Detering misconduct

- # Induction – identify fundamental values
- # Compliance as a condition of membership
- # Education before discipline – more effective participation in HEI community



Contact Details



Geraldine Swanton

Legal Director

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D 0121 214 0455

M 07921 759 834

E geraldine.swanton@shma.co.uk

