

# DEFENDING YOUR ADVOCACY ON PALESTINE IN THE HIGHER EDUCATION CONTEXT

Briefing prepared in consultation with [ELSC](#), [BRISMES Campaigns](#) and London Region [UCU](#) representatives for employees in higher education in England and Wales

## COMPLAINTS / (POTENTIAL) DISCIPLINARY ACTION

Complaints direct to university or college management or HR department

- [What do I do if I receive a call, email or letter from my employer about a complaint or potential investigation?](#)
- [What do I do if I have been called into a \(formal or informal\) meeting with department head, management or HR?](#)
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Public allegations followed by a request for comment from you

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### **Disclaimer:**

- This document sets out the law of England & Wales only.
- This document is not intended to be used as legal advice. Please see the information below on how to obtain trade union representation and legal advice.
- This document is *only* intended as information for [employees of higher education institutions](#), not students. A separate FAQ will be developed for students by the ELSC.
- This does not contain visa/immigration advice. The ELSC is working on a separate briefing document on visa and immigration issues. This is forthcoming.

### **Further information:**

- If you are concerned about criminal sanctions or potential arrest, please refer to the information on [Liberty, Migrants Organise and Black Protest Legal Support's Bust-Card](#) and call one of the free, 24-hour advice hotlines on the bust-card; and please contact the [European Legal Support Center \(ELSC\)](#).
- If you need information regarding immigration matters related to your employment status or are being threatened with revocation of your visa, please contact [European Legal Support Center \(ELSC\)](#).
- For information relating to protesting, please refer to this [Liberty's Explainer: Palestine Protests](#)
- For information relating to the IHRA Definition of Anti-semitism, please see the [ELSC-BRISMES Report](#)

## COMPLAINTS / (POTENTIAL) DISCIPLINARY ACTION

### What do I do if I receive a call, email or letter from my employer about a complaint or potential investigation?

- 1) Contact [your trade union representation at UCU](#) and take advice before providing any substantive answers or information to your University
  - If you are not yet a UCU member, [please join](#). You may [contact the ELSC](#) if you have any issue with representation.
  - if you are a member of another trade union, contact them as soon as possible
- 2) You can, however, ask that the University immediately provide information to you about any allegation and relevant procedures (see sample questions below) before you respond
- 3) Report the incident to the ELSC which is tracking all potential incidents of repression across mainland Europe and the UK, <https://elsc.support/intake>

### What do I do if I have been called into a (formal or informal) meeting with department head, management or HR?

- 1) Bring a trade union representative (or, if not, colleague) to any/all meetings:
  - a. Employees and workers have a [statutory right](#) to be accompanied by a co-worker or union official at a [disciplinary hearing](#) (or grievance meeting), if you request it.
  - b. If you have not secured representation or your trade union rep is not available at the proposed time, you should request that the meeting be rescheduled until you have a rep and note your statutory entitlement to be accompanied.
  - c. Your representative should, at a minimum, take a full note of all that is said at the meeting and (if they are an experienced trade union representative) ideally, speak on your behalf.
  - d. The University is likely to have their own note taker at the meeting. However, it is still highly advisable for your companion to take notes as well (and potentially for you to take notes when they are speaking / being spoken to)

- e. Section 10 of the Employment Relations Act 1999 does not expressly give you the right to initial investigation meetings or before that, but in practice almost all employers grant the right to be represented.
  - f. **No meeting should take place without written warning in advance, and a fair chance to obtain representation.**
- 2) Review the [ACAS Code of Practice on Disciplinary and Grievance Procedures](#) and your university's complaint/disciplinary procedures before any meetings.

### **What information should I ask for from the University prior to a (formal or informal) misconduct meeting?**

1. Who will be present at the meeting.
2. The nature of the complaint, including the specific allegation(s) made and the relevant policies/laws which they say are engaged.
3. The specific procedure that the University intends to follow, with reference to relevant internal policies.
4. Any and all evidence that the University intends to rely on to prove the allegations.
5. Clarification as to the steps the University will be taking to ensure that all information remains confidential, including in the event of a request for comment from the media.

### **How do disciplinary processes work?**

- **Formal investigations**
  - If there is a significant case to answer, such that an allegation of harassment might be substantiated, the institution would have a right to carry out a formal investigation.
  - If there is an allegation of criminal conduct, then the employer's investigation would be paused pending the police one.
  - Although in theory an employer can jump straight to a hearing (below), it would be normal for an investigation to be carried out before a hearing takes place.
  - This is likely to take time: to appoint an investigation manager, to gather facts, to interview parties and to write a report. Although there is no statutory right to be accompanied in investigation meetings, many institutions do allow people to bring a union rep or workplace colleague.
  - Investigations should be concerned with determining the facts and not with the opinion of an investigation manager. See the [ACAS Guide to Conducting Workplace Investigations](#).
  - Staff may be suspended pending the investigation, and may be instructed by the employer not to speak about the case. This can be difficult.
  
- **Formal disciplinary hearings (staff)**
  - Before a hearing takes place, an investigation will normally be conducted.
  - Employee procedures usually follow a specified template set out in the [ACAS Code of Practice 1](#).
  - This permits staff

- to see all of the evidence against them prior to formulating a response (usually this means a documentary bundle from the investigation);
  - to bring a colleague or union representative to accompany them ('the right to be accompanied');
  - to call witnesses, bring additional evidence and make representations;
  - to appeal any decision made by a further hearing process.
- **Dismissal**
    - You should immediately seek formal legal representation either through the UCU or ELSC (if you have not already done so) and take advice on whether to notify ACAS and issue proceedings in the Employment Tribunal, which must be done within 3 months minus 1 day.

#### **How should confidentiality be handled?**

- The area of confidentiality can be a tricky one to navigate, especially if allegations are in the public domain.
- The institution must maintain confidentiality to avoid acting either libellously or creating a hostile environment for someone who can reasonably claim were targeted for their protected political beliefs.
- Staff may be warned to act confidentially not to prejudice an investigation, but if someone has been libelled in the press, they may wish to respond. In general, cooperating with the employer regarding statements is wise.

## A BRIEF OVERVIEW OF THE RELEVANT LAW

- **What are my employment rights?**

[Section 98 of the Employment Rights Act 1996](#) and the associated case law provide that the employer is entitled to dismiss a person for behaviour which is **misconduct**. Conduct which is capable of causing reputation damage to your employer (bringing them into dispute) can potentially be such misconduct. The case law on what constitutes misconduct is highly subjective, but, for example in the free speech case of [Keable v Hammersmith \[2021\] UKEAT 2019-000733](#), the following were accepted as factors pointing to a lesser punishment:

- the speech concerned was made outside the workplace
- the speech concerned was made in a private capacity
- there was no discernible link to the employment
- the speech concerned was not discriminatory, criminal or libellous
- the speech concerned was not insulting or obscene
- the employee had a right to express his opinions in his own time (at para 42)
- the employee had not chosen to make his opinions publicly on any scale, rather they had been shared by his critics who created the audience for them (at para 45).

In a number of cases, the courts have looked unfavourably on employer arguments that expressing controversial opinions would bring the employer into disrepute. In [Smith v Trafford Housing Trust \[2012\] EWHC 3221 \(Ch\)](#), an employee had

- expressed his views moderately
- to a limited audience of friends
- outside work hours

The judge concluded that he could not envisage how such speech could “*sensibly lead any reasonable reader to think the worst of the Trust for having employed him*” (at para 63).

***If the above arguments would assist you in protecting your employment, then you should raise them at an early stage in the disciplinary process.***

- **Article 10 ECHR: Freedom of Expression**

[Section 6\(1\) of the Human Rights Act 1998 \(“HRA”\)](#) makes it unlawful for a public authority, including universities, to act in a way which is incompatible with the [European Convention on Human Rights \(“ECHR”\)](#), including [Article 10: Freedom of Expression](#).

Article 10 ECHR protects the right to freedom of expression, subject to restrictions in Article 10(2). The case law demonstrates the following:

- a. “*Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does*

*not tend to provoke violence. Freedom only to speak inoffensively is not worth having”* (Sedley LJ in [Redmond-Bate v DPP \(1999\) 163 JP 789](#), at para 20)

- b. *“The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government”* ([R \(Animal Defenders International\) v Secretary of State for Culture, Media and Sport \[2008\] 1 AC 1312](#), para 27).
- c. Article 10 is not absolute and is subject to restrictions by Article 10(2), but the restrictions have limited application to political speech.<sup>1</sup> The European Court of Human Rights (ECtHR) has established that expressions may be restricted where it *‘incite[s], promote[s] or justify[ies] hatred based on intolerance’*, but only where it creates real possibility of violence or hatred as a direct result.<sup>2</sup>
- d. In [Trimingham v Associated Newspapers Ltd \[2012\] EWHC 1296 \(QB\)](#), the High Court of England and Wales held that *“[i]t would be a serious interference with the freedom of expression if those wishing to express their own views could be silenced or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted”* (at para 267).

The significance of Article 10 for the purposes of interpreting the International Holocaust Remembrance Alliance (**IHRA**) definition and examples was expressed in the following terms by Sir Stephen Sedley, former Lord Justice of Appeal:

*‘While the IHRA ‘definition’ is not part of our law (at most it is a statement of policy), the right of free expression is. The Human Rights Act enacts article 10 of the European Convention on Human Rights, guaranteeing the right of free expression and qualifying it only where proportionate restrictions – for instance on hate speech – are imposed to protect the rights of others.*

*This is why, whatever criticism the IHRA’s examples may seek to suppress, both Jews and non-Jews in the UK are entitled, without being stigmatised as anti-Semites, to contend that a state that by law denies Palestinians any right of self-determination is a racist state, or to ask whether there is some moral equivalence between shooting down defenceless Jews in eastern Europe and unarmed Palestinian demonstrators in Gaza”.*<sup>3</sup>

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<sup>1</sup> *Wingrove v the United Kingdom* (1997) 24 EHRR 1 (at §58); *Vajnai v Hungary* (2010) 50 EHRR 44 (at §47); *Ceylan v. Turkey* (1999) ECHR 44 (at §34)

<sup>2</sup> *Erbakan v. Turkey* (2006) ECHR no. 59405/00 (at §56)

<sup>3</sup> <https://www.theguardian.com/commentisfree/2018/jul/27/antisemitism-ihra-definition-jewish-writers>

- **Academic Freedom**

In addition to its obligations as a public authority under the Human Rights Act and at common law, the University is subject to a statutory duty under [section 43\(1\) of the Education \(No.2\) Act 1986](#) “to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers”.

Section 43 also requires universities and colleagues to keep up to date a free speech code of practice, which must set out the procedures that must be followed in connection with the organisation of meetings or other activities taking place on a university’s premises. You may wish to reference your university’s freedom of speech code of practice in your arguments.

Universities must also ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to ‘any individual’ on ‘any ground connected with’ the beliefs or views of that individual (s.43(2) EA 1986).

Under [section 2 of the Higher Education and Research Act 2018](#) academic staff have freedom within the law ‘(i) to question and test received wisdom, and (ii) to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.’

In May 2023, this duty was augmented by legislation – the [Higher Education \(Freedom of Speech\) Act 2023](#) – which further requires higher education institutions to ‘take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable’ to achieve freedom of speech for all staff, students and visiting speakers. The Office for Students was given the power to find that a governing body or students’ union had breached its duties to protect freedom of expression.

Further, there is in any event, *and in addition to the above*, a longstanding principle of EU law that the state must take particular action to protect the expression of academic speaking in relation to the area of their own academic expertise. The principle of freedom of expression in relation to academic work has been upheld by bodies as various as the Parliamentary Assembly of the Council of Europe, the UN Committee on Economic, Social and Cultural Rights, and the European Court.

***As an employee threatened with disciplinary action, you should draw your employer’s attention to these rights early.***

- **Equality Act 2010 - Discrimination, Harassment and Victimisation**

Under the [Equality Act 2010 \(“EqA”\)](#), it is unlawful to discriminate against a person on grounds of a protected characteristic. As an employer and further and higher education institution, universities are subject to the obligations of the EqA.

There are nine protected characteristics listed at s.4 EqA. The two that are likely to be the most relevant in this context are “race” and “religion or belief”

“Race” encompasses nationality, and national or ethnic origins (such as being Palestinian, Arab or otherwise).

“Religion or belief” would include if you are Muslim or Jewish. It also includes *not* being Muslim or Jewish i.e. one can argue that one has been discriminated against because of religion for the reason that one is “not Jewish”. Philosophical beliefs are capable of being a protected characteristic, depending on the circumstances and whether they meet a particular legal test set out in *Grainger v Nicholson*. Therefore, if an employer had a policy of limiting all speech around Israel and Palestine (such as the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism), this may amount to indirect discrimination under section 19 EqA.

Subjecting an employee to less favourable treatment ‘because of’ a protected characteristic would amount to direct discrimination under section 13 EqA.

It is worth noting that the Equality Act equally prohibits harassment on the basis of a person’s religion, nationality or ‘race’, irrespective of their particular religion, nationality or race. A selective focus on allegations of anti-semitism or anti-Israeli racism without considering racism against Muslim, Christian, Jewish or atheist Palestinians may be discriminatory under the Equality Act.

Sometimes employers argue that a sanction is being imposed on an employee not because the employee has manifested a protected religious or philosophical belief, or because of an employee’s race, but because of a different reason altogether. However the law recognises that decisions are frequently reached for more than one reason. If consideration of the protected characteristic had a significant influence over the mind of the alleged discriminator, discrimination is made out ([Nagarajan v London Regional Transport \[1999\] IRLR 572](#), HL; [Villalba v Merrill Lynch \[2007\] ICR 469](#), para 76, 77 and 82). The motivation for discrimination is irrelevant, so that discrimination is made out even where the employer’s primary purpose in subjecting the employee to less favourable treatment was to keep the employee safe from third party violence ([Ahmed v Amnesty \[2009\] ICR 1450](#)).

- **Criminal investigations**

If an institution believes that a statement or act represents advocacy for a proscribed terrorist group such as Hamas, the complaint may be treated as a matter for the police.

If you are concerned about criminal sanctions or potential arrest, please refer to the information on [Liberty, Migrants Organise and Black Protest Legal Support’s Bust-Card](#) and call one of the free, 24-hour advice hotlines on the bust-card; and please contact the [European Legal Support Center \(ELSC\)](#).

## **SMEAR CAMPAIGNS**

### **What do I do if I have been contacted by a journalist for a comment or smeared in the press?**

Contact the ELSC: <https://elsc.support/intake>. We will first consider making a complaint to the regulatory (e.g. IPSO); and progress the matter from there.

Investigations and disciplinary procedures are supposed to be confidential (see 'confidentiality' above). University and college press offices:

- should be checking with the staff member or student before making any statement about them. They should not make any statement that prejudices their rights.
- should not make prejudicial statements that are not agreed with staff or students, e.g. that "the university is investigating" when they are not.