**Disciplining Members – when and how to grasp the nettle**

***A necessary evil…***

Most sporting bodies rely heavily on their members, in particular those who have the willingness to get involved with no thought of remuneration. Subjecting a member to a disciplinary procedure is an unattractive prospect, especially for those who have the unpleasant task of being directly involved. Nonetheless, there are times when it is a necessary evil, for the sake of the wellbeing of the organisation and/or other members.

***When?***

Some acts of misconduct by members are so serious (eg theft of club funds, physical and/or sexual assault etc ) that they require robust and immediate action. However, misconduct of a less serious nature can nonetheless be very damaging to a sporting organisation if allowed to continue.

A particularly difficult (and depressingly common) example of this is the member who feels entitled to send unpleasant communications to (or about) elected officers and full-time officials. Whilst a degree of robustness to legitimate criticism or comment is to be expected from those in positions of power, there is a line beyond which this must be viewed as impermissible, and possibly as bullying. When and how to grasp the nettle in such cases takes great care and thought, particularly where the member has friends and popular support in a section of the membership which perceives that this is no more than the exercise of free speech, albeit robust, and the holding of the Executive to account. The position is further complicated by the numerous opportunities for character assassination through social media, and the startling unpleasantness that some can descend to when behind a keyboard (akin to the internet “trolls” that blight the lives of those in the public eye).

Care should be used with the charge of conduct bringing the sport, or sporting body, “into disrepute”. Although the rules of most sporting bodies have such a rule, there is an obvious danger that such a widely drafted provision may not be applied consistently or fairly. It is, after all, hard to find evidence of actual, as opposed to potential, disrepute. A more specific charge should be used where possible.

***How?***

Firstly, and most importantly, the application of a disciplinary procedure must be:

* in strict conformity with the organisation’s disciplinary rules (this is, after all, a contractual matter in most cases);
* in compliance with the principles of *natural justice* , in particular the member’s right to have a reasonable opportunity to respond to the allegation(s) made;
* Conducted in good faith and not arbitrarily, capriciously, perversely, or irrationally.

Whilst the second and third requirements are self-explanatory and obvious, the disciplinary rules merit further discussion.

Some rules give the organisation a great deal of discretion in the procedure adopted (even to the extent of dispensing with the need for a hearing and conducting the procedure in writing), and in respect of the sanction. I dare say, however, that most sporting bodies give members the right to an oral hearing of some sort (particularly those in receipt of public funding which are subject to different considerations than, say, a commercially- run golf club), and that some may even provide for an appeal to a third party such as Sport Resolutions. Whichever procedure is adopted, the Courts are unlikely to interfere as long as the organisation complies with the basic requirements set out above.

***Which procedure to choose?***

The simpler procedures have obvious attractions in view of cost and administrative time. These are particularly appropriate for straightforward cases and those where time is of the essence. However, they can prove inadequate and inflexible in more complex cases, resulting in the need to seek the member’s consent to apply a variation. This may not, in the circumstances, be forthcoming.

The position of the disciplinary panel should also be considered. Where, as is often the case, this is comprised of elected or full-time officers of the organisation, they may have a conflict of interest or some other reason not to wish to sit on such a disciplinary panel. They may even be open to accusations of bias. In that event, please note that it is not enough that they are not biased; the question is whether the circumstances are such as to lead a fair-minded and informed observer to conclude there was a real possibility or real danger of bias[[1]](#footnote-1).

Whilst it is probably excessive to provide for reference to Sport Resolutions (or some other independent body) in all disciplinary cases, the disciplinary procedure should provide the power to make such a reference in an appropriate case (eg to demonstrate to the wider membership that the case has been handled fairly) and/or on appeal. Reference to an independent body enables justice not only to be done, but to be seen to have been done.

***The Human Rights Act 1998 (“HRA”)***

Article 6 of the HRA protects the right to a fair trial where the organisation is a “public authority” within the meaning of the Act. Discussing what is and what is not a public authority is beyond the scope of this article but suffice it to say that most National Governing Bodies, and other similar sporting organisations, are unlikely to be. Accordingly, they will not be obliged to have an oral hearing unless their members’ disciplinary procedure requires this.

Whilst on the subject of the HRA, some members who are subject to disciplinary procedures may seek to rely on the Article 10 right to freedom of expression. The answer is the same as above. If the organisation is not a public authority, the HRA does not apply and they have no such right.

***Conclusion***

Check your member’s disciplinary and appeal procedures and, if in any doubt as to whether they are fit for purpose, seek legal advice. By the time that you need to use them, you are stuck with what you have, and any defects can be expensive. Apart from anything else, the member may have a claim in damages for breach of contract.

Edward Wheen

Partner, Moorhead James LLP

1. Porter v Magill [2001] UKHL 67 [↑](#footnote-ref-1)