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**Misconduct in organizations – NDAs as a *poros* out of *aporia*?**

Stream – critique and contestation at work

## Abstract

### Misconduct in organizations – NDAs as *poros* out of *aporia*?

It is proposed that organizations are conceptualised as if a body of water, an “endless realm of pure movement, the most mobile, changeable and polymorphous of all spaces, a space where any way that has been traced is immediately obliterated, which transforms any journey into a voyage of exploration which is always unprecedented, dangerous and uncertain” (Kofman, 1988: 10). Workplaces construct, control, conceal (Knight and Tsoukas, 2018) through a state of constant dynamic operation of people, texts, visions, and priorities that can be imagined as moving like a body of water. An *aporia* is an irreconcilable state of contradiction, importantly related to its Greek origin of *poros/poroi* as being a pathway/pathways through bodies of liquid such as the sea with *aporia* implying a lack of pathway/pathways (Kofman, 1988). In playing with the potential of organizational activities and actors as ‘forces for good’, this developmental paper explores instances of ‘wrongdoing’ in the form of alleged workplace misconduct as *aporia*. Whilst it can be argued that ‘misconduct’ is clear and so implies no sense of potential for contradiction, I propose that organizational responses are frequently subject to competing interests such that a pathway is unclear. I explore this through the context of the use of non-disclosure agreements.

The research examines submissions from a range of interests to the UK Parliamentary Inquiry of the Women and Equalities Committee regarding the use of non-disclosure agreements in discrimination cases (Women and Equalities Committee, 2019). The formally termed ‘confidentiality clauses’, ‘settlement agreements’, and/or ‘compromise agreements’ are legal instruments used to protect the interests of all parties involved (e.g. Intellectual Property Office, 2015), the circumstances of their use in the incidence of misconduct is morally and ethically complex (e.g. Solicitors Regulation Authority, 12 March 2018). Such clauses are standard practice in a range of employment contract contexts, but this paper focuses on a specific use relating to instances of alleged misconduct and discriminatory behaviour as part of a combination of documentary tools and negotiation processes that have become known colloquially as ‘NDAs’ and/or ‘gagging orders’.

Part of management may be how to deal with workplace misconduct as an *aporia* – balancing a range of responsibilities to employees (for example: as victim of the misconduct; as perpetrator of the misconduct; as colleagues to both the victim and perpetrator of the misconduct) and to the organization (for example: reputation; shareholders; publics). Such balance is, arguably, irreconcilable – there will always be unequal effects of misconduct. I suggest that avoiding doing harm and changing to doing good in these situations may be subject to the use of legitimized legal standards, rules and tools (e.g. Rasche, 2010) as *poroi* to move on from the incidence, but that leave circumstances unreconciled and potentially dangerous. The NDA as a *poros*, a ‘force for good’ in response to the harms of misconduct, creates a temporary parting of the waves, calming of the wind, but the currents that enabled the misconduct are still under the surface and storm clouds are across the horizon. It offers a pathway but also means that no fundamental change to an organizational culture that is potentially enabling of misconduct:

“in this place of *aporia*, *there is no longer any problem*. Not that...the solutions have been given, but because one could no longer even find a problem that would constitute itself and that one would keep in front of oneself, as a presentable object or project, as a protective representative or a prosthetic substitute, as some kind of border still to cross or behind which to protect oneself.” (Derrida, 1993: 12)

So ‘one could no longer find a problem’ because the NDA conceals the misconduct by preventing those involved from speaking of it. Misconduct in organizations can be conceptualized as an aporetic situation such that deconstructing it could be better for an aim of justice rather than using NDA as a *poros* to ‘solve’ it. In Derrida’s words (in Kearney, 2001: 62) “[T]he *aporia* is not a paralyzing structure, something that simply blocks the way with a simple negative effect. The *aporia* is the experience of responsibility. It is only by going through a set of contradictory injunctions, impossible choices, that we make a choice.” Because of the responsibilities within the organization to both perpetrator and victim, “proper allocation of these rights is difficult to determine without any precision” (Buchanan, 2018); there is not any closure for those involved even though it may be considered such, there is potential for future ruptures and the conditions of possibility for further ‘problems’ (misconduct).

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