PN 922

27 October 2011

PRESS NOTICE: COURT OF APPEAL GIVES JUDGMENT IN OIA DISABILITY DISCRIMINATION CASE

The Court of Appeal has dismissed the appeal of Shelley Maxwell in the long-running case of *The Queen on the application of Shelley Maxwell v OIA*.

In a judgment which dismisses Ms Maxwell's appeal, the Court of Appeal ruled that the OIA's decision on Ms Maxwell's complaint was "*an adequately reasoned decision in accordance with its procedures, in accordance with the law and as a proper exercise of its wide discretion*."

Ms Maxwell had sought to challenge the approach taken by the OIA in complaints raising the issue of disability discrimination. The OIA found Ms Maxwell's complaint against the University to be justified and recommended the payment of compensation of £2,500, and changes to the University's procedures.

The essence of Ms Maxwell's judicial review claim was that the OIA ought to have made a finding on whether the University had discriminated against Ms Maxwell. Such a finding would, she claimed, have benefited her and the University, and would have informed the level of compensation awarded to her. Ms Maxwell claimed that by not making such a finding, the OIA erred in law, failed in its duty to promote equality, and had no rational basis upon which to make its decision. Mr Justice Foskett dismissed the claim.

Ms Maxwell appealed against Mr Justice Foskett's decision and her appeal was heard by Lord Justice Mummery, Lord Justice Hooper and Lord Justice McFarlane in July 2011.

Rob Behrens, the Independent Adjudicator, commented: "This is an important judgment which we welcome. It confirms the appropriateness of the OIA's approach to handling disability complaints in general, and to handling Ms Maxwell's complaint in particular.

The OIA is grateful to the Court of Appeal for the helpful clarification it has provided in relation to the OIA's processes and approach to these complex issues. It is pleased that the Court has recognised that the informality and flexibility of the OIA's processes should be protected and that 'judicialisation' of the process is not in the interests of students. The OIA Scheme is free to students, and has been designed to be accessible to all students, without the need for legal representation."

Giving judgment on 27 October 2011, Lord Justice Mummery said:

> *"Litigation in the courts against Higher Education Institutions (HEIs) for more favourable outcomes than those obtained in the special internal and external complaints procedures is not, except in very special circumstances, a course that anyone fortunate enough to be accepted for a course of higher education should be encouraged to take up. Most people would agree it is not in the interests of students, or of the HEIs that exist to provide them with educational courses, to engage in a stressful and expensive activity like litigation, when something more fulfilling, as higher education aims to be, is a more attractive long-term investment for life. This is particularly so when Parliament, taking the sensible line that there are more important things in life than generating a* lis *out of every grievance, has facilitated the provision of a less formal and affordable out-of-court scheme for reviewing and remedying justified complaints by students."* [7]
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> *"… the practice and procedures for the review and resolution of a wide range of student complaints under the independent scheme operated free of charge and largely as an inquisitorial on a confidential basis by the OIA under the 2004 Act, is quite different from civil proceedings. Its informal inquisitorial methods, which are normally conducted on paper without cross examination and possibly leading to the making of recommendations in its Final Decision, means that the outcome is not the product of a rigorous adversarial judicial process dealing with the proof of contested facts, with the application of the legislation to proven facts, with establishing legal rights and obligations and with awarding legal remedies, such as damages and declarations. The issue for the OIA in this matter was not to decide whether Ms Maxwell was in fact the victim of disability discrimination or whether the University is liable to her for such discrimination. The OIA's task was to* review *Ms Maxwell's complaint, which included a complaint of discrimination, to see whether the University's decision was* reasonable *in all the circumstances and was justified and, if so, to what extent, and what recommendations should be made to the University."* [32]
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> *"In my judgment, the courts are not entitled to impose on the informal complaints review procedure of the OIA a requirement that it should have to adjudicate on issues, such as whether or not there has been disability discrimination. Adjudication of that issue usually involves making decisions on contested questions of fact and law, which require the more stringent and structured procedures of civil litigation for their proper determination."* [33]
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> *"In a sentence what Ms Maxwell is seeking to do by these proceedings is for the courts to turn the OIA into something that it is not i.e. a court of law. As Mr Grodzinski* [counsel for the OIA] *pithily put it on behalf of the OIA, the heart of Ms Maxwell's case is that the OIA 'should, in effect, act as a surrogate of the county court.' The various ground of appeal are all variants of the same theme."* [36]
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> *"If the approach advocated by Mr Jones* [counsel for Ms Maxwell] *were correct, it is difficult to see what point there would be in having a scheme, which was established under the 2004 Act not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing students' complaints and grievances. The judicialisation of the OIA so that it has to perform the same fact-finding functions and to make the same*

> *decisions on liability as the ordinary courts and tribunals would not be in the interests of students generally."* [37]
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> *"Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law."* [39]

Lord Justice Hopping and Lord Justice McFarlane agreed. A copy of the full judgment is available on our website.

Notes to editors

1. To arrange an interview with the Independent Adjudicator and Chief Executive, please contact Charlotte Corrish, Policy and Communications Manager, by emailing charlotte.corrish@oiahe.org.uk or by phone on 0118 959 2733.
2. The OIA is the designated operator of the Scheme for reviewing student complaints in England and Wales, established under the Higher Education Act 2004. All universities in England and Wales belong to the Scheme.
3. The OIA has a wide remit to review student complaints about an 'act or omission' by HEIs in England and Wales. It does not review academic judgment or admissions issues. The Scheme Rules and all details related to OIA operations can be found at www.oiahe.org.uk.