Case No: CO/3517/2012

Neutral Citation Number: [2014] EWHC 558 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 5 March 2014

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

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Between :

THE QUEEN	**Claimant**
(on the application of DEAN RICHARD WILSON)	
- and -	
THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION	**Defendant**
- and -	
UNIVERSITY OF HULL	**Interested Party**

- -
- -

The Claimant in person
Laura McNair-Wilson (instructed by **EJ Winter & Son**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 19 February 2014

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Judgment

Philip Mott QC :

1. The Claimant seeks judicial review of the decision of the Defendant ("the OIA") dated 10 January 2012. Permission was granted by HHJ Sycamore at a renewed oral hearing on 23 April 2013. Since then the OIA has reviewed and revised the decision, and has issued a fresh decision dated 30 October 2013. As a result the challenge to the original decision has become academic. The Claimant maintains his challenge to the second decision, both as to its findings and as to its recommendations.

2. It was agreed by the OIA that I should consider this challenge to the second decision at this hearing, although there had been no formal application to amend or substitute grounds for relief. As a result the detailed complaints only became fully apparent at the hearing, but neither party submitted that any unfairness arose as a result. The Interested Party has taken no part in the proceedings and was not represented before me.

Principles of Law

3. There is no dispute that decisions of the OIA are amenable to judicial review. The Court of Appeal in *R (Siborurema) v OIA* [2007] EWCA Civ 1365 accepted this: see paragraph [49]. However, the OIA has a broad discretion in determining how to approach a particular complaint, and the court should have regard to the expertise of the OIA: paragraph [53]. As a result, the court is likely to be slow to accept that its choice of procedure was improper, and not easily persuaded that its decision and any consequent recommendation was unsustainable in law: paragraph [70]. Moreover, elaborate reasoning is not required in a decision of this nature: paragraph [79].

4. This was confirmed in *R (Maxwell) v OIA* [2011] EWCA Civ 1236, in which Mummery LJ said, at paragraph [23]:

> "The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals."

5. The position is the same in relation to other independent review bodies, such as the Independent Police Complaints Commission: see *Muldoon v IPCC* [2009] EWHC 3633 (Admin). This court should not expect the sort of tightly argued judgment that might be expected of a Chancery judge.

6. In *R (Cardao-Pito) v OIA & London Business School* [2012] EWHC 203 (Admin) it was accepted that the OIA had the power to review its decisions and to re-determine a complaint. HH Judge Gilbart QC considered the reasoning in relation to the assessment of compensation. He too emphasised that elaborate reasoning is not required. Although he found that the particular decisions were deficient in reasoning, he said, at paragraph [138]:

> "I entirely accept that the OIA is not to be expected to engage in the depth of assessment appropriate to a personal injury

claim – whether of special damages for loss of earnings, future losses or for disadvantage on the labour market."

Factual Background

7. In October 2009 the Claimant registered at the University of Hull to pursue an MSc course in Personal and Corporate Coaching, a two year part-time programme. The tutors were a married couple. Since they have not personally been involved in these proceedings, and were not represented, I shall refer to them as Dr D and Dr R. I shall likewise refer to other participants by initials.

8. The course consisted of six modules. The Claimant passed the first module with an overall mark of 50%, and also passed the second module with 62%. Module 3 was completed but unmarked when a problem arose with the study weekend for Module 4. This was a long weekend between 22 and 25 April 2010 when all the students on the course were expected to attend in Hull. In general, the other course work was conducted online and by private study. Unfortunately, just before the planned weekend the Icelandic volcano eruption caused a dust cloud which stopped all air travel. Dr D and Dr R were in Portugal and could not get back to Hull for the study weekend. It therefore had to be postponed.

9. Dr R wanted to hold an online seminar for one hour at the original start time of 9.30 am on 22 April 2010. The Claimant asked for it to be held that evening instead, as it was inconvenient for him. Dr R declined this request, and the Claimant in fact joined the seminar online in the morning. During that seminar Dr R wanted to fix a further one hour online seminar for the end of the planned weekend. As a result of objections from others, the seminar was eventually fixed for 8.30 pm on Tuesday 27 April, outside the dates of the original study weekend. This date and time was not inconvenient for the Claimant, but he felt a sense of grievance that his difficulties had been overruled in respect of the first seminar, whereas others' difficulties were accommodated in respect of the second seminar. As a result he emailed Dr R and Dr D alleging double standards in relation to flexibility.

10. The email correspondence then quickly became acrimonious and (as the Defendant rightly found) inappropriate on both sides. Within a few days Dr D informed the Claimant by email that he had failed both elements of his work for Module 3. He queried this, but the decision was upheld by the external examiner. At the end of May 2010 the Claimant submitted a formal complaint against Dr D and Dr R. He also referred to the loss by the University of a piece of his work for Module 2. That complaint was investigated by Dr C on behalf of the Head of Department, Professor W. The Claimant agreed to submit his work for Module 4 to Dr C, to be held pending completion of the investigation of his complaint. This work was marked by Dr D and Dr R in July and August 2010. He was failed in respect of all three pieces of work, and this was ratified by the external examiner.

11. In September 2010 the Claimant's complaint was considered by a Complaints Adjudication Panel ("CAP"). The CAP did not uphold his complaint, but noted that it could have been better handled by the Department.

12. Later that month the Claimant supplied receipts for his Module 2 work, to support his assertion that part had been lost. This was investigated as a new complaint by Mrs L,

but the Claimant declined to meet her unless the University would agree to treating both complaints as one. She concluded that the new evidence did not compromise the integrity and recommendations of the original investigation, and also that there was insufficient evidence to support his claim that he had been treated differently from other students.

13. The Claimant did not re-submit any work for Modules 3 or 4, and did not complete Modules 5 and 6.

14. On 20 December 2010 the OIA received a completed complaint form from the Claimant. The first decision, dated 10 January 2012, was that his complaint was partly justified. The body of the report showed that some complaints were held to be justified, some unjustified, and some partly justified. It recommended that the University should reimburse the Claimant's course fees, amounting to £1,695.

15. The Claimant was dissatisfied with this decision, and issued judicial review proceedings on 26 March 2012. Permission was refused by Collins J on paper on 31 August 2012, but renewed to an oral hearing on 23 April 2013. At that hearing HHJ Sycamore gave permission. The OIA thereafter conducted a fresh review and issued a second decision dated 30 October 2013. It concluded that the complaint was partly justified, although the reasoning was different. It recommended that the University offer the Claimant an apology, the return of his course fees of £1,695, and a further sum of £6,000 in compensation for the distress and inconvenience he had experienced. The University accepted this second decision, but the Claimant has not.

16. This is a very brief summary of the factual background, insofar as it is relevant to the particular complaints now made by the Claimant in relation to the second decision. I now turn to consider those in more detail.

Issues at the Hearing

17. The effect of the second decision was effectively to revoke and replace the first decision. There is, therefore, no subsisting first decision for this court to quash, even if satisfied that it contained errors of law. Any consideration of that decision, except as part of the background and by way of comparison with the second decision, would be entirely academic. I therefore declined to do so, and made it clear to the Claimant that he should confine his current complaints to the second decision.

18. At the hearing before me, it was apparent that the Claimant initially wished to rehearse the facts and treat this court as a primary fact-finder. In due course, it became possible to enumerate his current complaints as follows:

    i) He was treated unfairly because Dr R was prepared to accommodate others in relation to the timing of the second online seminar, but had not been prepared to accommodate the Claimant in relation to the first.

    ii) The University lost his work for Module 2. The first decision accepted that the work had been lost, whereas the second decision did not accept it.

    iii) His allegations of lies, collusion and deception by University staff had been found to be justified in the first decision, but not in the second decision.

iv) The only reasonable conclusion to draw from the evidence was that Dr C had lied in saying that his report was concluded when it was not, or at least he was trying to mislead the Claimant.

v) The CAP had included Dr W, who should not have been a member as she was also the Deputy Complaints Investigation Officer.

vi) In relation to remedies, he had asked for £15,600, which was the current cost of an equivalent course. He accepted that there should be a deduction from this of the full course fees at Hull, about £3,390. However, there was no explanation for the reduction of the balance to the recommended compensation of £6,000.

(i) Unfair Treatment

19. Following the circulation of this judgment in draft, the Claimant formulated his claim in this respect as follows:

> "My complaint of being treated unfairly was that the University expected me to be available for the Original Study Period because it said that I had known about it for some time, but that it did not expect other students in the same cohort to be available for the same period"

20. The second decision deals with this at paragraphs 45 to 53. It concludes that Dr R's decision on what was an appropriate time for the first online seminar was a matter of academic judgment, outside the scope of the OIA's review. However, it was not unreasonable for Dr R to use the start time of the original study weekend rather than engaging in further email correspondence with all the students. At the online seminar things were different, and easier, because those involved were taking part. Dr R's attempts to agree a convenient date for the second online seminar did not therefore render the decision about the first online seminar unfair or unreasonable. Indeed, it would have been perverse for Dr R to insist on an inconvenient time, when there was a time convenient for all including the Claimant, simply because the timing of the first online seminar had been inconvenient for the Claimant.

21. The second decision concludes that the complaint of unfair treatment is not justified. It was a conclusion clearly open to the OIA on the material available. Indeed it may well have been the only rational conclusion, for the reasons set out in the decision. It was also the conclusion on this part of the complaint in the first decision.

(ii) Lost Work

22. The crux of the Claimant's complaint in relation to the second decision is that it came to a different conclusion from the first decision. It is true that the end of the section in the first decision headed "Mr Wilson's missing coursework" says that the complaint is justified, whereas the equivalent section in the second decision, headed "Loss of work for Module 2", concludes that it is only partly justified.

23. That section of the first decision needs to be read in full. It reaches a number of conclusions, as follows:

i) The CAP noted a difference of opinion between the parties, which it could not resolve on the evidence before it. That was a reasonable conclusion by the CAP.

ii) Mrs L, conducting the further investigation, had concluded that the document referred to as "Transcript of online coaching session" on the University's receipt was not a verbatim transcript of a coaching session with someone not on the course (referred to in the first decision as the Confidential Transcript), but an analysis of that transcript produced by the Claimant. Such a document, headed "Transcript Analysis" had been received by the University and had not been lost. Mrs L concluded that the wording of the coursework submission was ambiguous. From this the OIA in the first decision concluded that there was an error in the University's receipting process, which was not sufficiently robust. It also concluded that Mrs L's investigation was not properly carried out because she did not identify the defect in the receipting process and make recommendations to improve it.

24. It follows that the first decision did not conclude that any work had been lost. It seems to me to have accepted that there had been a mis-description on the receipt, as Mrs L found. The second decision, at paragraphs 66 to 73, is not inconsistent with this. In any event, since he passed Module 2, the Claimant was not materially disadvantaged in relation to this issue.

25. In the absence of any inconsistency between the first and second decisions, this ground of complaint falls away.

(iii) Lies, Collusion and Deception

26. The section in the first decision headed "Mr Wilson's allegations regarding lies, collusion and deception by University staff" ends with the conclusion that "this element of the complaint is justified". Again it is necessary to read the section in full to understand what is meant.

27. The section concerned allegations made by the Claimant at the end of September 2010 in a letter to the chair of the CAP. These were given to Mrs L to investigate as a separate complaint. Mrs L did not reach any conclusions on these allegations and did not refer to them in her report. The first decision concluded that there had not been a proper review by the University of these complaints. To that extent the complaint was justified. As to the underlying allegations, the first decision said:

> "It is not for the OIA to substitute its judgment for that of the University's and I have not reviewed the documents obtained from Mr Wilson's subject access request with a view to determining whether or not allegations against the University staff were substantiated."

28. The second decision deals with the matters in a different way, considering together the various issues about the University's handling of the complaints. It too concludes that the investigation was inadequate, but makes no findings about the underlying allegations. Thus there is no inconsistency between the first and second decisions in this respect either.

(iv) Dr C's Report

29. Paragraphs 31 to 33 of the second decision set out the Claimant's allegations in this respect and the OIA's analysis. On 29 June 2010 Professor W, Head of Department, sent an email to Dr C reminding him that the deadline for his report on the Claimant's complaint was about to expire, saying that he understood Dr C proposed to get in touch with the Claimant very soon, and asked him to make it clear that he was writing on the Professor's behalf. This was because the Professor, as Head of Department, had the primary duty of communicating the result to the Claimant. Dr C responded "I will do it now".

30. The same day Dr C contacted the Claimant by email as follows:

> "I have now had time to thoroughly review your case. My investigation has shown that the correct University procedures regarding marking have been followed. In addition, the external examiner has also had the opportunity to look at the piece of work in question and verified the mark.
>
> It is the University policy that work will not be re-marked, unless there is clear evidence of a breach of marking procedure. As the procedures have been followed and an external independent review of the work has been obtained, the mark awarded to you will stand."

31. A copy of Dr C's formal written report was sent to the Claimant on 7 July 2010. The Claimant alleged that the absence of any mention of a written report in Dr C's email of 29 June 2010 meant that Dr C had omitted to produce one, and that subsequent emails denying this were an attempt to mislead him.

32. The second decision concludes that the full email correspondence does suggest that Dr C's investigation had not been fully completed at the time that he sent his email to the Claimant on 29 June 2010. It does not accept that Dr C was therefore lying when he said he had "time to thoroughly review your case". The second decision does go on to criticise the quality of Dr C's investigation, and to say that it would have been better practice for him to have told the Claimant that the University required more time to prepare the written report. As a result the complaint was partly justified.

33. This conclusion was well within the range of reasonable conclusions open to the OIA. The email correspondence fell some way short of providing material from which a finding of dishonesty could properly be made. This ground discloses no basis for alleging irrationality in the second decision.

(v) Constitution of the CAP

34. Dr W was the Deputy CIO, but had not performed this function in relation to the initial investigation of the Claimants complaints. She had had no prior involvement with the complaint, and was not even a member of the relevant Department. She was therefore, to any reasonable outside observer with knowledge of the process, an unbiased member of the Panel.

35. The second decision rejects the Claimant's complaint of a lack of transparency and a perception of bias, and rightly so. It might even be said that Dr W's training as a Deputy CIO made her particularly suited to be a member of the CAP in a case in which she had not been involved in any way.

(vi) Remedies

36. The second decision deals with these at paragraphs 75 to 87. It is a far more detailed section than the equivalent in the first decision. There is no challenge to the decision not to recommend that the Claimant be awarded an MSc degree.

37. In relation to monetary compensation, the Claimant told me that he had asked for £15,600. The reference to £16,800 in paragraph 79 of the second decision was either a typographical error or a misunderstanding by the OIA. He later told me that he had asked for £5,000 compensation for distress and inconvenience and £1,000 for expenses. He took it that the £6,000 he was awarded was the sum of these.

38. The second decision comes to a number of conclusions, as follows:

i) The sum of £15,600 is not strictly a 'loss of opportunity', but the cost of picking up his studies elsewhere (paragraph 79). The Claimant accepts this, but points out that the phrase 'loss of opportunity' is what appears in the OIA's published guide dated March 2013.

ii) It was not reasonable to compensate the Claimant for these full costs because, firstly, he did not pay all his fees of the MSc course to Hull, and in any event the OIA had recommended that Hull repay such fees as had been paid (Paragraph 79). The Claimant accepts this, and agrees that the full course fees at Hull, amounting to £3,390, should be deducted, leaving a balance of just over £12,000.

iii) It was also not reasonable to compensate the Claimant for the full costs, even after the deduction of course fees, because he did not take up some opportunities to discuss the progress of his studies with Hull, and also had not yet attempted to restart his studies elsewhere (paragraph 79). This is hotly contested by the Claimant, and I consider it further below.

iv) It was not possible to reach any conclusions as to the Claimant's loss of opportunity in the correct sense of that term. This was because he had only completed the coursework for two modules out of six, and had only obtained 40 out of the 180 credits required for the award of an MSc. As a result it was not possible to determine how likely it would have been for any of his job applications to be successful. In addition the Claimant had provided no information as to his expected level of earnings. So the value of any lost opportunity, on the available evidence, would be zero. In the end, therefore, no award was made for loss of opportunity (paragraph 80). The Claimant did not challenge this before me. In effect he was saying that his claim for 'loss of opportunity' was limited to the additional cost of obtaining an equivalent degree elsewhere.

v) The Claimant had claimed expenses of £1,000 in attending those parts of the course at Hull which he did attend, but had provided no breakdown or evidence of those costs (paragraph 86(iv)). The Claimant acknowledged that this might have led to some reduction in his claim, although the amount of any such reduction was unspecified in the second decision.

vi) The recommended compensation took into consideration the distress caused to the Claimant by his failure to obtain an MSc, and as a result the sum was higher than it would otherwise have been (paragraph 86(v)).

39. The basis of the finding that the Claimant had not taken up some opportunities to discuss the progress of his studies with the University is set out in paragraphs 81 to 83 of the second decision. The OIA took account of the following correspondence and communications between the Claimant and the University:

i) In September 2010 Professor W confirmed that the Claimant could attend Module 5 and Module 6 of the course.

ii) The CAP in September 2010 said that the Claimant should discuss with the Department his options for academic progression, noting that the Department were able to defer his option to resit failed modules.

iii) In late September 2010, according to the Claimant, he was told by Dr W not to have any communication with the Department.

iv) On 8 November 2010 the Claimant in an email to the CIO complained that he was still waiting to be told to whom he should submit his work for Module 5, and also that he had missed Module 6.

v) The CIO replied on 12 November 2010 saying that she understood the Faculty were going to contact the Claimant, and "if that is not the case, please let me know". The OIA had no copy of any response to that email.

vi) On 8 December 2010 Mrs O, on behalf of the University, told the Claimant that his position as expressed in earlier emails was noted, and any discussion would be put on hold pending the outcome of Mrs L's investigation. She continued, "If you wish to discuss continuation before then, please let me know". There was no such immediate request from the Claimant.

vii) The Claimant had referred the OIA to later emails he had sent, in February and March 2011. These were sent months after the deadline for the Module 5 work and the dates of the study weekend for Module 6. They were also months after he had declined the University's previous invitations in the autumn term of 2010 to discuss his continued study, and after he had made a complaint to the OIA in December 2010. In effect, the OIA was saying that by February and March of 2011 it was too late for the Claimant realistically to take up the University's earlier offers to discuss his continuing with the course.

40. The Claimant does not accept this factual finding, but he referred me to no further evidence which would suggest that it was an unreasonable one. Even after he had been put on notice of the finding in the draft second decision, he only referred to the

emails in February and March 2011. I am bound to conclude, therefore, that this was a finding which the OIA was entitled to make, and there is no basis for alleging any error of law in it.

41. That leaves the lack of any clarity about how the figure of £6,000 was arrived at. Certainly it is not explained mathematically. However, such detailed and mathematical reasoning are not required. I bear in mind the guidance given by the Court of Appeal in *Siborurema* and *Maxwell*, noted above. The lack of elaborate reasoning is not an error of law, if the ultimate conclusion is a rational one.

42. In this case it is clear to me that the figure of £6,000 was one which the OIA could quite rationally arrive at. The fees for the full course at Hull would have been £3,390, according to the Claimant. His expenses for the first year were claimed by him at £1,000. Even if they would have been the same for the second year, the total cost would have been only about £5,390. There was no explanation or breakdown of the figure of £15,600 which he put forward. It appears from documentation to which I was referred during the hearing that the Claimant has since given further details, and it relates to a combination of two courses at the University of Reading. In any event, he had not started an alternative course, even at the date of the second decision in October 2013.

43. In the light of this evidence, it would have been difficult to make any mathematically precise assessment of loss. Given the nature of the OIA's procedures and function, it was reasonable for it simply to come to a round figure, taking into account the various uncertainties which were set out in the second decision. The award of £6,000 in my judgment is within the bracket of reasonable figures which could be recommended on that evidence.

44. This was not a judicial award of damages. It was a recommendation which each party could accept or reject. The Claimant is entitled to reject it and seek a judicial determination of his claim through the courts.

Conclusion

45. For these reasons this application fails on all grounds. Unless the parties can agree the consequential orders, I shall direct that costs be dealt with on written submissions, and will lay down a timetable when I hand down this judgment. Any submissions as to the appropriate dates in that timetable, and any other consequential directions, should be submitted in writing with any suggested corrections to the draft judgment.