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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT  
SITTING AT BRISTOL



No. CO/3506/2021

Bristol Civil and Family Justice Centre  
2 Redcliff Street  
Bristol  
BS1 6GR

Thursday 9 June 2022

Before:

THE HON. MRS JUSTICE STEYN DBE

B E T W E E N :

THE QUEEN  
(on the application of THOMAS HALL)

Claimant

- and -

OFFICE OF THE INDEPENDENT ADJUDICATOR  
FOR HIGHER EDUCATION

Defendant

- and -

UNIVERSITY OF EXETER

Interested Party

THE CLAIMANT appeared In Person.

MS N. JACKSON (instructed by EJ Winter & Sons Limited) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE STEYN:

- 1 By this claim for judicial review, the claimant challenges the decision of the Office of the Independent Adjudicator for Higher Education (“the Adjudicator”) dated 28 July 2021 not to uphold his complaint against the University of Exeter in relation to the University’s decision to permanently exclude the claimant on 22 September 2020.
- 2 At the outset of this hearing, the claimant, Mr Hall, sought to appeal against the decision that I made on 1 June 2022 refusing to vacate this hearing. While I acknowledge that the claimant had little time to appeal to the Court of Appeal against that decision, in my judgment this hearing should proceed for the detailed reasons that I gave in my order of 1 June 2022.
- 3 I do not consider that the delay entailed in staying this claim pending an appeal to the Court of Appeal is in the interests of justice and, in particular, although I appreciate the claimant does not accept this, I do not consider that it would, in fact, be in his interests to grant the order he seeks. The reality is that that would merely delay this substantive hearing which would have to take place in any event and in which the court would have to determine the matters that are now before me.

## **BACKGROUND**

- 4 The claimant, who is now 25, was a student at the University of Exeter from September 2018 until September 2020 studying a Mathematics and Physics BSc degree course. He has certain disabilities which are highly relevant in considering the merits of this claim. However, I consider that his right to respect for his private life outweighs the interest in open justice to the limited extent that it is appropriate to make the details of his disabilities subject to restricted access and reporting. I have therefore addressed this part of the background in a confidential annex to this judgment.
- 5 During the claimant’s second year at university, disciplinary action was taken against him for two incidents. One incident on 21 February 2020 involved changing the wording on a light board in a student bar to display an abhorrent racist term. A second incident in June 2020 involved the posting on social media of a deeply offensive post comparing the beliefs of the Black Lives Matter movement to the beliefs of incels, suggesting that both groups should be made fun of. It was alleged that this use of inappropriate language of a racial and gendered nature has caused and has the potential to cause distress and/or harm to others whether or not that distress and/or harm was intended.
- 6 At the hearing before the Multi Disciplinary Board of the University, which was held remotely on 8 July 2020, the claimant apologised for his conduct and the distress he had caused. The Board decided to permanently exclude him from the University. He sought to appeal. The Senate Appeal Board considered he had not demonstrated sufficient evidence for his appeal to be referred to a further Senate Appeal Board. He subsequently asked the University to reconsider in light of issues concerning his welfare before and during the disciplinary procedure. That request was refused.
- 7 On 14 December 2020, the claimant submitted a complaint to the Adjudicator. On 28 July 2021, the Adjudicator determined that the complaint was “Not Justified (Reasonable Offer)”. The reasonable offer related to some delay in the process. Leaving that aspect aside, the determination - which is challenged in these proceedings - was that the complaint was not justified.

## **GROUND OF REVIEW**

- 8 At an oral hearing, Foster J granted permission limited to three grounds, namely:
- (a) The Adjudicator was wrong to dismiss the complaint that the penalty of expulsion was disproportionate in any event;
  - (b) The Adjudicator was wrong to dismiss the complaint, that the decision of the University was perverse and/or procedurally unfair in that the process failed properly to take into account the claimant's disabilities; and
  - (c) The Adjudicator was wrong in failing to hold that the University was fundamentally unfair in taking into account in its decision other alleged misdemeanours of the claimant (not charged against him) although stating that it did not.
- 9 Given that these are judicial review proceedings, in relation to each of these grounds, the question is not whether the court considers the Adjudicator's decision was "wrong" but whether the Adjudicator made a public law error. Each ground is, essentially, a rationality challenge to the Adjudicator's decision.

## **THE ADJUDICATOR'S RESPONSE**

- 10 Following the permission hearing, in correspondence, and reiterated in its Detailed Grounds of Defence, the Adjudicator has offered to reopen its review of the claimant's complaint and make a fresh decision. The Adjudicator has indicated, without wishing to prejudice the outcome, that it is highly likely that this review will result in the outcome of the complaint changing from "Not Justified" to "Partially Justified", with the effect that the University would need to reconsider his case.
- 11 That offer has remained open but the claimant has not accepted it because he considers that the Adjudicator should go further and agree to make a recommendation to the University that his permanent exclusion should be overturned, with a view to a lesser penalty being imposed.
- 12 In the Detailed Grounds of Defence and the Adjudicator's skeleton argument, the Adjudicator submitted that the claim is academic in light of its offer save to the narrow extent that there is an argument regarding the mandatory remedies that the claimant seeks. In the absence of agreement from the Claimant to a fresh review of his complaint, the Adjudicator has not proceeded in accordance with r.15 of the OIA Scheme Rules to undertake a fresh review. Ms Jackson informs me that the reason for that is that the OIA is precluded by the rules from doing so while the litigation is ongoing and, more broadly, the review process is one in which the OIA would seek the claimant's engagement.
- 13 The position before me, as Ms Jackson acknowledges, is that the claim is not strictly academic. In the absence of agreement between the parties, I have to determine whether the decision is unlawful on any of the three grounds on which permission was granted. The Adjudicator said in correspondence on 7 February 2022:
- "We have carefully considered our complaint outcome and the comments that the judge made during the permission hearing. In our view, the judge's comments, expressed in such clear terms, make it difficult for us to continue with our defence of your judicial review claim."
- 14 This point was reinforced by the Adjudicator in its letter of 8 February 2022, stating:

“The new review would not take time to complete because we have all the information already on our files. Without wanting to pre-judge our decision, I will have no involvement in it, it seems highly likely that we would change our decision to Partly Justified on the basis that the University did not properly consider the effects of your disability on how you expressed yourself during the disciplinary process and your ability to engage with available support.”

- 15 Nonetheless, the Adjudicator has not conceded the claim, and Ms Jackson has made submissions on the merits of the grounds. I turn therefore to consider whether the grounds, or any of them, are made out.

### **GROUND 1**

- 16 The first ground raises the question whether the Adjudicator’s decision was irrational in dismissing the claimant’s complaint that the penalty of permanent exclusion was disproportionate.
- 17 It seems to me that there are two aspects to this ground. First, the strong way in which it is put by the claimant is that the penalty of permanent exclusion was so disproportionate in the circumstances that it was not open to the University to impose it and, in dismissing his complaint, the Adjudicator irrationally failed to recognise this.
- 18 I am not persuaded that this way of putting the ground is made out. The Adjudicator’s view was that having regard to the gravity of the incidents, and the need for the University to protect the interests of the wider University community, it could not go so far as to say that the penalty imposed was not one which was rationally open to the University, as the primary decision maker. That view is not one which can properly be characterised as irrational.
- 19 The second way in which this ground may be put, and which in my view has merit, is this. In making its decision on penalty, the Board did not follow the process of working upwards through the range of available penalties and it gave no explanation as to why any lesser penalties were not appropriate or why it considered that nothing less than permanent exclusion was the appropriate and proportionate penalty. In addition, a fair determination of the proportionate penalty required a proper understanding of the claimant’s disabilities. In particular, such understanding was necessary both to the board’s assessment of the genuineness of the claimant’s remorse and of his prior engagement with support. Although the board was clearly aware of the claimant’s disabilities, it is evident that an understanding of their impact was lacking in considering the claimant’s apology, remorse, and his engagement with support. In my judgment, given these failures, the Board’s decision needed to be reconsidered and the Adjudicator’s finding that the complaint was unjustified was irrational.

### **GROUND 3**

- 20 I shall next consider Ground 3 which, in my judgment, is also made out. This ground concerns the fact that the Board had before it evidence of alleged misconduct on the part of the claimant which pre-dated the two incidents with which he was charged. The earlier conduct was denied by the claimant and he was not charged with it. Nevertheless, it is readily apparent from the Board’s decision, in which they referred on three occasions to their concern about the claimant’s “pattern of behaviour”, expressly including within that pattern in para.8.4 one of the earlier incidents with which the claimant was not charged and which he denied, that the Board unfairly took into account earlier alleged misconduct. In

my judgment, it was irrational for the Adjudicator to fail to uphold the complaint, that the Board had taken into account these earlier matters, and doing so was fundamentally unfair.

- 21 I note that the University had said in subsequent correspondence that it had focused only on the two matters with which the claimant was charged, the earlier matters simply being background to explain why the matter had been escalated and the support that had been offered. However, the key document was the decision itself from which it is manifest that the Board was concerned about the pattern of misconduct not just the two incidents with which he was charged.

## **GROUND 2**

- 22 The focus of Ground 2 is on whether the Adjudicator's decision - that the *process* adopted by the University was reasonable having regard, in particular, to the question whether the University failed properly to take into account the claimant's disabilities in that process - was an irrational one. I have already addressed the separate question relating to the substantive failure to show proper understanding of his disabilities in Ground 1. Ground 2 is concerned only with the procedure. The Adjudicator addressed this in paragraphs 9-11 of the complaint outcome. The Adjudicator said:

“9. The University notified Thomas that his mother had been in touch, expressing concern about the MDB meeting and for his welfare. The University offered to meet with Thomas to talk through the disciplinary process and any adjustments it may be able to make to support him. Thomas accepted the offer of a meeting and was clear in his response that he recommended the University ‘ignore all emails you receive from my parent’. The University accepted this and did not correspond with his mother.

10. The follow up emails from the support meeting of 2 July 2020 between Thomas, a staff member from Student Cases, and a staff member from Wellbeing Services show that staff were satisfied from the discussion that Thomas understood what was happening, how serious the situation was and the potential outcomes, and that he had been able to engage with them appropriately, including using the virtual meeting app. They also show that staff took action to help Thomas engage with support available by the Students' Guild and made sure he was aware of other forms of support available in the University and externally (e.g., via his GP and/or social worker). We think holding this support meeting was a reasonable extra step for the University to take in light of the concerns that Thomas' mother had shared, to ensure that he understood the circumstances, the process that needed to be followed, the potential outcomes and was able to engage with the process. The emails show that staff did discuss the concerns that Thomas' mother had raised with him and that he told staff he felt okay, was not feeling depressed, was well and ‘currently felt very safe’. We are pleased to note the proactive steps the University took to ensure Thomas did make contact with the Students Guild to obtain impartial advice and support from the MDB meeting. We are satisfied from the evidence we have seen that Thomas had the opportunity to have explained any personal circumstances that he felt were impacting his ability to engage with the process or understand what was being asked of him or what was to be considered by the

MDB. Namely, at the meeting of 2 July 2020, at any other point prior to the MDB meeting, and during the MDB meeting itself.

11. The evidence also shows that care was taken throughout the MDB meeting on 8 July 2020 to ensure that Thomas understood the proceedings and the seriousness of the matters being discussed. When it became clear early in the meeting that Thomas had not read all the documents that he had been given access to in advance, a short break was offered to allow him time to read them. He was also offered the opportunity to stop the meeting and for the MDB to be re-convened at a later date. Thomas chose to continue. Thomas was accompanied at the MDB meeting by an Adviser from the Students' Guild. Both Thomas and the Adviser are noted as saying at the time that he understood the severity of the situation, including that exclusion was a potential outcome, and that they were satisfied due process had been followed during the MDB meeting."

- 23 Ms Jackson submitted, and I accept, that the Adjudicator properly considered whether the support and adjustments offered were reasonable and reached an eminently rational conclusion that it was reasonable in all the circumstances for the University to proceed with the disciplinary process in June/July 2020 and that the claimant was offered a fair opportunity to participate in the proceedings. In my judgment, Ground 2 is not made out.

### **RELIEF**

- 24 For the reasons I have given, I find that the Adjudicator's decision was unlawful and the 'Not Justified' outcome should be quashed. It necessarily follows that the Adjudicator should make a fresh decision on the claimant's complaint. Although the claimant has been opposed to the Adjudicator undertaking a further review, the reality is that that is the only course open to the Adjudicator. The Adjudicator has to undertake a further review (even if as it has explained, that can be done speedily in the circumstances) before it can make a further decision. It is not possible for this court to substitute a decision for that of the proper decision-maker, namely the Adjudicator.
- 25 It follows from the conclusion that I have reached in respect of the first aspect of Ground 1 that I am not prepared to grant a mandatory order requiring the Adjudicator to make a recommendation that the University must overturn the permanent exclusion and impose a lesser penalty. That may be the conclusion once a fair and lawful decision has been taken, taking into account the Claimant's disabilities but it is impossible to go so far as to say that it would be irrational for the Adjudicator not to tell the University that irrespective of the evidence they hear in any reconsideration of this matter that there is only one possible course open to them.
- 26 I have considered whether it would be appropriate to grant any other lesser form of mandatory relief, in particular requiring the Adjudicator to substitute an outcome of 'Justified' or 'Partly Justified' for the decision that is being quashed. Relief is a discretionary matter and I do not consider that it is necessary to grant such mandatory relief. The Adjudicator has shown in the way that it has conducted these proceedings that it is ready and willing to reconsider the claimant's complaint and that it will do so taking full account of the findings of this court.
- 27 Accordingly, I find that the claimant succeeds on Grounds 1 and 3 for the reasons that I have given and the decision challenged falls to be quashed.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.