CO/4409/2015

Neutral Citation Number: [2015] EWHC 4169 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 3 December 2015

B e f o r e:

RHODRI PRICE LEWIS QC
(Sitting as a Deputy High Court Judge)
Between:
THE QUEEN ON THE APPLICATION OF PEAT

Claimant

v

INDEPENDENT ADJUDICATOR

Defendant

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(Official Shorthand Writers to the Court)

Mr C Newton (instructed by Sinclairslaw) appeared on behalf of the **Claimant**
Ms C Darwin (instructed by E J Winter & Son for the OIA) appeared on behalf of the **Defendant**
Ms A McColgan (instructed by Watson Buxton LLP) appeared on behalf of Leicester University

J U D G M E N T
(Approved)

1. THE DEPUTY JUDGE: This is the renewal of an application for permission to apply for judicial review of the decision of the defendant, the Office of the Independent Adjudicator for Higher Education, to find the claimant's complaint against the Appeal Panel of the University of Leicester, who are the interested party, as unjustified.

2. The Appeal Panel itself had dismissed the claimant's appeal against the decision of the university's Board of Examiners to terminate her registration with the university. There were originally eleven grounds of challenge.

3. Following consideration of the claim form, and the accompanying documents lodged by the claimant, and the acknowledgment of service filed by the defendant and the interested party and, indeed, the claimant's reply, Lewis J refused permission to apply for judicial review on all of the grounds. His reasons were as follows:

4. The claimant is a former medical student at the University of Leicester. She took the intermediate professional examination, written assessment, and clinical assessment in February 2013. Prior to that she had submitted a mitigating circumstances' claim, citing stress in the home due to child care problems. That was rejected and there was no appeal.

5. In May 2013, the claimant re-sat and failed. On 6 June 2013, the Board of Examiners decided to terminate the claimant's registration. On 20 June 2013, the claimant had a consultation with a consultant psychiatrist who confirmed a diagnosis of an adjustment disorder with anxiety as a direct consequence of circumstances relating to child care arrangements. The claimant appealed on 21 June 2013, seeking to rely on the consultant's diagnosis.

6. The relevant university regulation, Regulation 10.2 permits appeals on circumstances materially affecting the student's performance, which were not known to the Board at the time and which it was not reasonably practicable for the student to make known beforehand.

7. Regulation 10.4 deals with medical evidence and provides that panels will only accept evidence where it considers there was a good reason for it not to have been submitted at the appropriate time.

8. By letter dated 17 July 2013, the Appeal Panel dismissed the appeal. The claimant subsequently sought to put in new evidence and have the decision reopened. The university declined to reopen the decision.

9. The claimant complained to the OIA, which decided that the complaint was not justified for the reasons given in its letter of the 13 May 2015. That was the preliminary decision upon which the claimant commented and made further representations and the final decision, the subject of this challenge, is the decision of 16 June 2015, but nothing turns on these dates. The claimant seeks permission to challenge that decision.

10. Lewis J dealt with Grounds 1 to 3 in the second paragraph of his reasons, in these words:

> "Grounds 1 and 3 seek to challenge the reasonableness of the finding that the claimant had not satisfied the test in Regulation 10.2(a) and 10.4, essentially as the claimant did not have the diagnosis of adjustment disorder until 21 June 2013.
>
> Ground 2 contends the reasonableness of the decision that the consultant's expert was retrospective and unreliable.
>
> In substance, the decision of the university was that the claimant should have been aware of the need to produce medical evidence if there were issues thought to be affecting the student's health at the time. The decision to obtain and put in a consultant's report after the event was not timely. The defendant considered that was a reasonable conclusion, (see paragraphs 31 and 34, those are paragraphs of the defendant's decision).
>
> Further, the main issue was the absence of justification for the late submission. The OIA also considered it was in general terms reasonable for the Appeal Panel to place greater weight on contemporaneous evidence, particularly where the condition was variable in nature so that an assessment at a later stage may or may not accurately reflect the condition as it was at the time of the examination or assessment.
>
> There is no arguable basis for contending that the defendant's decision is unreasonable. It was entitled to come to the conclusion that it did and to express the views about the greater weight that could be attached to contemporaneous evidence. Grounds 1, 2 and 3 do not disclose any arguable error of law."

11. I do not need to read the remaining paragraphs of Lewis J's reasons.

12. I have been very helpfully addressed by Mr Clive Newton QC on behalf of the claimant, by Ms Claire Darwin on behalf of the defendant, and by Ms McColgan on behalf the university, the interested party.

13. In effect, this challenge asserts that the University Appeal Panel acted unlawfully and irrationally and that the defendant fell into the same errors. In my judgment, it is important to see what, therefore, the Appeal Panel wrote in their letter of to the claimant.

14. The letter reads as follows:

> "Dear Mrs Peat, the University Appeal Panel met yesterday to consider your appeal against the decision to terminate your registration. The issue

> which the Panel was required to consider was whether there are, or were, circumstances materially affecting your performance for which there was supporting evidence, but which were not known to the Examination Board at the time its decision was taken and which it was not reasonably practical [the regulation says practicable] for you to make known beforehand."

15. That first paragraph introduces the wording of Regulation 10.2 of the university's regulations in the very first paragraph of its letter to the claimant.

16. The letter continued:

> "The Panel considered the information provided on your academic appeal form and accompanying documents. The Panel also considered the departmental response to your appeal form which you have seen and any comments you made on that response.
>
> I have to tell you that the Panel, having considered all the information available to it did not identify evidence which met the criteria above and which would justify setting aside the academic judgment of the examiners."

17. I interpose that the "criteria above" were the criteria set out in the first paragraph, which were the criteria and are the criteria, in Regulation 10.2(a) of the university's regulations. So there was a express finding by the Panel that they did not identify evidence which met the criteria, three of them, in that regulation. The letter continued:

> "The Panel noted that all students had been advised of the need to provide evidence of mitigating circumstances and that you did so in relation to child care difficulties and associated stresses at home. These have not been accepted by the Mitigating Circumstances' Panel and the Appeal Panel agreed that this decision had been properly reached in accordance with university and departmental guidelines.
>
> The Panel also considered carefully the information you had provided about a diagnosis of adjustment disorder with anxiety. The Panel noted that this diagnosis was obtained after both your initial sitting of the intermediate professional examination, IPE, in February, and the re-sit IPE in May. You did not introduce it in mitigation at either stage and indeed did not obtain the diagnosis until 20 June 2013, after the results of the re-sit had been issued.
>
> The Panel was conscious that medical students have both a professional and an academic requirement to be aware of any issues affecting their health and to notify the school promptly. This is reflected in the pre-course student agreement and the Panel agreed that as student of long standing, you should have been aware of these expectations.
>
> The Panel did not regard the information from the 20 June consultation as

providing contemporaneous (and therefore timely) evidence relevant to your performance in the two assessments, or to your ability to learn and prepare for them in the preceding months."

18. The remainder of the letter deals largely with procedural matters and I do not need to read it out. As I have already indicated, the defendant issued a provisional decision in May 2015, upon which the claimant was able to comment. Then, on 16 June, the defendant issued its "complaint outcome" as it is known.

19. In that document, at paragraph 24, they wrote as follows:

> "The University's Consideration of Mrs Peat's Appeal.
>
> [...]
>
> Ms Peat appeals on the following grounds that there are, or were, circumstances materially affecting the student's performance for which supporting evidence exists which were not known to the Board of Examiners or other academic body at the time its decision was taken, and which it was not reasonably practicable for the student to make known beforehand."

20. Again, that is a summary of the content of Regulation 10(2).

21. The grounds continued, as set out in the complaint outcome:

> "24.There were procedural irregularities in the conduct of the examination or assessment procedure of such a nature as to create a reasonable possibility that the result may have been different had it not occurred."

22. That was part of the grounds on the appeal. Following that there is a reference to Senate Regulations 10.2(a) and 10.2(b).They are the regulations referred to in the Appeal Panel's letter and in the grounds of appeal.

23. The complaint outcome went on to say:

> "25.Senate Regulation 10.4 also specified that the university normally expected students to have submitted a medical certificate and/or other documentary evidence of mitigating circumstances at the time of the illness or other circumstances, with the proviso that retrospective evidence will be considered at the discretion of an Appeals' Panel and students must provide explanation as to why it was not possible to submit the evidence at the time.
>
> Panels will only accept evidence where it considers there is good reason for it not to have been submitted at the

appropriate time."

24. The critical paragraphs for the purposes of this challenge and application are these:

> "30.The Appeal Panel went on to consider the new evidence submitted with Miss Peat's appeal and concluded that it was not sufficient to justify setting aside the decision of the Board of Examiners.
>
> In reaching its decision, the Panel members took into account that Miss Peat had not submitted medical evidence at the relevant time, and that the diagnosis of adjustment disorder was not obtained until 20 June 2013, after the re-sit results had been issued to Miss Peat.
>
> The Panel members stated that making their decision they were conscious of Miss Peat's professional and academic responsibilities to notify the school promptly of any issues affecting her health."

25. In its representations to the OIA, Sinclairslaw, the claimant's solicitors, argue that the Appeal Panel's decision was unreasonable because the adjustment disorder was undiagnosed at the time of Miss Peats's examinations and because the Appeal Panel had not considered the university's responsibilities to Miss Peat as a disabled student. The complaint outcome continued:

> 31: Adjustment disorder, anxiety and stress are conditions variable and unique to an individual and which may well fall within the definition of a disability under the Equality Act 2010, provided the conditions have lasted or are likely to last for more than 12 months and provide a substantial adverse effect on the person's ability carry out day to day activities.
>
> It is not clear from the diagnosis how long Miss Peat had been experiencing the symptoms of this disorder."
>
> [...]
>
> 32. We are, however, satisfied that the overall decision was reasonable, having taken into account that in reaching its decision, the Appeal Panel did consider whether it would be reasonable for it to accept the retrospective evidence of the adjustment disorder, and that Senate Regulation 10.4 gave the Appeal Panel the discretion to do so if it considered that Miss Peat had established good reason as to why she had been unable to submit the evidence at the relevant time.

Universities commonly take the view that if the student is not declaring mitigating circumstances as soon as they become aware of them they cannot be taken into account later on, unless there are compelling reasons why they could not have been declared at the proper time.

This is standard practice across the sector, and we do not consider this approach to be unfair. If Miss Peat felt that circumstances raised were having a significant impact on her ability to study, then the onus was on her to submit a mitigating circumstances' claim and to provide supporting medical evidence at the relevant time in accordance with university procedure.

33. The Appeal Panel also reasonably considered that, as a medical student, Miss Peat was under professional as well as academic obligations to disclose in a timely manner any health issues that were affecting her, particularly given the pre-course student agreement and the professionalism requirements set out by the GMC, [General Medical Council].

Miss Peat, as a fourth year medical student, was expected to have developed a degree of self-awareness about any health issues that were affecting her, and in signing the pre-course student agreement she had confirmed that she would:

A) Recognise when her well-being was compromised by personal or other difficulties and seek appropriate professional support at the earliest stage.

B) Inform the Medical School if illness or other causes were affecting her academic performance.

34. Whilst the adjustment disorder was undiagnosed at the time of her examinations, we consider that Miss Peat had not provided compelling evidence to the Appeal Panel that her condition had prevented her from engaging with the university's usual processes at the time, or that the anxiety was unsuspected, such that a diagnosis could not reasonably have been made nearer to the examination periods.

Miss Peat does appear to have been aware that she was suffering from symptoms of stress and anxiety associated with her child care difficulties at the time of her examinations.

> In her mitigating circumstances form, Miss Peat referred to stress associated with the problems she had experienced with child care arrangements for her young children."
>
> [...]
>
> 35. Sinclairslaw argue that the University Appeal Regulations did not explicitly require evidence of mitigating circumstances to be contemporaneous, and state that it was therefore unfair that the Appeal Panel had taken this into consideration when making its decision.
>
> When considering the new evidence, we are satisfied that it was reasonable for the Appeal Panel to have taken into account when the evidence was obtained and to have placed greater weight on evidence obtained contemporaneously, particularly given the variable nature of the conditions identified.
>
> We also consider that when weighing up the evidence received, it was reasonable for the Appeal Panel to have had regard to the fact the consultant psychiatrist's report and diagnosis was not based on a contemporaneous assessment of Miss Peat's state of health at the time of her examinations, the diagnosis having been made at an appointment on 20 June 2013, several months after the February examinations and after the re-sit examinations when Miss Peat was aware of her results.
>
> Miss Peat gave no explanation as to why she waited until after her examination and results to seek an appointment with the consultant psychiatrist.
>
> As noted above, Miss Peat does appear to have been aware that she may have been suffering from anxiety and stress at the time, and in the circumstances we are not persuade that the diagnosis could not reasonably have been made nearer to the relevant examination periods."

26. In considering these passages of the complaint outcome and the findings of the defendant, I have been reminded of what was said about the relevant law pertaining to the defendant in the case of Maxwell, R (on the application of) v The Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1236, in the judgment of Mummery LJ, who gave the judgment of the court summarising an earlier decision and the relevant law pertaining to the defendant in that case and this as follows:

"23.

[...]

(1) The OIA is amenable to judicial review for the correction of legal errors in its decision-making process.

(2) That process involves conducting, in accordance with a broad discretion, a fair and impartial review of a student's unresolved complaint about the acts or omissions of an HEI and to do so on the basis of the materials before it, also drawing on its own experience of higher education, all with a view to making recommendations.

(3) The function of the OIA is a public one of reviewing a "qualifying complaint" made against an HEI and of determining "the extent to which it was justified."

(4) For that purpose the OIA considers whether the relevant regulations have been properly applied by the HEI in question, whether it has followed its procedures and whether its decision was reasonable in all the circumstances.

(5) It is not the function of the OIA to determine the legal rights and obligations of the parties involved, or to conduct a full investigation into the underlying facts. Those are matters for judicial processes in the ordinary courts and tribunals. Access to their jurisdiction is not affected by the operations of the OIA.

(6) The review by the OIA does not have to follow any particular approach or to be in any particular form. The OIA has a broad discretion to be flexible in how it reviews the complaint and in deciding on the form, nature and extent of its investigation in the particular case.

(7) 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."

27. I was also reminded of the dictum by Hallett LJ in the case of Burger v The Office of the Independent Adjudicator for Higher Education & Anor [2013] EWCA Civ 1803, with which the other judges agreed.

28. Hallett LJ observed that:

> "50. The OIA was set up to provide speedy, effective and cost effective resolution of students' complaints. It was not set up as a court or tribunal or other judicial body. Any court asked to review its decisions must, therefore, act with caution. One must look to the nature of the complaint before the OIA and how the OIA responded in far more general terms than might be the case when reviewing a decision of a judge."

29. Having reminded myself of those dicta, I identify that the critical issue here is whether the Appeal Panel (and, in turn, the defendant) properly applied Regulation 10.2(a) and made rational decisions in doing so. I bear in mind the guidance in the case law I just referred to in looking at that critical issue.

30. The Appeal Panel referred to the relevant regulations in its letter and set them out in the very first paragraph of its letter.

31. It went on to write:

> "I have to tell you that the Panel, having considered all the information available to it, did not identify evidence which met the criteria above and which would justify setting aside the academic judgment of the examiners."

32. So, having just set out the criteria in the regulations, they expressly found that the claimant's evidence did not meet it. They went on to write:

> "The Panel clearly found that the claimant ought to have known of the expectations that any medical issues should be reported promptly and that she did not meet the requirement. They knew of the psychiatric report, but they did not consider that it provided contemporaneous and therefore timely evidence relevant to your performance in the two assessments, or to your ability to learn and prepare for them in the preceding months."

33. That, in my judgment, is an important passage in the Appeal Panel's evidence. They knew of the psychiatric report, and they did not consider it provided contemporaneous and therefore timely evidence relevant to the complainant's performance in the two examinations on their particular dates in February 2013 and May 2013, or to her ability to learn and prepare for those examinations in the preceding months.

34. The Panel were aware of the claimant's circumstances and they formed that judgment of theirs in relation to her with the evidence that they had before them as to her condition.

35. The defendant, in turn, was fully aware of the relevant regulations and set them out in their decision, as we have seen. I am satisfied that the defendant lawfully applied the regulations and reached rational decisions in relation to them and that it is not arguable that they did not.

36. They found that the claimant had professional and academic responsibility to notify the school promptly of any issues affecting her health (see paragraph 30 of the complaint outcome).

37. They took into account the arguments that the disorder was undiagnosed at the time of her examinations and that allowance should be made for any disability. Again, see paragraph 30 of the complaint outcome. That adjustment disorder and stress were conditions which were variable. That is to be found in paragraph 31 of the complaint outcome document.

38. They also considered whether it was reasonable for it to consider whether to accept the retrospective evidence of the adjustment disorder. They looked at that in paragraph 32 of the complaint outcome. They found that it was not unfair and that the onus was on the claimant if she felt that the circumstances were having a significant impact upon her ability to study, to provide supporting medical evidence at the relevant time (i.e. before and at the time of the examinations) in accordance with the university procedure. The defendant expressly referred to that matter being "in accordance with the university procedure" in paragraph 32.

39. That procedure, in my judgment, clearly includes that set out in Regulation 10 which the defendant had expressly set out earlier in its document. They found that as a medical student, there was a professional obligation to disclose in a timely manner any health issues affecting the claimant. They say that in paragraph 33 of their document. They found that she ought to have developed a degree of self-awareness about any health issues affecting her. Again, see paragraph 33.

40. They found that the claimant had not provided the evidence to justify not complying with the university's processes. That is to be found in paragraph 34, and again, in my judgment, the university's process that the defendant is looking at there includes the Regulation 10.2 and 10.4 processes.

41. The defendant found that there was not the evidence that her condition prevented her from engaging with the usual processes. Again, in my judgment, the 'usual processes' there must include Regulation 10, or that the anxiety was unsuspected such that a diagnosis could not reasonably have been made nearer to the relevant examination period: see paragraph 34. In my judgment, that is expressly applying the relevant tests in Regulation 10.2 and applying them in a reasonable manner.

42. The defendant took her particular circumstances into account and found that her condition as shown by her particular circumstances was not such as to prevent her from obtaining a timely diagnosis in accordance with Regulation 10.2 (see paragraph 34 of the complaint outcome).

43. They also found that the claimant was aware that she was suffering from symptoms of stress and anxiety associated with her child care duties at the time of her examinations (see paragraph 34 again), and therefore could have provided timely evidence in their finding. Again, in my judgment, that was a finding that was reasonably open to them on the information they had before them.

44. The defendant also found it was reasonable for the Appeal Panel to take into account when the evidence was obtained, and to place greater weight on evidence obtained contemporaneously and they identified particularly the variable nature of the conditions identified (again, see paragraph 35 of the complaint outcome).

45. In other words, in my judgment, what they were saying was with a variable condition, evidence of the condition at a later time than the examination should be treated with particular caution. Here there was not a contemporaneous assessment at the time of the examination: (see paragraph 35). They expressly found that there was no explanation of why she had waited, (paragraph 35) and that was in the context of their earlier findings as to her responsibilities and her awareness.

46. She knew she had anxiety and stress at the time of her examination and the defendant came to the conclusion that they were not persuaded that this *'diagnosis*' (and that is the word they used) could not reasonably have been made nearer to the relevant examination period. In my judgment, in reaching that conclusion they looked at all the circumstances including the claimant's responsibilities, the claimant's condition, and her history that was before them on the material before them. Those, in my judgment, are rational and reasonable conclusions to be arrived at properly applying the university's regulations. I have addressed them in accordance with the guidance of the Court of Appeal and in my judgment, this claim is not arguable on either ground.

47. MS DARWIN: My Lord, thank you very much. My Lord, you will have seen that in Lewis J's judgment he ordered the claimant to pay the defendant's costs in the sum of £3,168.

48. THE DEPUTY JUDGE: Yes.

49. MS DARWIN: In so far as I need to do, may I ask you to simply confirm that order?

50. THE DEPUTY JUDGE: Any comments?

51. MR NEWTON: I have nothing to say.

52. THE DEPUTY JUDGE: Thank you. I confirm that order, no other applications. Thank you all very much indeed.