C1/2013/0469

Neutral Citation Number: [2013] EWCA Civ 1803
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Royal Courts of Justice

Strand
London, WC2A 2LL
Wednesday, 23 October 2013

B e f o r e:
THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE HALLETT
LADY JUSTICE SHARP

Between:

BURGER

Appellant

v

THE OFFICE OF THE INDEPENDENT ADJUDICATOR

FOR HIGHER EDUCATION

Respondent

and

THE LONDON SCHOOL OF ECONOMICS

Interested Party

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Mr P Greatorex appeared on behalf of the **Appellant**
Ms A McColgan appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

LADY JUSTICE HALLETT:

1. **Background**

2. The appellant was a student at the London School of Economics from approximately 2007 to 2009, hoping ultimately to achieve a PhD in economics. Year one comprised three core courses and the appellant failed two of them, EC 442 and EC 443, at his first attempt. The following year he passed EC 442 and did well in some aspects of the course but he again failed EC 443. This meant that he was unable to progress to his PhD.

3. He first raised concerns about the two core courses with his Head of Economics. He then lodged a formal complaint in a letter dated 27 July 2009 to a Mr Adrian Hall of the London School of Economics ("LSE"), which is before us as an interested party. His letter consisted of nine pages of detailed criticisms but he helpfully provided what he described as a brief summary of his complaints. They came under three/four main headings:

    a. That the courses EC 442 and 443 did not cover the material which was actually assessed in the final exams.

    b. That there was a failure to communicate the marking scheme for the final exam to the class teachers so that they were able to prepare their students appropriately for the exam and

    c. There had been the use of an inappropriate marking scheme for EC 442.

4. He also complained that the teachers had not been in a position to communicate their expectations to their students.

5. At that time the complaint did not make any express reference to the failure of the Economics department to publish assessment criteria for the examination as provided in paragraph 6.1 of the LSE's instructions for examiners. However, it is this failure which has featured prominently in this appeal and I shall therefore rehearse its contents.

6. Under the heading "Duties and Responsibilities of the Chair of the Sub-board of Examiners" paragraph 6.1 states that one of the duties of the Chair is to ensure that the department produces and publishes assessment criteria in line with the school's requirements. We are told that the interested party defines assessment criteria as:

    a. "Verbal descriptors of what a department expects of students which distinguish between different grades."

7. The interested party's investigator held meetings with various people and systematically considered and rejected each of the complaints. She concluded overall that:

    a. The courses EC 442 and 443 did prepare students fully and fairly for their final exams and

    b. The marking system was appropriate and fair and the student had been given sufficient information by means of mock exams and problem setting.

8. She recommended rejection of the complaint.

9. The appellant declared his intention to appeal, asking the University that he be allowed to take the new EC 442 course and be reassessed. Throughout this appears to have been his objective.

10. By a letter dated 12 January 2010 the LSE rejected his appeal. Nothing daunted, the appellant complained to the respondent, the Office of the Independent Adjudicator for Higher Education. The respondent is designated as the operator of a student complaints scheme under sections 11 to 14 of the Higher Education Act 2004. The respondent's rules provide where relevant that:

    a. The main purpose of the scheme is the review of unresolved complaints by students about acts and omissions of higher education institutions and the making of recommendations.

b. The scheme does not cover a complaint to the extent that it relates to a matter of academic judgment or, in the opinion of the reviewer the matter complained of does not materially affect the complainant as a student.

c. A complainant must first have exhausted the internal complaints procedures of the higher education institution about which complaint is made before bringing a complaint to the respondent.

d. In exceptional circumstances a reviewer may accept a complaint for review even if the internal complaints procedures have not been exhausted if he or she considers it appropriate.

11. The appellant's appeal to the OIA consisted of a letter of some 41 pages. In summary, it was a generalised complaint about the quality of the investigation conducted by LSE but most importantly he complained about the alleged failure to prepare students for the examination he had sat properly, for poor teaching and about the fairness of the marking scheme. He described his "key complaint" to be the fact that the courses and mock exams failed to prepare students properly for the final exam. In this letter he added a criticism that at no time did lecturers inform students about their assessment criteria or the marking schemes applied to the final exam. The tenor of his remarks was that failure to inform students about the marking schemes and the assessment criteria benefited students who had prior experience of them.

12. He did not, however, expressly complain of any alleged failure to publish assessment criteria, using the term as a term of art within paragraph 6.1(b) of the examination instructions. He demanded that all of the students that took the course and exams in EC 443 that year should have their marks increased as compensation for the "violation" of the regulations and he sought a reassessment of his own grades in the EC 442 paper.

13. On behalf of the respondent, a deputy adjudicator, conducted an investigation. She had considerable discretion under the rules of the scheme. Amongst other findings she made adverse to the appellant she concluded that there was no obligation upon the examiners to publish assessment criteria to the students.

14. By letter dated 21 March 2011 the OIA sent the appellant a draft formal decision for his comments. He responded very promptly, for the most part reiterating his previous complaints but also disagreeing with the deputy adjudicator's interpretation of paragraph 6.1(b) of the examination instructions.

15. By letter dated 6 May 2011 the OIA rejected the complaint in a formal decision and refused to revisit its interpretation of paragraph 6.1.

16. Judicial Review

17. The appellant wrote a pre-action protocol letter focusing on the failure to publish assessment criteria and the unfairness of his treatment. He sought permission judicially to review their decision acting as a litigant in person. He sought by way of remedy a quashing of the OIA's decision, a mandatory order instructing the OIA to take into account the effect upon him of the LSE's failure to publish assessment criteria in accordance with 6.1(b) and to set "problem sets and mock exam questions that materially prepare for the final exam" and an injunction preventing OIA's continued wrong doing. He also sought damages, if available.

18. In a more detailed statement of grounds he set out his complaints under the following headings.

19. Error of law. He argued that the deputy adjudicator failed to acknowledge the department was duty bound to publish assessment criteria.

20. Unreasonableness, procedural unfairness and failure to take into account relevant factors coupled with consideration of irrelevant factors. He argued that the OIA wrongly accepted the LSE's claim that the information provided to students was sufficient to prepare them for the examination and suggested the OIA must have ignored relevant material.

21. He also accused the OIA of bias. This ground is no longer pursued.

22. The appellant was given permission by Holman J to bring judicial review on very limited grounds. At the time the matter was before him there was some confusion over the nature and extent of the assessment criteria referred to in rule 6.1(b). Holman J was led to believe by Mr Burger that knowledge of the assessment criteria might well be of benefit to candidates because they include information about those parts of the syllabus upon which the examinations would be held. Troubled by this possibility, Holman J gave permission for judicial review on two bases:

    a. Whether the deputy adjudicator was in error when she said at paragraph 22 of her decision:

        i. "I do not consider that paragraph 6.1 of the instructions goes as far as to dictate that the assessment criteria or marking schemes is to be disclosed to students in advance of examination."

    b. Whether the interested party was in breach of its own instructions and rules by not publishing assessment criteria for examination EC 442 in a form that was available to the claimant as a student in advance of his taking that examination.

23. The substantive application came on before Mostyn J. He had the benefit not only of a description of what assessment criteria were, namely "grade descriptors", but also the assessment criteria published by two other departments at the LSE. He described the assessment criteria as "banal and statements of the obvious". Both the appellant and counsel for the OIA appeared to agree. I give two examples. For a "fail" in the department of political sociology, this is the descriptor:

    a. "The essay shows limited understanding of the subject and lacks evidence of any independent response to the question. It may be based entirely on lecture material, poorly structured and contain significant errors of fact. The essay may be incomplete, including poor presentation and inadequate referencing, and fail to demonstrate an appropriate level of engagement with relevant literature."

24. The "fail" for the department of media and communications read:

a. "This is for work that does not reach the overall standard required of a Masters student. It will feature many if not all of the following characteristics: weak argument, narrow range of sources used, prescriptive account, poor presentation, inaccurate citation and gaps in bibliography."

25. The appellant invited the court to note the reference to ‘inadequate referencing’ in the first descriptor and ‘inaccurate citation’ in the second. It was his contention that if the Economics department also required referencing or citation of sources the students should have been told. It may have been his failure to provide adequate referencing and sourcing that led to his failure.

26. Miss McColgan on behalf of the respondent argued strenuously that this could not be the case. She was in a position to rely upon the marking scheme for the actual exams that the appellant had sat. The scheme directed that a very broad brush approach should be taken to marking, reminded examiners there were no right answers and stated that detailed referencing was not required. Similarly, the model answers for EC 443 contained no requirement for citations and references, save in the most general terms, such as “X's theorem”.

27. Mostyn J concluded that the deputy adjudicator made the errors highlighted by Holman J but they were not material. He refused permission to bring judicial review, observing at paragraph 20:

28. "Had the deputy adjudicator been aware that other departments published assessment criteria of the kind exemplified above then she would no doubt have phrased paragraph 22 of her ruling differently and drawn a clear distinction between assessment criteria and marking schemes. She would I am sure have agreed with my conclusion that paragraph 6.1(b) did indeed require the publication of such criteria in this case but would also have concluded that had such publication taken place it would have made absolutely no difference to the claimant's performance in the exam and the complaint should therefore be dismissed under rule 3.5. Further, I consider it likely she would have concluded that the claimant, not having raised the failure to publish assessment criteria within the internal appeals process, had not exhausted his remedies with the LSE under

rule 4.1. I have no doubt that had this confusion not arisen the result would have been exactly the same; the complaint would have been dismissed."

29. Appeal

30. The appellant, still acting in person, took his case to the Court of Appeal and obtained permission to appeal on the papers from Sir Richard Buxton. Sir Richard observed:

    a. "Before such error can be discounted the court has to have a reasonable degree of certainty that the error made no difference to the outcome. I am not satisfied that that requirement is fulfilled in this case. If the deputy adjudicator had reached the correct conclusion that paragraph 6.1(b) required the publication of the assessment criteria for the examination and had accepted, as the judge appears to have done, that the applicant was unaware that referencing was or might be required in the exam essay, then it is arguable she would or should have required the institution to state whether, as in other departments, the department of economics indeed required referencing in the answers and whether the applicant had failed solely because he had not provided such references."

31. He stated further:

    a. "It may also assist the management of the appeal to make clear that permission is given in relation to the specific requirement or otherwise of references."

32. He gave permission on a second ground, that it was arguable that the judge took too narrow a view of the scope of the applicant's internal complaint.

33. Mr Paul Greatorex, who now appears for the appellant, has done his best to put the appeal in some kind of legal order. He has focussed on the first ground. He does not agree with the judge below that the errors found were errors of fact; he argues that there were errors of law. But, it matters not because he concedes that on the facts here it is a distinction without a difference. The only issue is one of materiality. He submits that the errors were plainly material.

34. Mr Greatorex placed considerable emphasis on the fact that the two questions posed by Holman J have been answered in the appellant's favour and therefore, he submitted, the appellant was entitled to relief unless the judge could be satisfied that the decision would inevitably be the same. He placed reliance upon the decision in R(Smith) v North Eastern Derbyshire Primary Care Trust [2006] 1 WLR 3315, where at paragraph 10 of the judgments May LJ observed:

    a. "Probability is not enough. It is for the defendant to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision."

35. Mr Greatorex complains that the judge has done just that: he has strayed into the merits of the decision.

36. He has also complained that the judge in paragraph 20 of his judgment used the word "likely" when concluding that the deputy adjudicator would have found that the appellant had not exhausted his remedies. This, he submitted, shows that the judge had been applying the wrong test.

37. Further, he insisted that there is no evidence that publication of the assessment criteria would have made no difference. A High Court judge, highly educated, may well consider them banal and obvious but not every student would have the intellectual advantage of Mostyn J. A student from abroad, without experience of the English education system, it was said requires all the help they can get. The LSE considered them sufficiently important to require publication of assessment criteria before any final exams were set.

38. He also argued that given the error was made at the outset of the process it is impossible to say what the outcome would have been.

39. Mr Greatorex suggested that the judge has misunderstood the impact of rule 3.5 and has applied the test of whether or not the appellant would have failed the exam, which is not the only remedy open to the adjudicator if the complaint was upheld.

40. In relation to the exhaustion of internal remedies point, Mr Greatorex maintained that the appellant had in effect complained of a breach of rule 6.1 to the LSE, even if he had not used those express words before launching his appeal to the OIA.

41. Conclusions

42. Having considered the documentation with care, I see considerable force in Miss McColgan's submissions that the general thrust of the appellant's complaints to the university was that he had been inadequately prepared for the examination. He felt there was a "lack of fit" between the course as taught and the examination as assessed and that there had been a failure of communication between him and the interested party as to what marks would be allocated to what parts of the examination. Any reference to assessment criteria was made in a very general sense and in the context of the marking scheme. He did use the words "assessment" and "assessment criteria" on more than one occasion but not in the context of a failure of the department to publish them. His complaint was about the way in which his performance had been assessed in the final examination. In truth, he had not explored with the university the failure to publish criteria.

43. It was only after the University had completed its procedures that he raised the issue of a breach of rule 6.1 and then he did so in the midst of several pages of closely typed complaint to the OIA. The substance of his complaint continued to be the way that he had been treated. In the body of the letter he wrote:

a. "Thus, also this source did not enable students to learn about assessment criteria. Furthermore, in violation of paragraph 6.1 (b) of the instructions for examiners the LSE economics department did not produce and publish assessment criteria."

44. He did not go on to specify what, if any, consequence such a failure had had upon him. The rest of the letter focussed on the complaints already made to the LSE.

45. I have no doubt that it was the way Mr Burger mentioned paragraph 6.1 (b) (almost by a side wind) that led to the deputy adjudicator unfortunately conflating the two issues of marking schemes and publication of assessment criteria. But, the fact is there was an error. However, I am also entirely satisfied, as Mostyn J was satisfied, that had this confusion between assessment generally and assessment criteria (as a term of art) not arisen the complaint would have been dismissed in any event because the appellant failed to exhaust internal remedies. The University was never given the opportunity to address the complaint about publication and the materiality of any failure to publish.

46. I accept that Mostyn J's use of the word "likely" when referring to the adjudicator's decision on exhaustion of internal remedies was unfortunate but reading the judgment as a whole and taking that passage in context, it is clear that the judge applied the correct test in law and asked himself the right questions. On the material before him he was justified in concluding both that internal remedies had not been exhausted and that was the inevitable conclusion of the adjudicator and that a breach of the duty to publish assessment criteria would have made no difference to the outcome.

47. The assessment criteria are less than illuminating. The appellant was experienced in sitting LSE exams- he had sat the final exam on a previous occasion. He had also received feedback on his examination performance and been set relevant problems to prepare him for the exams. As the deputy adjudicator found and he

must now accept he was fully and properly prepared for the examination. Now we know the assessment criteria and the model answers to the papers we know he was not prejudiced in any way. They do not require the level and kind of referencing that would have put him at a disadvantage as a student from Germany.

48. Finally, it should be remembered that the OIA enjoys a broad discretion as set out in R(Siborurema) v the Office of the Independent Adjudicator [2007] EWCA Civ 1365. Decisions may be challenged where, for example, there have been breaches of the rules of natural justice by way of bias or relevant procedural injustice or where there has been such scant or inappropriate consideration of a complaint that what had occurred could not fairly be described as a review. The OIA is expected to follow rational and fair procedures and to give adequate reasons for it is decisions and recommendations. The procedures followed and the decision letters can then be properly scrutinised. Pill LJ observed at paragraph 64:

49. "It must be kept in mind that the question before the OIA was whether the complaint was justified. It does not follow that the procedures and decisions of the OIA are to be treated as if it were a judicial body or that every complaint must be investigated in the same way. The nature and seriousness of complaints referred to the OIA is likely to vary widely and is therefore likely to call for a submission that in every case the OIA is bound to examine the underlying merits of a dispute and account properly limit itself to a review of the decision which has given rise to the complaint. It is for the OIA in each case and to decide the nature and extent of the investigation required, having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA and is likely to be slow to accept that its choice of procedure was improper. Similarly, I should not expect the court to be easily persuaded that its decision and any consequent recommendation was unsustainable in law, see paragraph 70 of Lord Justice Moore-Bick's judgment."

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. Here the OIA did its very best with a very far ranging series of complaints made by the appellant. It followed rational and fair procedures and gave adequate reasons for its decisions and recommendations. It addressed the substance of the complaints. Even if no errors had been made the result would have been the same.

51. For those reasons I would reject the criticism made of Mostyn J's analysis and of his reasoning and I would dismiss the appeal.

52. LADY JUSTICE SHARP: I agree.

53. THE CHANCELLOR OF THE HIGH COURT: I also agree.