Neutral Citation Number: [2012] EWHC 203 (Admin)

Case No: CO/1572/2011

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 16th February 2012

Before :

HIS HONOUR JUDGE GILBART QC
HONORARY RECORDER OF MANCHESTER
(sitting as a deputy High Court Judge)

- -

Between :

THE QUEEN (ON THE APPLICATION OF TIAGO CARDAO-PITO)	**Claimant**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION	**Defendant**
and	
LONDON BUSINESS SCHOOL	**Interested Party**

- -
- -

The Claimant in person
Sam Karim (instructed by **E J Winter & Son LLP of Reading**) for the **Defendant**
Simon Forshaw (instructed by **Farrer and Co of London**) for the **Interested Party**

Hearing dates: 3rd January 2012

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JUDGEMENT

JUDGE GILBART QC :

Introduction

1. This application for judicial review relates to a complaint made by the Claimant to the Defendant Office of the Independent Adjudicator for Higher Education ("OIA") after the Claimant had been asked to leave the London Business School (LBS), where he was enrolled in September 2007 on a four year course leading to the award of the degree of Doctor of Philosophy. He had done so as an EU national (he is Portugese) and was in receipt of an award of £16,800 per annum for 2007-8 and £17,220 for the year 2008/9 (both paid monthly)**.** It was paid by the LBS, but was actually funded by the Economic and Social Research Council ("ESRC"). The first part of that course requires a student to undertake a Masters Course (known as a MResearch or MRes**)** which included a research paper, supervised by a professor. He was asked to leave at end of the 2008-9 academic year because his coursework paper within the MRes course received a "C" grade, whereas LBS made it a condition of proceeding to the Ph.D stage that a student achieved at least a Grade B for that element. He then had to find another institution where he could obtain a Ph.D. However the ESRC decided not to continue funding his studies, as a result of the grading at the LBS. He enrolled at the University of Strathclyde and has now passed the viva for his Ph.D, but has had to find other funds to pay for his last two years of study.

2. He had appealed internally at the LBS, raising grounds that went to the supervision he had received, alleged bias or prejudice against him by his supervising professor, and challenged the mark awarded for his research paper. There were attempts made within LBS at a senior level to discourage him from appealing, which he resisted. Those charged with dealing with the appeal at LBS decided that his appeal showed no prima facie case, as I shall describe in greater detail below. He was notified of that decision on 18th September 2009. He made a complaint to the OIA on 30th September 2009.

3. The OIA, as also appears in more detail below, partly upheld his complaint by a formal decision of 25th November 2010, not issued until about 14 months after the original complaint. In summary it

   i) concluded that LBS should have found that there was a prima facie case raised of bias and prejudice towards him on the part of his

supervising professor, Professor X who was also one of the examiners of his research paper;

ii) rejected his complaints about the grading of his paper;

iii) accepted his complaint that senior academic and administrative staff at LBS had sought to deter him from appealing;

iv) stated that the LBS should have made the Claimant aware of the Harassment and Bullying Procedure and asked him if he wished to complain under it.

v) when addressing what recommendations it should make, and whether he should be compensated for the fact that he had lost his scholarship and now had to pay tuition fees, considered that he must "bear a significant proportion of responsibility for the problems that arose."

vi) recommended that the LBS offer him £400 in compensation for the parts of the complaint the OIA thought justified. In the draft (whose terms are very similar to the formal decision) the figure was £250.

4. These proceedings started when the Claimant challenged that decision on 18th February 2011. As appears below, the Defendant OIA has now reviewed that decision (on 23rd September 2011) , and concluded , inter alia, that

i) inappropriate attempts were made to dissuade the Claimant from pursuing an appeal

ii) it was unreasonable for LBS to have concluded that no prima facie case had been shown

iii) LBS should have investigated the case made against the supervising Professor under its harassment and bullying procedure;

iv) the Claimant's complaint about the choice of examiner, and other matter relating at purely academic questions should be rejected;

5. It recommended that the LBS should offer to pay him a total of £ 6500, and offer to him to open an investigation under the harassment and bullying procedure.

6. I was invited to consider whether the later decision and recommendations should be quashed.

7. This matter is somewhat complex, and will take some time to set out in this judgement although, as will appear in due course, the central issues can be shortly stated. I shall deal with the matter under the following heads

i) The role of the OIA in law, the scope for judicial review, and the duty to give reasons
ii) The Claimant's course of study, marking and subsequent career
iii) The original internal appeal and its treatment by LBS
iv) The First Decision of the OIA
v) The proceedings;
    a) stages up to the grant of permission by Judge Raynor QC
    b) The application to stay proceedings before Judge Pelling QC
vi) Subsequent reconsideration process by the OIA and the objections of LBS
vii) The Second Decision of the OIA
viii) Events subsequent to Second Decision
ix) The status of the Second Decision in law: submissions and ruling
x) The case for the Claimant
xi) The case for the Defendant
xii) The case for the Interested Party
xiii) Discussion and conclusions
    a) The Case before the OIA, the issue of academic judgement, and the scope of the review
    b) The First Decision letter
    c) The Second Decision letter
    d) Order and concluding remarks.

8. For reasons that appear in due course, I have referred to two professors by anonymised initials only, since allegations against them are as yet undetermined.

(1) The role of the OIA in law, the scope for judicial review, and the duty to give reasons

9. In this case, the OIA is the relevant designated operator for the purposes of the review of student complaints under part 2 of the *Higher Education Act 2004*

("HEA 2004"). Its task is to deal with "qualifying complaints"[1]. A qualifying complaint is defined as

> " a complaint about an act or omission by a qualifying institution, which is made by……a student or former student ."

(It is agreed that LBS is a qualifying institution and that the Claimant is a student or former student). A complaint is not a qualifying complaint " to the extent that it relates to matters of academic judgement" [2], which is not defined as such. The jurisdiction of Visitors is excluded in the case of qualifying complaints[3].

10. The Act, at Schedule 2, sets out conditions to be met by a Student Complaints Scheme to be provided by a designated operator, while Schedule 3 sets out duties imposed upon the operator. The OIA had [4] to produce a scheme for the review of qualifying complaints which complied with Schedule 2, and must comply with that scheme [5]. The following provisions of Schedule 2 are to be noted:

> "Individuals to review complaints
> 4 Condition C is that the scheme requires every qualifying complaint referred under the scheme to be reviewed by an individual who—
> (a) is independent of the parties, and
> (b) is suitable to review that complaint.
> Review of complaint
> 5 (1) Condition D is that the scheme requires a reviewer—
> (a) to make a decision as to the extent to which a qualifying complaint is justified; and
> (b) to make that decision as soon as reasonably practicable.
> (2) A scheme does not fail to meet condition D only because it contains provision that a reviewer may dismiss a qualifying complaint without consideration of the merits if the reviewer considers the complaint to be frivolous or vexatious.
> Recommendation of reviewer if complaint justified
> 6 Condition E is that the scheme provides that, in a case where a reviewer decides that a qualifying complaint is to any extent justified, the reviewer—
> (a) may recommend the governing body of the institution to which the complaint relates—
> (i) to do anything specified in the recommendation (which may include the payment of sums so specified), and
> (ii) to refrain from doing anything so specified, but
> (b) may not require any person to do, or refrain from doing, anything.
> Reviewers to notify parties of decisions, recommendations etc.
> 7 Condition F is that the scheme requires a reviewer to notify the parties to a qualifying complaint in writing of—
> (a) the decision the reviewer has made,

[1] HEA 2004 s 12 (1)
[2] HEA 2004 s 12(2)
[3] HEA 2004 s 20
[4] HEA Sched 3 para 2
[5] HEA Sched 3 para 5

(b) the reviewer's reasons for making that decision, and
(c) if the reviewer makes a recommendation—
(i) that recommendation, and
(ii) the reviewer's reasons for making that recommendation."

11. It follows that there is a duty to give reasons for any decisions. It is of course trite law that, provided they deal with the principal issues, reasons may be succinct, and shortly stated. I shall address in more detail below the scope of reasoning which is required.

12. The OIA has published Rules pursuant to its duty to produce a "scheme." At all relevant times they included the following passages.

a) "The scheme "does not cover a complaint to the extent that (3.2) it relates to a matter of academic judgement"
b) The student must first have exhausted the internal complaints procedures save in exceptional circumstances (4.1)"

13. I have also included Rules 6 and 7 in Appendix A to this judgement. It will be noted that the Rules address the steps by which a decision is reached. They include the issuing of a draft decision, upon which the parties may make comments[6]. No provision is made within the Rules for a decision to be reviewed after a formal decision has been reached and issued under Rule 7.

14. By Rule 3.6, a complaint is not covered by the scheme

> "where the matter complained about is being dealt with (or has been dealt with) under the current or previous rules of the OIA. "

15. However the OIA has also issued guidance, although it is expressly stated in that guidance that

> "In the event of any conflict between this Guidance Note and the Rules the latter will prevail."

The guidance includes this passage

> "*Rule 3.6 - The matter complained about is being dealt with (or has been dealt with) under the current or previous rules of the OIA*
> The OIA cannot look at the same complaint twice. However, we might look at a complaint about whether a university has complied with recommendations we have made on a previous complaint. Occasionally we will look at a complaint again if the student produces new evidence after we have issued our Decision and there is good reason to do so. In exceptional circumstances, we might also reopen a review if correspondence received following the Formal Decision gives us reason to believe we might have made a substantive error in the Decision."

16. The scope of the scheme has been considered by the Court of Appeal in *R (Sibourema) v OIA* [2007] EWCA Civ 1365 [2008] ELR 209 and *R (Maxwell)*

[6] See Rule 6.4

v OIA [2011] EWCA Civ 1236. Despite initial objections by the OIA (addressed in *Sibourema*), it is now firmly established that its decisions are amenable to judicial review. There is a very useful summary by Mummery LJ in *Maxwell* at paragraph 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."

17. I do not consider that paragraph 5 of Mummery LJ's summary was intended to cut down the scope of the review described in *Sibourema*. According to the *Sibourema* approach the OIA does have the power to conduct a full investigation if it wishes, and is not necessarily confined to a review of the processes adopted by the HEI in question. I would refer to the judgement of Pill LJ at paragraph 53

> "Parliament has conferred on the designated operator a broad discretion. It is not prescriptive as to how complaints should be considered when making a decision whether they are justified. OIA is able, both in defining its scheme and in deciding whether particular complaints are justified, to exercise a discretion in determining how to approach the particular complaint. OIA is entitled to operate on the basis that different complaints

> may require different approaches. In assessing whether a complaint has been approached in a lawful manner, the court will have regard to the expertise of OIA, which in turn should have regard to the expertise of the HEI. OIA is entitled in most cases, if it sees fit, to take the HEI's regulations and procedures as a starting point and to consider, when assessing a complaint, whether they have been complied with."

18. I would also refer to the judgement of Moore-Bick LJ at paragraph 70

> "70. However, 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 variety of different approaches. I am unable to accept, therefore, the submission that in every case the OIA is bound to examine the underlying merits of the dispute and cannot properly limit itself to a review of the decision which has given rise to the complaint. It is for the OIA in each case 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."

19. I would also draw attention to two specific passages in the judgement of Richards LJ in at paragraphs 73 and 75

> "73 That decisions under the Scheme are amenable to judicial review is plain from the statutory context within which the Scheme has been established and the nature of the function being performed by the OIA in reviewing qualifying complaints against HEIs. The concession that judicial review would lie in a case of bias or other procedural unfairness was inevitable; but there is no principled basis for drawing a line at procedural unfairness and not accepting the availability of judicial review to correct other legal errors in the decision-making process."
>
> "75 The core requirement under paragraph 6.1 of the Scheme to "carry out a review of the complaint to decide whether it is justified in whole or in part" does not prescribe the form that such a review is to take. Nor does paragraph 7.3 of the Scheme, which is in permissive terms. A review of the kind contemplated by paragraph 7.3, under which the reviewer considers "whether or not the HEI properly applied its regulations and followed its procedures, and whether or not a decision made by the HEI was reasonable in all the circumstances", is entirely consistent with paragraph 6.1 and with the purpose of the Scheme. But so too is a more intensive form of review, involving an enquiry de novo and a fresh decision on the merits. Which of those approaches to take, or whether to take some middle or different course, is a matter of discretion. In this, as in

> other matters, little assistance is to be derived from reference to the former jurisdiction of the university visitor, which the statute abolished. The Scheme represents a new approach to the review of qualifying complaints and is not intended to replicate the old system."

20. It is because of the *Sibourema* approach set out above that I regard the authorities relied on by Mr Forshaw (*Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, *Van Mellaert v Oxford University* [2006] EWHC 1565 and *Moroney v Anglo-European College of Chiropractice* [2009] EWCA 1560) as being of little relevance. None of them concern the OIA scheme.

21. Like HH Judge Ockleton in *Budd v Office of the Independent Adjudicator for Higher Education* [2010] EWHC 1056 (Admin) (12 May 2010) at paragraph 63, I consider that the OIA's role is not limited to looking at whether an institution has breached its procedures or acted unfairly. It has a discretion which enables it to choose the form of review, as per the judgement of Richards LJ in *Sibourema* cited above. However I would also refer to this passage in the judgement of Mummery LJ in *Maxwell* at paragraphs 34-38 about the complaint in that case

> 34 "Ms Maxwell had a number of options. She chose to use the OIA as the primary route for her complaint. She has secured a favourable response in the form of the recommendations in the OIA's Final Decision. If she is dissatisfied with that outcome, because there has been no positive adjudication on whether or not there has been disability discrimination against her by the University, her remedy is to resurrect the county court proceedings, which have been stayed by consent for the last 5 years. Her remedy is not in judicial review proceedings mounted on the basis that the OIA has erred in law in not making such an adjudication which it was not obliged to make. It is contrary to the whole spirit of a scheme established for the free and informal handling of students' complaints that the outcomes under it should replicate judicial determinations, which continue to be available in civil proceedings in the ordinary courts, for which the OIA is not and was never intended to be a substitute.
>
> 35 ……
>
> 36 ……
>
> 37 …….
>
> 38 Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. The new processes have the advantage of being

> able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law."

22. As is pointed out there by Mummery LJ, the route of complaint to the OIA is an alternative to litigation, but not necessarily a substitute for it.

23. It follows from the passages cited above from Richards and Mummery LJJ that the OIA is not *required* to substitute its own assessment of the facts in dispute between a complaining student and his/her University/HEI. It *may* do so if it chooses to do so, but it is not bound to do so. It may determine whether the University/HEI in question has dealt with the complaint of the student in accordance with the Rules of the University/HEI and has reached a reasonable decision.

24. As is clear from the judgement of Richards LJ in *Sibourema* at paragraph 75 (cited above) the scope of any judicial review is determined by the application of usual public law principles to the statutory context of the OIA and its scheme.

25. I turn therefore to address the standard of reasoning required in this context. I refer to the terms of condition D of Schedule 2 of HEA 2004, to paragraph 6 of the Rules, to Mummery LJ's third summary point in *Maxwell*, and to Richards LJ's observations at paragraph 75 of his judgement in *Sibourema* where he referred to Rule 6.1

> "The core requirement under paragraph 6.1 of the Scheme to "carry out a review of the complaint to decide whether it is justified in whole or in part……."

26. When issuing its decision, while it is correct that the reasons may be shortly stated, and while they are not expected to be drafted as if they were part of a judgement of a court, reasons must be given which deal with the issues raised. It follows on normal public law principles that they must deal adequately with the principal issues, albeit that they can be succinctly stated. In the words of Mummery LJ in *Maxwell* in his seventh summary point

> "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 bear in mind Mr Karim's submission that a decision letter is to be interpreted benevolently (see Richards LJ at paragraph 79 of *Sibourema*), but that would

not justify a different application of the duty to give reasons as applies to other decision makers, nor is Mummery LJ's summary so to be taken. The standard of reasoning required must of course reflect the context in which the decision is taken- in this case the OIA, but that does not justify a departure from the principle that adequate reasons are required. Given the number of cases in that field where the point is raised, it is inevitable that the principles are most conveniently to be found in the field of challenges to Ministerial town planning decisions. A very useful guide appears in the judgement of Keene LJ in *First Secretary of State & Anor v Sainsbury's Supermarkets Ltd* [2007] EWCA Civ 1083 at paragraph 43, where he summarised the law on this topic, while explaining that he preferred the submissions in that case of Miss Nathalie Lieven for the Secretary of State

> " The judge referred to this aspect in the final sentence of his decisive paragraph, when he observed that
>
> > "at least the reasoning of the Secretary of State did not explain why those disadvantages [of Option A] had to be accepted." (paragraph 73)
>
> Both appellants challenge that proposition. The Secretary of State relies upon the leading case of *South Bucks District Council v. Porter (No. 2)* [2004] 1 WLR 1953, where Lord Brown of Eaton–under–Heywood summarised the principles applicable to this well-worn topic. At paragraph 36 he said:
>
> > "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been

> substantially prejudiced by the failure to provide an adequately reasoned decision."

Miss Lieven emphasises the propositions that the degree of particularity required depends entirely on the nature of the issues and that decision-letters are addressed to parties well aware of the issues involved and the arguments advanced. She also refers us to a passage from *Clarke Homes Ltd v. Secretary of State for the Environment* [1993] 66 P and C R 263, cited with approval in the *South Bucks* case. In *Clarke*, another case involving a reasons challenge, Sir Thomas Bingham, M.R., observed at page 271 – 272:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

28. The principle there set out is not confined to the interpretation of decision letters in planning appeals, but has wider application. See for example *R (on the application of Assura Pharmacy Ltd) v NHSLA and E Moss Ltd (t/a Alliance Pharmacy)* [2008] EWCA Civ 1356 per Lawrence Collins LJ, who when dealing with decisions by a Primary Care Trust to list pharmacies which could dispense prescriptions, said at paragraph 59

> "……decision letters such as the ones which are the subject of this appeal are to be considered on a "straightforward down-to-earth reading… without excessive legalism or exegetical sophistication ": *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P&CR 263 at page 272-3, per Sir Thomas Bingham MR), applied in, e.g. *MR Dean & Sons (Edgware) v First Secretary of State* [2007] EWCA Civ 1083, at [43].

29. In my judgement, the context of an OIA decision did not require elaborate reasoning. But what is significant in these proceedings is this principle: once the OIA had decided to address an issue within its decision, it was required to give reasons for the conclusion it reached on that issue. Similarly any recommendation had to be supported by reasons. In both cases they could be expressed shortly.

(2) The Claimant's course of study, marking and subsequent career

30. The Claimant is a Portugese national, who had attended University in his own country. He obtained an M.Sc degree, and his Professor at the Technical University of Lisbon, who supervised him on his research paper, describes

him as graduating with the highest grade in his class. In 2007 the Claimant registered at the LBS on a Ph.D course in Accounting. That course is divided into three parts

i) An M Res (Master of Research) which consists of 9 courses on subjects which are partly taught and partly the subject of coursework, and also requires the submission of a research paper of between 8-12,000 words.

ii) An M Phil component, during which s/he must submit chapters of the Ph.D theses and pass through a viva

iii) Completion of the thesis and a further viva, leading to the award of a Ph.D.

31. One is not permitted to pass from the first to the second stage without getting 9 course credits, and also a Grade B mark for the research paper.

32. The Claimant's studies were funded by a scholarship which was provided by LBS. However the source of the funding was actually the Economic and Social Research Council, who paid the money to the LBS. The award covered fees and living expenses, and was for £16,800 per annum for 2007-8 and £17,220 for the year 2008/9 (both paid monthly).

33. The Claimant started his MRes course in October 2007. By the end of the summer term 2008, he had taken 10 examinations, receiving 5 Grade As and 5 Grade Bs. From Autumn 2008 he embarked on his research paper under the supervision of a Professor X. As one would expect, the role of the supervisor is to give guidance to the student in and about the preparation and completion of his research paper. Sticking for the moment to the bare facts of the Claimant's academic career, he submitted his paper in Spring 2009 and was awarded a C grade. He resubmitted it. It was marked by Professor X, who had told the Claimant that the resubmitted paper was an improvement on the original, which Professor X had marked with a B grade. The resubmitted paper was also marked by Dr R of the LBS, and then submitted to an external examiner (a Professor at another University). He was awarded a C grade. As a result he was not permitted to continue on the course.

34. He subsequently made an internal appeal (of which more below), which failed. He then sought admission to the University of Strathclyde, which he achieved in 2009. Interestingly, one of the reasons given by that University for

accepting his transfer was that the MRes paper, for which he had received the C grade at LBS was regarded as "an original and engaging piece of research" by his Ph.D supervisor at Strathclyde. He has since passed his viva, and will soon be awarded his Ph.D. However the ESRC had declined to continue payment of his award, and did so on the basis that he had not been given a mark sufficient to permit him to stay at LBS.

35. I have not mentioned his success at Lisbon and Strathclyde, or his success in the other parts of the LBS course, so as to suggest that the marking of the research paper is thereby to be criticised. I have done so only because it demonstrates that one is dealing here with someone whose application to the necessities of academic study has been strongly demonstrated.

(3) The original internal appeal and its treatment by LBS

36. It is necessary to start by identifying the published procedures at LBS for dealing with complaints about the assessment of a research paper. As will become apparent, LBS failed to follow its own Rules for dealing with the Claimant's complaint. It produces General Assessment Regulations, but at the relevant time, appeals were determined according to the " Academic Appeals Procedure"

    i) By Rule 2.2, a complaint may be considered on one or more of three grounds. They include "substantive evidence of bias or prejudice against the candidate" but by Rule 2.3 exclude "appeals against the academic judgement of examiners."

    ii) Rule 3.2 sets out a code for the process to be followed.

37. The code has the following elements

    i) A written case must be filed by the student on an "Academic Appeals Form"[7].

    ii) The Deputy Dean Programmes (sic) will then obtain written statements of the relevant facts from all the parties concerned. The Deputy Dean Programmes and one member of the Assessment Policy Committee will review the submissions within six weeks of receipt to determine whether there exists a prima facie case for appeal. If they

[7] Rule 3.1

consider that there is no apparent case the appeal will be dismissed, and the student will be informed of this decision in writing. If the evidence provided raises questions or doubts then an Appeal Committee will be appointed to hear the appeal [8].

iii) If a prima facie case exists, the Appeal Committee is to hold a hearing where the student will have the opportunity to present his case[9]. The Appeal Committee may hear evidence, and may call for written evidence or documentation[10]. No new written evidence may be presented at the hearing[11].

iv) The decision must be given in writing[12].

38. It is clear from the above that

i) the threshold test is whether a prima facie case exists. That of course is a fundamentally different question from whether that case is eventually accepted by the Appeal Committee;

ii) if such a case is found to exist, then an Appeal Committee will be appointed;

iii) it follows that if a prima facie case exists, then the student has the right to present his case at an oral hearing before that committee. That safeguard is of course the mechanism by which the student has the right to comment on or challenge any other evidence obtained by the Chief Examiner at the first stage, or by the Appeal Committee at a later stage.

39. The Claimant submitted a complaint under this procedure. In short terms his complaints were that

i) His supervisor Professor X had behaved towards him in a quite inappropriate manner, and was biased against him and/or displayed prejudice towards him.

ii) That had adversely affected his ability to study and deal with his coursework.

[8] Rule 3.2
[9] Rule 3.5
[10] Rule 3.6
[11] Rule 3.7
[12] Rule 3.8

iii) He gave substantial detail of his allegations. Given the fact that I am quite unable to determine whether those allegations are true, it would be wrong to repeat them here save insofar as they are proved. In fact it is also unnecessary to do so, for reasons that will become apparent. While the Claimant described it in his submissions to the court as "harassment" in the criminal sense, it would be more aptly described as allegations of domineering, hectoring and inappropriate behaviour on the part of Professor X. The Claimant set out his allegations in considerable detail. As will become apparent from the eventual conclusions of the OIA, some of the facts of the known conduct of Professor X towards the Claimant (as shown by the Professor's own E mails) raise what are at the very least serious issues about the way in which the Claimant was supervised, and undoubtedly called for an answer. The Claimant contended that his work on his research paper had suffered as a result.

iv) When the Claimant originally submitted his paper, Professor X is known to have recommended a B grade. Although stating that the resubmitted paper represented an improvement on the original, yet he now said that it should have a C grade.

v) The Claimant had included a note of thanks to various persons whose help he acknowledged, whereupon Professor X insisted that all such names be removed except his own.

vi) Professor X did not understand his work.

vii) He complained that his paper had not been assessed properly, in that

a) one of his examiners was a Dr R, whom he considered insufficiently experienced. Dr R was in fact a recently appointed Assistant Professor at LBS and holds a degree in Government from Harvard University, Massachusetts, and a Ph.D from the Massachusetts Institute of Technology

b) The external examiner, a Professor from another University, had marked his paper in knowledge of the views of Professor X and Dr R and had been influenced by them.

40. The procedure followed by the LBS in this case was described in a submission it made to OIA on 4th December 2009 by its Quality Assurance manager Ms Julia Dawson.

i) The appeal was submitted on 17th August 2009. Ms Dawson obtained statements from a number of persons, including Professor X, Dr R, and Professor Z, the Head of Department. They were put before two senior members of the faculty. She also had a meeting with them after submitting the material.

ii) In the LBS submission, she refers to the two senior members from time to time as the "appeal committee."

iii) On 18th September 2009 she wrote to the Claimant telling him that

> " It is with regret that I must inform you that the Deputy Dean (faculty) and a member of the Assessment Policy Committee have concluded that there is no prima facie case for an appeal
>
> Their decision was made on the basis that they felt that
>
> 1 There was no systematic (sic) evidence that (Professor X) was biased towards you;
>
> 2 That significant effort was made to supervise you. They noted that you had received a considerable amount of supervision from Professor X, and a number of other faculty members within the Accounting subject area, and that despite them issuing you with clear instructions on how to improve your paper you failed to follow them and incorporate their feedback successfully;
>
> 3 They further noted that they did not feel that Professor X did not understand the contents of your paper, rather they noted that your work had not presented to the markers the motivations underlying your work to this particular research problem;
>
> 4 They also noted the comments of Dr R and the External Examiner were substantially consistent regarding your paper's shortcomings and the comments of Professor X and his colleagues. They did not find any evidence to suggest that these comments were motivated by prejudice."

41. The OIA, as I shall relate in due course, accepted that his complaint had not been properly dealt with. The LBS did not address the merits of that decision in its submissions before me, and did not seek to argue before this Court that its own appeal decision could be supported.

42. It is of course clear that the LBS had failed to follow its own Rules, and just as importantly, had failed to give the Claimant's case a fair hearing. I say that for the following reasons:

i) on any view, he had presented a prima facie case. His thoroughly particularised (as it was) case on appeal, if accepted as true, demonstrated serious defects in Professor X's supervisory approach. If so, as he contended, and as counsel for both OIA and LBS accepted, the logical consequence is that the Claimant's ability to conduct his research and prepare his research paper would (or as the Defendant and Interested Party would say, could) also have been affected;

ii) it followed from the existence of a prima facie case that the next stage was an appeal hearing, where he would have the chance of responding to other evidence submitted and to those comments or representations which sought to rebut that case;

iii) I regard it as significant that Ms Dawson referred to the two senior members as "the appeal committee" in her submissions for LBS to the OIA to which I have already referred. She and LBS had elided the two separate parts of the procedure, and the two senior members had made the mistake of thinking that their job at the threshold stage was to reach a conclusion on contested issues of fact or interpretation. However the contents of communications passing between the administration, the Head of Department and the senior members leave little room for doubt that they were being asked to address the question of whether the Claimant was a student whom they wished to see remain at LBS.

43. But the result is that just as it would be wrong to reach any conclusions in this judgement adverse to Professor X (although he did at least have the opportunity given to him by LBS of commenting on the allegations against him) so it would be wrong to assume that conclusions adverse to the Claimant should be given weight when the LBS deprived him of the chance of dealing with them in accordance with its own rules.

44. I am bound to observe also that I am concerned by the reference to there being "no systematic evidence." Unless the adjective is mere surplusage, which I doubt, it implies that the two professors found that there was evidence of bias but that it was not "systematic," whatever that adjective means in this context. Even if one substitutes "systemic" , it does not overcome the concern raised by this paragraph.

(4) The First Decision Of The OIA

45. The OIA accepted the claimant's complaint[13] about his treatment by LBS. It received submissions from both the Claimant and the LBS. As well as the matters originally argued, the Claimant complained also that efforts had been made by Professor Z and by the Deputy Director of Academic Affairs to dissuade him from appealing. The OIA issued a draft decision on 19th August 2010, upon which it invited comment.

46. Both the Claimant and the LBS made representations. The formal decision was issued on 25th November 2010. It is attached to this judgement as Appendix B.

47. In that decision the OIA

i) upheld the complaint that the LBS should have found that there was a prima facie case raised of bias and prejudice towards him on the part of Professor X (paragraphs 11-19)

ii) rejected his complaints about the grading of his paper (paragraphs 20-26)

iii) accepted his complaint that the LBS had sought to deter him from appealing (paragraphs 27- 30)

iv) while it accepted that he had raised arguments before the LBS about the conduct of Professor X, characterised by him as "harassment and defamation" it only dealt with the matter by saying that the LBS should have made the Claimant aware of the Harassment and Bullying Code of Practice ("HBCP") and asked him if he wished to complain under it. (paragraphs 31- 38)

v) when addressing what recommendations it should make, and whether he should be compensated for the fact that he had lost his scholarship and now had to pay tuition fees, considered that he must "bear a significant proportion of responsibility for the problems that arose." The only basis given for that conclusion was that the HBCP was

[13] In the original letter of acceptance, it was referred to by OIA as an "appeal. " Thereafter it was usually referred to as a " complaint." I shall use the latter term, which reflects the language of the statute.

available on the LBS website and could have been used by the Claimant.

vi) recommended that the LBS offer him £ 400 in compensation for the parts of the complaint the OIA thought justified. In the draft (whose terms are very similar to the formal decision) that figure was put at £250.

48. It follows that the Claimant had succeeded in establishing that

i) he had been wrongly prevented from pursuing his case relating to the conduct of Professor X;

ii) the LBS should have addressed his allegations of bullying and harassment, but only by drawing the relevant complaints procedure to his attention

iii) the LBS should not have sought to deter him from appealing.

49. He had failed on the complaint about how his paper was marked. He had ended up with a recommendation that the school offer him the sum of £400, whereas his claimed loss was, at the very least, something of the order of £34,000 (2 years at £ 17,000 p.a in round terms).

50. LBS complied with the formal recommendation on 25th November 2010, and made the offer of £ 400 to the Claimant. Given the issue that arises of the legality of the Second Decision made by OIA, it is necessary to note also what happened subsequently.

51. On 4th January 2011 Ms Dawson of LBS wrote by E mail to the OIA, reporting that the Claimant had rejected the offer, and asking

> "if you could advise on the School's obligations if any, under the OIA scheme to enter into correspondence on this matter with (the Claimant) at this stage"

52. On 5th January 2011, the OIA replied as follows

> " …..I can confirm that, having complied with the recommendation in our Formal Decision of 25th November 2010, there is no further obligation on LBS under the OIA scheme to enter into any correspondence with (the Claimant)……..."

(5) The Proceedings

(a) Stages up to the grant of permission by HH Judge Raynor QC

53. The Claimant sought permission to apply for judicial review. He has represented himself throughout. One effect of that is that his grounds have ranged far and wide. His grounds were

    i) The choice of examiners, the use of only one external examiner and the lack of a viva, were all contrary to the Code of Practice issued by the Quality Assurance Agency for Higher Education (CPAAQS: S1)

    ii) It had failed to give sufficient weight to his claims of harassment

    iii) The compensation awarded was inadequate, and should have amounted to £ 68,400 (said to represent £ 1900 per month for 3 years) , plus £3000 removal costs

    iv) The LBS should be mandated to open the procedure under its bullying and harassment code against Professors X and Z.

    v) The allegations of harassment should be reported to the proper authorities for investigation of offences contrary to the *Protection from Harassment Act 1997.*

54. Of course many of those grounds go well outside the scope of potential judicial review. But the third one inevitably raises the question of whether the very low award of £ 400 was justified by any, or any adequate reasoning.

55. The OIA submitted detailed grounds in its Acknowledgement of Service why permission should not be granted, and sought an award of costs against the Claimant. However, as will appear below, one should note that since then, it has written to the Claimant apologising for the quality of its decision, and conceded before me that it could not defend it.

56. Permission was refused on the papers by HH Judge Sycamore on 5th April 2011. He also ordered the Claimant to pay the OIA's costs. However, after an oral hearing on 26th May 2011, HH Judge Raynor QC granted permission. Judge Raynor QC indicated that he considered that it was arguable that

    i) the conclusion that the Claimant bore a significant responsibility for the problems that had arisen was not justified in the decision

ii) there was no justification given for the very low recommended compensation figure of £ 400 when his loss had been much greater than that

iii) his work had not been assessed in accordance with the relevant code of practice.

57. The case was then listed for substantive hearing for 25th July 2011.

(b) <u>The application to stay proceedings before HH Judge Pelling QC</u>

58. As a result, the OIA, having argued hitherto that the decision was unassailable, now decided to reopen the case. On 10th June 2011 its solicitors wrote to the Claimant expressing concern about Judge Raynor QC's order and raising objections that the Claimant had failed to follow the Pre Action Protocol, which it said had meant that it had not had the opportunity to review its decision. (Of course the argument about the Pre Action Protocol can carry little weight. The OIA had known of the proceedings since late February 2011, and only decided to act when HH Judge Raynor had granted permission. Indeed, it has since withdrawn the suggestion it was relying on any breach of the Pre Action protocol.) It now offered to reopen the review of the Claimant's complaint on the basis that it was "anxious to correct any flaws which the courts might have identified in our decision."

59. As will also appear below, it has also apologised since to the Claimant for the way in which it approached and made that First Decision.

60. The Claimant was at first reluctant to accept the offer. Be that as it may, the matter came before HH Judge Pelling QC after being listed for a substantive hearing on 25th July 2011. The substantive hearing was vacated. By his order (in the form amended on 28th July 2011)

i) The proceedings were stayed until 23rd September 2011 so as to permit the OIA to review the challenged decision

ii) The OIA was to send a new decision to the Claimant by 30th September 2011

iii) By 21st October 2011 the Claimant was to either (a) file and serve revised grounds or (b) sign a consent order agreeing to the dismissal of

the proceedings, either agreeing to pay costs or providing for the determination of any costs issues by the Court

iv) If the Claimant filed revised grounds, the OIA should serve grounds of resistance and any evidence by 11th November 2011

v) Directions were given concerning preparation for, and listing of the substantive hearing

vi) The issue of costs was reserved.

61. Before moving on to the next part of this case's history, it is necessary to observe that

i) The learned judge was not invited to quash the original decision, but only to stay the proceedings for a temporary period. The OIA still maintained that the original decision was free of legal error until part way through the proceedings before me;

ii) However, the OIA suggested, and the Claimant accepted, that it could review its decision. It was quite plain to me (and appears from the correspondence) that it was the OIA which was promoting the idea of the stay so that the decision could be reviewed.

iii) The course proposed by OIA presupposes that it had the power to review its decision. That topic will be addressed further at a later stage in this judgement.

(6) Subsequent reconsideration process by the OIA and the objections of LBS

62. On 25th July 2011 the OIA informed LBS that the new review was under way. On 26th July 2011 it provided the LBS with a copy of the material put before this Court by both parties in the judicial review proceedings. It sought a response by 9th August 2011. It also sought further comment from the Claimant.

63. LBS (through Ms Dawson) wrote to the OIA on 8th August 2011, responding to the points raised in the material put before the court. At that time it made no objection to the proposed review. The OIA invited further comment from the Claimant upon the LBS response, which he sent on 8th August 2011.

64. On 1st September 2011, the OIA issued a draft decision to both parties, inviting comment on any material inaccuracies, or comments on the remedies

recommended. In that draft, much of it follows what had been said in the First Decision (Appendix B) but there were some important differences

i) It amplified its concern at the conduct of Professor Z's attempts to deter the Claimant from appealing to the OIA

ii) It concluded that the LBS decision that the Claimant had no prima facie case was within the LBS' discretion, but that it would consider whether the decision to dismiss the appeal was reasonable

iii) The OIA considered that the Claimant had put forward a case to LBS concerning harassment and bullying within the terms of the LBS procedure, and that the appeal process should have been suspended while they were dealt with. The OIA held that the Claimant was entitled to expect that his complaints would be investigated.

iv) It decided not to recommend that LBS reconsider the appeal of the Claimant

v) It decided that it would not recommend payment of the full loss of scholarship (which it found to be £ 1900 per month over 2 years) because one could not speculate on whether he would have successfully completed his studies at the University, but decided that he was entitled to be compensated for the distress and inconvenience he had been caused.

vi) It recommended that

   a) LBS make an open apology for its failure to refer his appeal for consideration by the Appeals Committee, and acknowledging that the evidence he had presented had raised questions or doubts that the examination process may have been affected by prejudice or bias;

   b) LBS offer him £ 5000 for the loss of opportunity to have his appeal heard and the material costs by him in moving to another University, and £ 1500 for the distress and inconvenience he had been caused suffered by LBS' failure to give proper consideration to his appeal

   c) That LBS should offer to refer the Report submitted by the Claimant for an expedited investigation under the HBCP.

d) That the offers should remain open for a period of 2 months and were in full and final settlement of the matters considered in the Review. It went on

> "For the avoidance of doubt, the OIA's recommendations must be taken in their totality, that is, Mr Cardao-Pito must accept either all or none of them."

vii) It also suggested that the School consider reviewing its Academic Appeals Procedure, and any guidance provided to students and staff, with a view to clarifying the process to be followed where an appeal raises grounds of complaint under the HBCP. The School should also give consideration to publishing a formal process for the appointment of examiners for the MRes degree.

65. The draft decision was sent out and comments invited. Despite its earlier lack of objection to the process of review following Judge Pelling QC's order, LBS now began to raise points, first of query about the decision, and then of objection to the principle of the review by the OIA. On 1st September 2011 it E mailed the OIA. It took two points

i) it asked if the OIA had taken into account the E mail of 5th January 2011[14];

ii) it asked what factors had been taken into account in the calculation of the figure of £ 5000, and how they differed from the factors taken into account in fixing on the sum of £ 400.

66. The OIA informed the LBS on the same date by return of E mail that

i) it had taken all documents into account, including the E mail. It stated that

> "our role under the terms of the consent order, was to consider the matter afresh and issue a new Draft Formal Decision."

ii) it declined to give an explanation for its decision, but reminded LBS that it could make any comments it wished.

67. The Claimant made representations by letter of 6th September 2011, which included the following

i) It reiterated his previous case

ii) He was satisfied that the OIA had dealt with his complaint that the OIA did not take harassment seriously

iii) The OIA draft decision failed to apply the CPAAQS approach

[14] referred to at paragraph 51 above

iv) Its conclusions on the grading of his paper were irrational and unlawful

v) It wrongly failed to regard the external examiner as having been influenced by the examiners from within the school.

vi) The compensation of £ 6500 recommended was far too low, and represented only 14% of what he had actually lost. It would make it financially advantageous for an HEI to expel a student, knowing that OIA would not apply a significant sanction.

vii) It wrongly placed the burden of proof on him to show that he would have passed his studies at the University, and he argued that the absence of any evidence to attribute any responsibility to him should have led to an award of the full award for a period of 2 years.

68. LBS now, by an 11 page letter of 9th September 2011, adopted a quite different stance to that which it had taken before, and now decided to take strong objection to the whole concept of the new review. As will become apparent, at the substantive hearing it has again changed its position fundamentally, and made no submissions through its counsel that I should treat the review by OIA as lawful, and stated that the only matter it wished to advance was that the Second Decision's recommended level of compensation for the loss of opportunity was rational. In the original draft of this judgement I had added the words "and lawful," after "rational", to which a technically accurate objection was taken by Mr Forshaw, who pointed out that he only actually argued the former. The fact is that LBS now argue that the award was rational, and eschewed any arguments before me that it was unlawful. Given the lack of challenge, the distinction Mr Forshaw seeks to draw is, in practical terms, of no moment whatever. I shall therefore do no more than summarise its case as at 9th September 2011.

69. In the letter, it argued the following points on the legality of the review;

i) By 25th November 2010 (the date of the First Decision) the matter had been considered exhaustively

ii) The LBS was unaware of the proceedings before Judges Raynor QC and Pelling QC until after they had taken place.

iii) The OIA had no power to reconsider a complaint once the decision had been issued, and this complaint did not fall within the scope of paragraph 3.6 of the Guidance.

iv) The reopening of the Review was unlawful, was in breach of legitimate expectation, was taken for an improper purpose, was irrational, and taken by reference to irrelevant considerations.

v) The only proper course was for the OIA to confirm its original review.

70. Without prejudice to the above, it made comments on the draft decision itself, arguing as follows

i) It corrected the use of the figure of £ 1900 per month, and said that the relevant figures for 2009-2010 were £ 1470, and in 2010-1 £ 1500 per month rising to £ 1530 from October 2011. It suggested that if the figure of £ 1900 had been used to calculate the £ 5000 compensation figure, that figure of £ 5000 should be reduced accordingly.

ii) It regarded the figure of £ 5000 as "not supported by any logic." It argued that any figure for relocation costs should be justified by findings on the likelihood of his having to relocate in any event, which it could not consider because it would involve it forming a view on whether the C grade was appropriate. It therefore argued that it was "wholly inappropriate" that he should receive any award in relation to relocation costs. It then argued that the figure of £ 1500 was " plainly overinflated" (by which I think they meant just "plainly inflated") and it drew attention to the length of his submissions and correspondence, and argued that anything spent in relation to the second review was not compensatable because the second review was itself unlawful.

iii) There should be no investigation of harassment on papers alone, because it could compromise Professor X and his employment rights. It said that a *public* hearing was required (It was of course LBS own failure to treat the Claimant's case as a good prima facie one which had prevented a public hearing taking place)

iv) The recommendation that the school should carry out an investigation under the bullying and harassment procedure was unlawful by virtue of Rule 3.5.

v) It contended that the OIA had no power to make suggestions.

vi) If a new decision was made, it reserved its right to challenge that decision.

71. It should be noted that, notwithstanding the issue of a second Formal Decision on 23rd September 2011, LBS has taken no steps since then to challenge it by way of application for judicial review or otherwise.

(7) The Second Decision of the OIA

72. This was issued on 23rd September 2011. I have attached a copy as Appendix C to this judgement. It deals with matters as follows

i) It (paragraphs 16-20) upheld the complaint that the Head of Department had sought, inappropriately, to enforce an agreement which denied the Claimant's right to appeal, finding that it placed the Claimant "*in an invidious position and would likely have affected his confidence in the appeals process*." If one reads Professor Z's E mails to the Claimant and to Professor X as set out at paragraphs 18.1 and 18.3, and the Deputy Director's at paragraph 18, that conclusion was in my judgement inevitable. The First Decision had also upheld this complaint, but in less forceful terms. The Second Decision rejected (paragraph 21) the complaint of harassment by the Head of Department. It said it had no evidence of it, that it had not been raised in the original internal complaint, and that it would be wrong for the OIA to make a declaration that the there had been a breach of the *Public Order Act 1986.*

ii) It (paragraph 22-24) held that LBS did follow the school's academic appeals procedure, and was entitled to hold that the Claimant had not established a prima facie case, so that the question was whether it had been reasonable for LBS to dismiss the appeal. I shall set out my views of that approach below.

iii) It (paragraphs 25-32) considered the complaint of bias and prejudice. The decision that it was justified is to the same effect as in the First Decision. Given the content of the E mails sent by Professor X, and the other matters referred to in paragraph 28 of the Decision, no other decision was realistically open to the OIA.

iv) It (paragraphs 33-37) rejected the arguments of the Claimant on the selection of examiners and on the grading of his work.

v) It accepted (paragraphs 38-42) that the Claimant had raised matters with LBS which amounted to harassment or bullying within the terms of the HBCP, and concluded that LBS should have investigated them, suspending the appeal to do so. The OIA said that it could not make a finding on whether there had been harassment, but it held that the Claimant was entitled to expect that they would be investigated.

vi) It (paragraphs 43-50) rejected the Claimant's case on the relevance and application of the QAA Code of Practice.

vii) Given the issues that arise, it is necessary to refer to the recommendations at paragraphs 53 ff verbatim.

73. The OIA's recommendations were

"Section 4— Recommendations

53. l do not consider it appropriate to recommend that the School now reconsider Mr Cardao-Pito's academic appeal. It has been over two years since Mr Cardao-Pito was withdrawn from his course and he is now studying towards his PhD at another institution. Moreover, the likely outcome had Mr Cardao-Pito's appeal been considered and upheld (that is, if it was found that there had been prejudice and/or bias in the assessment process as Mr Cardao-Pito contended) is that Mr Cardao-Pito would have resumed, in some form, his studies at the University. That remedy is no longer sought by Mr Cardao-Pito nor do I see that it would be a viable option given the deterioration of the relationship between Mr Cardao-Pito and the University.

54. Similarly, I do not consider it is appropriate to recommend that the School pay Mr Cardao-Pito the total amount of scholarship he would have received had he been allowed to proceed with his programme of study. This is because it is not possible to speculate whether, had Mr Cardao-Pito's appeal been heard, he would have successfully completed his studies at the University. This is because I cannot be certain that Mr Cardao-Pito would have passed his Research Paper (or indeed met any further progression requirements) had the flaws identified in this decision not occurred. Mr Cardao-Pito has argued that he is studying successfully elsewhere. Whilst this is to his credit, it is not conclusive evidence that he would have met the academic requirements at the School.

55. Notwithstanding the above, I consider Mr Cardao-Pito is entitled to be compensated for the loss of the Opportunity to have his appeal properly heard and the distress and inconvenience this has caused him.

56. Having regard to what is fair and reasonable in all the circumstances, I recommend that, within one month of the date of issue of this Decision, the School writes to Mr Cardao-Pito

56.1 offering an open apology for its failure to refer his appeal for consideration by an Appeals Committee and acknowledging that the evidence presented by Mr Cardao-Pito raised questions or doubts that the examination process may have been affected by prejudice or bias; and

56.2 offering him the sums of:

56.2.1 £5000 compensation for the loss of the opportunity to have his appeal heard and in recognition of the fact that he incurred costs in relocating to another University which may have been avoided had his appeal been given full and proper consideration. I am unable to agree with Mr Cardao-Pito's contention, in response to the Draft Formal Decision, that the OIA should factor into this sum income he might have earned had he not pursued his studies at the University. Mr Cardao-Pito's loss of income was occasioned by his decision to pursue a full- time PhD and not by the flaws identified in this decision; and

56.2.2 £1500 compensation for the distress and inconvenience suffered by him as a result of the University's failure to give full and proper consideration to his valid ground of appeal. Had it done so, Mr Cardao-Pito may have avoided the time and trouble associated with bringing his complaint to the OIA.

57.It is clear that Mr Cardao-Pito remains aggrieved that his complaint of harassment has not been heard. Having considered the provisions of the HBCP carefully, 1 can see no reason why an investigation under that procedure could not now be initiated by the School. Nor do I accept the School's contention, in response to the Draft Formal Decision, that the OIA's rules prohibit the OIA from making such a recommendation. It is clear to me the allegations which form the basis of Mr Cardao-Pito's complaint of harassment would, if upheld, have materially affected him as a student. I therefore also recommend that the School offers to refer the Report accompanying Mr Cardao-Pito's appeal for an expedited investigation under the Formal Action provisions of the HBCP. The investigation should be undertaken by individuals with no prior knowledge of, or involvement with, Mr Cardao-Pito's appeal. Given Mr Cardao-Pito is no longer studying at the School; consideration should be given to conducting any interviews required with Mr Cardao-Pito under that procedure via telephone or in writing. Mr Cardao-Pito should be informed of the outcome of the investigation within eight weeks of notifying the School that he accepts the offers.

> 58.The School's offers should remain open for a period of two months and should be in full and final settlement of the matters considered in this review. For the avoidance of doubt, the OIA's recommendations must be taken in their totality, that is, Mr Cardao-Pito must accept either all or none of them. On Mr Cardao-Pito's acceptance of the School's offers, the School should ensure that the compensation payments are sent to him within 21 days of receiving his letter of acceptance to the School and that he is informed of the outcome of the investigation under the HBCP within eight weeks of the date of the letter of acceptance.
> 59. I also suggest that the School consider reviewing its Academic Appeals Procedure, and any guidance provided to students and staff, with a view to clarifying the process to be followed where an appeal raises grounds of complaint under the HBCP. The School should also give consideration to publishing a formal process for the appointment of examiners for the MRes degree."

(8) Events subsequent to Second Decision

74. The Claimant complied with Judge Pelling QC's order, by submitting objections to the Second Decision by letter (and enclosures) of 7th October 2011. In that document he argued, inter alia, that the amount of compensation recommended was irrational, and not reasoned.

75. On 13th October 2011 the LBS acted upon the Second Decision by writing to the Claimant to say that it had considered " the new formal decision" (sic) and " as recommended in that decision"

i) offered the Claimant "an open apology" (but its terms were unspecified)

ii) offered the sums of £ 5000 and £ 1500 as compensation

iii) offered to refer the report accompanying the Claimant's appeal for an expedited investigation under the HBCP.

The offer was expressed to be in full and final settlement of all the matters considered in the Independent Adjudicator's review, and would be left open for two months. The Claimant has not taken up that offer, because of course the judicial review proceedings were still under way. At the hearing the LBS' counsel, having been given an opportunity to take instructions, confirmed that the offer would be kept open until after these proceedings had concluded.

76. LBS then obtained permission from HH Judge Davies on 2nd December 2011 to appear as an Interested Party. It contended at that stage, by detailed grounds settled by Mr Forshaw on 21st November 2011, that the award recommended

to the Claimant by the OIA should not have been made, and that his case of irrationality was not made out. At the hearing before me, Mr Forshaw sought to distance himself from the first argument, and limited himself to arguing that the award was *not* irrational. It is therefore clear that the LBS stance that the decision was unlawful, and the reasoning behind the award illogical, so vigorously argued on 9th September 2011, had been cast aside as it has changed its case. None of it now remains.

77. Also surprising is the approach adopted by the OIA. It maintained by a witness statement by its Deputy Adjudicator Ms Felicity Mitchell sworn on 10th November 2011 that

i) The OIA had been justified in reopening the complaint because it had determined that the First Decision was "potentially flawed"……the OIA is not infallible and must be permitted to look for and put right its mistakes[15] ;"

ii) However she still maintained that the Claimant had not established grounds for judicial review, and wrote that the OIA had written to the Claimant asking for his consent to dismiss his judicial review claim.

78. That contradictory stance (that the First Decision "was flawed" and was a mistake that required putting right, but that the Claimant had never had grounds to challenge the First Decision) was maintained right up to the hearing. The claim that there were no grounds to challenge the First Decision was only abandoned during the hearing, after Mr Karim has taken express instructions.

79. It is instructive to read the terms of the open letter sent to the Claimant by the OIA, and exhibited by the OIA to its detailed grounds of 7th October 2011 for resisting the Claimant's complaints about the Second Decision. It contains the following passages

a) "Firstly, we would like to offer you an apology for the fact that our first review of your complaint resulted in recommendations which did not fully address the concerns you had raised. Whilst we do not accept that our Formal Decision was flawed as a matter of law, our second review made recommendations which were substantially different and so we accept that our first review did not go far enough……."

b) " Secondly, I would like to apologise personally for failing to recognise this when you first issued your judicial review claim. With hindsight, we ought

[15] She was here quoting what she had written to LBS on 13th September 2011

> to have reopened our review when you issued your claim rather than waiting until you have been granted permission to proceed……..
>
> c) " It seems to us that your continued dissatisfaction relates principally to our original decision, rather than to our new decision. I hope that you will now feel able to withdraw your claim. Should you do so, we would be happy to make a reasonable contribution to your costs to date."

80. It follows that as from 7th October 2011, at the very latest, the OIA's stance was actually one of apologising for the First Decision and offering to pay some at least of the Claimant's costs of bringing his claim. It is a matter of astonishment to the court that it could even consider seeking to defend the First Decision in the light of that open letter.

81. At the substantive hearing, the case for the OIA concentrated on the Second Decision, and contended that the First Decision was now academic. It also argued, wrongly as was conceded at the substantive hearing, that the Claimant did not challenge the Second Decision. He did so, and on grounds filed within time and responded to the by the OIA.

(9) The status of the Second Decision in law: submissions and ruling

82. The court was concerned at the substantive hearing that the OIA may have had no power to redetermine the complaint, and that, in the absence of an order of this Court quashing the First Decision and requiring its redetermination, it had no power at the time of the Second Decision to reopen a complaint which it had already determined – i.e. in elderly but expressive legal shorthand, that it was *functus officio*. I asked the parties to consider whether the Court should, if it quashed the First Decision, then set a timetable for any redetermination to occur, and for dealing with any challenges to that decision.

83. Mr Karim for the OIA asked me to proceed on the basis that

i) The OIA had power to review its decision after the judicial review proceedings were under way. He submitted that the Scheme Rules do not proscribe such an event occurring, as is shown by the Guidance that is published.

ii) If it did so, then the court should address the legal merits of the Second Decision.

iii) If the court found that it was lawful, then the court should dismiss the claim for judicial review.

iv) That approach had the merit that if the court was satisfied with the legality of the Second Decision, then it would save the parties having to return for another hearing and the preparation of further submissions.

v) He drew comfort from cases in the Asylum and Immigration context where the Home Secretary often agrees to review an immigration decision after an application for judicial review has been issued.

84. Mr Forshaw for LBS supported that position, pointing out that LBS had not sought to challenge the Second Decision by way of judicial review, its arguments made as recently as 9th September 2011 no longer being pursued. As noted above he also drew back from the suggestion of 21st November 2011 that the making of a revised recommended offer of compensation was unlawful.

85. The Claimant argued that the Second Decision suffered from the same vices as the first. However when pressed by me, he said that he was not arguing that the OIA had no power to redetermine the complaint.

86. Albeit with some diffidence, I accept that this court should proceed on the basis that the OIA had the power to issue the Second Decision. No-one has suggested that the Guidance is unlawful, and while the situations it describes do not include that which has arisen here, there is in the context of any potential application of the *functus officio* doctrine in the context of this scheme, no difference in legal principle between a final determination being reopened for one set of reasons as opposed to another (I do not suggest that such reviews must be anything other than rare indeed, nor other than wholly exceptional[16].) The purpose of the statutory scheme is to provide a flexible responsive scheme. This approach is consonant with that.

87. For the avoidance of doubt I draw no comfort from the example of Asylum and Immigration decisions, where the Home Secretary is not acting in an appellate or quasi-appellate context, nor in something akin to Alternative Dispute Resolution (see Mummery LJ in *Maxwell* at paragraph 38, cited above).

[16] Different principles may be at play in cases where the first decision is vitiated by some conduct such as fraud or other serious misconduct by one party. Nothing of that kind is alleged here.

88. Because the First Decision was made and issued, and has not formally been withdrawn I am still required to give judgement concerning the challenges to it. I do that below.

(10) The Case for the Claimant

89. The Claimant is not legally qualified, and English is not his first language. His case was wide ranging, and sometimes embarked on arguments about merits and credibility not appropriate on judicial review. What follows is a summary of his main relevant points. The Claimant's case against the First Decision was that

    i) The OIA draft decision failed to apply the CPAAQS approach

    ii) The OIA decision did not comply with Articles 6, 10 or 14 of the European Convention on Human Rights

    iii) It did not deal adequately with his complaints that he had been harassed by Professor X in a way which amounted to breaches of the criminal law and of the LBS HBCP, nor with his contention that it could have affected his academic performance

    iv) Its failure to investigate his complaint of harassment meant that those who engaged in such conduct would not suffer any sanction.

    v) Its conclusions on the grading of his paper were irrational and unlawful.

    vi) The decision to award compensation of only £ 400 was irrational

90. His case against the Second Decision repeated those points. It also argued that

    i) The Second Decision was vitiated by the same flaws as (i) to (v)

    ii) The decision to award compensation of £ 6500 was irrational and derisory. He complained also that it did not set out how the assessment was made.

(11) The case for the defendant OIA

91. The OIA's case at the hearing before me was

    i) The original proceedings were "now academic" by reason of the further decision and recommendation

ii) The First Decision was not unlawful or irrational in any sense (a stance abandoned during the hearing)

iii) In the light of *R(Sibourema) v OIA* [2007] EWCA Civ 1365 [2008] ELR 209 and *R(Maxwell) v OIA* [2011] EWCA Civ 1236 the following principles applied

a) The OIA could operate on the basis that different complaints required different approaches, and that the decisions of the OIA were not to be treated as those of a judicial body, or that every complaint should be investigated in the same way

b) The Court should recognise the expertise of the OIA and be slow to accept that its choice of procedure was improper

iv) The First Decision was lawful and reasonable (see above).

v) It was wrong to argue that the OIA had changed its position after the First Decision

vi) The Claimant does not challenge the Second Decision (as appears from this judgement, that seems to me to be a fundamental misunderstanding of his position)

vii) The recommended award was rational and properly reasoned. Given the fact that the OIA had not found that the Claimant would have obtained a B grade, the award of the full sum was not justified. The Court should not look at the assessment of the award in the same way that a judge would do so when hearing a personal injuries claim.

viii) In the case of the award for inconvenience and distress, the figure recommended was rational, and no further reasoning was required. Unlike the situation in the courts, there were no precedents to guide the decision maker on the level of awards for inconvenience or distress.

ix) The application should be dismissed.

(12) The Case for the Interested Party the London Business School

92. The LBS case was essentially to echo the OIA submission at (vii) above. The award of £ 5000 compensation was rational and reasoned. LBS' counsel expressly eschewed any suggestion that the OIA had no power to make the Second Decision.

93. The LBS also made the submission on the authorities referred to at paragraph 19 above.

(13) Discussion and Conclusions

94. I have set out the legal principles which apply in an earlier section. In my judgement the principal issues in this matter are

i) Did the OIA give adequate reasons for its decisions?

ii) Should it have accepted the complaints concerning the marking of the paper?

iii) Should it itself have investigated the allegations of harassment and bullying?

iv) Were its decisions to recommend payment of compensation of £400 (First Decision) or £ 6500 (Second Decision) sustainable in law, and in particular, adequately reasoned?

(1) The Case before the OIA, the issue of academic judgement, and the scope of the review

95. The Claimant had in my view the following essential points in his internal appeal.

i) That he had been given the wrong mark for his research paper

ii) That the choice of one of his examiners (Dr R) was inappropriate

iii) That another examiner (Professor X) had displayed bias and prejudice towards him;

iv) That Professor X had behaved in a manner towards him which was aggressive and intimidatory.

v) That the quality of his research paper had been harmed by the conduct of Professor X towards him

vi) That the LBS should have investigated his allegations about Professor X's conduct towards him

vii) That it was wrong for LBS to dismiss his appeal without giving him the opportunity to be heard, as he had established a prima facie case.

viii) That he had suffered a substantial loss of award through the conduct of the LBS.

96. When he appealed to the OIA it confirmed with him by letter of 26th October 2009 that he was taking such points, albeit phrased differently. It is clear to me that some part at least of those complaints was inadmissible. The actual marks awarded, and the choice of examiner, can only relate to matters of academic judgement, and are thus outside the remit of the OIA scheme. But it does not follow that the effect of his supervisor's conduct upon him, which includes the effect upon his performance in his research paper, is excluded from consideration. In the language of the Rules

> "The scheme "does not cover a complaint to the extent that (3.2) it relates to a matter of academic judgement"

97. In my view, that is intended to exclude appeals where the central subject matter of the complaint is a dispute about an academic judgement. Typical examples would be those whose substance is to dispute an academic assessment of the quality of a piece of work, or where issues are raised about the performance of a student in tutorials or seminars. But that does not serve to exclude complaints which do not relate to such a dispute, albeit that its subject matter can have an *effect* on the ability of the student to pursue his or her course of study. It cannot be doubted that misconduct, omissions or failures by an HEI which adversely affect a student are subject to the scheme. It would be extraordinary if it could exclude consideration of misconduct or failures by the HEI simply because their effects showed up in a poor performance of the student in his/her coursework or examinations. The claimant's complaint about the conduct of his supervisor, and of its effect upon his ability to write his research paper, was not a complaint which related to a matter of academic judgement. It was one which related to the conduct of an academic, which is a quite different question. The fact that it had an effect on the marking given to his paper is not a question related to a matter of academic judgement within the ambit of the exclusion in Rule 3.1.

98. In the case of each decision, the OIA declined to do more than consider whether the matters raised with LBS by the Claimant had been dealt with by LBS in the sense of being considered properly or adequately. It eschewed any investigation of its own into the merits of the Claimant's case. In my judgement, and in accordance with the principles set out in *Sibourema* and

Maxwell, it was within its discretion to take that course, albeit that it had the power (but not the duty) to pursue an investigation of its own.

99. I do not consider that that involved a breach of Article 6 of the European Convention. As set out in *Maxwell*, the OIA process is not a substitute for the process of litigation by a student against his/her HEI for breach of contract or for tortious or other unlawful conduct (although of course much cheaper). Had a breach of Article 6 ECHR been involved in the failure to enter upon issues of disputed fact, or upon issues about the inferences to be drawn from the facts, then the judgements in *Sibourema* and *Maxwell* could not have approached the topic as they did. For completeness, I also reject the claim that there was a breach of the other Articles complained of.

(2) First Decision Letter

100. The First Decision Letter addressed the complaint about the "prejudice" shown by Professor X. As noted above, this related to his conduct towards the Claimant, and his approach to supervision of him. At paragraph 19, the OIA concluded that it was unreasonable for the School to have concluded that the Claimant had not established grounds of appeal. As the Decision noted at paragraph 37, that does not mean that the appeal would necessarily have succeeded. In my judgement, what the LBS was required to do by its own published procedures was to consider if the Claimant had put forward a prima facie case. In other words, if his case was made out and accepted, would it justify allowing his appeal? If he had shown such a case, then it had to have a hearing before an appeals committee, when he could have the opportunity of dealing with any other evidence or material presented to, or obtained by, the Committee. Instead of that LBS elided the procedures, and set about obtaining material and evidence from others before purporting to dismiss the appeal in reliance on it. The terms of the decision, and the submission from LBS to the OIA cited above, shows that such elision of procedures had occurred.

101. The OIA concluded that LBS was at fault in that regard. That was a reasonable conclusion in law. It is also in my judgement, the only conclusion which the OIA could reasonably have reached. The failure by LBS in the handling of the appeal had left the Claimant deprived of the chance of rebutting or refuting the

evidence advanced against his interest, despite clear procedural requirements to the contrary. It was procedurally unfair to the Claimant to have adopted such a course.

102. The OIA rejected the Claimant's challenge to the choice of examiners, and to the marks awarded. In my judgement that conclusion lay within its powers. That part of the Claimant's challenge related to a matter of academic judgement. As to the choice of examiner, the dispute related to whether the experience and standing of a highly qualified academic were sufficient to permit him to be an examiner. In my judgement, that is a wholly academic issue, and therefore outside the scope of the powers of the OIA to consider. I take the same issue about the marking of the research paper concerned. . That is also wholly a matter of academic judgement.

103. The OIA then addressed the question of the Claimant's complaints of prejudice. It addressed them in the context (paragraph 12 and 13) of whether the decision maker was biased, applying the test in *Porter v Magill* [2002] 2 AC 357. In doing so it recited the concern it felt at the tone of Professor X's feedback, as set out at paragraph 15. It also noted (paragraph 16) other apparently concerning aspects of Professor X's conduct at paragraph 17. It also considered that the School should have investigated how it was that Professor X marked the resubmitted paper with a C, when he regard it as an improvement over the original, which he had marked with a B..

104. The OIA considered that, in the context, of this issue, it was unreasonable for LBS to have concluded that the Claimant had not established grounds for appeal. However it will be noted that the decision did not address the issue of whether the unusual conduct of Professor X, which showed possible bias, could have affected the quality of the supervision he gave, or of the effect that may have had on the Claimant's performance.

105. I stress at once that the allegations made against Professor X have not been proved, and there may be explanations for what is on its face an unfortunate way of dealing with a student. But the reason those allegations have not been determined is of course that LBS failed to apply its own Rules, and deprived the Claimant (and therefore Professor X) of the hearing which those Rules provided for.

106. The First Decision rejected the complaints about the examination process, namely the choice of examiners and the processes adopted (paragraphs 20-26). In my judgement the reasons given by the OIA are adequate, and betray no legal error.

107. The First Decision (paragraphs 27-30) upheld the Claimant's complaint that Professor Z and the Deputy Director of Academic Affairs, had acted inappropriately in seeking to dissuade the Claimant for pursuing his right of appeal to the OIA. No suggestion is made by anyone that the OIA's criticism of LBS was anything other than well made.

108. The Decision then turned to what it described as the complaint of harassment and defamation (paragraphs 31-36). As it records, the Claimant had set out a very detailed account. The OIA considered that the LBS should have made him aware of the HBCP, and to have clarified with him whether he wished to pursue a complaint.

109. As will become apparent, the Second Decision makes a much stronger criticism. It is not necessary for me to say more than that at this stage of the judgement on the topic, given the fact that it is common ground that this First Decision cannot be supported, albeit on different grounds.

110. At paragraph 37 ff the First Decision sets out the decisions and recommendations.

> **"**37. I have concluded that:
>
> • It was unreasonable for the School to have concluded that Mr Cardao-Pito had not established grounds for appeal. For the avoidance of doubt, this conclusion does not imply that if an appeal hearing had taken place the result would necessarily have been in Mr Cardao-Pito's favour. It would have been for the Appeal Committee to have determined the outcome after holding a hearing: the appeal might, or might not, have been upheld.
> • Mr Cardao-Pito's complaints about the examination process are not justified.
> • Mr Cardao-Pito's complaint that attempts were made to deter him from pursuing a formal appeal is justified.
> • It would have been appropriate for the School to have made Mr Cardao-Pito aware of its Harassment and Bullying procedure and to have clarified with him whether he wished to make a complaint under it.
>
> 38. I have therefore found Mr Cardao-Pito's complaint to the OlA to be Partly Justified.
>
> 39. Mr Cardao-Pito has made the OlA aware that he is now pursuing his studies at another university. He comments that he does not

> have the benefit of a scholarship and is not exempt from paying tuition fees as was the case when he was registered at the School. I have taken careful note of his situation and have considered the matter again when looking at the points he has raised following the issue of the Draft Decision, particularly in relation to the School's Harassment and Bullying procedure, and again following the issue of the revised Draft Decision. I consider, however, that Mr Cardao-Pito must bear a significant proportion of responsibility for the problems that arose. I have noted that the School's Harassment and Bullying procedure was available on the School's website and could have been consulted by Mr Cardao-Pito irrespective of whether the School drew the procedure to his attention. .I am therefore of the view that it is not appropriate to recommend the payment of substantial compensation for those aspects of his complaint that I have concluded to be justified.
> 40. I recommend that within one month of the date of issue of this Decision the School writes to Mr Cardao-Pito offering him the sum of £400 in compensation. The offer should remain open for a period of two months and should be in full and final settlement of the matters dealt with in this review. If Mr Cardao-Pito accepts the offer, the University should ensure that payment is sent to him within 21 days of receiving his letter of acceptance."

111. As Judge Raynor QC pointed out, the statement in paragraph 39 that the Claimant must bear a significant proportion of responsibility for the problems that arose was entirely unsupported by any reasoning, save for saying that he could have invoked the HBCP. In any event, it cannot sensibly be argued that that anything he did caused the failures already found to exist by the OIA. The OIA approach also assumed, without evidence, and having elected not to carry out its own review, that he would have been found to have been responsible had the procedure been invoked.

112. So far as the question of compensation is concerned, the only reasoning one finds is that the decision maker did not want to award substantial compensation. The decision letter never applied its mind to how the sum of compensation is to be calculated, nor what it is to compensate him for. It is worth recalling how the OIA Scheme Rules deal with a recommendation that the HEI should pay compensation. A decision may recommend

> "that compensation should be paid to the complainant, including, at the Reviewer's discretion, an amount for inconvenience and distress"

113. If the issue of compensation is to be addressed, then adequate reasons had to be given. The Claimant had argued that he had been deprived of the benefit of funding which he would otherwise have obtained, and which he had

calculated. This decision never grappled with the question of whether he should get any or some of that claim, nor did it even state whether what he was being granted was a compensatory award for monies lost to him, or for inconvenience and distress, or both. If it was an award for inconvenience and distress, it gave no reasoning whatever for the quantum of the award. Like Judge Raynor QC, I find the decision deficient in this respect.

114. As noted above, neither the OIA not the LBS now seek to defend that First Decision, albeit that the OIA sought to do so until part way through the hearing before me.

(4) The Second Decision Letter

115. On this occasion, the OIA considered at paragraphs 12- 14 and 22-24 whether the LBS applied its own regulations correctly. At paragraphs 22-24 it addressed the formal appeal process, by considering the Academic Appeals procedure. Although recited in paragraph 15, it did not also address the Assessment Regulations for the Master of Research Degree at London Business School (Ph.D 2007), but they are to the same effect.

116. The Decision found that

> " 24 Based on the documentation I have seen, I am satisfied that the School followed the Academic Appeals Procedure in its consideration of Mr Cardao-Pito's appeal. The decision that Mr Cardao-Pito had not established a prima fade case for appeal was within the discretion afforded to the School under the Academic Appeals Procedure. The issue which therefore remains for consideration by the OIA is whether the decision to dismiss Mr Cardao-Pito's appeal on that basis was reasonable in the circumstances."

117. However it went on at paragraph 51.2 that

> "It was unreasonable for the School to have concluded that Mr Cardao-Pito had not presented a prima facie case for an appeal on the grounds of prejudice or bias. For the avoidance of doubt, I have made no finding as to the merits of Mr Cardao-Pito's substantive grounds of appeal"

118. Because I was concerned about that apparent discrepancy, and about whether the OIA had addressed the existence of a discretion in paragraph 24, I invited further submissions from the parties after the hearing. Mr Karim and Mr Forshaw have submitted that at paragraph 24, the Decision was merely identifying that such a decision was open to the LBS, but that it later went on to conclude that the decision was unreasonable. They contend therefore that

there was no discrepancy, and that the LBS had had a discretion to exercise in this respect. I cannot accept that argument. It was incumbent on the OIA to consider whether the appeals procedure had been followed. It is clear from the documents submitted by LBS to the OIA that the two parts of the procedure had been elided, as is implicit in paragraph 29 of the decision itself. The process adopted by LBS was procedurally flawed, and it had moved, at least in part, to an examination of the merits without giving the Claimant his right to comment under its own procedures. For those reasons, and for those at paragraphs 34-43 above, it is my view that no other decision was reasonably open to it, or at the very least that the reasoning of the OIA for this part of its decision was inadequate.

119. I consider the approach taken by the OIA in paragraph 24 is therefore flawed. However since the OIA reached the same conclusion by a different route at paragraphs 29 and 51.2, it may not matter.

120. The Second Decision at paragraphs 16 to 21 deals with the attempts by Professor Z and the Deputy Director of Academic Affairs to dissuade the Claimant from appealing. The OIA held that the complaint was justified. That decision was properly reasoned and was lawful, and was open to the OIA to make - indeed no other conclusion was reasonably open to it.

121. When I asked for further submissions (see paragraph 117 above) the Claimant drew my attention to a document already referred to in the Bundle, namely a submission made by Professor Z on 8th September 2009 to the body dealing with the appeal at the first stage, which reads

> "I have informally asked all faculty in the Department as to whether they would be happy to supervise Tiago in the future. Nobody in the Department including myself wants to be his supervisor"

122. I have formed the view that the procedure followed by LBS could not be supported in law anyway, but the fact that that representation was being submitted at a time when the decision was being reached as to whether there were prima facie grounds for an appeal, and therefore when the Claimant was thereby unable to comment, can only serve to underline the seriousness of the departures from proper procedure. It is also raises questions about whether the attempts to dissuade him from appealing by offering a review were offered in good faith. I can reach no conclusion on such questions in the absence of a response from the Professor concerned, and I decline to do so.

123. The decision also concluded (paragraph 21) that there was no evidence of an intention by the Head of Department to "harass" the Claimant. That was a conclusion which in my judgement was open to the OIA on the material before it. However I disagree with some other aspects of its conclusions on this topic. I agree that the OIA has no power to make a declaration as such that the Head of Department's actions amounted to a breach of the *Public Order Act 1986*, which is a matter for the criminal courts (see paragraph 21). However it must not be thought that the fact that conduct is alleged to have occurred which, if proved in a criminal court, would constitute breach of a criminal statute, thereby deprives the OIA of jurisdiction to determine whether the allegation is made out or should have been investigated, or in some sense prejudices the jurisdiction of the criminal courts. On long established principle, a finding by another body (in this case the OIA) to that effect would be inadmissible in a criminal court to prove that such an offence had occurred. Further, the OIA had no power to impose a criminal sanction (i.e. a sentence) which could only be imposed after a lawful conviction before the criminal court. In my view the idea that it would prejudice the function of the criminal court is therefore illusory. Further, the HEA 2004 imposes no such restriction on the OIA. Were it otherwise, it would deprive a student aggrieved by improper conduct by an HEI or its staff, some of which was criminal, of obtaining redress via the OIA, and having to look to the criminal courts for redress, when the criminal court would have no power (for example) to award compensation for loss of an award or scholarship . The test is *not* whether some conduct might be investigated by another body, or go before another court or tribunal, but *is* whether investigation of the conduct in question is relevant to dealing properly and fairly with the complaint made to the OIA. I accept that there could be circumstances where it might exercise its discretion to defer investigating, or to decide not to investigate, such matters because another statutory body was involved. Without seeking to be prescriptive, or to draw up an exhaustive list, examples could occur when a complaint had been made to the Police and was being investigated, or a prosecution was under way, or a criminal prosecution had been brought and an acquittal resulted - but the automatic exclusionary line taken by the OIA was too broadly expressed.

124. At paragraphs 25 to 32 the OIA decision addressed the complaint of prejudice and bias. It adopted the same test of bias as in the First Decision (the *Porter v Magill* test), recited the same material concerning Professor X's conduct which had caused it to identify serious questions and doubts, and concluded that the matters described

> " 29…….when considered in their totality, raised serious questions and doubts about (Professor X's) ability to remain independent and impartial in the assessment process. In my view, those matters ought properly to have been referred to the Appeal Committee for further consideration."

125. In my judgement that decision was one which it was open to the OIA to reach. Indeed, given the nature and tone of Professor X's E mails, and the aspects of his conduct to the Claimant identified in the OIA letter, no other conclusion was in my judgement reasonably open to the OIA.

126. However in this decision the OIA took a different approach to the marking by Professor X from that adopted in the First Decision. It (paragraph 28) did not consider that the award of a C grade by Professor X when the resubmitted coursework was said by him to be a better paper was of itself, evidence of bias or prejudice. In my judgement, that was not an unreasonable approach to take. The words "of itself" show that the OIA was not excluding it from consideration when "the totality" was looked at in paragraph 29.

127. At paragraph 31 the OIA considered the question of whether the External Examiner's comments could have been different had the Claimant's appeal succeeded, and concluded that such a possibility could not be excluded. This was also a departure from the line taken in the First Decision. However in my judgement it was a reasonable decision open to it on the evidence before it.

128. At paragraphs 33-37 the OIA considered the Claimant's case that the choice of one of his examiners was objectionable because he was inexperienced, and that because others considered his work potentially interesting, it should have been resubmitted. The OIA rejected his claims, because they would involve the OIA getting involved in matters of academic judgement. In my judgement it was right to do so.

129. The Decision then turned to the allegations of harassment (paragraphs 38 to 42). The Claimant contended that he had not been aware of the HBCP, but that the allegations he made should have been recognised as raising complaints of harassment and bullying. The LBS responded at first by taking the point that

there had been no complaint under the HBCP. However as the OIA records at paragraph 40, the LBS now accepted that the allegations made to it could be construed as harassment as defined in its code.

130. The Decision finds also that no formal complaint using terms such as "harassment" or "bullying" was required under the HBCP for a complaint to be lodged. It concluded (paragraph 41) that it would have been good practice for LBS to have referred the Claimant's allegations for investigation when he first proposed, and again then made, his internal appeal. It concluded that the appeal process ought to have been suspended while that investigation occurred. The OIA could not make a finding on whether they were well founded, as they had not been investigated by LBS (paragraph 42), but said that he had the right to expect that they would be investigated. It upheld this part of the Claimant's complaint. In my judgement, that was an entirely reasonable conclusion open to it on the evidence.

131. Indeed in my judgement, the OIA could not have done anything other than uphold it. A student had made very serious allegations relating to his treatment by a senior member of staff, and had, quite properly, raised them in a proper appeal made in accordance with the LBS procedures. One would have expected a prestigious Higher Educational Institution to have responded with concern when such allegations were raised, and to have investigated them with alacrity and due process. Its approach to his complaint about this to the OIA was most unfortunate.

132. The Claimant made a complaint to the OIA that, when measured against the QAA Code of Practice, the method adopted of marking his paper was to be found wanting. Some of the complaints echo other parts of his case (e.g. those on bias, and on the choice of the second examiner). Some others go the issue of whether this was a paper to whose marking the Code applied. They are recited at paragraph 43 of the Decision. The OIA rejected the complaints on the grounds that

    i) It was reasonable of LBS to argue that the Code did not apply (paragraph 47)

    ii) It rejected the Claimant's case on how the paper should be weighted mathematically in the overall grading (paragraph 48)

iii) It did not accept that, even if it did apply, there were breaches of the Code (paragraph 49)

iv) Some of the points raised by the Claimant had not been raised on the internal appeal (paragraph 50)

In my judgement it was open to the OIA to reach those conclusions on the material before it. They are also properly reasoned.

133. I turn now to the conclusions. They were summarised as set out at the Decision's paragraphs 51 to 52, set out at paragraph 72 above.

134. It will be noted that missing from the decision is any consideration of whether the alleged conduct of Professor X, if proved in an HBCP investigation, would have had some effect on the performance of the Claimant in the paper being worked on under his supervision. In the absence of conducting its own review, the OIA could not of course reach any firm conclusion, because of the failure of LBS to address the complaints as the OIA had properly found it should have done.

135. Against that background, I turn now to Section 4 of the Decision which deals with the Recommendations. I start with paragraph 53, which I have also recited above. In my judgement it was a reasonable decision, for which it gave adequate reasoning, for the OIA to determine that it would be wrong to recommend that the academic appeal now be reconsidered.

136. I pass now to paragraphs 54 -56 (and especially 56.2) on the question of whether and how the Claimant should be compensated. The Claimant submitted that he should receive the lost award together with relocation expenses, while the LBS argued, and the OIA decided, that since he had failed to succeed on the grounds that his paper had received the wrong grade, it was open to the OIA to conclude that it would be wrong to allow him any figure for the lost grant, on the basis that it would involve a speculative assumption that he would have received a higher grade than a C. Those submissions were also made to me in support of the sums awarded.

137. In my judgement, the choice for the OIA on the quantum of compensation did not lie between all or nothing. It was not limited to deciding only between (a) awarding all (the Claimant's position), and (b) awarding none (effectively the LBS position). Had it chosen one of those alternatives, the choice of either (a) or (b) would have required a reasoned justification, albeit a short one. But

there was a middle ground also open to it, namely that he had had a prospect of winning his appeal, and therefore had a prospect of retaining funding had he been permitted to remain at LBS. But if it took that course (as it did), no figure could be assessed without some reasons being given.

138. Lest there be any doubt, 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. Such an assessment was not required here. The assessment could have been shortly stated, been broad brush, and could have been as simple as saying " The total lost award was £34,000, but given factors A B and C, I assess the chances of a successful appeal as having been z % and therefore the award is £y. I apply the same proportion to the costs of relocation from the LBS to Strathclyde. " In some cases it may not be possible to reach any conclusion. If so, then the award may in some cases properly be assessed as nil under this head. But here, it did not take that approach, and actually elected to adopt a position in the middle ground to which I made reference above. Having made that election, it was required to give some reasons for the level of award upon which it fixed. One therefore looks to see what reasoning appears in the decision.

139. The OIA has chosen to recommend two compensatory payments, of £5000 and £1500 respectively. The <u>first</u> was said to be in respect of the "loss of opportunity to have his appeal heard" and also to compensate him for losses in relocation "which may have been avoided had his appeal been given full and proper consideration." The <u>second</u> relates to distress and inconvenience suffered as a result of the University not giving full and proper consideration to his appeal. Had it done so, he may have been avoided the time and trouble associated with an appeal to the OIA.

140. The approach at paragraph 54 of the decision is that compensation for the lost award would only be payable if the OIA had been "certain" that he would have passed his Research paper with a B grade. It therefore decided to award compensation under the <u>first</u> head for the loss of the "opportunity to have his appeal heard," and in recognition of costs incurred in transferring elsewhere (paragraphs 55, 56.1). That conclusion in paragraph 54 certainly explains why the OIA was not recommending an offer of the full lost award, but it says

nothing about why the lost opportunity is valued at £ 5000. But that is as far as the reasoning goes. So the Decision Letter was explaining the OIA's reasons for *not* making a recommended award in the claimed sum, but gave no reasons for the recommended award which it *was* putting forward.

141. All that was excluded was an award for the "*total* amount of the scholarship." On the one hand, one cannot know whether or not the Claimant was actually harmed in his work on the paper. On the other, that only comes about because of the serious failures on the part of LBS. Given the fact that he has been compensated for his losing an "opportunity" to have his appeal heard, in my judgement it must follow that there was a chance that it would succeed. The £5000 is indeed said to be a compensatory payment. But a loss of opportunity to have an appeal heard only generates a loss which is compensatable if that appeal has some prospect of success. As a matter of logic, the level of compensation must depend upon the assessment of the prospect, however broad brush that assessment may be.

142. Given the fact that a large sum had been claimed, based on a case that he had lost his award, and that his complaint had not been regarded as frivolous, it was a topic which demanded an explanation, albeit a succinct one. For example one asks - What figures have been taken into account, or brought into account? How has the OIA approached the valuation of the "opportunity" to which it refers? Did it take into account some lesser proportion than the total? Did it apply some discount, and if so what was it? What are the expenses it has included in that figure? It is to be noted also that the OIA had been expressly asked what factors it had taken into account, by the LBS E mail of 1st September 2011[17]. The Claimant had also challenged the scale of the proposed recommended award. However despite those points being taken by the two parties concerned, the Decision said nothing about how the figure of £ 5000 had been arrived at.

143. I therefore find the reasoning of the OIA to be deficient here. This was a very important issue, because the enforced departure of the Claimant from LBS followed his submission of a proper appeal which raised serious issues which had the potential to have affected both his performance, and the marking

[17] referred to at paragraph 65 above

given, which LBS failed to deal with appropriately, and which called into question at a fundamental level the conduct of his supervising Professor. Picking a figure which is unjustified by any even brief reasoning was not enough. The OIA had already shifted from an unexplained award of £250 to an unexplained figure of £400, and was now recommending £5000 for the compensatory element, so it must have accepted that more thought had to be given to the level of the award, but still gave no reasons for the change, however brief. In this respect at least I echo the complaint of LBS in its letter of 9th September 2011 that this finding (which first appeared in the draft) was unreasoned and illogical.

144. I note also that the second part of the award (£ 1500) includes an element for the Claimant's distress and inconvenience that his appeal was not properly dealt with. It follows that the first award is not seeking to compensate him for that. That confirms me in my view that the assessment of the "opportunity" under the first head necessarily must involve some assessment of the prospect of a successful appeal.

145. So far as the second element is concerned, there is no justification for the figure chosen. However as Mr Karim pointed out to me, this is not an area where there are precedents of previous awards of the kind available in the courts when dealing with claims for distress and inconvenience, which are a much more intangible head of damage than that covered by a compensatory award. I consider that the choice of figure, and the choice of the heads for which it was awarded, fell within the OIA's discretion.

146. So far as paragraph 57 is concerned, I accept the approach of the OIA. It was within its discretion whether it investigated the allegations itself, or regarded it as a matter for LBS The OIA was confronted by a most disappointing approach by LBS which had failed to recognise its own serious failure, that being its omission to address a serious set of allegations against one of its senior staff, which if true had seriously affected the welfare and academic success of one of its students. The OIA approach was designed to ensure that that investigation took place if the Claimant wanted it to do so. In my judgement that was a reasonable approach by OIA.

147. As to paragraph 58, I was at first concerned that the OIA has no power to insist that a set of recommendations must be accepted in totality by a student.

However I accept the submissions of Mr Karim that that is lawful. It is in the interests of Higher Education Institutions that once a decision is made (subject of course to judicial review taking place) that the HEI and the student can know whether the recommendation is to be acted upon, or whether there is to be further litigation.

148. It follows from the above that I find that the Second Decision failed to give any or any adequate reasons for its recommended first award of £ 5,000.

149. Although not necessary to my decision, I also consider that the OIA's failure to address the consequences of the alleged misconduct on the performance of the Claimant is one which rendered the reasoning of the Second Decision inadequate.

(5) Order and concluding remarks

150. As the OIA and LBS have argued before me that I should treat the Second Decision as the final decision upon the Claimant's complaint, it follows that the determination of the OIA of the Claimant's complaint is quashed. I direct that the OIA must now redetermine it. In the draft judgement I invited submissions on the form of the Order of the Court.

151. If I was wrong to accept the arguments of the OIA and LBS that the OIA had power to reopen the decision, it follows from the conclusions I have reached that neither the First nor Second Decisions lawfully and adequately addressed the Claimant's complaint.

152. The quashing means that the entire complaint must be redetermined. It is a matter for the OIA, to be determined in accordance with the existence of its wide discretion (as discussed above[18]) whether it decides on this occasion to conduct its own investigation of the allegations of bullying and harassment.

153. I do not endorse all the Claimant's complaints. The implication in his case that the OIA showed a lack of good faith is one which I reject. However I have accepted his criticism that its decisions cannot be supported in respect of its assessment of compensation. In my judgement, the OIA found itself in a difficult position, having to hold the ring between a student who felt a strong sense of grievance at how he had been treated, and an HEI which had

[18] At paragraphs 17-23

conducted itself in a most unattractive manner. But the fact that this was a difficult complaint to deal with cannot justify a failure in law to do so properly.

154. That leads me to this last observation. I cannot leave this matter without saying something about the conduct of LBS. It is a prestigious institution with a worldwide reputation. Nothing I say should be taken as endorsing the allegations of the Claimant about the conduct of Professor X, which have not been determined. It is for that reason that I have referred to him by initial only. I have adopted a similar approach to Professor Z. It will be for others to comment (as have OIA) on the tone adopted by Professor X in his E mails, and on his insistence that only he be thanked by the Claimant in his research paper. It is of course possible that there are reasons for that conduct which would have emerged and been adjudicated upon had the internal appeal been allowed to run its course, and I shall not speculate about what they could be.

155. However the lack of determination of the allegations has only come about through serious failures/acts on the part of the London Business School, as follows

a) the way in which the Claimant's original appeal was handled, which was procedurally unfair to him, and was contrary to its own adopted Rules

b) its refusal until after the Second Decision to accept that it was incumbent upon it, as a responsible institution, to investigate serious allegations which, if true, showed a course of conduct which required investigation under its Harassment and Bullying Procedure

c) the inappropriate attempts, made by both the Head of Department and a senior member of the administration, to dissuade one of its students from exercising a lawful right of appeal, prescribed in its own procedures.

156. It has also adopted an approach in these proceedings, and in relation to the efforts of the OIA to reconsider the Claimant's complaint, in which it has argued quite contradictory cases. That does not show the sort of considered and consistent attitude one might have expected.

157. None of that is conduct which one would expect of a prestigious Higher Education Institution. One hopes that the Governing Body will have the OIA decisions, and this judgement, brought to its attention, and that the London Business School will learn from the spotlight which this appeal by one of its students, and its subsequent treatment of it and the consequent complaint to the OIA, has thrown on the way it should deal with matters in future.

158. The Order of the Court is as follows

i) The determination of the Defendant of the Claimant's complaint, made by the Defendant by way of decision letters dated 25th November 2010 and 23rd September 2011 is hereby quashed, and must be redetermined by the Defendant; and

ii) The Defendant do pay the Claimant's costs in the sum of £1,776, and the Interested Party do pay the Claimant's remaining costs in the sum of £1,000, both within a period of 21 days.

APPENDIX A EXTRACTS FROM OIA SCHEME RULES

6. Review Procedures

6.1 Once a complaint has been accepted the Reviewer will carry out a review of the complaint to decide whether it is justified, partly justified or not justified.

6.2 The review will normally consist of a review of documentation and other information and the Reviewer will not hold an oral hearing unless in all the circumstances he or she considers that it is necessary to do so.

6.3 The nature and extent of the review will be at the sole discretion of the Reviewer and the review may or may not include matters that a court or tribunal would consider.

6.4 The normal review process for dealing with a complaint will be as follows:

6.4.1 The Reviewer will decide what further information (if any) he or she needs for his/her review; this may include a requirement that the HEI provides a copy of the information that it considered at the final stage of its internal complaints procedures (and any related records) and at any time the Reviewer may require the parties to answer specific questions and/or provide additional information.

6.4.2 Prior to issuing a Formal Decision the Reviewer will (unless the Reviewer considers it unnecessary to do so) issue a draft or preliminary decision (and any draft/preliminary Recommendations).

6.4.3 Where a draft decision is issued the parties will be given the opportunity to make limited representations as to any material errors of fact they consider have been made and whether the draft Recommendations are practicable.

6.5 The parties shall comply promptly with any reasonable and lawful request for information the Reviewer may make relating to the review.

6.6 The Reviewer shall not be bound by legal rules of evidence nor by previous decisions of the OIA.

6.7 The Reviewer may decide to issue a Formal Decision at any time where he or she considers that he/she has sufficient information or it is otherwise appropriate to do so.

6.8 Notwithstanding the above the Reviewer may at any time seek to achieve a mutually acceptable settlement of a complaint (including, with the consent of the parties, through the appointment of a mediator) whenever he or she considers it appropriate.

6.9 The Reviewer may terminate or suspend consideration of a complaint, as he or she considers appropriate, if it appears to the Reviewer that,

6.9.1 the HEI has satisfactorily dealt with the complaint;

6.9.2 the complaint would be better considered in another forum;

6.9.3 there are proceedings taking place within the HEI or elsewhere which may be relevant to the complaint;

6.9.4 a party has unreasonably delayed or has otherwise acted unreasonably; or

6.9.5 there are other good reasons for doing so.

7. The Formal Decision and any Recommendations

7.1 The Reviewer will issue a Formal Decision, and any Recommendations the Reviewer decides to make, to the complainant and the HEI as soon as is reasonably practicable.

7.2 The Formal Decision and any Recommendations shall be in writing and contain reasons for the Formal Decision and for any Recommendations.

7.3 In deciding whether a complaint is justified the Reviewer may consider whether or not the HEI properly applied its regulations and followed its procedures and whether or not a decision made by the HEI was reasonable in all the circumstances.

7.4 The Reviewer may, where the complaint is justified in whole or in part, make Recommendation(s) that the HEI should do something or refrain from doing something. Those Recommendation(s) may include, but not be limited to, the following:

7.4.1 that the complaint should be referred back to the HEI for a fresh determination because its internal procedures
have not been properly followed in a material way;

7.4.2 that the complaint would be better considered in another forum;

7.4.3 that compensation should be paid to the complainant, including, at the Reviewer's discretion, an amount for inconvenience and distress;

7.4.4 that the HEI should take a course of action that the Reviewer considers to be fair in the circumstances;

7.4.5 that the HEI should change the way it handles complaints;

7.4.6 that the HEI should change its internal procedures or regulations.

7.5 The OIA expects the HEI to comply with the Formal Decision and any accompanying Recommendations in full, and in a prompt manner.

7.6 Where Recommendations require the HEI to take a particular course of action it should do so within the time scale stipulated or, where no time scale is indicated, as soon as is reasonably practicable. The HEI shall, if requested, report to the Reviewer on such compliance.

7.7 Any non-compliance by an HEI with a Recommendation will be reported to the Board and publicised in the Annual Report.

APPENDIX B FIRST DECISION OF OIA OF 25TH NOVEMBER 2010 (Edited to substitute initials for names)

Complaint

1. Mr Cardao-Pito is complaining about the School's decision in its letter of 18 September 2009 not to uphold his academic appeal in respect of the grade awarded to his research paper. He considers that his supervisor, who was one of the markers, was prejudiced against him. He has concerns about the level of experience of the second marker and the operation of the marking procedure. He also complains that the School attempted to deter him from pursuing a formal appeal and he raises complaints about harassment and defamation.

Background

2 In September 2007 Mr Cardao-Pito registered at the School on a PhD programme in Accounting. Students on this programme are initially registered for the degree of MRes At the end of the first two years they are required to write a research paper for which they must achieve a minimum of a 'B' grade in order to upgrade their registration to MPhil/PhD

3. Mr Cardao-Pito was awarded a 'C' grade for his research paper. He was permitted to revise and resubmit his paper but was awarded a 'C' grade for the resubmitted version. This was sufficient for him to be awarded the degree of MRes but not to continue with the PhD programme.

4. Mr Cardao-Pito considered that the grade had been affected by prejudice on the part of his supervisor, Professor X, who had been one of the markers. He raised a number of concerns with Professor Z, Chair of the Accounting Subject Area, which were investigated by Professor Z but rejected.

5. In August 2009 Mr Cardao-Pito lodged an academic appeal. On 18 September 2009 the School wrote to Mr Cardao-Pito informing him that his appeal had been rejected after investigation by a Deputy Dean and another member of staff, who had concluded that it did not disclose a prima facie case.

6. The School's letter of 18 September 2009 constituted the Completion of Procedures letter. The OIA received Mr Cardao-Pito's Scheme Application Form on 7 October 2009. The Draft Decision was issued on 19 August 2010 and the revised Draft Decision was issued on 25 October2010.

OIA Review Process

7. The purpose of the OIA's review is to decide whether a complaint is justified, partly justified, or not justified. In deciding whether this complaint is justified, we have considered whether the School applied its regulations properly and followed its own procedures correctly. We have also considered whether any decision made by the School was reasonable in all the circumstances.

8. In considering the complaint, we have taken into account all the documentation provided by Mr Cardao-Pito and the School Mr Cardao-Pito has commented on the School's response to his complaint and the School has answered questions we have asked. Mr Cardao-Pito has also commented on the Draft Decision, we sent his comments to the School which has provided its response, and Mr Cardao-Pito has commented on the School's response Mr Cardao-Pito and the School have commented on the revised Draft Decision.

9. Our decisions do not necessarily refer to all documentation provided and points raised during the course of our review. We include all material which we consider necessary to make a decision about the complaint.

10. The OIA cannot interfere with the operation of an institution's academic judgment. We cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given However, we can look at whether a university has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness or bias in the decision-making process.

Review of Complaint and Conclusions

Mr Cardao-Pito's complaint of prejudice

11. Under the School's Academic Appeals procedure, one of the grounds for appeal is that "there is substantive evidence of bias or prejudice against the candidate." When an appeal is made, written statements are obtained from the parties concerned. "If the evidence provided raises questions or doubts then an Appeal Committee will be appointed to hear the appeal," but otherwise the appeal is dismissed.

12. In considering bias or prejudice, I have borne in mind that the question to be addressed is not whether a decision-maker was actually biased but whether there was a perception of bias. The test set out in the House of Lords decision of Porter v Magill [20021 1 All ER 465 is:

> *The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal* [in the case of Mr Cardao-Pito, the persons marking his work] *was [were] biased.*

13. Having reviewed the considerable amount of documentation in this case, I have concluded that some - but not all - of the evidence put forward by Mr Cardao-Pito raised questions or doubts. I therefore find that it was unreasonable for the School to have concluded that Mr Cardao-Pito had not established a prima facie case.

14. The evidence that I consider raised questions or doubts includes the following:

1 The tone of Professor X's email correspondence with Mr Cardao-Pito.

2. The fact that Professor X advised Mr Cardao-Pito to remove from his paper the names of a number of people whose help Mr Cardao-Pito was acknowledging, leaving Professor X as the sole person being thanked.
3. The fact that Professor X recommended a 'C' grade for Mr Cardao-Pito's resubmitted paper even though he had recommended a 'B' grade for the original version and considered that the resubmitted paper represented an improvement.

15. In relation to paragraph 14(1) above, I draw attention to the following comments in emails from Professor X to Mr Cardao-Pito providing feedback on drafts of Mr Cardao-Pito's paper:

• 19 March 2009: ... "Improve the writing if you want to stay at the School. I am very
serious. Do not show this paper to anybody. Anybody! You will have one chance. Work on the paper."
• 13 March 2009 ": ... Do as you are told! not more, not less."
• 10 March 2009: " ... use log (MVE) and don't argue with me."
• 20 November 2008: "here are many many many many more comments. I am not sure I can go on. Be very careful. If I find that you ignored one of my comments I will send you to Portugal on Monday."

16. The School has acknowledged that Professor X had, at times, become frustrated with Mr Cardao-Pito's Jack of progress and inability to incorporate feedback into his paper. It concluded, however, that Professor X's correspondence was not evidence of bias or prejudice, but rather was an attempt to encourage Mr Cardao-Pito to improve his work. I accept that it is part of a supervisor's role to provide robust feedback if, in the exercise of the supervisor's academic judgment, the supervisor considers that this is warranted. I am, however, concerned about the strong and unorthodox tone in which such feedback was provided to Mr Cardao-Pito. In my view, this could lead a fair-minded observer to conclude that there was a possibility of bias.

17. In relation to paragraph 14(2) above, I recognise that in his response to the academic appeal Professor X explained his concern that Mr Cardao-Pito "was running from one faculty member to another like a headless chicken producing new versions of his paper frequently." Professor X's intention had been to introduce focus by asking Mr Cardao-Pito to work only with him. He accepted, with hindsight, that he should not have asked for the names of his colleagues to be removed from the acknowledgements and he apologized to his colleagues for this. I appreciate that Professor X's intentions may have been constructive but I consider that a fair-minded observer might conclude, particularly given the level of frustration Professor X was apparently experiencing, that there was a possibility of bias.

18 1n relation to paragraph 14(3) above, I have noted Professor X's explanation that he had recommended a 'C' grade for the resubmitted paper because it had "not improved significantly relative to the previous version, for which the final grade was 'C'." (While Professor X had initially recommended a grade 'B' for the original version, the other marker had recommended a grade 'F', and the two markers ultimately agreed upon a grade 'C'.) Professor X considered that even if he had recommended a grade 'B' for the resubmitted paper the average of the two graders

would still have been below a 'B' grade. I have noted that the final grade for the original paper was not based on an average but on the agreement of the two markers after discussion between them I am of the view that it would have been reasonable for the School to have explored this aspect in more detail

Conclusion

19. For the reasons set out above, I conclude that it was unreasonable for the School to have concluded that Mr Cardao-Pito had not established grounds for appeal. I therefore find his complaint in this respect Justified.

Mr Cardao-Pito's complaints about the examination process

20 Mr Cardao-Pito queried the competence of the second marker, Dr R, and expressed concern that the two markers had met, along with Professor Z, to agree the final grade. He was also concerned that Professor Peasnell, the external examiner, had seen, and could therefore have been influenced by, the comments made by Professor X and Dr R in their grading reports.

21. In his appeal, Mr Cardao-Pito commented in relation to Dr R:

> "[He] appears a researcher with potential. Nonetheless, he has just finished his PhD last year, is inexperienced and has not published papers yet. This would not exclude him from the grading process However, I had several meetings with him where I could note his narrow familiarity with key papers to follow my reasoning ... [Dr R's] analysis of my paper is rather superficial"

22. In his comments on the Draft Decision, Mr Cardao-Pito argues that in his appeal he suggested that the appointment of Dr R as an examiner represented a procedural irregularity. I have noted that the School does not have a formal procedure for the selection of examiners "because as a small institution in most cases there is not a large pool of Examiners with the relevant expertise to select from". The School explains that "Internal Examiners are selected by the Subject Area based on possession of relevant expertise in the topic being examined". I do not consider that the appointment of Dr R as an examiner represented a procedural irregularity. Mr Cardao-Pito states that he identified Dr R's "lack of experience and lack of publications". In my view, Mr Cardao-Pito is seeking to attack the School's academic judgment of the suitability of Dr R to act as an examiner. This is not a valid ground of appeal. The School has indicated to us that it "would like it to be noted that Dr R has a degree in Government from Harvard University and a PhD in Management from the MIT Sloan School of Management and has been employed at the School at Assistant Professor level since September 2008." The School considers Mr Cardao-Pito's comments about Dr R to be inappropriate. I fully note the School's comments and do not find that it was unreasonable for the School to fail to support Mr Cardao-Pito's views in this respect.

23. In the papers submitted with his Scheme Application Form, Mr Cardao-Pito argues that Professor X, Dr R and the external examiner made similar points about his work. In Mr Cardao-Pito's view, the most likely explanation for this is that Professor X influenced Dr R and Professor Peasnell. He notes that Professor X and Dr R had

met to discuss the grading and that both their reports were supplied to Professor Peasnell.

24. The School explains that where there is a discrepancy in the grades recommended by the first and second markers, as there was in the case of Mr Cardao-Pito's initial submission, it is normal practice for the markers to meet to discuss their marking and agree a final grade together. This meeting is often attended by the Subject Area Chair (Professor Z) as head of the department, particularly if the final decision affects the student's progression I consider that it is normal practice for such meetings to take place I have particularly noted that the grade initially recommended by Professor X was higher than that recommended by Dr R. This does not support Mr Cardao-Pito's contention that Professor X influenced Dr R to his (Mr Cardao-Pito's) detriment. On the facts, it would seem that Professor X's involvement was to the benefit of Mr Cardao-Pito. In any event, the meeting related to the initial submission, following which Mr Cardao-Pito was given the opportunity to revise and resubmit his paper.

25. Providing his comments to the School on Mr Cardao-Pito's resubmitted paper, Professor Peasnell explained that he had read the paper "without reference to the examiner's comments and then looked to see whether my view agreed with the internal examiner."
The external examiner explained his reservations, observed that these "were clearly echoed by the internal examiner," and concurred with the overall mark that had been recommended I have not seen any evidence to suggest that, in arriving at his conclusions, Professor Peasnell was influenced by Professor X. Professor Peasnell stated: "This paper mystified me. ~. this is a study looking for a rationale." I make no comment on the academic merits of Mr Cardao-Pito's work as that is not a matter for the OIA. I do, however, observe that issues around the rationale for his study formed a consistent theme in feedback that was provided to him. I consider it was reasonable for the School to conclude that the consistency in the shortcomings identified by the examiners did not constitute evidence that the examiners had been motivated by prejudice. In commenting on the Draft Decision, Mr Cardao-Pito has suggested that sending the internal examiners' reports to Professor Peasnell represented a procedural irregularity. I do not agree: I note that the role of the external examiner is to provide independent verification. In other words, the role is to check the grade recommended by the internal examiners.

Conclusion

26. For the reasons set out above, I do not find Mr Cardao-Pito's complaints about the
examination process to be well founded. I therefore find his complaints in this respect Not Justified.

Mr Cardao-Pito's complaint that the School attempted to deter him from pursuing a formal appeal

27. In its representations to us about Mr Cardao-Pito's complaint, the School comments:

Professor Z did offer the complainant the opportunity to appeal to him informally in his role as Subject Area Chair for Accounting The complainant submitted a document to Professor Z who then provided them [sic] *with a detailed response to the points he had put forward.*

I note that Professor Z and the complainant did have an agreement that the complainant would accept Professor Z's decision, which was the basis under which Professor Z agreed to spend a considerable amount of time investigating the claims put forward in the documentation However once the complainant received Professor Z's response he decided to launch a formal appeal through the School's main academic appeal procedures

It should be noted that Professor Z has no authority within the School in relation to allowing students to submit academic appeals and that he would not and could not, under any circumstances, deny any student access to the formal academic appeal procedures.

28. Mr Cardao-Pito did, in fact, pursue his academic appeal through the formal procedure. It follows that he has not been adversely affected by the matters of which he complains I do, however, have serious concerns that attempts were made to dissuade him from making a formal appeal I draw attention in particular to the following emails received by Professor X which he included with his document in which he provided his comments on the formal appeal and to which Mr Cardao-Pito has drawn attention:

- An email from F, Deputy Director, Academic Affairs, dated 1 September 2009:

I have met with Tiago twice to try and dissuade him from appealing. Z also made a big effort to prevent it I'm really sorry that Tiago is doing this and believe that he could not possibly succeed with this appeal.

- An email from Professor Z, also dated 1 September 2009:

I have been trying to persuade Tiago not to make an appeal — but like everything else, he doesn't listen. Earlier, I made a gentleman's agreement with him that I will review Tiago's evidence for his claim that you were biased against him and if I independently agreed with his evidence, I would give him another chance, but if I disagreed he should leave the programme without appealing. He agreed to this initially, but reneged when I disagreed with his evidence and decided to appeal.

29. I appreciate that it can be stressful for members of a university's staff, as well as for the student concerned, to be involved in an appeal, particularly where, as here, the student was making lengthy, detailed and strongly-worded allegations directed against one
member of staff. I appreciate that the primary purpose of the actions described in the emails to Professor X that I have quoted above may have been to provide support to Professor X rather than to deny Mr Cardao-Pito access to a procedure he was entitled to invoke. Nevertheless, I consider these actions were inappropriate.

Conclusion

30. I have concluded that attempts were made to deter Mr Cardao-Pito from pursuing a formal appeal. I therefore find his complaint in this respect Justified.

Mr Cardao-Pito's complaint of harassment and defamation

31. in commenting on the Draft Decision, Mr Cardao-Pito has drawn attention to what he describes as "serious evidence of harassment and defamation" which he states was "the principal ground of my complaint to the OLA". I have noted that Mr Cardao-Pito did not summarise his complaint in his Scheme Application Form but simply referred to "the attached document" which ran to some 50 pages. I do not agree that his comments about harassment and defamation represented the principal ground of his complaint although I appreciate that such matters were mentioned by him and I have therefore carefully considered his comments in this respect.

32. In its letter to us of 8 February 2010 providing its response to Mr Cardao-Pito's complaint, the School explained that it had handled Mr Cardao-Pito's complaint based on its understanding that Mr Cardao-Pito was arguing that his relationship with his supervisor had broken down and, in consequence, his supervisor had been biased against him in the marking process. The School had therefore followed its academic appeals procedure. If Mr Cardao-Pito had initiated "a pure complaint of harassment" he would have been offered the opportunity of bringing a separate complaint under the School's Harassment and Bullying procedure. Mr Cardao-Pito explains to us that he was unaware of this separate procedure until he received a copy of the School's letter from us. He points out that under the procedure:

> *All individuals have a responsibility to be sensitive towards others and have an obligation to take action if they experience or observe unacceptable standards of behaviour.*

33. The School accepts that Professor X's behaviour "could have been construed" in the way Mr Cardao-Pito suggests but it emphasises that it "did not interpret Mr Cardao-Pito's original appeal submission as stating that this relationship breakdown affected his performance when writing his research paper which is what he now appears to be suggesting". The School states that at no point during the internal complaints process did Mr Cardao-Pito mention a complaint of harassment against Professor X despite putting forward an extremely detailed submission, My understanding is that even if Mr Cardao-Pito did not use the word "harassment" in the internal complaints process, he considers that the factors he had detailed were such as to indicate that harassment had occurred. In my opinion, it would have been appropriate for the School to have made Mr Cardao-Pito expressly aware of the School's Harassment and Bullying procedure and to have clarified with him whether he wished to pursue a complaint under it. I have reached this conclusion because Mr Cardao-Pito had provided the School with copies of emails from Professor X which I consider are worded in strong and unusual terms. I consider that the School should have given greater consideration to this than was the case.

34. Mr Cardao-Pito states that he wishes a complaint against Professor X to be pursued under the School's Harassment and Bullying Procedure He explains "More than the material right to the scholarship and compensation, I am interested in the symbol that a strong sanction would represent. This process serious [sic] affected my reputation with persons that I care very much, and this deeply worries me." In commenting on the revised Draft Decision, Mr Cardao-Pito has made detailed and repeated reference to criminal law concerning harassment and defamation I have given careful consideration to his representations but the focus of the OIA's role is on reviewing the School's handling of Mr Cardao-Pito's academic appeal It is not for the OIA to express an opinion on matters of criminal law Furthermore, I am concerned that in his recent representations Mr Cardao-Pito is endeavouring to widen his complaint beyond its initial scope

35. I note that if a complaint of harassment had been pursued and had been found to be justified, the remedy would not have had a direct impact on Mr Cardao-Pito: for instance, no compensation would have been awarded to him. He argues, however, that it might have enabled him to remain at the School and to continue to enjoy his scholarship. I have carefully considered his argument but I am not persuaded that the successful pursuit of a complaint of harassment could have led to such an outcome. I am also mindful that Mr Cardao-Pito alleges that "during the period November 2008-June 2009, my supervisor Prof A engaged in several actions/behaviour towards me that can be classified as harassment according to the juridical consigned description" However, although he refers to these actions taking place over a significant period of time, it does not seem that he raised any concerns until the issue arose over the grading of his research paper.

Conclusion

36 I consider that when Mr Cardao-Pito raised concerns with the School following the grade awarded to his research paper it would have been appropriate for the School to have made him expressly aware of its Harassment and Bullying procedure (which I note was already available on the School's website) and to have clarified with him whether he wished to pursue a complaint under it. To this extent, therefore, I find this aspect of his complaint Justified.

<u>Decision and Recommendations</u>

37. I have concluded that:

- It was unreasonable for the School to have concluded that Mr Cardao-Pito had not established grounds for appeal. For the avoidance of doubt, this conclusion does not imply that if an appeal hearing had taken place the result would necessarily have been in Mr Cardao-Pito's favour. It would have been for the Appeal Committee to have determined the outcome after holding a hearing: the appeal might, or might not, have been upheld.
- Mr Cardao-Pito's complaints about the examination process are not justified.
- Mr Cardao-Pito's complaint that attempts were made to deter him from pursuing a formal appeal is justified.

- It would have been appropriate for the School to have made Mr Cardao-Pito aware of its Harassment and Bullying procedure and to have clarified with him whether he wished to make a complaint under it.

38. I have therefore found Mr Cardao-Pito's complaint to the OlA to be Partly Justified.

39. Mr Cardao-Pito has made the OlA aware that he is now pursuing his studies at another university. He comments that he does not have the benefit of a scholarship and is not exempt from paying tuition fees as was the case when he was registered at the School. I have taken careful note of his situation and have considered the matter again when looking) at the points he has raised following the issue of the Draft Decision, particularly in relation to the School's Harassment and Bullying procedure, and again following the issue of the revised Draft Decision. I consider, however, that Mr Cardao-Pito must bear a significant proportion of responsibility for the problems that arose. I have noted that the School's Harassment and Bullying procedure was available on the School's website and could have been consulted by Mr Cardao-Pito irrespective of whether the School drew the procedure to his attention. I am therefore of the view that it is not appropriate to recommend the payment of substantial compensation for those aspects of his complaint that I have concluded to be justified.

40. I recommend that within one month of the date of issue of this Decision the School writes to Mr Cardao-Pito offering him the sum of £400 in compensation. The offer should remain open for a period of two months and should be in full and final settlement of the matters dealt with in this review. If Mr Cardao-Pito accepts the offer, the University should ensure that payment is sent to him within 21 days of receiving his letter of acceptance.

Susanna Reece
Deputy Adjudicator

On behalf of the Office of the Independent Adjudicator for Higher Education

APPENDIX C SECOND DECISION OF OIA OF 23RD SEPTEMBER 2011 ((Edited to substitute initials for names)

Section 1 — Background

1 Mr Cardao-Pito registered on the School's PhD programme in Accounting in September 2007, In common with all students on that programme, Mr Cardao-Pito was initially registered for the degree of MRes (the two year taught component of the PhD programme). That degree consisted of both taught and research components. Mr Cardao-Pito successfully passed the taught components of the degree. At the end of his second year of study Mr Cardao-Pito was required to submit a research paper for which he needed to achieve a minimum "B" grade in order to continue to the MPhil/PhD phase of the programme.

2. Mr Cardao-Pito received a "C" grade for his research paper and was permitted to resubmit the paper one month later. Unfortunately, Mr Cardao-Pito again achieved a "C" grade. This was sufficient for him to be awarded the degree of MRes but not to upgrade his registration and continue on the PhD programme.

3. In August 2009, Mr Cardao-Pito submitted an academic appeal against the decision not to allow him to upgrade his registration. Mr Cardao-Pito's appeal was lodged, in brief, on the following grounds:

3.1 that there was substantial evidence of prejudice against him; and

3.2 that there were irregularities in the grading of his work.

4. In a letter dated 18 September 2009, the School advised Mr Cardao-Pito that his appeal had been rejected on the grounds that it disclosed no prima fade case. The School's letter of 18 September constituted a Completion of Procedures letter for the purposes of the OIA

Scheme Rules.

5. The OIA received Mr Cardao-Pito's Scheme Application Form on 7 October 2009. The issues which Mr Cardao-Pito asked the OIA to consider, in brief, were as follows:

5.1 that his supervisor, who also marked his research paper, was prejudiced against him;

5.2 that his supervisor's actions/behaviours towards him during the period November 2008 — June 2009 amounted to harassment;

5.3 that there were irregularities in the grading of his work; and

5.4 that the School attempted to dissuade him from lodging a formal appeal and that its actions in that regard amounted to harassment.

6. The OIA issued its Draft Decision on Mr Cardao-Pito's complaint on 19 August 2010. Following consideration of the representations made by Mr Cardao-Pito and the School (in particular, the increased emphasis by Mr Cardao-Pito on his complaints of harassment) a revised Draft Decision was issued on 25 October 2010. Both Mr Cardao-Pito and the School submitted further comments in response to the revised Draft Decision.

7. The CIA issued its Formal Decision on Mr Cardao-Pito's complaint on 25 November 2010. Mr Cardao-Pito's complaint was found to be partly justified and the CIA recommended that the School offer Mr Cardao-Pito £400 compensation in relation to the failings identified in the Formal Decision. Mr Cardao-Pito rejected the School's offer.

8. On 18 February 2011, Mr Cardao-Pito lodged an application for permission to judicially review the CIA's Formal Decision of 25 November 2010. The OIA served and filed its Acknowledgement of Service on 14 March 2011. Mr Cardao-Pito's claim was refused permission on 5 April 2011.

9. In a letter dated 14 April 2011, Mr Cardao-Pito renewed his application for permission to proceed with his judicial review application. Mr Cardao-Pito's application was granted at an oral hearing and a judicial review hearing was fixed for 25 July 2011.

10. On 10 June 2011, the CIA wrote to Mr Cardao-Pito offering to reopen the review of his complaint. Mr Cardao-Pito rejected that offer.

11. At a directions hearing on 21 July 2011, it was agreed that the judicial review proceedings would be stayed to allow the CIA to re-open its review of Mr Cardao-Pito's complaint and issue a fresh Formal Decision. This Decision is the outcome of that review.

Section 2- OIA Review process

12. The purpose of the OIA's review is to decide whether a complaint is justified, partly justified, or not justified. In deciding whether this complaint is justified, we have considered whether the University applied its regulations properly and followed its own procedures correctly. We have also considered whether any decision made by the University was reasonable in all the circumstances.

13. In considering the complaint, we have taken into account all the documentation provided by Mr Cardao-Pito and the University in the course of the OIA's review and the judicial review proceedings. Mr Cardao-Pito has commented on the University's responses to his complaint and both he and the University have answered questions we have asked.

14. Our decisions do not necessarily refer to all documentation provided and points raised during the course of our review. We include all material which we consider necessary to make a decision about the complaint.

15. In the course of our review we have identified the following documents issued by the University as of particular relevance:

15.1 Academic Appeals Procedures (version three, March 2008) ("Academic Appeals
Procedures");

15.2 Assessment Regulations for the Master of Research Degree (MRes) at London
Business School (August 2005) ('Assessment Regulations"),'and

15.3 Harassment and Bullying in London Business School: Code of Practice 001 (June
2006) ('/-IBCP'2.

Section 3— Review of Complaint and Conclusions

The Head of Department's Review of Mr Cardao-Pito's Appeal

16, Mr Cardao-Pito has complained that the School, in particular the Head of Department (Z), attempted to deter him from pursuing a formal appeal. Mr Cardao-Pito has sought from the OIA a declaration that the actions of the Head of Department in this regard amounted to "intentional harassment as predicted on the 4A of the Public Order Act 1986, which was inserted by section 154 of the Criminal Justice and Public Order Act 1994, or if being inappropriate it does not fall within this ambit and why" (sic).

17. In response to this aspect of Mr Cardao-Pito's complaint, the School says that:

17.1 The Head of Department did offer Mr Cardao-Pito the opportunity to appeal to him informally in his role as Subject Area Chair for Accounting. Mr Cardao-Pito submitted a document to the Head of Department who then provided him with a detailed response to the points he had put forward;

17.2 The Head of Department and Mr Cardao-Pito did have an agreement that Mr Cardao-Pito would accept the Head of Department's decision and that was the basis under which the Head of Department agreed to spend a considerable amount of time investigating the claims put forward in the documentation. However, once Mr Cardao-Pito received the Head of Department's response he decided to launch a formal appeal through the School's academic appeals procedure;

17.3 It should be noted that the Head of Department has no authority within the School in relation to allowing students to submit academic appeals and he would not, and could not, under any circumstances deny any student access to the formal academic appeal procedure.

18 I have reviewed carefully the documentation provided by Mr Cardao-Pito and the School in relation to this issue. The following emails cause me particular concern:

18.1 An email from Z, Head of Department, to Mr Cardao-Pito dated 4 August 2009:

"It is in your best interests to study elsewhere.

You stated in your appeal documents to me that you will abide by decision (sic). So, without any further arguments, I expect you to send a confirmation email to me and F regarding your leaving the programme this summer."

18.2 An email from (the) Deputy Director, Academic Affairs to Professor X dated 1 September 2009:

"I have met with Tiago twice to try and dissuade him from appealing. Z also made a big effort to prevent it.. .I'm really sorry that Tiago is doing this and believe that he could not possibly succeed with this appeal."

18.3 An email from Professor Z to Professor X, also dated 1 September 2009:

"I have been trying to persuade Tiago not to make an appeal — but like everything else, he doesn't listen. Earlier, I made a gentleman's agreement with him that I review Tiago's evidence for his claim that you were biased against him and if I independently agreed with his evidence, I
would give him another chance, but if I disagreed he should leave the programme without appealing. He agreed to this initially, but reneged when 1 disagreed with his evidence and decided to appeal."

19. It is clear from the emails provided that Mr Cardao-Pito understood, and agreed to, the terms on which the Head of Department was offering to review his case. I am also mindful of the sensitive nature of the issues Mr Cardao-Pito had raised. I can understand why he, as well as the Head of Department, might have wished to avoid pursuing those matters through a formal appeal procedure.

20. Notwithstanding the above, I do not consider it was appropriate for the Head of Department to seek to enforce an agreement which denied Mr Cardao-Pito's legitimate right to pursue a formal appeal through the University's Academic Appeals Procedure. Whilst Mr Cardao-Pito did ultimately exercise his right to lodge an academic appeal, I consider the attempts to deter him from appeal placed him in an invidious position and would likely have affected his confidence in the appeals process. To this extent, I find this aspect of Mr Cardao-Pito's complaint to be justified.

21. I have seen no evidence that would lead me to find that the Head of Department's actions were motivated by an intention to "harass" Mr Cardao-Pito. I am also mindful of the fact that the OlA cannot consider complaints which have not completed the internal procedures of the University and/or College and it does not appear that such a complaint was put to the School during its internal processes. I do not, in any event, consider it to be appropriate, or within the OIA's remit, to make a declaration that the Head of Department's actions amounted to a breach of the Public Order Act 1986. Such matters are quite properly the reserve (sic) of the courts.

The Formal Appeal Process

22. Under the School's Academic Appeals Procedure a student may appeal against a decision on student admission, progression, assessment or the award of a degree. Appeals against such a decision may be considered on one or more of the following grounds:

> 22.1 there is evidence of extenuating circumstances which, for valid reasons, were not known when the decision was made;
> 22.2 there is evidence of significant administrative or procedural irregularity; and
> 22.3 there is substantive evidence of prejudice or bias against the candidate (section 2.2 of the Academic Appeals Procedure).

23. Section 3.2 provides that if there is no prima facie case the appeal will be dismissed and the student will be informed of this decision in writing. If the evidence provided raises "questions or doubts" then an Appeal Committee will be appointed to hear the appeal. Where an Appeal Committee upholds an appeal the matter will normally be referred back to the Board of Examiners.

24. Based on the documentation I have seen, I am satisfied that the School followed the Academic Appeals Procedure in its consideration of Mr Cardao-Pito's appeal. The decision that Mr Cardao-Pito had not established a prima fade case for appeal was within the discretion afforded to the School under the Academic Appeals Procedure. The issue which therefore remains for consideration by the OIA is whether the decision to dismiss Mr Cardao-Pito's appeal on that basis was reasonable in the circumstances.

The School's Decision to Reject Mr Cardao-Pito's Appeal

Alleged Prejudice against Mr Cardao-Pito in the Supervision and Assessment Process

25. In his appeal Mr Cardao-Pito contended that his supervisor had "manifested prejudice against me and a will to fail me instead of supervise me" (sic). Mr Cardao-Pito also expressed concern that the grading process had been tainted by bias as the external examiner had seen, and could therefore have been influenced by, the comments made by his supervisor and the second marker in their grading reports. Mr Cardao-Pito appended to his appeal a 12 page report entitled "Report of One Year Under (A's) Supervision with Documented Evidence of Prejudice Against Me" in support of his claim.

26. In response to this aspect of Mr Cardao-Pito's appeal the School concluded that:

> 26.1 There was no systemic (sic[19]) evidence that Professor X was biased towards Mr Cardao-Pito;

[19] I.e. not " systematic" as actually stated by LBS

26.2 Significant effort was made to supervise Mr Cardao-Pito. The School noted that Mr Cardao-Pito had received a considerable amount of supervision from Professor X, and a number of other faculty members within the Accounting Subject area, and that despite being issued with clear "instructions" on how to improve his paper he failed to follow them and incorporate their feedback successfully;

26.3 let was not the case that Professor X did not understand Mr Cardao-Pito's paper, rather they noted that his work had not presented to the markers' satisfaction the motivations underlying his work on the particular research problem; and

26.4 The comments of Dr R and the External Examiner were substantially consistent regarding the paper's shortcomings and the comments of Professor X and his colleagues. They did not find any evidence to suggest that these comments were motivated by prejudice.

27. In considering allegations of prejudice and/or bias the issue is not whether a decision- maker is actually biased but whether the fair-minded and in formed observer, having considered the facts, would conclude that there was a real possibility that [the decision-maker was biased." (Porter v Magill [2002] 1 All ER 465). Similarly, the issue for determination by the School at the first stage of the Appeals Procedure was not whether there was evidence of actual bias or prejudice against Mr Cardao-Pito but whether the evidence presented raised "questions or doubts".

28 I have reviewed in detail the evidence put forward by Mr Cardao-Pito in support of his appeal and Professor X's response. I do not consider the fact that Mr Cardao-Pito's supervisor awarded a C grade for Mr Cardao-Pito's resubmitted research paper despite considering it an improvement on Mr Cardao-Pito's previous submission is, of itself, evidence of prejudice or bias in the examination process. I do, however, consider that some- but not all - of the evidence presented by Mr Cardao-Pito raised questions or doubts about the existence of prejudice in the supervision and assessment process. The evidence which has led me to this conclusion is as follows:

28.1 The unorthodox content and tone of Professor X's email correspondence with Mr Cardao-Pito. I refer, in particular, to the following examples:

"……*here are many many many many more comments. I am not sure I can go on. Be very careful. If I find that you ignored one of my comments / will send you to Portugal on Monday* (20 November 2008)

"…..…Use log (MVE) and don't argue with me "(10 March 2009)

"……*Do as you are told! Not more, not less"* (13 March 2009)

"……*Improve the writing if you want to stay at the School 1 am very serious. Do not show the paper to anybody. Anybody! You will have one chance. Work on the paper*" (19March 2009).

28.2 The unanswered allegation that, on 20 November 2008, Professor X had yelled at Mr Cardao-Pito to "work on the f****** paper" in the Department Corridor; and

28.3 the fact that Professor X admitted that he had advised Mr Cardao-Pito to remove from his paper the names of a number of people whose help Mr Cardao-Pito was acknowledging (including that of the second marker) leaving Professor X as the sole person to be thanked.

29. Whilst I appreciate it is the supervisor's role to provide robust feedback, it is apparent from the evidence that Professor X was becoming increasingly frustrated with Mr Cardao-Pito in the period leading up to the resubmission of his research paper. I consider the matters described above, when considered in their totality, raised serious questions and doubts about Professor X's ability to remain independent and impartial in the assessment process. In my view, those matters ought properly to have been referred to the Appeal Committee for further consideration.

30. I am mindful of the fact that Mr Cardao-Pito's research paper was evaluated by the External Examiner and I have noted the email from the External Examiner to the PhD Programme Manager on 25 June 2009 which states: *"I have now had a window of opportunity to read the two research papers. What I/ did was read each paper without reference to the examiner's comments and then looked to see whether my view agreed with the internal examiner"... "my reservations were clearly echoed by the internal examiner. My grades would be a C for originality, C/F for soundness, B for structure etc. That would suggest an overall grade of C."*

31. It is unlikely, therefore, that the External Examiner was influenced by Professor X's comments on Mr Cardao-Pito's research paper before determining that Mr Cardao-Pito's paper should be awarded an overall C grade. However, I cannot exclude the possibility that the External Examiner might have formed a more favourable view of Mr Cardao-Pito's work in the hypothetical scenario that Mr Cardao-Pito's appeal was upheld and Mr Cardao-Pito was awarded a passing internal grade.

32. For the reasons set out above, I find this aspect of Mr Cardao-Pito's complaint to be justified.

<u>Other matters raised in Mr Cardao-Pito's appeal</u>

33. In his appeal, Mr Cardao-Pito alleged the following further irregularities in the grading process:

33.1 That the second marker of his research paper was inexperienced, had no
publications and was not an expert in the field of his paper; and

33.2 that experts in the subject matter of his thesis (the Editor in Chief of the Journal of Finance and another Faculty Member) considered his work to be "potentially interesting" and he ought therefore to have been given the opportunity to resubmit his work.

34. I consider that these aspects of Mr Cardao-Pito's appeal amount to challenges to the academic judgment of the School and not, as Mr Cardao-Pito has sought to contend, procedural irregularities in the grading process. Challenges to academic judgment are not grounds for appeal under the University's procedures nor are they matters which are amenable to review by the OIA.

35. The School has explained that, due to the size of the institution, it does not have a formal procedure for the selection of examiners but has stated that internal examiners are selected on the basis of relevant expertise in the topic being examined. It is clear that the School was satisfied that the second marker possessed the relevant expertise and qualifications to assess Mr Cardao-Pito's work and I am unable to interfere with that assessment.

36. Similarly, it is not the role of the OIA to prefer the opinion expressed by one academic on a student's work over that of another. To do so would inevitably require the exercise of academic judgment. The emails from the Editor in Chief of the Journal of Finance and the Faculty member (which Mr Cardao-Pito provided in support of his contention that he should be given a further attempt) do not, in any event, contradict the examiners' conclusion that Mr Cardao-Pito's research paper was not of the standard required in order for him to continue to the next phase of his programme of study.

37. For the reasons set out above, I find these aspects of Mr Cardao-Pito's complaint to be not justified. I do, however, consider it would be good practice for the School to have in place a published procedure for the appointment of examiners.

Allegations of Harassment

38 In the documentation accompanying his Scheme Application Form, Mr Cardao-Pito has claimed that his supervisor's conduct as described in his appeal should be classified as harassment "according to the juridicial consigned description". Mr Cardao-Pito contends that he was not made aware of the School's Harassment and Bullying Procedure and would have submitted a complaint under it had he been so. In any event, Mr Cardao-Pito says the School ought to have recognised his complaints of harassment and referred his allegations for investigation under the provisions of the HBCP.

39. The School says that it accepted and considered Mr Cardao-Pito's appeal on the grounds on which it was put forward, It states that at no point during the internal process did Mr Cardao-Pito mention a claim of harassment against his supervisor, despite putting forward a detailed submission. The School considers that it has not therefore had the opportunity to act on Mr Cardao-Pito's allegations of harassment. The School also notes that the HBCP is available on its website and it was therefore open to Mr Cardao-Pito to lodge a complaint under that procedure.

40 In the course of the OIA's previous review, the School has accepted that the behaviour described in Mr Cardao-Pito's appeal "could have been construed' as harassment as defined in the HBCP, I agree that this is the case. I consider a number of the actions/behaviours alleged in Mr Cardao-Pito's appeal documentation fell

within the definition of harassment and/or bullying as set out at section 3 of the HBCP. 1 do not consider it was necessary for Mr Cardao-Pito to explicitly use the term harassment and/or bullying in order for his allegations to be identified as such. I note also that the HBCP does not require the use of those terms in order for a formal complaint to be lodged.

41. I consider it would have been good practice for the School to have referred Mr Cardao-Pito's allegations for investigation under the HBCP when he first presented his proposed appeal to the Head of Department and certainly upon receipt of his formal appeal. As the outcome of that investigation would be relevant to the consideration of Mr Cardao-Pito's appeal, the appeal process ought to have been suspended whilst that investigation occurred.

42. As Mr Cardao-Pito's complaints of harassment have not completed the internal procedures of the School I am unable to make a finding as to whether Mr Cardao-Pito's allegations are well- founded. I do, however, find that Mr Cardao-Pito was entitled to expect that, having put his allegations to the School (albeit not explicitly as a complaint under the HBCP), they would be investigated. To this extent, I find this aspect of Mr Cardao-Pito's complaint to be justified.

QAA Code of Practice

43. in the course of his application for judicial review, Mr Cardao-Pito has contended that the OIA ought to have regard to the Code of Practice for the Assurance of Academic Quality and Standards in Higher Education, Section 1: Postgraduate Research Programmes (September 2004) ("the Code") when considering the process by which his research paper was assessed. In particular, Mr Cardao-Pito contends that the School contravened the Code in the following respects:

43.1 his supervisor was biased against him;

43.2 his supervisor was appointed as an examiner of his work;

43.3 the second marker of his work was inexperienced;

43.4 the majority of the examiners were from within the School;

43.5 he did not have the opportunity to attend a viva voce examination;

43.6 individual reports on his work were not prepared before that examination nor was a joint report prepared afterwards; and

43.7 the external examiner was not fully independent as he saw the internal grades before reading Mr Cardao-Pito's research paper.

44. In response, the School says that the Code is applied appropriately to its MPhil and PhD programmes but does not apply to, nor was it designed for, the MRes programme on which Mr Cardao-Pito was registered. The School says, in any event, that it is confident that the grading process applied in Mr Cardao-Pito's case was in accordance with the relevant Quality Assurance Agency guidance (Section 4: External

Examining (August 2004) and Section 6: Assessment of Students — (September 2006)).

45. Compliance with the Codes of Practice is monitored by the Quality Assurance Agency. Notwithstanding this, the OIA may, in appropriate cases, have regard to the Codes when considering the reasonableness of a University/College's conduct. I note also that the Codes of Practice are not binding and are intended as guidance for institutions.

46.The Code defines Research Programmes as follows:

> "Research programmes
>
> This document is intended to apply to a wide range of research qualifications. Specifically, it covers the PhD (including the New Route PhD and PhDs awarded on the basis of published work), all forms of taught or professional doctorate, and research master's degrees where the research component (including a requirement to produce original work), is larger than the taught component when measured by student effort. Including such a broad and complex group of programmes means that not all sections of the document apply equally to all types of research programme. (my emphasis)"

47. Whilst I accept Mr Cardao-Pito was studying towards a PhD, the degree on which he was registered, and in relation to which his research paper was submitted, was the Master of Research Degree (MRes) (PHD2007). The Assessment Regulations for that degree specify that students must complete nine taught courses and one research paper. In these circumstances, I do not find the School's contention that the Code does not apply in Mr Cardao-Pito's case to be unreasonable.

48. In response to the Draft Formal Decision, Mr Cardao-Pito has submitted that the Research component of the MRes was larger than- the taught component. In support of this submission Mr Cardao-Pito refers to the fact that he obtained an average "A" grade across the nine taught components of the degree and contends that if those components were larger than the research component (for which he obtained a "C" grade) he would have to have been allowed to progress. I am unable to agree with Mr Cardao-Pito's analysis in this regard. The relevant measure under the Code is "student effort" not the assessment weighting given to the particular component. I note also that Mr Cardao-Pito was required to obtain a minimum "B" grade for the Research paper in order to progress rather than a weighted "B" average across all components of the course. I am unable to make a finding as to whether, objectively, greater student effort was required for the Research Paper than the taught component as to do so would require the exercise of academic judgment which is outside the scope of this review.

49. Having considered the relevant provisions of Section 1 of the Code, I am not persuaded that the manner in which Mr Cardao-Pito's Research Paper was assessed did not comply with guidance in that section in any event, Precept 23 sets out the "most common features" of research degree assessment, amid "some variation between institutions and between different types of research degree'~ Those features relate to the final assessment of the research degree which, in Mr Cardao-Pito's case, would have been the examination of his PhD thesis. I note that in accordance with precept 16 progress reviews should be conducted by a panel including the student's supervisor. Similarly, I have seen no evidence that the assessment of Mr Cardao-

Pito's Research Paper did not comply with the guidance either section 4 or Section 8 of the Code.

50.1 have also noted that Mr Cardao-Pito did not raise as grounds of appeal: the principle that the supervisor should not be appointed as an examiner; the majority of examiners being from within the School; or the absence of a viva voce examination in his appeal to the School. As those substantive issues have not completed the internal procedures of the School the CIA cannot make findings on them, regardless of whether the Code applies. Similarly, it has not been necessary for the OIA to have regard to the provisions of the QAA Code of Practice in order to reach a decision on the other matters to which Mr Cardao-Pito refers.

Summary of Conclusions

51. I have found the following aspects of Mr Cardao-Pito's complaint to be justified in whole or in part:

51.1 Attempts were made, inappropriately, to deter Mr Cardao-Pito from pursuing a formal appeal;

51.2 It was unreasonable for the School to have concluded that Mr Cardao-Pito had not presented a prima facie case for an appeal on the grounds of prejudice or bias. For the avoidance of doubt, I have made no finding as to the merits of Mr Cardao-Pito's substantive grounds of appeal; and

51.3 The School ought to have recognised the facts as described in Mr Cardao-Pito's appeal constituted grounds for complaint under the HBCP. The School should therefore have suspended consideration of Mr Cardao-Pito's appeal to allow an investigation under that procedure to occur. Again, for the avoidance of doubt, J have made no finding as to whether or not Mr Cardao-Pito's allegations of harassment should be upheld.

52. Mr Cardao-Pito's remaining complaints regarding irregularities in the examination process and the application of the QAA Code of Practice are not justified.

Section 4— Recommendations

53 .l do not consider it appropriate to recommend that the School now reconsider Mr Cardao-Pito's academic appeal. It has been over two years since Mr Cardao-Pito was withdrawn from his course and he is now studying towards his PhD at another institution. Moreover, the likely outcome had Mr Cardao-Pito's appeal been considered and upheld (that is, if it was found that there had been prejudice and/or bias in the assessment process as Mr Cardao-Pito contended) is that Mr Cardao-Pito would have resumed, in some form, his studies at the University. That remedy is no longer sought by Mr Cardao-Pito nor do I see that it would be a viable option given the deterioration of the relationship between Mr Cardao-Pito and the University.

54. Similarly, I do not consider it is appropriate to recommend that the School pay Mr Cardao-Pito the total amount of scholarship he would have received had he been allowed to proceed with his programme of study. This is because it is not possible to speculate whether, had Mr Cardao-Pito's appeal been heard, he would have successfully completed his studies at the University. This is because I cannot be certain that Mr Cardao-Pito would have passed his Research Paper (or indeed met any further progression requirements) had the flaws identified in this decision not occurred. Mr Cardao-Pito has argued that he is studying successfully elsewhere. Whilst this is to his credit, it is not conclusive evidence that he would have met the academic requirements at the School.

55. Notwithstanding the above, I consider Mr Cardao-Pito is entitled to be compensated for the loss of the Opportunity to have his appeal properly heard and the distress and inconvenience this has caused him.

56. Having regard to what is fair and reasonable in all the circumstances, I recommend that, within one month of the date of issue of this Decision, the School writes to Mr Cardao-Pito

56.1 offering an open apology for its failure to refer his appeal for consideration by an Appeals Committee and acknowledging that the evidence presented by~ Mr Cardao-Pito raised questions or doubts that the examination process may have been affected by prejudice or bias; and

56.2 offering him the sums of:

56.2.1 £5000 compensation for the loss of the opportunity to have his appeal heard and in recognition of the fact that he incurred costs in relocating to another University which may have been avoided had his appeal been given full and proper consideration. I am unable to agree with Mr Cardao-Pito's contention, in response to the Draft Formal Decision, that the OJA should factor into this sum income he might have earned had he not pursued his studies at the University. Mr Cardao-Pito's loss of income was occasioned by his decision to pursue a full- time PhD and not by the flaws identified in this decision; and

56.2.2 £1500 compensation for the distress and inconvenience suffered by him as a result of the University's failure to give full and proper consideration to his valid ground of appeal. Had it done so, Mr Cardao-Pito may have avoided the time and trouble associated with bringing his complaint to the OIA.

57. It is clear that Mr Cardao-Pito remains aggrieved that his complaint of harassment has not been heard. Having considered the provisions of the HBCP carefully, 1 can see no reason why an investigation under that procedure could not now be Initiated by the School. Nor do I accept the School's contention, in response to the Draft Formal Decision, that the OIA's rules prohibit the OIA from making such a recommendation. It is clear to me the allegations which form the basis of Mr Cardao-Pito's complaint of harassment would, if upheld, have materially affected him as a student. I therefore also recommend that the School offers to refer the Report accompanying Mr Cardao-Pito's appeal for an expedited investigation under the

Formal Action provisions of the HBCP. The investigation should be undertaken by individuals with no prior knowledge of, or involvement with, Mr Cardao-Pito's appeal. Given Mr Cardao-Pito is no longer studying at the School; consideration should be given to conducting any interviews required with Mr Cardao-Pito under that procedure via telephone or in writing. Mr Cardao-Pito should be informed of the outcome of the investigation within eight weeks of notifying the School that he accepts the offers.

58. The School's offers should remain open for a period of two months and should be in full and final settlement of the matters considered in this review. For the avoidance of doubt, the OIA's recommendations must be taken in their totality, that is, Mr Cardao-Pito must accept either all or none of them. On Mr Cardao-Pito's acceptance of the School's offers, the School should ensure that the compensation payments are sent to him within 21 days of receiving his letter of acceptance to the School and that he is informed of the outcome of the investigation under the HBCP within eight weeks of the date of the letter of acceptance.

59. I also suggest that the School consider reviewing its Academic Appeals Procedure, and any guidance provided to students and staff, with a view to clarifying the process to be followed where an appeal raises grounds of complaint under the HBCP. The School should also give consideration to publishing a formal process for the appointment of examiners for the MRes degree.

Robert Behrens
Independent Adjudicator & Chief Executive

On behalf of the Office of the Independent Adjudicator for Higher Education