EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 8
P221/24

Lord Malcolm
Lord Doherty
Lord Armstrong

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

by

AB

Petitioner and Reclaimer

against

THE SCOTTISH PUBLIC SERVICES OMBUDSMAN

Respondent

Petitioner and Reclaimer: Party
Respondent: D Blair; Burness Paull LLP

11 March 2025

Introduction

[1] The petitioner was a law student at the University of Glasgow on the LLB common law degree programme. The respondent is the Scottish Public Services Ombudsman. After graduating, the petitioner sought to appeal her degree classification. The university advised her to return her degree parchment in order to appeal, and that she could re-enrol to graduate after the appeal. She returned her parchment and lodged an appeal. However, two days after providing the initial advice the university informed the petitioner that in

terms of University Regulation 26.3.7 she could not appeal because she had already graduated. It returned her degree parchment to her.

[2] The petitioner complained to the university about being denied an appeal. She maintained that, given what had happened, she ought to be afforded one. The appeal would have addressed her grades in two subjects - Commercial Law and Advanced Property and Trusts. It would also have founded on failure by the university to provide information to her about reasonable adjustments which could have been made for disability which she suffered because of mental health issues, and on the university's failure to make such reasonable adjustments. Those matters would have been advanced in support of her case that she should have been awarded a first-class honours degree.

[3] The petitioner also complained to the university about discrimination against students on the common law programme compared to students on the Scots Law programme. She maintained discrimination was evident (i) in the operation of the Commercial Law course and its exams; (ii) in the selection of students for the European Human Rights Project; and (iii) in student grades awarded, and in teaching staff's interaction with students, in Advanced Property and Trusts.

[4] The university was satisfied that the regulations were clear. As the petitioner had graduated, she no longer had a right to appeal. It was also satisfied that adequate information had been available to students about welfare services and possible adjustments. In the petitioner's case a number of adjustments (extensions of time for course work) had in fact been made. The university did not accept that there had been any discrimination against students on the common law programme compared to students on the Scots Law programme. Admission to the European Human Rights Project had been on the basis of academic merit.

The complaint to the respondent and the respondent's decisions

[5] In terms of the Scottish Public Services Ombudsman Act 2002, the respondent has power to investigate maladministration and service failure by a range of public bodies, including universities, if a member of the public claims to have sustained injustice or hardship in consequence of it. In terms of section 8 and Schedule 4, paragraph 10A one of the matters which is excluded from investigation is action taken by or on behalf of certain higher education bodies (such as universities) in the exercise of academic judgement in relation to an educational or training matter. Section 10(1) provides that the respondent must not consider a complaint made more than 12 months after the day on which the person aggrieved first had notice of the matter complained of, unless she is satisfied that there are special circumstances which make it appropriate to consider a complaint made outwith that period.

[6] The petitioner made a complaint to the respondent of maladministration by the university. The respondent carried out an initial assessment of the complaint, but on 27 June 2023 she decided that she would not investigate it further.

[7] The respondent noted that the university accepted that the advice which the petitioner received about returning her parchment and appealing had been misleading. However, the university's stance was in accordance with the regulations and the erroneous advice did not impact on the petitioner's decision to graduate. The respondent considered the university's response to this grievance was reasonable.

[8] The complaint about selection of students for the European Human Rights Project was time-barred because it was not made within 12 months of the petitioner becoming aware of the issue. The respondent added:

> "I considered whether there were special circumstances relating to action or inaction by the University and by you that would make it appropriate for SPSO to consider this complaint, and whether it would be in the public interest to consider this complaint. I decided that neither of these apply in your case."

[9] Apropos the complaint about information relating to medical support and the making of reasonable adjustments, the respondent found that relevant information had been contained in the student handbook and in online resources; and that the petitioner had been granted extensions for submission of course work for Competition Law and Advanced Property and Trusts, and for her dissertation. The respondent considered that the university's response to this grievance was reasonable.

[10] The university had understood the petitioner's complaint about Advanced Property and Trusts to be a complaint of lack of response by staff to pre-exam questions. It explained that, in fairness to all students, it could not respond individually to points raised by students. The respondent considered that to be a matter of academic judgement, and that the university's response was reasonable.

[11] As for the suggestion that common law students were disadvantaged on the Commercial Law course, the university demurred, indicating that all five common law students on the course received a B, which was a very good performance. The respondent concluded that the grading of students and whether to reply to individual queries by students were matters of academic judgement, and that the university's response was reasonable.

[12] The petitioner asked the respondent to review her decision of 27 June 2023. On 8 December 2023, following a review, the respondent adhered to her decision. The university's decision not to provide an appeal was in accordance with the regulations. The respondent did not consider that the medical information provided by the petitioner ought

to have resulted in the university allowing her to appeal. She concluded that the petitioner could have provided that information at an earlier date. In relation to the time-barred element of the complaint, the respondent did not accept that there were special circumstances which ought to have led to it being accepted for investigation notwithstanding that it was late. She added:

> "[E]ven if special circumstances persuaded me to accept it late, my office could still not investigate it as the matter does not fall within my jurisdiction. This is because first and foremost I consider this aspect of your complaint to be a matter of academic judgement."

The petition

[13] In this petition for judicial review the petitioner challenges the respondent's decisions of 27 June 2023 and 8 December 2023.

[14] The first ground advanced is that the respondent erred in law by mischaracterising the petitioner's complaints about the European Human Rights Project, Competition Law, and Advanced Property and Trusts. The essence of those complaints was that she and other students on the common law programme were discriminated against compared to students on the Scots Law programme. It was not a mere disagreement about the exercise of academic judgement by the university, and it ought not to have been so characterised. It was a matter which the respondent was entitled to investigate - it was not an excluded matter. The error went to the root of the respondent's decision and reasoning. Reference was made to *Argyll and Bute Council* v *Scottish Public Services Ombudsman* 2008 SC 155 and *Anyanwu* v *South Bank Student Union* [2001] 1 WLR 638. It led to the respondent failing to take proper account of the claimed discrimination when she dealt with the time-bar issue. The alleged discrimination was clearly a special circumstance which ought to have led to the allowance of a late complaint. That would have been in the public interest.

[15] The second ground is that the respondent erred in law in failing to investigate whether the university had been in breach of its statutory duties under the Equality Act 2010 by failing to take pro-active steps to identify the petitioner's needs as a disabled student and making reasonable adjustments for them. Reliance was placed upon *University of Bristol* v *Abrahart* [2024] EWHC 299 (KB) in support of the proposition that the university had had pro-active duties.

[16] The third ground is that, in deciding not to investigate the complaint about non-provision of an appeal, the respondent erred in law by failing to give proper consideration to the facts (i) that the petitioner had a legitimate expectation that she would have an appeal (*R (Bibi)* v *Newham London Borough Council (No 1)* [2002] 1 WLR 237); and (ii) that new information about lack of reasonable adjustments could be a significant factor justifying an appeal after graduation, and could also be relevant to the merits of the appeal.

The Lord Ordinary's decision

[17] Following an oral hearing, the Lord Ordinary refused permission for the petition to proceed. He did not consider that the arguments advanced disclosed a "reasonable"(*sic*) basis for challenging the respondent's decision. In relation to time-bar, the petitioner's complaint to the respondent had not clearly flagged up a complaint of discrimination or put it forward as a special circumstance for considering the complaint outwith the 12-month period. The respondent had been entitled to conclude as she did in relation to the complaints about Competition Law, Advanced Property and Trusts, and about health and disability problems and reasonable adjustments. As for the academic appeal, he noted that no part of the petitioner's complaint made specific reference to a legitimate expectation.

The submissions in the reclaiming motion

[18] The petitioner now appeals to this court. We had the benefit of written notes of argument and oral submissions. As this is a reclaiming motion (appeal) against a decision refusing permission to proceed, there is no need to rehearse at length the submissions. The petitioner advanced the three grounds already referred to. Counsel for the respondent supported the Lord Ordinary's decision and reasons. The use of the word "reasonable" by him had been a slip - it was clear he had applied the correct test. In any case, if the petition was examined *de novo,* it was clear that none of the grounds had a real prospect of success. The respondent had exercised her broad discretion and had decided not to investigate further. The respondent is not a court of law. The petitioner had other remedies. The suggested breaches of the Equality Act 2010 could be litigated in the sheriff court. If the petitioner had a legitimate expectation of an academic appeal, the appropriate remedy was judicial review of the university's refusal to afford her it. However, she did not have a legitimate expectation of an appeal. She had not relied to her detriment on the university's mistake. The time-bar decision had not been unreasonable. The respondent had been entitled to conclude that there were no special circumstances justifying a late complaint. She did not need to explain why the matters relied upon by the petitioner were not such circumstances. In any case, selection for the European Human Rights Project involved the exercise of academic judgement. The respondent had been entitled to conclude that the university's response to the health and reasonable adjustment issues had been reasonable. The discrimination complaint had grown arms and legs since the petitioner's initial complaints to the university. It had been reasonable for the respondent to treat the complaints made to the university about Commercial Law and Advanced Property and Trusts as being about the exercise of academic judgement.

Decision and reasons

[19] We accept that the Lord Ordinary's use of the word "reasonable" is likely to have been a mere slip, and that he had in mind the correct test for permission. Whether or not that is right is not crucial, because this court requires to consider *de novo* whether the test for permission is met (*PA* v *Secretary of State for the Home Department* 2020 SC 515, at [33]). The threshold is a relatively low one - whether the proposed grounds have a real prospect of success. The question is whether there is a point of substance to be argued (*Wightman* v *Advocate General for Scotland* 2018 SC 388, at [32]).

[20] The decision challenged is a decision not to investigate further. We bear in mind that the petitioner is a party litigant, and that some allowance should be made for that when it comes to considering her pleadings and the precise terms of the complaint which she made to the respondent.

[21] We are persuaded that the petitioner has a real prospect of establishing that the respondent mischaracterised parts of her complaint in material respects: in other words, that there was a failure to take into account the real complaint (cf *Kelly* v *Financial Ombudsman Service Ltd* [2017] EWHC 3581 (Admin), [2018] CTLC 107, at [32]). Fairly read, her complaint about the European Human Rights Project and about Commercial Law and (perhaps less clearly) Advanced Property and Trusts raised an issue of discrimination against common law students. If she is right about that, then those parts of the complaint are not merely concerned with the exercise of academic judgement. It is within the respondent's powers to investigate alleged discrimination. We are not dealing with a situation where the respondent recognised that the complaint was of discrimination but declined to investigate it because she considered that the courts were better placed to

adjudicate upon it (cf. *R (Maxwell)* v *Office of the Independent Adjudicator* [2011] EWCA Civ 1236; [2012] PTSR 884).

[22] We think the threshold test is also met in relation to the part of the complaint which was held to be time-barred. The alleged existence of discrimination would arguably be a special circumstance which justified allowing the complaint to be made outwith the 12-month period. It is arguable that the respondent simply asserts that there are no special circumstances without providing any satisfactory reasoning on the point. Moreover, her "fall-back" position (that if there were special circumstances she would in any case have no jurisdiction because selection for the course involved the exercise of academic judgement) seems doubtful. She would have jurisdiction to investigate if selection was on a discriminatory basis.

[23] It is not clear to us that the threshold test is met in relation to the remaining parts of the complaint. The prospects of the petitioner establishing that the respondent's approach to the medical issues/reasonable adjustments part of the complaint is irrational or otherwise vitiated by an error or law appear to us to be fairly poor. In relation to the provision of an academic appeal, we do not attach much importance to the absence of the phrase "legitimate expectation" in the petitioner's complaint to the respondent. It seems tolerably clear that the petitioner complained that she was promised an appeal. She argues that the university acted unlawfully in failing to honour the promise, and that the respondent erred in law in failing to recognise that. A difficulty may be the apparent lack of any concrete detrimental reliance. Such reliance will normally be required for a claimant to show that it will be unlawful to go back on a representation (*R (Bibi)* v *Newham London Borough Council (No 1)* [2002] 1 WLR 237 at [28] and [29] (citing and adopting a passage in Craig, *Administrative Law* (4th edition) at p 619); see also [51] - [55]). The petitioner had already

graduated when the erroneous advice was given to her. The period during which she was led to believe that she could appeal was only 2 days. When pressed by the court as to what the detriment to her was, the petitioner maintained that her mental health issues would have been aired at the appeal and that that would not now happen. However, that is not a detriment that arises because of her reliance on the promised appeal. Had these two grievances stood alone, we doubt if we would have favoured granting permission to proceed. However, they do not stand alone: there are the other grievances where we have found that the threshold test is met. Moreover, it is possible that we have not fully understood precisely how the petitioner maintains that the various aspects of her complaint may be interdependent. In the whole circumstances, we think the appropriate course is simply to grant permission for the petition to proceed.

Disposal

[24] We shall allow the reclaiming motion, recall the Lord Ordinary's interlocutor of 3 July 2024, and grant permission to proceed. In his note of reasons the Lord Ordinary indicated that had he been disposed to grant permission he would have extended the 3-month time limit to enable the petition to be brought late. We do not understand it to be disputed that such an extension is appropriate. We shall grant it.