Case No: EA-2020-001057-LA
(previously UKEAT/0059/2019/LA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02 November 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

DR H KORTHALS ALTES	**Appellant**
- and -	
UNIVERSITY OF ESSEX	**Respondent**

- -
- -

Mr A Ohringer (Direct Public Access) for the **Appellant**
Mr J Milford QC (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 12 October 2021

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JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT

The employment tribunal did not err in law in holding that the terms of the claimant's contract of employment (including incorporated provisions of the respondent's Ordinances) allowed the respondent to terminate her contract before the end of her probationary period because of unsatisfactory performance, without following the procedure for dismissal for good cause pursuant to Ordinance 41.

HIS HONOUR JUDGE JAMES TAYLER

The Judgment and appeal

1. This is an appeal against the judgment of the employment tribunal sitting at the East London Hearing Centre on 30 October 2020, Employment Judge Reid, holding that the terms of the claimant's contract of employment (including incorporated provisions of the respondent's Ordinances) allowed the respondent to terminate her contract before the end of her probationary period on grounds of unsatisfactory performance, without following the procedure for dismissal for good cause pursuant to Ordinance 41. The reserved judgment with reasons was sent to the parties on 11 November 2020.

2. The claimant was employed by the respondent as a Lecturer in French from 1 September 2017. On 29 May 2019, the Academic Staffing Committee of the respondent, stating that it was acting under Ordinance 39(4), which provides for decisions about the "confirmation of an appointment which has been made with a view to permanency", gave the claimant notice of dismissal which expired on 28 August 2019. The reason given was that "on balance, you are unlikely to be able to achieve satisfactory progress against your probation targets before the end of your probation period".

3. The claimant submitted a claim form to the employment tribunal on 23 December 2019 contending that the respondent could not terminate her contract of employment before the end of the probationary period unless it complied with the full procedures in place for dismissal for "good cause" provided for in Ordinance 41. She claimed that she could not be dismissed pursuant to ordinance 39(4) until the end of her probationary period on 1 September 2020.

4. The issue in this appeal is whether the employment tribunal correctly interpreted the contractual provisions as permitting dismissal before the end of the probation period without the application of Ordinance 41 where the reason for dismissal related to the claimant's capability.

The Law

Contractual construction

5. There was little significant difference between the parties as to the law to be applied in construing contractual provisions. In **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 Lord Hoffman summarised the principles by which contractual documents are construed:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191 , 201:"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense." [my emphasis]

6. In **Arnold v Britton** [2015] AC 1619, Lord Neuberger PSC again summarised the approach to be adopted to contractual construction:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background

> knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

7. Lord Neuberger emphasised a number of factors that are of assistance in considering this appeal:

> First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve. …
>
> Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
>
> The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement

> involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties. [my emphasis]

8. In **Wood v Capita Insurance Services Ltd** [2017] AC 1173 Lord Hodge emphasised again that in contractual interpretation the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, and said of so doing:

> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571 , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions. [my emphasis]

9. The authorities include consideration of the extent to which in construing commercial contracts it is permissible to have regard to commercial common sense, including the significant limitations in so doing. The parties agreed that these authorities were apposite to consider the contractual provisions in this case, although I would incline to the view that the species of common sense that might be prayed in aid, where it is permissible, would better be described as employment

common sense.

The *contra proferentem* "rule"

10. Without much obvious enthusiasm, Mr Ohringer contended that while the question of whether the *contra proferentem* "doctrine" remains effective in the sphere of commercial contracts is a matter of dispute, "there is every reason why it should still have effect in relation to contracts of employment". He contended that if all the other tools of contractual construction proved insufficient to the job I should construe any remaining ambiguity against the respondent as the party that "put the clause forward and relies upon it". Fortunately, I have found the usual tools sufficient to the task, and have not had to determine whether the *contra proferentem "*rule" has anything left to offer in the construction of employment contracts.

The Statutory background

11. Ordinance 41 was drafted in accordance with the requirements of the Education Reform Act 1988 which limited the extent of security of academic tenure. In broad terms, sections 203 and 204 of the Education Reform Act 1988 include requirements that the statutes of Universities include provision permitting dismissal for "good cause" including for reasons related to capability.

Deman

12. Both parties prayed in aid the decision of the Northern Ireland Court of Appeal in **Deman v Queen's University of Belfast** [1996] NI 379. The University dismissed an employee because of misconduct at the end of his probationary period by application of its probation policy, rather than by using the provisions that permitted dismissal for good cause. The employee sought judicial review, contending that the university was required to apply the more complex procedural requirements for dismissal for good cause. The application was refused. The Court considered that on strict and literal interpretation of the provisions in play there might be force in the claimant's arguments, but applied a purposive interpretation, and concluded that the dismissal was lawful. Considering the different context and specific provisions, I have not gained great assistance from that authority, although all three judges did give some consideration to the nature of probation, particularly in the case of

academics, by having regard to what might be considered to be employment common sense.

13. Hutton LCJ considered that there was a distinction to be drawn between deciding to terminate the employment of a probationer and deciding to dismiss an established member of staff. He stated that:

> I consider that this difference is particularly apposite in relation to the academic staff of a university. Where a lecturer has served a probationary period and has been confirmed in his appointment, it is entirely fair and reasonable that he is entitled to know that he cannot be dismissed from his position unless for good cause or redundancy …
>
> I consider that there may be some cases in relation to a probationer lecturer where his conduct
> and/or his skill or aptitude are such that his senior colleagues and the board of curators would be entitled to form the opinion that he was not a suitable person to become a permanent member of the academic staff with the permanent security of tenure (subject to dismissal under Ch XX) which this entailed, although his conduct and/or his defects in skill or aptitude were not such as to justify dismissal of a permanent lecturer under the standards laid down in Ch XX.

14. MacDermott LJ stated:

> I would, however, make one general observation. Probation is a status of some considerable antiquity in academic and other circles. It gives both the employer and employee time in which to assess the situation in the light of practice and experience: the probationer will have an opportunity to assess the 'pros and cons' of his post: the employer will have time to examine the competence of the probationer as it appears, not at interview, but in the real world of teaching, research and personal relationships. The probationary period also gives the employer, in this case a university, the opportunity to advise and assess the probationer before taking the critical step of confirming him as a permanent member of staff who may be in post for 30 or 40 years. When a probationer is not confirmed in post it may be because of poor conduct but more likely because of some reason relating to capability or compatibility.

15. Nicholson LJ noted:

> The legal effect of an appointment subject to the confirmation procedure is that the appointment does not become complete and unqualified unless and until the conditions laid down in the confirmation procedure have been satisfied. The satisfaction of the conditions is part of the process of appointment, not of dismissal. The appellant's appointment may never become unconditional.

16. I have not relied on these passages to a great extent, as the real issue in this appeal is one of contractual interpretation, however they illustrate what would be well known in the academic workplace that because passing probation is the end of the recruitment process there may be reasons

that justify a determination that a probationer has failed to meet the requirements of their probation that would not justify the dismissal of a permanent member of staff for good cause. Mr Ohringer did not dispute this, but contended that pursuant to the relevant contractual terms the determination of whether a lecturer should be retained after probation could only be made after an application for confirmation, usually at the end of the probationary period.

The key grounds of appeal

17. Mr Ohringer summarised the appeal in his skeleton argument:

> The claimant's case is that the contract provides two separate routes for the termination of a probationary academic's employment:
>
> a. Termination at the end of the probationary period if the academic has not met expectations; and,
>
> b. Termination under the processes applying to dismissal for 'good cause' for matters relating to discipline or capability.
>
> There is however no power for the respondent to terminate the employment of an academic by curtailing her probationary period.

18. In construing the relevant provisions, I have sought to apply the iterative process by which each suggested interpretation is checked against the provisions of the contract and its consequences. The comments made in respect of specific provisions are made after having had regard to all the relevant contractual provisions.

19. Mr Ohringer contends that the wording of the relevant provisions are clear and that their proper construction is obvious. They are professionally drafted and should be taken to mean what they say. If that means that the respondent has made a bad bargain, so be it. I have not found the provisions to be as clearly drafted as Mr Ohringer contends. While they will generally have been professionally drafted to a greater or lesser extent, contractual provisions of institutions such as universities come into existence over time. The provisions that are incorporated into the contract have often been drafted at different times, by different people, with differing levels of expertise. The incorporated documents may have been negotiated with different purposes. The contractual terms agreed may have been the result of compromises that forego some clarity to achieve agreement. It is

not surprising that the contractual intention is not always immediately apparent from the words used.

The contractual provisions

20. The claimant's employment was subject to a Statement of Main Terms and Conditions of Employment ("the Contract").

21. Clause 2 of the Contract provides for a Probationary period:

> For Lecturers … a permanent appointment is subject to satisfactory completion of a three year academic probationary period unless otherwise agreed in writing by the Vice Chancellor or his/her nominee. Before successful completion of probation is confirmed, you will be required to make an application to Academic Staffing Committee prior to the end of your probation period.

22. The clause is not as clearly drafted as it could have been:

(1) Clause 2 does not expressly state what the consequences are if "successful completion of probation" is not confirmed at the end of the probation period; does the probationary lecturer remain on probation, potentially indefinitely? Mr Ohringer accepted that if an application for confirmation was made at the end of the probationary period, and was unsuccessful, the consequence would be that the probationary lecturer's employment would terminate. This suggests that inherent in the concept of determining an application for confirmation is the possibility that it will not be granted, which will result in dismissal, unless the probation period is extended.

(2) Before successful completion of probation is confirmed Clause 2 requires the probationary lecturer to make an application to the Academic Staffing Committee. What happens if the probationary lecturer does not do so? Mr Ohringer contended that this would result in a failure to have been confirmed in post before the end of the probationary period which would result in the termination of the employment contract. Again this involves an acceptance that failure to successfully complete probation results in the termination of employment although this is not expressly stated in Clause 2.

(3) Clause 2 does not expressly state that a decision on whether confirmation should be granted can only be made on application by the probationary lecturer and/or only at the end of the probationary period. Mr Ohringer contends that because the probationary lecturer is subject to a three year probationary period, the probationary lecturer is entitled to the full three years to prove herself, subject only to having to make an application for confirmation at the end of the three years failing which the employment will terminate as it will if the application for confirmation is unsuccessful. Even if it becomes apparent substantially before the end of the three year period that the probationary lecturer is not suitable for confirmation, nothing can be done prior to the end of the probationary period, other than to seek a dismissal for good cause pursuant to Ordinance 41. Mr Ohringer accepts that there may be reasons why a probationary lecturer would not be suitable for confirmation that would not provide good cause for dismissal pursuant to Ordinance 41. On that analysis it follows that even if it is inevitable that confirmation will not be granted the probationary lecturer must be retained in employment until the end of the probationary period if the factors that make the lecturer unsuitable for confirmation are not sufficient to constitute good cause for the purposes of Ordinance 41.

23. Clause 13 of the contract provides for a notice period:

> Employment may be terminated by the employee by submitting a written resignation to their Head of Department or his/her nominee. The period of notice for an employee is at least three months, which must include one full academic term. Employment may be terminated by the University in writing by giving three calendar months' notice or by pay in lieu of notice. Should you be summarily dismissed on the grounds of gross misconduct, your employment will be terminated without notice but following the procedures laid out in Ordinance 41 … [my emphasis]

24. Mr Milford, for the respondent, contends that this provision provides for dismissal within the probationary period, only subject to there being some other provision that prevents the respondent giving notice to terminate the contract. Mr Ohringer noted that this provision confirms that Ordinance 41 can be applicable to a probationary lecturer at least in the case of dismissal for gross misconduct.

He contends that Ordinance 41 is more generally applicable, including in the case of dismissal for incapability during the currency of the probationary period.

25. Various documents including the Ordinances of the University ("the Ordinances") are incorporated into the Contract by clause 11:

> Appointments are subject to the Charter, Statutes and Ordinances of the University, including Ordinance 41, where applicable. Your employment will also be governed by certain other jointly agreed workplace policies and procedures issued from time-to-time by the University. All your terms and conditions of employment are collectively negotiated on your behalf by the University and the recognised Trades Unions and will form part of your main terms and conditions. Policies will be regularly updated and made available on the HR webpages. This does not preclude changes to your contract of employment being agreed with you directly. [my emphasis]

26. Ordinances 33 and 34 make provision for Academic Staff and permanent members of the Academic Staff:

> Ordinance 33
>
> THE ACADEMIC STAFF
>
> The Council shall appoint such Academic Staff and other Officers as it may deem necessary at such remuneration and upon such terms and conditions as it may think fit; provided that no permanent member of the Academic Staff shall be appointed except on the recommendation of the Senate.
>
> Ordinance 34
>
> DEFINITION OF ACADEMIC STAFF
>
> 'Academic Staff' means all persons holding appointments as … Lecturers, … of the University, or in other posts stipulated by the Senate.

27. Mr Milford accepted that a probationary lecturer is a member of the Academic Staff during the currency of the probationary period.

28. Ordinance 39(3) and (4) makes provision as to the probationary period:

> 3. … Lecturers who are appointed without having held a permanent appointment in a teaching post in a university shall normally be appointed subject to confirmation after a probationary period of three years, and if this appointment as Lecturer is confirmed they shall then have permanency of office (subject to the provisions of the Ordinances as to termination).
>
> 4. Decisions as to confirmation of an appointment which has been made with a view to permanency are made by Academic Staffing Committee. The Committee may make

> a decision on confirmation at any point prior to the end of the probationary period and the decision will be based on evidence that, having regard to his or her standing, experience and the opportunities which have been afforded to him or her, the member of Academic Staff under review has met the criteria laid down for probationary staff by the Committee. [my emphasis]

29. Mr Milford contends that Ordinance 39(4) makes it clear that a decision on confirmation can be made at any point prior to the end of the probationary period. A decision on confirmation may result in a decision that the requirements of probation have not been met, with the consequence that the probationary lecturer's employment will be terminated. Mr Milford contends that it is therefore clearly possible for the respondent to decide that the probationary period be brought to an end early because the probationary lecturer is not suitable for confirmation, including where this is because of a lack of capability. Mr Ohringer contends that while a decision on confirmation can be made at any time during the probationary period, it can only be made on the application of the probationary lecturer; if the probationary lecturer unadvisedly applies early and is unsuccessful that may result in the termination of their employment, unless it is determined that they are likely to reach the necessary standard by the end of the probationary period.

30. Ordinance 41 makes provision for dismissal for good cause, including setting out the procedural requirements. Ordinance 41.1 provides:

> 1. This Ordinance or any Regulation made under this Ordinance shall be construed in every case to give effect to the following guiding principles, that is to say:
>
> (a) to ensure that Academic Staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges;
>
> (b) to enable the University to provide education, promote learning and engage in research efficiently and economically; and
>
> (c) to apply the principles of justice and fairness.

31. The parties accept that while the Education Reform Act 1988 reduced security of academic tenure, the Ordinances produced pursuant to it still provide academics with considerably more security of tenure than the law of unfair dismissal alone, because of the importance of academic freedom.

32. Ordinance 41.3 states the application of the Ordinance:

> Application
>
> 3. (1) This Ordinance shall apply:
>
> (a) to the persons defined as 'Academic Staff' in Ordinance 34; …

33. As Mr Milford accepted that a probationary lecturer is a member of the Academic Staff he accepted that Ordinance 41 can apply, but he contended that a dismissal because a decision has been taken not to grant confirmation, even if lack of capability is the reason, or part of the reason, for that decision, is a different thing from dismissal for good cause pursuant to Ordinance 41.

34. Good cause is defined by Ordinance 41.5:

> Meaning of 'good cause'
>
> 5. (1) For the purposes of this Ordinance 'good cause' in relation to the dismissal or removal from office or place of a member of the Academic Staff, being in any case a reason which is related to conduct or to capability or qualifications for performing work of the kind which the member of the Academic Staff concerned was appointed or employed to do, means:
>
> (a) conviction for an offence …; or
>
> (b) conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment; or
>
> (c) conduct constituting failure or persistent refusal or neglect or inability to perform the duties or comply with the conditions of office; or
>
> (d) physical or mental incapacity established under Part IV.
>
> (2) In this paragraph:
>
> (a) 'capability', in relation to such a member, means capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and
>
> (b) 'qualifications', in relation to such a member, means any degree, diploma or other academic, technical or professional qualification relevant to the office or position held by that
> member.

35. I consider that it is important to note that Ordinance 41.5 defines what is meant by "capability" and what may constitute "good cause" for dismissal. Capability is defined in a manner equivalent to that in the Employment Rights Act 1996, but good cause for dismissal for a reason related to

capability is limited to physical or mental incapacity (for which there is separate specific provision) and what is described in sub-paragraph (c) as "conduct constituting failure or persistent refusal or neglect or inability to perform the duties or comply with the conditions of office".

36. Ordinance 41.7 provides in respect of conflict with other provisions:

> 7. (1) In any case of conflict, the provisions of this Ordinance shall prevail over those of any other Ordinances and Regulations. Provided that Part III of and the Annex to this Ordinance shall not apply in relation to anything done or omitted to be done before the date on which the instrument making these modifications was approved under subsection (9) of section 204 of the Education Reform Act 1988.
>
> (2) Nothing in any appointment made, or contract entered into, shall be construed as over-riding or excluding any provision made by this Ordinance concerning the dismissal of a member of the Academic Staff by reason of redundancy or for good cause:

37. Part III of Ordinance 41 sets out the detailed procedures that are to be applied in the case of the consideration of dismissal of a person for good cause. It provides an informal process and, in cases where there is no, or insufficient, improvement, or where conduct or performance may constitute good cause for dismissal without prior warning, a formal process under which a complaint seeking the institution of charges is considered by the Vice-Chancellor. There is a procedure for the employee to comment, following which the Vice-Chancellor may direct that "charges be preferred". The charges are considered by a Tribunal appointed by the Council which shall comprise: (a) a Chair; and (b) one member of the Council, not being a person employed by the University; and (c) one member of the Academic Staff nominated by the Senate. If the Tribunal decides to dismiss, which it can only do for "good cause", there is a right of appeal to a person not employed by the University being a person holding, or having held, judicial office or being a barrister or solicitor of at least ten years' standing who may choose to sit with two other persons being (a) one member of the Council not being a person employed by the University; and (b) one member of the Academic Staff nominated by the Senate. Accordingly, in addition to the safeguard provided by the limitation of what constitutes good cause for dismissal there are very substantial procedural safeguards that involve independent input into decision making and serve to protect academic freedom.

38. I asked Mr Ohringer whether he contended that at the end of the probationary period if the Academic Staffing Committee was minded not to grant confirmation because the probationary lecturer lacked capability they would then have to invoke Ordinance 41. He did not argue that was the case. Otherwise, there would be no point in there being a probationary period.

39. The respondent has a Capability Procedure. Paragraph 2.1 sets out its application:

> The procedure applies to all University of Essex employees. It complements and incorporates the provisions of Ordinance 41 for those employees to whom the Ordinance applies but does not replace it. Ordinance 41 applies to academic staff, …

40. Mr Ohringer contends that this demonstrates that application of the Capability Procedure is subject to the requirements of Ordinance 41 in the case of members of the Academic Staff, which includes probationary lecturers.

41. Further provision is made as to the application of the Capability Procedure to those on probation at paragraph 8.1:

> Employees with less than 6 months service or who are on probation will be subject to regular reviews of progress in line with the University's probation policies. Should capability action become necessary they will be dealt with at the first formal warning and dismissal stages (with a right of appeal). The informal warning and final formal warning stages will not apply. Employees on academic probation will be managed through Academic Staffing Committee. [my emphasis]

42. Mr Milford contends that this makes it clear that matters about the capability of probationary lecturers are to be determined by the Academic Staffing Committee, rather than the separate individuals and bodies that are involved in the complex procedures for dismissal for good cause pursuant to Ordinance 41.

43. The respondent also has a procedure titled Annual Review Procedures for Academic Staff that provides:

> 1.7 ASC is the sole locus for decisions on academic staff promotion and probation.
>
> 2.2 All probationary academics are allocated a probation supervisor, and Probation Agreements are codeveloped and agreed, and approved by Heads of Department and Executive Deans. These should contain interim and final objectives for achievement in all categories, as well as indications of how evidence of performance will be assessed (e.g. SAMT scores for teaching, peer-review of teaching, quality of papers published, evidence of grant-writing and submissions). Formal reviews should take

place at 18 months (interim) and towards the end of the probation period (final), alongside regular informal discussions and appraisals. Each year, Academic Staffing Committee will review all new Probation Agreements.

2.3 Should the performance of a probationary member of academic staff be unsatisfactory, the Head of Department should notify their Faculty HR Manager and Executive Dean as soon as possible during the probation period to ensure appropriate support and guidance is given. The member of staff should be given sufficient opportunity to demonstrate improvement prior to the end of their probation period. Further guidance can be found in the Probation (academic staff) notes for guidance for Heads.

2.4 Probation Agreements should contain clear targets that if achieved should result in the granting of permanency. Probationary supervisors and Heads of Department have a responsibility to ensure that each member of probationary staff has the necessary support and opportunities to achieve permanency.

2.5 If a member of academic staff has not met the objectives outlined in their Probation Agreement, the Executive Dean and Faculty HR Manager will invite the member of staff to attend a formal meeting prior to the relevant meeting of Academic Staffing Committee (ASC). The member of staff will be entitled to be accompanied to the meeting by a colleague or Trade Union Representative. The purpose of this meeting is to allow the member of staff the opportunity to present their case to the Executive Dean. Following the meeting with the member of staff the Executive Dean will make a recommendation to ASC. ASC makes the final decision.

2.7 Applications for permanency must be submitted to a meeting of the ASC by the HoD of the academic department on behalf of the probationer, prior to the end-date of the probation period as detailed in the contract of employment.

2.8 Successful completion of probation leads to confirmation of the applicant's current contractual status. …

2.9 ASC will consider whether the probationer has fulfilled the objectives outlined in their probation agreement and achieved the level of performance applicable to their grade. The Committee will then decide whether or not to grant permanency.

2.10 The Committee has the discretion to extend the probation period for up to one year, where it feels that circumstances have impacted on the probationer's opportunity to demonstrate satisfactory performance or achievement.

2.11 Normally probation will be for three years, but during their first or second probationary year where a probationary member of staff can demonstrate that all elements of their Probationary Agreement have successfully been met and they have the support of the Head of Department, the Head of Department can advise the individual to apply for early permanency by completing the Permanency/Probation Application form and submitting it to the Department by an agreed date. [my emphasis]

44. Mr Milford contends that this again makes it clear that all matters relating to probation are within the remit of the Academic Staffing Committee. Mr Ohringer contends that paragraph 2.11 suggests that any early consideration can only be on an application for confirmation by the probationary lecturer.

Analysis

45. Clause 2 of the Contract provides for a three year academic probationary period. I do not consider that it is inherent in the wording of the provision that a decision cannot be taken that the appointment will not be confirmed, and that the probationary lecturer will be dismissed, before the end of that period. It does not expressly state that is the case.

46. Although Clause 2 of the Contract is silent as to the consequence of a decision of the Academic Staffing Committee not to grant confirmation at the end of the probationary period, Mr Ohringer accepts that, subject to an extension of the probation period (limited to one year by the Annual Review Procedures for Academic Staff), such a decision necessarily results in the termination of the probationary lecturer's employment.

47. Mr Ohringer accepts that a decision not to grant confirmation at the end of the probationary period does not require that Ordinance 41 be applied, with all its procedural requirements and necessity for the decision whether to dismiss for good cause to be taken by persons and bodies other than the Academic Staffing Committee. This demonstrates that a decision not to confirm is different to a decision to dismiss for good cause. There is no conflict between Ordinances 39 and 41 and/or the Contract to which Ordinance 41.7 would apply to give primacy to Ordinance 41. This is because dismissal for failure to pass probation, even if as usually will be the case, the reason for the failure to confirm the appointment is related to the capability of the probationary lecturer, is different to dismissal for good cause.

48. I consider that this construction is consistent with the statement in the Capability Procedure that "Employees on academic probation will be managed through Academic Staffing Committee" and in the Annual Review Procedures for Academic Staff that "ASC is the sole locus for decisions

on academic staff promotion and probation". It is for the Academic Staffing Committee to decide whether a probationary lecturer has the capability to be retained as a permanent member of the academic staff.

49. Mr Ohringer accepts that a decision on confirmation can be made prior to the end of the probationary period, but he contends only on an application from the probationary lecturer. Where such an early application is made he accepts that it is to be determined by the Academic Staffing Committee and that if they consider that the probationary lecturer lacks sufficient capability to be confirmed in post, it is not necessary for the probationary lecturer to be referred for consideration for dismissal for good cause under the provisions of Ordinance 41, just as application of Ordinance 41 would not be required were the decision made at the end of the probationary period.

50. Mr Ohringer accepts that when the Academic Staffing Committee considers whether a probationary lecturer should be confirmed it is open for it to decide that confirmation should not be granted because of lack of capability that would not be sufficient to amount to good cause for dismissal pursuant to Ordinance 41.

51. I do not accept that the fact that Clause 2 of the Contract requires an application for confirmation prior to the expiry of the probationary period means that the Academic Staffing Committee cannot determine that a person has failed to pass probation at an earlier date. Clause 2 does not state that is the case.

52. I consider that Ordinance 39(4), which it is common ground is expressly incorporated into the Contract, permits the Academic Staffing Committee to "make a decision on confirmation at any point prior to the end of the probationary period". I do not consider that on a proper construction of the provision this is limited to circumstances in which an application for confirmation is made by the probationary lecturer. The provision includes no such limitation. If it has become apparent to the Academic Staffing Committee that a probationary lecturer will not pass probation there is nothing in the contractual provisions preventing it from reaching a decision on confirmation in the absence of an application from the probationary lecturer prior to the end of the probationary period and

dismissing on notice pursuant to clause 13 of the Contract.

53. Because a "decision on confirmation" can be made without an application for confirmation having been made by the probationary lecturer; and Mr Ohringer accepts that, subject to a decision to continue or extend probation, (1) a decision not to confirm necessarily results in the termination of employment, (2) can be effected without the procedural requirements of Ordinance 41 being applied, and (3) is not limited to dismissal for a reason that would establish "good cause" for the purposes of Ordinance 41, I consider it follows that the employment tribunal was correct in concluding that the respondent could dismiss the claimant pursuant to Ordinance 39(4) for lack of capability before the expiry of the probation period.

54. I have reached this decision on the basis of my view of the meaning that the contractual documents would convey to a reasonable person having all the relevant background knowledge. The reasoning is a little different to that of the employment judge, but ends with the same conclusion. Although I have not found it necessary to construe the contractual provisions, I also consider that this construction conforms with employment common sense. Even where there is as long a probationary period as there is in the case of probationary lecturers, the process is designed to allow a period during which the parties can assess whether there is a match between the probationary lecturer and the role the lecturer would have as a member of staff at the University should a permanent appointment be granted, which would be subject to the significant safeguards provided by Ordinance 41 limiting the circumstances in which the lecturer can be dismissed.

55. If it becomes apparent to the Academic Staffing Committee prior to the end of the probationary period that a person is not suitable for permanent appointment for reasons related to capability, but such reasons would not constitute "good cause" for dismissal of a permanent member of staff, it is illogical that the University should be required to keep the probationary lecturer in employment until the end of the probationary period, at which stage they will inevitably be dismissed for a failure to pass probation, because in the meantime their lack of capability does not provide good cause for dismissal. Generally, during a probationary period it is easier to bring employment to an

end than would be the case once employment is confirmed, otherwise there would be little point in their being a probation period. Often this will be by way of a short notice period and/or simpler procedures to be applied before employment is brought to an end. Completion of probation is best seen as the end of the appointment process, and so it is not surprising that it may be possible to dismiss during that period for reasons related to capability that are akin to the reasons that might result in a decision not to appoint an applicant, but would not necessarily provide good cause for the dismissal of a person who has obtained a permanent position.

56. I would finally note that it appears that there are certain potential procedural protections for probationary lecturers who are considered to lack capability as a result of which early consideration may be given as to whether they should be dismissed because of a failure to achieve the requirements of probation, although of a lesser extent than the protections afforded to permanent staff by Ordinance 41, in the Capability Procedure and Annual Review Procedures for Academic Staff. These provisions were not relied upon by the claimant in this case as giving rise to a limitation on the right of the respondent to dismiss the claimant short of that provided by Ordinance 41 and have not been subject to argument in this appeal, so I have not made any determinations in respect of them.