Neutral Citation Number: [2023] EWHC 1803 (Admin)

Case No: CO/1191/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT (BIRMINGHAM DISTRICT REGISTRY)

33 Bull Street,
Birmingham, B4 6DS
Date: 13/07/2023

Before:

MR JUSTICE GARNHAM

- -

Between :

The King on the application of X Limited	**Claimant**
- and -	
(1) Chief Inspector of Education, Children's Services and Skills	**First Defendant**
(2) Secretary of State for Education (Acting Through the Education Skills Funding Agency (ESFA))	**Second Defendant**

- -
- -

Peter Oldham KC (instructed by **Evershed Southerland (International) LLP**) for the **Claimant**
Fiona Scolding KC (instructed by **Ofsted Legal Services**) for the **First Defendant**
Jack Anderson (instructed by **GLD**) for the **Second Defendant**

Hearing dates: 12 July 2023

- -

Approved Judgment

This judgment was handed down at 10.30am on 12 July 2023 in court and by release to the National Archives.

.....

MR JUSTICE GARNHAM

Judgment Approved by the court for handing down.

Garnham J:

Introduction

1. The applicant, X Ltd, seeks to challenge the decision dated 24 February 2023 by HMCI of education, children services and skills (hereafter HMCI) to rate X Ltd 's training provision as inadequate.

2. Yesterday, I heard argument in support of X Ltd's application that the public and private law claims be consolidated or at least heard together, for permission to further amend its grounds and to rely on an additional witness statement, for permission to apply for judicial review against both defendants and for interim relief against both defendants.

3. Submissions in support of those applications were made by Peter Oldham KC. In response I heard submissions from Fiona Scolding KC for HMCI and from Jack Anderson for the Secretary of State. I'm grateful to counsel and to those who instruct them for their assistance.

4. Those arguments lasted a full day, at the end of which I indicated I would give my ruling this morning. This short judgement contains the rulings on those applications.

5. I indicated during the course of argument that in the light of the absence of opposition I would allow X Ltd 's application further to amend its grounds. I agreed to consider the additional witness statement de bene esse. Having done so I now give permission to X Ltd to rely on the 3rd and 4th statement of Mr Phipson if at the end of this judgment they chose to do so.

6. I will return, after I have given judgment on the other matters, to the application that the public and private law claims be consolidated or at least heard together. It seems to me best that that matter is determined against the background of my other rulings.

7. The points of substance remaining are the applications against both defendants for permission to apply for judicial review and the application for interim relief. I deal with each point in turn.

The application for JR against HMCI.

8. I remind myself that the test for the grant of permission to apply for judicial review is arguability. That is a relatively low hurdle to surmount. The question is whether the claimants have a case that is properly arguable, that is, one in response to which the defendants cannot deliver a knockout blow.

9. The claimant advances 6 grounds.

10. First, they submit that the conclusions of HMCI are irrational because X Ltd has been assessed against the standards for a general education provider rather than as a provider of apprenticeship training. That is said to be contrary to OFSTED's own policy as outlined in the education inspection framework and handbook which it is said the D failed to follow. The response from HMCI is that the claimant misunderstands the nature of an OFSTED inspection. It is not solely concerned with the delivery of courses leading to qualifications. Instead it considers the provision of

education as a whole. In that context the conclusions reached about X Ltd were clear and evidenced. What the claimants seek to advance, argues the First D, is a merit challenge.

11. Second, the claimants contend that Ofsted conclusions as to curriculum and course content are irrational or unevidenced, for example in criticising the delivery of subjects in simultaneous rather than sequential modules, failing to take account of different mathematical ability of students and failing to provide relevant materials for welding students. In response, HMCI say that the criticisms were all valid. Students were hampered by being unable to consolidate knowledge before moving on. Whether they had attained qualifications is irrelevant in assessing whether they achieved the best possible results. Mathematics is very important for engineering and so is rightly a focus for Ofsted. X Ltd failed to provide a course that was tailored to the students existing ability. Again whether or not sufficient material was provided for passing the exam, it failed to provide overall a good education.

12. Third, it is said by the Claimants that Ofsted has reached conclusions in relation to safeguarding, notably in relation to misogynistic behaviour, unsupported by any evidence, or supported only by unrepresentative samples. Further Ofsted has failed to take into account evidence offered by X Ltd to counter some of the adverse findings made in the original report. In response, HMSI submit that the failure to treat any allegations of misogynistic behaviour seriously is of particular concern because it results in under reporting and because there is a dearth of female representation in engineering so that a properly led education provider would be proactive and would ensure that such behaviour did not take place.

13. Fourth, it is alleged that Ofsted made other irrational or unevidenced criticism, for example, that the progress of students has been delayed by a lack of qualified staff, when in fact all X Ltd staff have appropriate qualifications; that there was a failure to ensure a linkage between on and off the job training, when any insufficiency was adequately explained by the difficulty in ensuring employers always attended meetings, and failing to teach Fundamental British Values when no reference is made to some of those values and when the nature of X Ltd's course is such that students spend most of their time in environments over which X Ltd has no control.

14. In response, it is said that this again amounts to a merits challenge. The criticism of the lack of qualified staff was not about the existence of qualified staff but about the failure of X Ltd to ensure that qualified staff were present to provide the training. It is said that whilst it is correct that employers may not attend meetings, X Ltd did not demonstrate engagements with them to encourage them to do so. It is said that the teaching of fundamental values reflects the fact that X Ltd regards itself as an apprenticeship only body and Ofsted's focus is on overall education.

15. Fifth, it is said that Ofsted has reached its conclusions based on insufficient sample sizes. In response HMCI say sample sizes were proportionate and more particularly that HMCI were not conducting a survey. They were instead seeking views of students across the range of different courses as part of wide assessment of the adequacy of those courses.

16. Sixth, the claimants say that Ofsted was irrational or unreasonable in the way it operated its complaint system which it itself has recognised was inadequate. In

response, HMCI say that the fact that Ofsted has sought to improve it's complaint processes says nothing about whether the way they operated in this case, in response to X Ltd's criticisms, was fair.

The JR v the Secretary of State

17. As against the Secretary of State the claimant asserts that it would be unlawful in public law for ESFA to take action under its contract that is detrimental to X Ltd. It advances 5 grounds of challenge.

18. First, it is said it would be Wednesbury unreasonable for ESFA to take what has been called "Detrimental Action" at least pending the current challenge to the Report, given, in particular, the very serious harm that such a step could cause X Ltd and others; the substantial nature of the grounds of claim against OFSTED as set out above; the lack of evidence of any need for ESFA to take Detrimental Action to protect any person or the public interest; and the interests of good administration and the rule of law.

19. Second, it is submitted that were ESFA to take Detrimental Action, and OFSTED subsequently withdrew (or materially changed) the Report, or the Court subsequently quashed it, ESFA would have acted on the basis of mistaken facts.

20. Third it is said that ESFA's decision would be based on a failure to rely on adequate information or ask itself the right questions

21. Fourth, it is said that ESFA's decision was based on unlawful act of OFSTED

22. Fifth, it is said that any decision to act based on this report would be irrational given that the secretary state has continued to fund X Ltd after the report and in the light of the age of the report.

23. In response to all those grounds the Secretary of State's essential answer is that he has as yet taken no action, he has not said or indicated that he is going to take any action, and there is no reasonable basis for believing he will act in any unlawful manner.

The Contractual Claims

24. In addition to these public law challenges X Ltd alleges that under its funding contracts with ESFA, ESFA could take detrimental action against it following publication of an Ofsted report to the effect that X Ltd management is inadequate. That action could include the cessation of funding. Accordingly, it seeks an interim injunction to prevent such publication or such detrimental action.

Discussion – Applications for PTA for JR

25. In my judgement, X Ltd has established a properly arguable case in public law against HMCI. It would not be right for me to express any further views on the merits of the claims but I give permission on all grounds.

26. In contrast, I see no properly arguable claim in public law, or for that matter private law, against the Secretary of State, acting through her agency the EFSA. In my judgement the submissions of Mr. Anderson are entirely correct.

27. In my view, the claim against the S/S is premature because ESFA has taken no decision affecting the claimant and has not threatened to do so. EFSA has made it crystal clear that no decision has been taken and that no decision will be taken until Ofsted has published its final report. In a letter dated 27 April 2023 the government's legal department (GLD) confirmed that "the second defendant has no intention of taking any action under the contract in reliance on OFSTEDs provisional findings (as opposed to a final report)".

28. Furthermore GLD has made it clear that it will only consider whether to take any action after OFSTED has published its final report, which it has not yet done.

29. Mr Oldham made much of the fact that the Secretary of State has declined to give an undertaking to that effect. In my judgement, the secretary of state is under no obligation to give such an undertaking. Declining to do so is not a threat. As Mr Anderson correctly puts it, it simply "reflects the fact that EFSA not obliged to take any decision until the appropriate time and cannot be compelled to make some sort of decision in principle on hypothetical facts. EFSA is entitled to await the outcome of the challenge to Ofsted's report in these proceedings before deciding whether action is needed and if so what action to take."

30. I am reinforced in this conclusion by the clear indication in Mr Anderson's skeleton argument that it is "ESFAs practise to invite representation before making a decision on what action, if any, to take in response to a published finding that a provider is inadequate."

31. That is sufficient to dispose of the application for permission against the Secretary of State.

Application for Interim Relief

32. It follows from the preceding paragraph that the claim for interim relief against the Secretary of State must also be rejected.

33. I would add that even if I had been minded to grant permission to apply for judicial review against the Secretary of State I would still have refused interim relief. The claimant is in substance seeking a mandatory injunction to require ESFA to maintain the contract and provide funding, regardless of the contractual provisions and regardless of what ESFA thinks appropriate if and when the report is published. The court will only grant such relief if it has a high degree of assurance that the claimant will succeed at trial (see Quest v SS for Education [2023] EWHC 3578 at [85]). The JR claim against HMCI is arguable but there can be no such assurance here.

34. The final point of substance therefore is the Claimants application for interim relief against HMCI. This is an issue that requires some close consideration in the light of my grant of leave.

35. HMCI is under a statutory duty to arrange for the publication of reports following inspections of further education institutions under section 125(7) of the Education and Inspections Act 2006.

36. In *Taveta Investments v Financial Reporting Council* [2018] EWHC 1662, Nicklin J held that the caselaw established the following propositions:

    i) there is a significant public interest in publication of reports by public bodies, particularly when they are under a duty to publish;

    ii) in such cases the grant of an injunction requires "pressing grounds";

    iii) where… what is sought to be restrained is allegedly defamatory allegations, then the Court should have regard to the fact that, in private law cases, the principle in *Bonnard v Perryman* [1891] 2 Ch 269 would usually prevent the grant of an order to restrain publication of defamatory statements where the respondent contends that the proposed publication was defensible.

37. In R *(on the application of Barking and Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin) the claimant college applied for interim relief in its claim for judicial review against the defendant's refusal of its registration as a higher education provider, to restrain publication of the refusal decision. Chamberlain J cited Nicklin J's judgment in *Taveta* with approval. He said that

> "Where a public authority has the function of publishing a report, that function will often be conferred for the benefit of a specific section of the public. Ofsted's reporting powers are conferred primarily for the benefit of pupils and parents (existing and prospective) of the inspected schools".

38. He went on to observe that in such cases there is

> "a specific section of the public with an interest in receiving the information in question. This interest is protected by Article 10 ECHR, which confers the right not only to express but also to receive information. The right of a section of the public to receive information which a public authority wishes to communicate to them in what it regards as their interest must carry very substantial weight in the balancing exercise."

39. He noted that the weight of the Cs interests on the other side of the scales will vary and said that

> "it is important not to lose sight of the fact that, if interim relief is refused and the Decision is published, those to whom it is published can be told that the Decision is the subject of legal challenge. I accept that there will be some who will not be prepared to suspend judgement pending the resolution of the claim, but a fair- minded observer learning of a decision critical of the Claimant would factor in the existence of a pending challenge before reacting to it."

40. In those circumstances, he said *"other things being equal, the authorities rightly impose a high hurdle ('pressing grounds', 'the most compelling reasons' or 'exceptional circumstances') for the grant of interim relief to restrain publication of a*

report by a public authority. The high hurdle is consistent with, and indeed flows from, the 'intense focus on the comparative importance of the specific rights being claimed'.

41. That analysis was approved and followed by the Court of Appeal in R (Governing Body of X) v Office for Standards in Schools [2020] EWCA Civ 594. In his judgment in that case, Lindblom LJ said at [78]

> "Unsurprisingly, and in my view correctly, the case law at first instance has been consistent in emphasizing the need for a suitably demanding approach to applications for an interim injunction to prevent the publication of an Ofsted report. It is important to recognize the scope of Ofsted's functions under sections 5, 13 and 14 of the 2005 Act, including their powers and duties to secure the timely publication and dissemination of their inspection reports. The inherent purpose of this part of the statutory regime is to promote the public interest in parents, pupils and local communities knowing, without delay, the results of school inspections, and to uphold the rights of those entitled to receive that information. The considerations that would warrant impeding these functions would have to be very powerful."

42. Lindblom LJ cited as an example of the sort of case where interim relief might be appropriate the case of R. (on the application of the Interim Executive Board of X) v Ofsted [2016] EWHC 2004 (Admin);

> "where an injunction was granted to restrain publication of an Ofsted report on a school whose teaching arrangements were said to give rise to unlawful sex discrimination. Between that report and others recently prepared by Ofsted there was a discrepancy described by Stuart-Smith J. as "extraordinary". The challenged report was "frankly inconsistent" with the previous ones (paragraph 40 of the judgment). There was also "clear evidence of antagonistic behaviour" by inspectors during the inspection, about which complaints had been made at the time (paragraph 41). The judge saw an arguable case that the process from which the report had emerged was "infected by a pre-determined mindset or prejudice that would be quite alien to the proper and independent inspection process upon which the education system and the public at large rightly depends" (paragraph 45). There was "compelling evidence" that the effect of publication could be "extremely adverse and irreparable". The "immediately foreseeable effect" of publishing the report "would be to raise the spectre that the [school] will be placed back into special measures". But the "adverse effects" went "much wider". It was "entirely plausible that, at the present time and in the febrile atmosphere that has prevailed since the Trojan Horse school problem arose, publication of the report has the capacity to affect social and community cohesion", and also "the capacity to be seen as an

> unwarranted attack on aspects of the [school's] Islamic religious ethos which have in the very recent past been acceptable to Ofsted, because the nature and effect of the [school's] segregation policy have not changed since the previous reports" (paragraph 46). The school could not effectively mitigate the damage by communicating the fact that the report was being challenged – because the report was due to be published on the last day before the summer holiday (paragraph 49).

43. In the present case, Mr Oldham points to a number of features of the case which he says justify injunctive relief and meet that stringent standard. He says that publication would cause not just reputational damage and threaten financial harm but, critically, would put the very existence of X Ltd at risk. He say that unlike challenges to OFSTED reports brought by schools or colleges, statutory bodies which will go on functioning despite the publication, if this Report is published and ESFA removed X's funding as a result, X's apprenticeship operations would, or would probably, close. That would in turn be very damaging for its many apprentices. The loss of specialist training would also be damaging for their employers and the UK economy.

44. He also points out that the Defendants have been content to agree not to publish for some months pending this hearing.

45. He concludes that *"regardless of the strength and nature of X's causes of action, these factors, as well as the fact that an injunction has already been in place for a long time, set this case apart from those in which the Courts have found that the heightened test for the grant of an interim injunction to restrain publication of an OFSTED report is not met. The public interest in this case, or at least in these applications, weighs very heavily in X's favour. This is a genuinely exceptional case."*

46. I reject that argument. In my judgment the claimant here falls some distance short of surmounting the high hurdle imposed before a court will restrain publication of a report required under s125(7) of the 2006 Act.

47. I say that for four reasons;

    i) The factors on the other side of the scales are very weighty indeed. In particular, I take into account the public interest in HMCI complying with its statutory duty, the Article 10 rights of both HMCI in reporting the results of the inspection and the public in receiving that information, and the interest of employers, would-be apprentices and the local community in learning of HMCI's concerns.

    ii) Publication will lead the S/S to consider whether to take action against X Ltd under the contract. But there is a range of actions open to the department and the ending of funding is a long way from being a certainty. The C will be able to make representations to the 2D when that stage is reached.

    iii) I have granted the Claimants permission to apply for JR and it will be open to them to make public, when the report is published, both that its contents are

disputed and that the Court has given it permission to challenge the report.

iv) I propose, subject to further submissions, to order that the hearing of this JR should be expedited so that the period before the Claimants have the chance to establish the falsity of OFSTED's analysis and the unlawfulness of their report will be short.

48. In my judgment the claim for an interim injunction can fare no better in contract than it does in public law. Even if the claimant could establish that, in private law, there is a serious issue to be tried, for all the reasons set out above the balance of convenience would not support the grant of injunctive relief.

Conclusions

49. For those reasons:

i) I grant the C permission to apply for JR against the 1D;

ii) I refuse PTA for JR against the 2D

iii) I refuse interim relief against both defendants

iv) Subject to further submissions, I would be minded to grant an expedited hearing of the JR claim.

50. The application that the public and private law claims be consolidated or heard together is not now pursued.