TIMPSON REVIEW OF SCHOOL EXCLUSIONS

Tom Amraoui

One of the more controversial, complex and hot button topics in education law has for some time been the issue of school exclusions – now even more so with the recent publication of the Timpson review.

The review, published by the government in May 2019, finds that although permanent exclusions are rare (0.1% of the 8 million children in schools in England were permanently excluded in 2016/17) this still means an average of 40 are happening every day; a further average of 2,000 pupils per day are excluded for a fixed period. The review makes a number of recommendations aimed at ensuring that exclusion is used consistently and fairly, and that permanent exclusion is always a remedy of last resort. The report emphasises that neither 'informal exclusion' nor 'off-rolling' are permissible responses to poor behaviour: these are not exclusions and should never be conflated with schools following the proper exclusion process.

Among the key Timpson proposals are that the exclusions guidance should be updated to define and guard against off-rolling, that Ofsted should *"consistently recognise schools who succeed in supporting all children"* and find to be inadequate those which off-roll, that there should be a consultation on imposing a revised limit on the total number of days for which a pupil may lawfully receive a fixed-term exclusion (currently 45 days), that standards and funding need to be improved for alternative provision (PRUs and the like), and that there should be a greater role for local authorities in identifying and supporting children at risk of exclusion and intervening early.

Practitioners in this area will know that the legal regime governing challenges to permanent exclusions changed earlier this decade. Independent appeal panels

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(a merits-based jurisdiction, with the power to order reinstatement of a permanently excluded pupil) have been replaced by independent review panels ("IRPs"). IRPs have no power to order reinstatement. Further: their role is limited to reviewing on judicial review grounds the decision of the governing body not to reinstate the pupil. The IRP may uphold the school's decision, recommend that it be reconsidered or direct reconsideration (but even a directed reconsideration does not compel the governing body to reinstate). The system has therefore become one that is arguably tilted further than it used to be in favour of schools and against the interests of parents and excluded pupils. It is an open question how this will sit alongside the apparently growing concern about schools' approach to exclusions, as expressed in the Timpson report.

VAT TREATMENT OF COLLEGES

Kelly Stricklin-Coutinho

Supplies of education to students in the UK are exempt from VAT if they are made by a college of a university within the definition provided for in the Value Added Tax Act 1994 ("VAT Act"). The case of *SAE Education Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKSC 14, dealt with the applicable criteria for determining whether an undertaking is a college.

SEL is an English company, which is part of a group of companies trading worldwide under the name "SAE Institute", which is an acronym for "School of Audio Engineering". In this case, SEL argued that it was a college of Middlesex University and supplied education to students in the UK which are exempt from VAT. Middlesex University is a university within the VAT Act. Neither the University nor SEL have any financial interest in each other nor do they have controlling interests in each other. There were, however, a series of agreements which resulted in the validation by the University of SAE Institute programmes, and accreditation of SAE companies.

The Supreme Court held, unanimously, that a commercial provider of university education is exempt from VAT as a "college of the university" where the activities provided by the commercial provider are integrated with those of the university. In assessing whether a commercial provider may benefit from the VAT exemption, the Supreme Court held that it is necessary to consider whether the provider's educational activities are so integrated with those of the university that it may be inferred that both entities have the same constitutional objects.

Five features were identified which, if met, meant that the entitle is highly likely to be a college of the university. Those features were:

1) Whether they have a common understanding that the body is a college of the university.
2) Whether the body can enrol or matriculate students as students of the university.
3) Whether those students are generally treated as students of the university during their period of study.
4) Whether the body provides courses which are approved by the university.
5) Whether the body can in due course present its students for examination for a degree from the university.

Some features were identified as being likely to be of much less assistance.

Although the VAT treatment of commercial providers in the university education sector will depend on the facts of each case, this judgment provides useful guidance as to how those facts should be assessed.

SEN BANDING POLICY: R (AD) V HACKNEY LBC [2019] EWHC 943

Katherine Barnes

Banding policies to allocate funding by local authorities for the special educational provision required by children with special educational needs ("SEN") are widespread. Indeed, it was submitted by Hackney in the above case that there is no local authority in the country which costs education, health and care plans ("EHCPs") on an individual basis and then allocates funding accordingly. It is therefore of great significance that the High Court held Hackney's banding policy to be lawful. Watch this space, however, because it is understood that the Claimant has appealed to the Court of the Appeal.

The key issue in the above case was the lawfulness of a "Resource Levels Policy" ("the Policy") which governed

Hackney's funding of schools to deliver the SEN provision specified in section F of its EHCPs. Under the Policy, Hackney gave to children with EHCPs (via their schools) additional "top-up" funding according to the band the child was allocated under the Policy (which depended on the severity of the child's needs). Readers of this newsletter will no doubt be aware that s.37 of the Children and Families Act 2014 ("CFA") requires local authorities to secure that an EHCP is prepared and maintained for a child found to require an EHCP following an EHC needs assessment. Where an EHCP is in place, s.42 CFA requires local authorities to secure the special educational provision therein, regardless of cost.

The Claimants' primary argument was that the Policy was inconsistent with s.42 CFA. In particular, it was said that there is nothing in s.42 that permits local authorities to group children into bands and then fund their schools to secure the provision in accordance with a generic figure allocated to that band. Instead, local authorities had to ensure that each child's school had sufficient funding to secure the SEN provision listed in the EHCP. This argument was said to be supported by the adult social care case of *R (KM) v Cambridgeshire CC* [2012] UKSC 23 in which it was held that funding bands are permissible to generate "ball-park" figures but that consideration then needs to be given to whether the funding offered is sufficient to provide the necessary provision to meet eligible needs.

Mr Justice Supperstone rejected the Claimant's submissions in this regard, finding that *KM* was distinguishable because it concerned a different statutory scheme and context (which requires the formation of personal budgets). Further and more fundamentally, the duty under s.42 CFA is not a duty to cost but to "secure" SEN provision. As long as the provision is secured, there is nothing to prevent a local authority achieving this through a banded policy.

The Claimants also argued that the Policy was systemically unlawful because it gives rise to an unacceptable risk of unlawful decision-making. However, this submission failed on the facts, with the court observing: *"none of the Claimants can demonstrate that there has been a failure to secure provision in his or her case because of the Resource Levels policy. Their concerns about provision are either disputed with contrary evidence, or attributable to some other cause, or both"* [49]. Moreover, Supperstone J found that, in circumstances where a school finds it does not have sufficient funding to meet a child's needs as set out in the EHCP, there were flexibilities built into the system to address this. These included the annual review and the allocation of additional funding by Hackney on a discretionary basis.

As is clear from the analysis above, the court did not reject the systemic challenge as a matter of law but because it was insufficiently supported by evidence. Therefore, if the current financial climate continues, this case may not be the end of the matter. If further evidence can be gathered which shows a clear link between the application of a banding policy and the failure of a local authority to secure the SEN provision in an EHCP, then the court may well be prepared to reach a different view.

PROFESSIONAL REGULATION AND SOCIAL MEDIA POSTING

Jennifer Thelen

The policing of social media posting continues to be a difficult issue for employers and educators. Taking appropriate action requires a careful balancing of an individual's right to express their beliefs as against the application of the institution's policies, including disciplinary policies. The Court of Appeal recently weighed in to this debate in the context of professional regulation.

In *Ngole v University of Sheffield* [2019] EWCA Civ 1179, the Court of Appeal considered the case of a student, enrolled on a two-year MA Social Work course at the University of Sheffield, who had expressed his religious views on a public social platform, disapproving of homosexual acts. He was subject to disciplinary action, and ultimately was removed from his course, on fitness to practise grounds. The question before the Court of Appeal was whether or not that was a proportionate response?

The Court of Appeal found it was not, for two reasons. First, the Court of Appeal found that the University's disciplinary proceedings were flawed. They were critical of the Appellant for quickly becoming entrenched in his

views during the disciplinary proceeding, rather than adopting a conciliatory stance. However, the Court of the Appeal found that this entrenched position was understandable given that Mr Ngole was being told *"something that he found incomprehensible, namely that he could never express his deeply held religious views in any manner on any public forum"*.

Next, and of wider application, the Court of Appeal found that the University adopted an approach which was too stringent and not in accordance with the relevant Health and Care Professions Council ("**HCPC**") guidelines. As eluded to above, the University's position was that any expression of disapproval of same-sex relations, however mildly expressed, on a public social media or other platform which could be traced back to the person making it, was a breach of professional guidelines. The Court found this was simply too wide, and could ban any discussion of beliefs except in the privacy of one's home. In contrast, the HCPC professional code and guidelines did not prohibit the use of social media to share personal views and opinions, but simply said that the University might have to take action *"if the comments posted were offensive, for example if they were racist or sexually explicit"*.

This case provides a useful starting point for analysing any type of disciplinary hearing arising out of an expression of opinion, including religious views. As explained above, the Court of Appeal's discussion provides clear guidance on the need for a proportionate approach to such communications – and rarely will "never" be the right answer as to when can a professional express his or her beliefs on social media, provided they are not offensive. The judgment also offers a practical reminder that the polarisation of the position of the parties in these types of debates will seldom be necessary. Rather, thoughtful and diplomatic handling, including specific guidance to the student concerned on how he or she might preserve a space to articulate his or her own private views, whilst ensuring that professional standards are satisfied, could provide a sensible middle ground.

SCHOOL PROTESTS

Rachel Sullivan

A case concerning the recent anti-LGBT+ protests outside a school in Birmingham provides a helpful lesson for local authorities into how (not) to go about seeking interim injunctions to restrict such protests: *Birmingham City Council v Afsar and Ors* [2019] EWHC 1560 (QB).

As Warby J noted, *"the case involves a conflict between a number of important civil rights, some of them fundamental human rights"*: on the one hand, the rights of protestors to lawful protest and (where relevant) expression of their religious views protected under articles 9-11 of the ECHR; on the other, the rights to respect for private life, freedom of speech and education (articles 8 and 10, article 1 of the Second Protocol 'A1P2'). He also noted that arguably there was a case to be made for the protesters under A1P2, insofar as it requires respect for the right of parents to educate their children in accordance with their religious convictions. The court on this occasion was not concerned with the merits, beyond considering the likelihood of success at trial. There will be a trial in due course, which will no doubt provide further interesting reading.

In March 2019, protests began outside the primary school over its teaching of sex and relationships. The protestors were initially parents, many of Muslim faith. The protests grew until in the final Friday before half-term in May, when a 'national' protest was held outside the school. The school tried to avoid this by closing early, but without success.

In light of concerns about the escalation of protests and the potential risks to the safety and security of staff and pupils, Birmingham City Council applied (ex parte) for an injunction during half term. The injunction sought an 'exclusion zone' around the school in which protest was prohibited, and bans on contacting staff at the school.

The application initially came before Holgate J who queried why it was being made without notice, but in the event, the case was heard in London on the Friday of that week. The injunctions were initially granted. The

Defendants then applied to discharge them, alleging failures to provide full and frank disclosure.

Warby J was critical of the manner in which Birmingham City Council brought the application. Not only was their justification for applying ex parte weak (since it was in fact half term, the reason for making the application that week undermined the need for secrecy) but the application was also procedurally deficient. There is clear guidance in the CPR and the *Practice Note: Interim Non-Disclosure Orders* [2012] 1 WLR 1003 on the procedure to be followed where ex parte applications which impinge on the right to freedom of expression. The Council had failed to comply with this guidance.

Particular failings are set out in the judgment and include a failure to identify that under s. 12(3) of the Human Rights Act 1998 it was necessary for the applicant to demonstrate they were likely to succeed at trial. S. 12(3) refers to restraint of 'publication' and Birmingham had accordingly felt it was not engaged. The judge held there was no justification for a narrow reading and that the section applied where the injunction sought would restrict freedom of expression.

The breaches of the duty to provide full and frank disclosure were sufficiently serious to require the order to be discharged with costs.

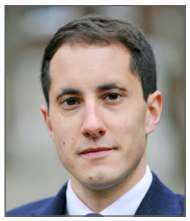
However, on a proper analysis, Warby J was satisfied that interim injunctions were appropriate: having regard to the evidence of distress to the students, the Council was likely to succeed at trial in showing that restrictions on protest could be justified. The judge therefore made fresh injunctions. The case is therefore an (expensive) object lesson in doing things right the first time, and in particular given careful consideration to whether without notice applications can be justified.

CONTRIBUTORS

Kelly Stricklin-Coutinho

ksc@39essex.com

Kelly was a Foundation Governor at St. Michael's Catholic Grammar School for Girls, where she was also on the Curriculum & Standards committee. Her experience includes being appointed the chair of a Complaints Appeal Panel and appointing a head teacher. She has taught at University of London colleges for 10 years in both undergraduate and postgraduate courses, where she has been responsible for the setting of the course and the assessments, as well as dissertation supervision. She has experience of undergraduate and postgraduate students with special educational needs and of academic appeals and plagiarism. She also has experience of the Early Years Foundation Stage statutory framework and holds a diploma in Montessori Pedagogy for Early Childhood. To view full CV click here.



Tom Amraoui

tom.amraoui@39essex.com

Tom is ranked as a leading junior in Education law by Chambers and Partners and The Legal 500. He regularly represents local authorities in special educational needs cases, has advised and represented schools in discrimination cases and has experience in the Upper Tribunal on education matters. Tom speaks regularly at education law conferences and seminars, and has delivered training to many authorities on effective case preparation in SEN appeals. Tom also has extensive experience of school admissions and exclusion appeals, having acted as both a representative and clerk at many such appeals. To view full CV click here.

Jennifer Thelen

jennifer.thelen@39essex.com

Jennifer is recognised in the Education law section of Chambers and Partners (Band 4) and The Legal 500 (Tier 5). She regularly appears in the First tier Tribunal and Upper Tribunal on behalf of local authorities in education cases as well as, for both local and central government, on education matters in the High Court. She has been instructed to advise and appear across a range of education matters including special educational needs, disability discrimination, governance, admissions and exclusions appeals, as well as challenges by way of judicial review to the implementation of statements of special educational needs and Ofsted reports. Jennifer has a broad legal background, having practised corporate and regulatory law before being called to the Bar. Jennifer is a member of the Attorney General's B Panel of Junior Counsel to the Crown. To view full CV click here.

Katherine Barnes

katherine.barnes@39essex.com

Katherine is a public law and human rights specialist, with particular expertise in education law. She has worked on several claims for the judicial review in this area including a recent challenge to the closure of a rural primary school and a decision by a local authority to reduce its special educational needs funding. In addition to her judicial review work, Katherine regularly appears before the First-Tier Tribunal and Upper Tribunal in special educational needs cases and disability discrimination claims. She also has significant experience of admissions and exclusions appeals. In respect of higher education matters, Katherine's recent work includes advice on student finances and various complaints to the Office of the Independent Adjudicator. Katherine recently acted for Ofsted in relation to the case study on child sexual abuse at residential Catholic schools as part of the Independent Inquiry into Child Sexual Abuse. To view full CV click here.

Rachel Sullivan

rachel.sullivan@39essex.com

Rachel is developing her education law practice, having joined chambers in 2017 following the completion of pupillage. She has recently appeared for a local authority in a CCMC for an Equality Act claim. To view full CV click here.

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