



Neutral Citation Number: [2024] EWHC 880 (Admin)

Case No: AC-2023-BHM-000111

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

Birmingham Civil and Family Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 23rd April 2024

Before :

MRS JUSTICE STACEY

Between :

THOMAS TELFORD SCHOOL

Claimant

- and -

OFFICE FOR STANDARDS IN EDUCATION,
CHILDRENS' SERVICES AND SCHOOLS

Defendant

Mr Russell Holland (instructed by **PHP Law LLP**) for the **Claimant**
Mr Toby Fisher (instructed by **Simon Ramsden TLT LLP**) for the **Defendant**

Hearing dates: 2nd February 2024

APPROVED JUDGMENT

Mrs Justice Stacey :

1. The claimant, Thomas Telford School (“TTS” or the School), brings these proceedings against the defendant, the Office for Standards in Education, Children’s Services and Skills (Ofsted), to challenge Ofsted’s decision to rate the leadership and management at the school as ‘good’, rather than ‘outstanding’, in its final inspection report (“the Inspection Report”) sent to TTS on 19 May 2023 and published on 5 July 2023 following its inspection visit on 6 and 7 December 2022. In all other areas TTS was rated as “outstanding”, but as a consequence of it being rated only as “good” for leadership and management, the school received an overall rating of “good”. The issues are firstly whether the conclusion of “good” for leadership and management at the school in the Inspection Report was a legally rational conclusion or if it was based on material errors of law (ground 1, the rationality ground) and secondly, whether the Inspection complied with the requirements of procedural fairness (ground 2, the procedural ground).
2. TTS is one of only 2 remaining City Technology Colleges (“CTC”) in the country following their much publicised launch in 1988. The freedoms and rules applicable to CTCs in their statutory arrangements are different in some respects to other educational institutions inspected by Ofsted. At the heart of this complaint is whether Ofsted failed properly to understand the different statutory arrangements and freedoms of CTCs with the consequence that they fell into error in their Inspection Report and during the inspection process. The two areas of concern identified in the inspection by Ofsted were the School’s approach to recording absences in the attendance register and its behaviour policy and practices.
3. I am grateful to both parties for their counsel’s clear and helpful submissions: both written and oral, and for all the work in the meticulous preparation of the bundles and generally in advance of the hearing.

Litigation history and preliminary issue.

4. The application for judicial review was issued on 31 May 2023 after completion of the pre-action protocol procedure. HHJ Rawlings initially granted an interim order on 1 June 2023 prohibiting Ofsted from publishing its Inspection Report pending the outcome of the claimant’s application for interim relief. HHJ Worster then refused the application for interim relief at a hearing on 3 July 2023. The Inspection Report was published on or after 5 July 2023. Mrs Justice Lang granted permission to apply for judicial review on 1 August 2023 as the claim raised arguable grounds which merited consideration at a full hearing.
5. On 26 January 2024 in response to matters raised in the claimant’s skeleton argument served the previous week, the defendant filed an application for permission to adduce the claimant’s updated Behaviour Policy of July 2023. The application was granted by consent.

The facts

6. CTCs were established under the Education Reform Act 1988 (ERA 1988) and were an innovation at the time. Although state funded, CTCs have more freedom and power to innovate than maintained and academy schools. They are not subject to an

identical regulatory regime and are defined as “independent schools” under the ERA 1988. TTS was established as a CTC on 24 September 1990 by a Scheme of Government (SOG) which was approved by the Secretary of State for Education.

7. The School opened in 1991. It has been successful and is highly regarded in the local community and beyond. As at October 2022 it had 1546 students on the roll of which 10.86% were eligible for free school meals, 155 were classified as disadvantaged, and 4.2% classed as having special educational needs. It is racially mixed with 26.32% from minority ethnic groups, consistent with the population it serves. It’s academic results are impressive.
8. It was rated as outstanding by Ofsted in 2006 and 2009 under the inspection framework in use at the time. The statement of its headteacher, Sir Kevin Satchwell (who received a knighthood for his services to education in 2001) sets out in interesting detail some of the innovative policies the School has adopted and its successes under his stewardship as its headteacher since the School’s foundation in 1991 by using the freedoms allowed under its CTC status. I mean the parties no disrespect by not setting out in full all the evidence about how the School has operated and achieved its successes, but rather I will focus on the relevant facts necessary to determine the narrow issues in the case before me.
9. In relation to school discipline, the SOG provides:
 - “14. (g) The Head shall have jurisdiction over the discipline of the School, subject to the restriction that corporal punishment is not permitted in a City Technology College.
 - (h) The Head shall have the power in his (or her) discretion to suspend or expel any student and in the event of expulsion shall invite and give due consideration to representations from the parents of such student and consult the Chairman of the Governors (or if unavailable the Vice-Chairman) before making a final decision.”
10. TTS operates a disciplinary policy which does not provide for students to be suspended which is a policy of considerable importance to the School and on which it prides itself. It has a behaviour policy (“the Behaviour Policy”) which sets out the standards expected of students and the steps to be taken should behaviour fall below the expected standards. The Behaviour Policy contains no reference to suspension or temporary exclusion. In the body of the policy in an annex entitled ‘Serious Incidents of Misbehaviour’, it states that a “cooling off period” of 2 - 3 days would normally apply (where the student would be excluded from school) pending a decision on what should happen next.
11. In the Self-Evaluation and Development Plan prepared for a governors’ meeting in November 2022 it states that the school
 - “does not apply fixed term exclusions. On occasions, parents may be requested to collect children after a serious incident, but investigations are swiftly concluded to find a way to return students to school as quickly as possible”.

12. The School had been exempted from routine Ofsted inspections for 13 years since its last inspection in 2009 and fell to be inspected again in December 2022 after the Covid restrictions had been relaxed.
13. On 5 December 2022, the day before the 2 day inspection visit, the lead inspector (LI), Mark Howes, had a call with the head teacher, Sir Kevin Satchwell. The LI did not fully take on board what he had been told about the distinct position of CTCs and did not fully familiarise himself with their unique status prior to the inspection visit. During the call the headteacher explained how the School seeks to deal with any behavioural issues in a creative way by not applying punishments or detentions and avoiding permanent expulsions unless absolutely unavoidable. Instead of a punishment regime they look to resolve difficulties with an early intervention model and early warning system and involve the student's parent or carer. It is not in dispute that the behaviour of the students is exemplary throughout the School.
14. The fact that the statutory Exclusions Guidance does not apply to TTS means that it is not obliged to report suspensions to the local authority, only to report any permanent exclusions. There have been 2 permanent exclusions in the last decade both of which have been reported in accordance with the School's statutory obligations.
15. TTS is also required to report its census data to the Department for Education ("DfE"). Although it is not required by law to apply the Attendance Guidance prepared by the DfE, as a matter of practice TTS adopts and applies the attendance and absence codes for recording any absences from the School set out in the Attendance Guidance. These codes are also used by the DfE to collect statistics through the school census system. The codes relevant to the issues in this case are Codes C, B and E.

"Code C: Leave of absence granted by the school

207. Only exceptional circumstances warrant granting a leave of absence. Wherever referred to in this guidance a leave of absence should not be, and from certain types of school must not be, granted unless it has been applied for in advance by the parent who the pupil normally lives with and the headteacher believes the circumstances to be exceptional. Schools must consider each application for a leave of absence individually taking into account the specific facts and circumstances and relevant background context behind each request. Where a leave of absence is granted, the school will determine the number of days a pupil can be absent from school. A leave of absence is granted entirely at the headteacher's discretion."

16. Specific leaves of absence falling within Code C given in the Attendance Guidance are listed as when a pupil is participating in a performance or pregnant or where in very exceptional circumstances it is necessary for a student to have a temporary part-time timetable.
17. Code B is for off-site educational activity.

“Code B: Off-site educational Activity

249. Attending an off-site educational activity that has been approved by the school and supervised by someone authorised by the school.

250. For pupils of compulsory school age, schools must also record the nature of the activity, examples are:

attending taster days at other schools;

attending courses at college;

attending unregistered alternative provision arranged or agreed by the school.

251. The educational activity must take place during the session for which it is recorded.

252. Ultimately schools are responsible for the safeguarding and welfare of pupils educated off-site. Therefore, by using code B, schools are certifying that the education is supervised, and measures have been taken to safeguard the pupil. Schools should ensure that they have in place arrangements whereby the provider of the educational activity notifies the school of any absences by the pupil. The school should record the pupil’s absence using the relevant absence code.

253. This code must not be used for any unsupervised educational activity i.e., when a pupil is at home doing some schoolwork.”

18. Code E: Excluded but no alternative provision made is as follows:

“217. If no alternative provision is made for a pupil to continue their education whilst they are suspended from school or excluded from school, but their name is still entered in the admission register.

218. When a pupil of compulsory school age is suspended or permanently excluded from a maintained school, pupil referral unit, academy, city technology college, or city college for the technology of the arts, alternative provision must be arranged from the sixth consecutive day of any suspension or exclusion. Where alternative provision is made schools should record this using the appropriate code for attending an approved educational activity.”

19. When the inspection visit started the next day on 6 December 2022, the LI was wrongly under the impression that the statutory Permanent Exclusion Guidance from Maintained Schools (September 2022) (“the Exclusion Guidance”) applied to the

School. He also wrongly believed that the School was required to follow the Attendance Guidance.

20. The headteacher explained the School's approach to discipline in more detail to the inspectors. He told them that the School does not suspend students but if there has been a serious incident students will initially be placed in internal isolation at the School until their parents can collect them, or until the end of the day. If they are required to go home it is to reflect on their behaviour and work from home under direction. The School refers to it as a "cooling off" period. On their return they have a meeting with staff or in more serious cases are required to do a presentation to staff and their parents to demonstrate their reflection and learning from their behaviour.
21. During the first day of the inspection visit the inspection team asked to see the attendance certificates for the previous 18 months which included 46 students coded as absent for Codes B and C.
22. When his team of inspectors examined the circumstances of the 46 instances by reference to the student incident logs, they considered that the School should have used Code E (excluded but no alternative provision made) and that the School's attendance records masked what were in effect suspensions and the "cooling off" periods were suspensions in all but name. There were also inconsistencies in how the Codes were being used. For example the 3 students recorded in the logs from Year 11 as having been sent home, 2 had received a Code C and one had been recorded with a present code.
23. The headteacher however considered that the School was using the Attendance Guidance codes that it had chosen to adopt correctly and that where students had been sent home this could accurately be termed leave of absence granted by the School (Code C) or Code B (off-site educational activity). He considered that it accurately reflected that there were no suspensions at the School.
24. Since the LI and his inspectors were at that stage under the impression that TTS was bound to follow the Exclusions Guidance and Attendance Guidance, the LI considered that the School's approach to sending children home were illegal exclusions. The LI forcefully and repeatedly conveyed his initial view to the headteacher several times during the day both in 1-1 meetings with the headteacher, as well as in front of his inspection team, also to a number of School governors and to one of the School's senior leaders that there were potential breaches of their legal obligations. As stipulated in the Ofsted Schools Inspection Handbook he also told them that if the School was considered to be gaming the system, it could also lead to a finding of "inadequate". The distress and anxiety to the headteacher, his leadership team and the School governors was immense. They understood that the implication of the LI's initial view, if sustained, would be that the School would be rated as overall "inadequate" and the headteacher considered that he would have to resign. From the contemporaneous notes of the HMI Duty Desk Contact Log over 6-7 December 2022 it is clear that the LI remained of the view that the School was in breach of its legal obligations until at least 12:38 of the second day of the visit. Even though the LI realised by lunchtime on day 1 of the Inspection visit that the Exclusions Guidance did not apply to TTS, it was not until lunchtime on the second day that he appreciated that the Attendance Guidance was not statutory guidance for TTS.

25. The School quickly agreed to amend the way that it recorded absences in its use of the codes and this was put in hand at once.
26. The inspectors also found that as well as the coding anomalies there was some confusion in the School community as to the Behaviour Policy. Some staff and students referred to being sent home for poor behaviour as a “suspension” and in a feedback form (Ofsted’s Parent View online portal) one parent stated that they were confused about the School’s Behaviour Policy and its implementation. They found it hard to follow, that the practice did not follow the policy and the attendance policy was not on the School’s website. Some of the students also found the Behaviour Policy and how it was applied unclear and, at times, inconsistently applied.
27. The School has an arrangement with another secondary school, Madeley Academy which is also in Telford where it sends students with challenging and disrupting behaviour, sometimes for 2 weeks at a time. This is not referred to in the Behaviour Policy.
28. In discussions with the School’s governors the LI formed the view that they had not held the School’s leaders to account for the attendance records or adequately challenged the leadership team on the processes and systems with regards to pupils being “sent home” and did not fully understand the School’s approach to suspension and education off-site at Madeley Academy.
29. Once the LI properly understood the position of TTS as a CTC and was satisfied that the School was not in breach of any of its legal obligation and he was also satisfied that it was not trying to game the system in its use of the codes, he told the headteacher that he no longer considered that an “inadequate” assessment might be justified. He remained concerned however that the Codes were not being implemented appropriately which meant the records did not accurately record the true position and limited the ability of the School’s governors and senior leadership team to have proper oversight.
30. The LI therefore concluded at that stage that the rating for leadership and governance would have to be “good” rather than “outstanding” because the School was not implementing the Codes appropriately and as a consequence there was a lack of clarity and transparency over implementation of the Behaviour Policy and an inaccurate reporting of students’ attendance and reasons for absence.
31. The Ofsted inspection process has a number of stages. The initial call the day before the inspection visit is followed by the 2 day inspection visit itself, a draft report is prepared and sent to a school for fact checking. Following receipt and consideration of any points raised by a school at the fact-checking stage a final draft report is sent to a school. Ofsted’s Complaints Procedure in relation to an inspection comprises a three-step process: factual accuracy checking; formal complaint; and thirdly an internal review request. A formal complaint may be raised after receipt of the final report. The complaint is considered by an HMI inspector and the outcome given to the school. The School did not request an internal review or any subsequent referral to the Independent Complaints Adjudication Service for Ofsted. Any further challenge is by way of judicial review. The procedure was followed in this case.

32. The draft report was issued on 3 January 2022 which rated the School as “outstanding” for quality of education; behaviour and attitudes; personal development; and sixth form provision. It rated the School as “good” for leadership and management which gave it an overall rating of “good”.
33. Following a factual accuracy check process, Ofsted shared its final report with the School on 23 January 2023. The headteacher lodged a complaint in response to the final report on behalf of the School on 27 January 2023 seeking to change the judgement of “good” for leadership and management to “outstanding”. The complaint raised a number of issues. It criticised the manner in which the Inspection had been undertaken and the frequent inaccurate initial assertions by the LI that the School was acting illegally. The LI and his team’s initial failure to understand the special legal status of CTCs was asserted as a breach of his obligation to prepare adequately for the Inspection. The School considered the entries on the attendance registers were merely unintentional administrative errors allocating the wrong code for different variations of absence. Given that the LI had accepted that the School was not intending to game the system and the School had considerable freedom as a CTC to use what it considered to be the most appropriate codes in its attendance register, TTS failed to understand why the unintentional errors in this one aspect could have downgraded the overall assessment of leadership and management to “good” when considered against all the other “outstanding” judgements that had been reached.
34. The outcome of the complaint was responded to by Ofsted on 30 March 2023. It did not uphold the central complaint nor did it change the assessment of “good” for leadership and management. It concluded from his review of the evidence base that the inspection team had gathered and reviewed an appropriate range of evidence to arrive at a secure judgment for leadership and management. It was not based solely on the use of attendance codes. The governors did not have adequate oversight of the processes around students being sent home due to poor behaviour, were unaware of the implications of coding in the attendance registers and did not have a sound understanding of the School’s records on the number of students being sent home due to poor behaviour. The attendance codes distorted attendance and suspension statistics.
35. However the wording of the final report was amended and softened adding greater clarity to fully reflect the inspection findings, so that the final paragraph in the section headed “What does the school do well and what does it need to do better?” was amended to read as follows:

“Governors are highly committed to the school and are rightly proud of its reputation in the local community. They have a strong understanding of the school’s many strengths. However, the school’s variation from standard practice in the application of attendance codes means that the governors do not have a clear oversight of pupils’ attendance and behaviour. Therefore, they are hampered in their ability to hold leaders to account for aspects of the school’s performance. In addition, the school’s behaviour policy does not include all steps that leaders take to help support pupils. Leaders are aware of this and are already starting to make changes.”

36. The section headed “What does the school need to do to improve?” was amended to read:

“Leaders have not ensured that staff use attendance codes consistently to record when pupils are sent home due to poor behaviour. This means that governors do not have a clear oversight of pupils’ behaviour and attendance. Leaders should ensure that, when pupils are sent home due to poor behaviour, this is recorded in the register in such a way that enables governors to have a better understanding of attendance, especially when pupils are sent home as a disciplinary measure. Leaders should also review their behaviour policy so that it accurately reflects the interventions that are put in place to support pupils with their behaviour.”

37. Two aspects of the complaints were upheld. It was accepted that the LI initially failed to understand the characteristics of a CTC and aspects of its legal standing. It was also accepted that the statutory suspension and Exclusion Guidance should not have been considered in the first place. However the complaint outcome was that since the guidance was discounted once the LI properly understood the specific legal differences of a CTC relating to exclusion, the overall assessment was not changed. The second aspect of the complaint that was upheld was that the LI:

“may not have provided sufficient detail in explaining clearly why some bullet points in the “good” criteria for leadership and management were not fully met.”

38. The School’s complaint about the unprofessional conduct of the LI of engendering an unnecessarily threatening climate in the conduct of the inspection were passed to the LI’s line manager to take forward as part of Ofsted’s internal performance management arrangements. The School was told it would not be appropriate to comment further on the outcome of that process.

39. The final Inspection Report issued in July 2023 was highly complimentary of many aspects of the School’s effectiveness. For example, students flourish at TTS and a culture of high expectations permeates every aspect of school life. Students rise to the academic challenge and wealth of additional opportunities that staff provide and the leaders work in close partnership with parents and carers to ensure that students grow and develop into successful young adults. It stated that:

“Students’ behaviour throughout the school is exemplary. In lessons, pupils show a hunger and desire to learn and feed off teachers’ enthusiasm and passion for their subject. At lesson change-over and social times, pupil are mature and respectful of others. They carry their red folders to each lessons sensibly and wear their uniform and physical education (PE) kit with pride. Leaders deal with bullying swiftly if it ever occurs.”

40. Many of the sixth form students achieve high grades and go on to Russell Group universities. However, since the flattering findings are not the subject of this dispute it is not necessary to cite them in their full glory, beyond noting that in all aspects

beyond the two criticisms set out in [35] and [36] above, the Inspection Report is indeed impressive.

Legal framework

41. The legislative framework is not in dispute and can therefore be summarised briefly. CTCs were first established under the ERA 1988. Those provisions were subsequently repealed and replaced by section 482 of the Education Act 1996 (EA 1996). Section 482 EA 1996 was in turn repealed by schedule 14 paragraph 16 of the Education Act 2011 (EA 2011). Section 15 of the Academies Act 2010 (AA 2010) makes provision for transitional arrangements which are relevant to CTCs.
42. As noted in the facts above CTCs come within the definition of an “independent school” under s.463 EA 1996. As such TTS is subject to The Education (Independent School Standards) Regulations 2014. Paragraph 15 provides:

“The standard in this paragraph is met if the proprietor ensures that an admission and attendance register is maintained in accordance with the Education (Pupil Registration) (England) Regulations 2006.”
43. Regulation 6 of the Education (Pupil Registration) (England) Regulations 2006 provides:

“6.— Contents of Attendance Register

(1) Subject to regulation 6A, the following particulars must be recorded in the attendance register at the commencement of each morning session and once during each afternoon session —

(a) in the case of every pupil whose name is entered in and not deleted from the admission register whether the pupil is—

 - (i) present;
 - (ii) absent;
 - (iii) attending an approved educational activity within paragraph (4);
 - (iv) unable to attend due to exceptional circumstances within paragraph (5);
 - (v) not attending in circumstances relating to coronavirus;

(b) in the case of any such pupil of compulsory school age who is absent, a statement whether or not his absence is authorised in accordance with paragraph (2);

(c) in the case of any such pupil of compulsory school age who is attending an approved educational activity the nature of that activity; and

(d) in the case of any pupil unable to attend due to exceptional circumstances, the nature of those circumstances: but this paragraph does not apply in respect of a pupil who is a boarder.

(2) ...[not relevant]

(3) ...[not relevant]

(4) An approved educational activity is either—

(a) an activity which takes place outside the school premises and which is—

(i) approved by a person authorised in that behalf by the proprietor of the school;

(ii) of an educational nature, including work experience under section 560 of the Education Act 1996 and a sporting activity; and

(iii) supervised by a person authorised in that behalf by the proprietor or the head teacher of the school; or

(b) attendance at another school at which the pupil is a registered pupil.”

44. The Attendance Guidance states (para.203) as follows:

“The national codes enable schools to record and monitor attendance and absence in a consistent way and are used to collect statistics through the School Census system. The data helps schools, local authorities and the government to gain a greater understanding of the level of, and the reason for, absence and the delivery of education.”

45. Detailed provision is made in the Education Act 2002 (“EA 2002”) for suspensions and exclusions in maintained schools in s.51A EA 2002 which do not apply to CTCs.

46. Ofsted is a body corporate established by section 112 of the Education and Inspections Act 2006 (EIA 2006) and its powers and duties are provided for by that statute. His Majesty’s Chief Inspector of Education, Children’s Services and Skills (‘the Chief Inspector’) is the most senior officer of Ofsted. Sections 116 – 119 EIA 2006 set out the general functions and duties of Ofsted and the Chief Inspector. The Chief Inspector has power to delegate her functions to Ofsted and/or additional inspectors under paragraph 9 of schedule 12 EIA 2006.

47. Section 5 of the Education Act 2005 (“EA2005”) imposes a duty on the Chief Inspector to inspect certain schools in England, including CTCs, and to make a report of the inspection in writing. s.5(5) provides that it is the general duty of the Chief Inspector, when conducting an inspection, to report on the quality of education provided in the school. Ss.5(5A) and (5B) EA 2005 provides as follows:

“(5A)The Chief Inspector's report under subsection (5) must in particular cover—

- (a) the achievement of pupils at the school;
- (b) the quality of teaching in the school;
- (c) the quality of the leadership in and management of the school;
- (d) the behaviour and safety of pupils at the school.”

48. Section 11 EA 2005 empowers the Chief Inspector to arrange for any report of an inspection to be published in such manner as she thinks appropriate. Section 133 EIA 2006 provides that the Chief Inspector must devise a framework for inspections and publish it in such manner as she considers appropriate.

Ofsted Inspections

49. The Chief Inspector has adopted the Education Inspection Framework (“EIF”) pursuant to the duty in section 133 EIA 2006. The EIF sets out how Ofsted inspects maintained schools, academies, non-association independent schools, further education and skills provision and registered early years settings in England.
50. The EIF explains the value of inspections as follows:

“Inspection provides independent, external evaluation and identifies what needs to improve in order for provision to be good or better. It is based on gathering a range of evidence that is evaluated against an inspection framework and takes full account of our policies and relevant legislation in areas such as safeguarding, equality and diversity.

Inspection provides important information to parents, carers, learners and employers about the quality of education, training and care. These groups should be able to make informed choices based on the information published in inspection reports.”

51. The EIF establishes a four point grading system on which overall effectiveness, quality of education, behaviour and attitudes, personal development, and leadership and management will be measured. The grading system includes: grade 1 – outstanding; grade 2 – good; grade 3 – requires improvement; and grade 4 – inadequate. The EIF sets out key aspects of each graded aspect is to be measured.

52. The EIF is supplemented by Ofsted’s School Inspection Handbook (‘SIH’). The SIH includes detailed guidance for inspectors on how to carry out inspections of schools in accordance with the EIF, including graded inspections under section 5 EA 2005. The SIH outlines a number of stages of inspections, including desktop research, on-site inspection, seeking the views of parents, staff and pupils.
53. Ofsted’s inspection, evaluation and reporting process, and its procedure for handling complaints, are inherently procedurally fair (*R. (on the application of Durand Academy Trust) v. Office for Standards in Education, Children’s Services and Skills* [2018] EWCA Civ. 281 at [63]). But it goes without saying that even a generally fair procedure that is not followed or where there are particular distinguishing features will not necessarily and will not always be fair or immune from public law challenge.
54. Irrationality challenges are not easy in the context of Ofsted inspections. In *R. (Governing Body of X) v. Ofsted* [2020] EWCA Civ. 594 the Court stated that:

“an allegation of irrationality is never easy to establish. In the context of a school inspection, undertaken within a statutory framework by inspectors familiar with the task and involving issues on which the exercise of evaluative judgment is an essential part of the process, it is likely to be particularly difficult. ”

...

dissatisfaction with the findings and conclusions of the inspection report does not, of itself, amount to a demonstration of irrationality.’

55. As to procedural impropriety, the requirements of procedural fairness summarised by Lord Mustill in *Doody v Secretary of State for Home Department* [1993] 3 All E R 92 at 106 [1994] 1 AC 531 & 560 and cited with approval by Singh LJ in *The Queen (on the application of Citizens UK) v Secretary of State for Home Department* [2018] EWCA Civ 1812 at [69]:

“From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is

taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

Submissions

For the claimant

56. For TTS on ground 1 it was submitted that because the inspection proceeded without having regard to the special status and powers of a CTC Ofsted had wrongly assumed that the School was subject to the statutory Exclusions Guidance. As a consequence the inspectors wrongly considered that the School was not using the correct attendance code from which they then concluded that the School did not have adequate oversight or governance of attendance of students. The whole inspection proceeded on the wrong premise, and although the error was ostensibly corrected during the course of the inspection, the false reasoning infected the whole process. If the Ofsted inspectors had properly understood the status and powers of a CTC from the beginning they would have approached the whole exercise differently and asked different questions. It was a fundamental flaw.
57. The conclusion that leadership and management at the School was “good” rather than “outstanding” was unlawful because there were insufficient reasons to reach that conclusion. It was also irrational since it had failed properly to correct its errors and to have regard to the fact that the School is a CTC with the legal framework that applies. It was also irrational because of the glaring inconsistency with the conclusion that the behaviour and attitudes of the students was “outstanding”. If the School’s use of the Attendance Guidance absence codes was inaccurate and lacked transparency so that the students’ absence and behaviour could not properly be assessed, as Ofsted had concluded, how could the Inspection Report have then been able to assess the students’ behaviour as exemplary? There was an inherent contradiction between the two findings.
58. Although the tone of the emails and behaviour of the LI towards the headteacher and the School was not alleged as bias or prejudice, it was relevant to understanding how the inspection had started, and remained, on the wrong foot throughout, looking for problems, and how the initial errors were not corrected during the inspection process.
59. It was an error of law for Ofsted to have based its judgment on the School’s use of the codes. The view of a random parent absent any context, was a makeweight that did not mean the findings were sufficiently robust.
60. As to the second ground, procedural unfairness, the complaints process did not remedy the defects in the Inspection itself and *Durand* was of no assistance to the defendant since the inspectors were unfamiliar with the task of inspecting a CTC. Confirmation bias had been at play. The tone of the inspection was aggressive and accusatory which was indicative of the wrong-footed approach of the inspectors based on the false initial conclusion that the School was required to follow the Exclusions Guidance when it was not. Ofsted has continued to fail properly to understand that

the Exclusions Guidance does not apply by their use of the term “suspension” in relation to students at the School since the term “suspension” derives from the exclusion guidance and does not apply to TTS as a CTC.

61. Whilst TTS accepted that the Ofsted inspection process is generally fair *Durand* it did not mean that this particular inspection was fair given the mistakes and misunderstandings and inherent irrationality in the Inspection Report.

For the defendant

62. For Ofsted it was submitted that the early misunderstandings about the unique, and now extremely rare, status of CTCs were corrected during the Inspection process and before the inspection team reached its provisional judgments. The rating of “good” rather than “outstanding” was not infected by any misunderstanding of fact or law.
63. The reason why the School could not be rated as “outstanding” in leadership and management went beyond the technical coding issues and compliance with the Exclusions Guidance that Ofsted realised during the course of the inspection did not apply to TTS and their misunderstanding that the Attendance Guidance did not bind TTS. The problem was the shortcomings in the School’s system of recording absences in the attendance register meant that the School leaders could not properly scrutinise patterns of students attendance and behaviour. The School chose to adopt and follow the Attendance Guidance absence codes, yet they failed to record the information accurately. As a result the leadership in the School did not have sufficient oversight of students attendance.
64. Another reason why the School was not “outstanding” in leadership and management was because the School’s Behaviour Policy did not capture the range of interventions that the School was applying to behaviour issues. These were relevant matters for the inspectors to take into account in their evaluative process and in line with the non-statutory Attendance Guidance that applied to the School.
65. As to the second ground, procedural fairness, the inspection process was well able, and did, enable any misunderstandings to be corrected and re-evaluated during the course of the Inspection itself. The process and the outcome was not tainted by the original misunderstanding of the legal status of the School as a CTC.
66. As to the criticisms of the tone of communications with the School, this was not scaremongering, but a necessary part of the process to share at an early stage potentially serious concerns so that the School has the opportunity to respond appropriately. Initial misconceptions and misunderstandings were cured during the inspection process which has many stages.
67. Ultimately the School took a different view to Ofsted as to the seriousness of the problems with recording pupil absences and gubernatorial oversight, but Ofsted’s role is to provide an objective assessment. It was entitled to reach the views that it did based on the evidence provided to them during the inspection process that was derived not only from the School’s use of the absence codes, but also the interviews with pupils and students and a comment from a parent that triangulated with the other evidence.

Analysis and conclusions

68. There was no dispute between the parties about the applicable law, but they did not agree about the conclusions to be drawn from the agreed evidence. There was a minor dispute of fact as to whether the LI had told the headteacher that the School was behaving illegally, how many times he said it and the degree of vehemence, and at what time during the Inspection visit the LI realised that the Attendance Guidance was non-statutory and when exactly he appreciated that the School was not bound by the Exclusion Guidance, but the parties agreed that they were not material differences and not necessary to resolve the dispute in order to decide the issues in the case. To the extent that I have needed to do so to make findings necessary for the narrative account, I have directed myself that it is for the claimant to prove the facts on the balance of probabilities. The defendant and its witnesses are unlikely to have lied, but the contemporaneous notes provide good evidence of what witnesses believed and thought at the time they made their notes.
69. TTS is a successful, thriving school which was judged “outstanding” in all areas in the 2023 Ofsted inspection apart from leadership and management. The consequence of being “good” and not “outstanding” in leadership and management brought the overall assessment down to “good”.
70. The only reason why the School did not receive an “outstanding” mark for leadership and management was because of its method of the recording of non- attendances and absences with the consequent lack of transparency and oversight from unclear data. Notwithstanding the problems identified Ofsted was still able to assess the behaviour of students at TTS in its Inspection and judged it to be exemplary without qualification.
71. Behind the noise of the inspection and the School’s understandable fury at the way it was conducted, Ofsted had two legitimate concerns with the School’s approach that were not predicated on the misunderstandings of the LI and his inspection team— firstly that it was not possible to ascertain which students were absent for misbehaviour under Behaviour Policy because of the mis-coding of absences and secondly because the Behaviour Policy did not reflect the actual practice in some cases. Whether a student is sent home as a “suspension” or for a “cooling off” period is a semantic distinction: either way they are being asked to leave the School premises for a temporary period. Even if the students are asked to work from home, under the Attendance Guidance codes that the School adopted, Code B must not be used for any unsupervised educational activity i.e. when a pupil is at home doing some schoolwork ([253] of the Attendance Guidance). Yet some student absences were recorded as code B and others were recorded as not being absent when they had in fact been sent home. The School chose to adopt the codes set out in the Attendance Guidance and did not always apply them properly.
72. The evidence from the coding issues identified on the first day of the Inspection visit were corroborated by the views of some of the students in discussion with the inspection team. They were also corroborated by the view of one parent on the Ofsted parent’s view portal.
73. The opinion of one parent out of a school of over 1,500 students is a slim basis on which to base a conclusion. But Mr Holland’s submission that Ofsted was clutching at

straws would have been more powerful, if it was the only strand of corroborating evidence on which Ofsted based its conclusion. Also the parent's observations were articulate and well-informed and chimed with the inspection findings.

74. I have considered the evidence base particularly carefully as there is no doubt that the inspection started with the wrong presumptions and confirmation bias can be extremely powerful and cloud an otherwise rational mind. It is alarmingly easy to see only the evidence that supports an already partially formed view and it can be surprisingly difficult properly to adapt to changed circumstances or new information and shake off an erroneously held view. But the fact of the errors in the coding of student absences did mean that the records were not accurate and did have the effect of masking what were suspensions in all but name. They also made it difficult for the senior leadership team and the School governors and others in the School community to know the true picture. If one takes the initial errors made completely out of the equation - ignores them utterly - and ask the question: Could the LI and his inspection team rationally and reasonably conclude that there were shortcomings in the absence record keeping process that reduced the overall assessment of the School's leadership and management from "outstanding" to "good"? the answer would be Yes.
75. Ultimately, the errors over the legal requirements applicable to CTCs were not relevant to the criticisms found in the absence reporting process. It was neither irrational or unreasonable for Ofsted to conclude that it represented "good" rather than "outstanding" practice. In the midst of this, and looking at the bigger picture, it is not to be forgotten that whatever it was that the School was doing, their students' behaviour was exemplary. It was the record keeping that left something to be desired. I do not however accept the argument that the finding that the student's behaviour was exemplary meant that the criticisms of the recording of behaviour-related absences was irrational. One does not follow from the other.
76. The headteacher's statement states that the inspection team did not ask for the headteacher's reports to the governors on attendance and absences. However from the inspectors' discussions with the governors and the fact of the mistakes in the accuracy of the recording of the information, the inspection was entitled to conclude that there was a lack of effective oversight of this area of the School's performance by the governors. I was unclear if the inspectors had seen the SEF prepared in advance of the November 2022 governors meeting exhibited to Sir Kevin Satchwell's statement. In any event it would have strengthened the inspectors conclusion that the governors did not have the necessary information to have good oversight if they had seen it. As is apparent from the extract set out above, it fudges the issue of suspensions and does not make clear how the School is treating students who are not in School for behaviour issues. Ground 1 is dismissed.
77. As to ground 2, it was disappointing that the inspectors were not aware of the special status of CTCs prior to the commencement of their inspection and initially made two fairly basic errors as to both the Exclusions Guidance and Attendance Guidance, demonstrates a lack of preparation and precision,. It would not have inspired the School's confidence in the inspection. It naturally made them more anxious and defensive. However I find that those errors were corrected during the course of the inspection process itself. The entire inspection process is well-placed to identify and correct mistakes and misunderstandings (see *Durand*) and in this case it did. My

observations in relation to ground 1 are relevant also to ground 2 as the grounds overlap.

78. When the LI erroneously thought that the School might be in breach of its legal obligations it was right for him to raise it, so that the School could correct him, which they did. The evidence is however consistent with the School's experience of it being raised in a heavy handed manner, exacerbating the understandable anxieties already engendered by the advent of an Ofsted inspection in a school, particularly given the seriousness of such allegations. The LI appeared to the School to be insensitive and thoughtless of the impact of the statements he made to the headteacher, especially in the presence of others and the impact of his words. The School's indignation was understandable. It must have been a bruising experience. It reinforced their perception that the inspection was looking for fault and to find problems. The Inspection Report itself however is full of praise and adopts a very different tone to the School's experience of the manner of inspection visit. It is the Inspection Report that falls to be judged. Although a poor bedside manner is not obviously a ground of legal challenge, there are lessons to be learned for Ofsted and its inspectors from this inspection. It was reassuring to hear from Mr Fisher on behalf of Ofsted that this is already in hand.
79. The claimant's claim is dismissed.

Costs

80. The parties agreed at the end of the hearing that costs should follow the event. The defendant accepted that the claimant's costs claimed of £41,706.30 were reasonable costs on the standard basis and the defendant agreed to cap their costs at £42,000 in the event of the defendant succeeding.
81. Since the defendant has succeeded and the claim is dismissed it follows that the claimant is ordered to pay the defendant's costs of £42,000 and I leave to the parties to decide the time for payment or if the default provisions should apply.