[2025] EWHC 224 (Admin)

Claim No. AC-2022-LON-003695

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

Royal Courts of Justice

Friday, 7 February 2025

Before Mr David Lock KC, sitting as a Deputy Judge of the High Court.

B E T W E E N :

THE KING (ON THE APPLICATION OF BOURNEMOUTH, POOLE AND CHRISTCHURCH COUNCIL)

Claimant

- and -

LOCAL GOVERNMENT AND SOCIAL CARE OMBUDSMAN

Defendant

- and -

TOPS DAY NURSERIES LIMITED

Interested Party

MR PETER OLDHAM KC (Instructed by the Legal department of Bournemouth, Poole and Christchurch Council) appeared on behalf of the Applicant.

MS HANNAH SLARKS (instructed by Kingsley Napley) appeared on behalf of the Defendant.

Hearing dates: 22 October 2024 and 29 January 2025

APPROVED JUDGMENT

1. This is an application for judicial review by the Bournemouth, Christchurch and Poole Council ("**the Council**") against the Commissioners for Local Administration, who are commonly referred to as the "Local Government

Ombudsman" ("**the LGO**"). The Council seeks the quashing of a report produced by the LGO dated 10 October 2022 in which the LGO upheld a complaint of maladministration against the Council following a complaint to the LGO by Mr X. Mr X complained that the Council was responsible for maladministration when it failed to uphold a complaint he had made that he was wrongly required to pay fees to a privately operated nursery where his child was provided with childcare as part of the government's Free Early Education Entitlement ("**FEEE**") scheme. The relevant childcare nursery which charged the fees is operated by Tops Day Nurseries Limited ("**the Nursery**"). The Nursery was named as an Interested Party in these proceedings in the claim form but has taken no part in these proceedings.

The anonymisation of the original complainant.

2. The original complainant, Mr X, who raised a complaint with the LGO which led to the report under challenge has not taken an active part in these proceedings and wishes to remain anonymous. An order was made to that effect earlier in the proceedings. As he is not a party to these proceedings, is not named in the LGO report and his circumstances are largely generic, there is no benefit in him being named.

An outline of the facts behind the challenge.

3. Mr X's daughter was provided with childcare by the Nursery, which operates in the Bournemouth area, under the FEEE scheme. Mr X complained to the Council that he was wrongly required by the Nursery to pay additional charges for some of the hours when his daughter was being provided with care by the Nursery. Mr X's complaint set out his view that state funded childcare was supposed to be free of charge to parents and so he should not have been charged any top-up fee. He sought reimbursement of the additional fees that he had been charged. The Council did not uphold his complaint. Mr X was dissatisfied with the Council's response and so he complained to the LGO. The LGO upheld his complaint. After providing the Council with a series of draft reports and inviting their comments, the LGO produced a report which criticised the Council. The Council then brought these proceedings arguing that, in doing so, LGO had proceeded on an incorrect

legal basis as well as challenging the report for other reasons. In summary, the Council's case is that the LGO made errors of law because it misunderstood how the FEEE statutory scheme operates and submits that those errors of law should lead to this court quashing the report.

The wider implications of the dispute.

4. The Council was represented by Mr Peter Oldham KC and the LGO by Ms Hannah Slarks. I am grateful for the assistance I have received from both counsel and the legal teams instructing them. The issues in this case were argued with particular fairness and courtesy by counsel on both sides, acknowledging that the case had potential implications for local authorities generally. Both counsel were mindful of the tension between parents, nurseries and local authorities over the vexed issue of the extent to which nurseries can lawfully charge parents fees for funded nursery places. Both counsel submitted that any decision in this case had the potential to affect other local authorities and nurseries generally. This case may also have implications for the LGO because the LGO fairly informed the court that, in preparing for this case, she[1] has discovered that she has adjudicated on a significant number of these complaints and has made inconsistent decisions concerning these types of complaints.

5. I am very cautious about expressing any views in this judgment which could be seen to have wider implications for local authorities and nurseries taking part in the FEEE scheme which are not strictly necessary for me to determine the challenge in this individual case. This judgment should only be taken as expressing views on the lawfulness of this particular LGO report based on the facts of this particular case. In doing so, I will have to consider the lawfulness of the specific criticisms that the LGO has made of the Council's conduct given the specific facts arising in this particular case. There are likely to be many other issues arising in other factual scenarios relating to other charges that nurseries

[1] I have referred to the LGO as "she" because Ms Amerdeep Somal is the Chair of the Local Government and Social Care Ombudsman, which consists of the Commissioners.

may potentially seek to ask parents to pay who are accessing FEEE hours. Nothing in this judgment should be taken to setting out a view on the lawfulness of any other factual situations. The Secretary of State was invited to intervene in this case but declined to do so. If this case is to go any further, I have little doubt that the Court of Appeal would be assisted by representation by the Secretary of State.

The background.

6. The background to this issue is relatively well known but is worth setting out in order to understand why a dispute involving relatively small amounts of money for Mr X is being taken so seriously by both the Council and the LGO. Childcare in the UK consumes a significant proportion of the budgets of parents of young children, particularly in the years before they attend schools. Parents on medium to low incomes can find themselves having to pay a significant proportion of their earnings to meet childcare costs, particularly if they have more than one pre-school child. In order to assist this group of parents, the government provides funding to support the cost of nursery placements for defined categories of parents of pre-school children of defined ages up to a maximum number of hours per week.

7. The government channels the moneys to fund nursery places through local authorities, and it requires at least 95% of this funding to be passed on to nurseries who are providing FEEE places. In this case I am told that the Council passported about 99% of the government funding through to those nurseries that provide childcare places under the government scheme in the Council area. The sum paid by the government to local authorities effectively sets the rate that local authorities are able to pay to nurseries that participate in the FEEE scheme. Some childcare under the scheme is provided by local authority operated schools but much of the childcare under the FEEE scheme is provided by nursery businesses that operate in the private sector. These businesses will be registered with Ofsted and operate under the regulatory regime set out by Ofsted. They will typically provide childcare to children whose parents pay for their services and may also elect to provide childcare to qualifying children under the FEEE scheme.

8. Local authorities are under a statutory duty to secure that sufficient state funded childcare is available in their area to meet the needs of all eligible children. In practice that means encouraging as many nursery businesses as possible to agree to provide childcare through the FEEE scheme. It is not in dispute that those representing nurseries have complained that the amount nurseries are provided per child per hour under the FEEE scheme is too low. It is common ground that it is generally lower than the amount nurseries charge paying parents. Some even claim that the sums provided under the scheme are insufficient even to meet the costs of providing childcare to meet the standards required by the regulator, Ofsted. I am not in a position to express any views about the merits or otherwise of those complaints.

9. Local authorities seek to support nurseries to deliver childcare under the FEEE scheme although, in practice, each nursery has to make its own decision whether to take part in the scheme or not. Nurseries are private businesses and it is a matter for each nursery to decide whether their business wishes to be part of the FEEE scheme. It is obviously more attractive for nurseries to take part in the FEEE scheme if they are able to secure additional revenue from parents whose children are supported under the FEEE scheme. Thus, both local authorities and nursery providers have their own reasons for seeking to support nurseries in making additional charges. I accept that local authorities have a real concern that taking a hard line on top-up charges could lead to a diminution in the availability of FEEE childcare in their area and thus may make it more difficult for local authorities to deliver on their statutory duties.

The arrangements between the Nursery and the Council.

10. The Nursery agreed to take part in the FEEE Scheme and signed an agreement with the Council which set out the terms of its participation in the scheme. I am told by the LGO that a model provider agreement was published by the Secretary of State and that that document was used by the Council as a template for setting up its agreement with the Nursery. The version of the agreement in the bundle is

unsigned but it appears clear that the agreement was intended to set up a legally enforceable contract between the Council and the Nursery ("**the Agreement**").

11. The Agreement says that it sets out the "*Terms and conditions for Bournemouth, Christchurch and Poole childcare providers to deliver funded early education places for 2, 3 and 4 year olds*". Clause 2.2 sets out the primary responsibilities of Nursery saying:

> *"The provider should deliver the funded entitlements consistently to all parents, whether in receipt of 15 or 30 hours and regardless of whether they opt to pay for optional services or consumables. This means that the provider should be clear and communicate to parents details about the days and times that they offer funded places, along with their services and charges. Those children accessing the funded entitlements should receive the same quality and access to provision"*

12. Clauses 11.1 to 11.3 provide:

> *"11.1 Funded early education is part time place for each eligible child and must be completely free at the point of delivery.*
>
> *11.2 Government funding is intended to cover the cost to deliver 15 or 30 hours a week of free, high quality, flexible childcare. It is not intended to cover the cost of meals, consumables, additional hours or additional services.*
>
> *11.3 The provider can charge for meals and snacks as part of a funded entitlement place and they can also charge for consumables such as nappies or sun cream and for services such as trips and yoga. These charges must be voluntary for the parent. Where parents are unable or unwilling to pay for meals and consumables, providers who choose to offer the funded*

entitlements are responsible for setting their own policy on how to respond, with options including waiving or reducing the cost of meals and snacks or allowing parents to supply their own meals."

13. I note that there is only a partial definition of the term "consumables" in the agreement. The agreement also requires transparency from the provider in clause 11.9 which provides:

 "The provider must ensure their invoices and receipts are clear, transparent and itemised, allowing parents to see that they have received their entitlement completely free of charge and understand fees paid for additional hours, services or consumables."

14. This agreement was intended to be a legally enforceable agreement between the Nursery and the Council.

The arrangements between the Nursery and Mr X.

15. Parents who ask the Nursery to provide care to their children are required to sign an "Enrolment Form". This provides:

 "The Enrolment Form and these Terms from the basis of the legally binding contract between the Parent and Tops ("the agreement")"

16. The Nursery is open between the hours of 6am and 8pm. It sets out a scale of charges for parents who pay for their childcare, with the hourly rate depending on the number of hours provided each week. The terms refer to "funded hours" which means hours that are funded by the Council under the FEEE scheme. The terms define the Nursery's "*core hours*" as being between 9.30am and 3pm. The terms provide for additional charges to be made to parents in receipt of funded hours who seek childcare provision during core hours as follows:

> *"At Tops Day Nurseries we charge 'general extras' to any funded hour claimed during our core hours. This charge covers consumables and additional activities that are not covered by the Early Education Funding. These general extra charges are applied per hour during the weeks the funding is claimed. The charge per hour is £1.84"*

17. The charge was £1.79 per hour in the period prior to Mr X's complaint but it was raised to £1.84 per hour by the Nursery in the year in which the matter was investigated by the LGO.

18. The Nursery's terms provide for a series of exemptions from the £1.84 charge for defined categories of children. Those exempt include any child who accesses the Early Years Pupil Premium. Parents who have a second younger child at the Nursery are also exempt from the £1.84 per hour charge. The Nursery's terms also make it clear that there is a mandatory additional charge of £3 per day to meet food costs for any child that is present between 12pm and 12.30pm. Further optional charges were imposed if parents asked for their child to attend "Tops Forest School" and if the child needed for items such as a toothbrush, a wet bag, a water bottle or a T-shirt.

19. The Nursery's terms do not explain the nature of the "*consumables*" that were said to be required to support children within core hours, but which are not required outside those core hours. There is also no explanation in the terms about what "*additional activities"* are provided in core hours or an explanation as to why it is said that these activities are not covered by the FEEE payment. The terms give Mr X no choice about whether to pay the additional charge of £1.84 for each hour of childcare provided to his daughter during core hours. Mr X was charged those sums, they appeared on his invoices and he duly paid them.

Mr X's complaint to the Council.

20. On 28 January 2021 Mr X wrote to the Council complaining about this charge. His emailed complaint said:

"I wish to inform you that a registered nursery/childcare provider in your area namely Tops Day Nurseries is charging top up fees, in the form of general extras on their invoices, which according to government guidance and now a ombudsmen judgement is not legal. I wish to complain to you as the council and governing body regulating these providers. Myself and all families that have a right to free childcare for three and four year olds are being overcharged by this nursery and have a right to be reimbursed for the amount we have been overcharged. Please investigate this matter and get back to me. I am willing to provide evidence in the form of emails and invoices from the nursery detailing these top up charges"

21. I note that the only complaint that Mr X made related to the mandatory charge for "*general extras*", namely the £1.79 per hour that he was charged during core hours. He made no complaint about the charges for meals or any other charges which were levied by the Nursery.

The Council's investigation of Mr X's complaint.

22. The Council referred the complaint to a Council officer who investigated Mr X's complaint. She sought an explanation from the Nursery about the additional charges. The Nursery set out its position in an email dated 9 February 2021. This email said:

"For the avoidance of doubt Tops does not charge 'Top-up fees'. The term 'Top-up fees' is well defined in the Statutory Guidance and is understood to mean a charge ... which is the difference between a provider's usual fee and the funding they receive from the local authority to deliver free places. 'General extras' are not fees, they are actual goods and services provided in addition to and distinct from the services purchased by the fees. Therefore it cannot be said that Tops' charges 'tops-up fees' in breach of clause 15.7 of the Provider Agreement.

The general extra's help Tops deliver its service to a high standard. They are a necessary part of the Tops' brand and offering. They are necessary during the core-hours for the obvious commercial reasons, but beyond that and more fundamentally, it is necessary to make them mandatory for an operational and practical reason. The regulations around staff to child ratios are very rigid. Therefore it would not be operationally possible that some children are excluded from an activity such as yoga or boogie mites. Nor would it be financially viable to pay for the wages of a member of staff to look after a child that is not taking part in a general extra activity"

23. I read this email as confirming that the fees for general extras are mandatory. I also note that the Nursery disputed that the "general extras" charges should be classified as "top-up fees". As I read this email, the Nursery was arguing that the fees were justified because they were commercially necessary to meet the costs of delivering childcare to the standard that the nursery chooses to operate. It also argues that it would not be possible to remove children from some activities, such as "*yoga or boogie mites"* and thus, because funded children take part in these activities as a general part of the care they are provided with at the nursery, the Nursery felt that it was justified in requiring parents to pay a supplementary fee.

24. The Council considered this information and Mr X's complaint was not upheld. The response from the Council was set out in an e-mail dated 12 February 2021. The emailed response said:

"Tops offers a pattern of 'core' and 'non-core' hours. Core hours are those from 9.30 am to 3pm. None-core hours are those hours booked before 9.30am or after 3pm. There is a mandatory charge for 'general extras' for bookings in the core hours, and this applies equally to all parents.

Tops offers free entitlement places during the non-core hours. These hours are delivered consistently to all parents that chose to use them and any charges for 'extras' are voluntary.

Parents do have the option, should they so choose, to book core hours and use their government funding entitlement to pay towards the cost of those hours. If they chose to do this, the mandatory charge will apply and this is made clear in Tops price list. The exceptions to the mandatory charges are:

- *if a child is accessing the Early Years Pupil Premium*
- *if a parent has a second younger child at the nursery that does not access funding;*
- *if a child access 30 hours funding and they attend for 40 hours or more a week.*

I must emphasise the point that it is the parent's choice to make a booking in the core hours.

All of the above is made clear in Tops Day Nursey price list."

Did the Council properly answer Mr X's complaint?

25. In my judgment, there are two main difficulties for the Council arising out of this response. First, as the Council rightly now concedes, the Council acted wrongly in that it failed to treat Mr X's email as a complaint which should have been considered and determined in accordance with the processes set out by the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 ("**the Complaint Regulations**"). Although the complaint was about the actions of an independent business, that business was delivering Council funded services and was operating services under contract with the Council. It follows that Mr X's complaint should have been treated by the Council as a complaint about services where the Council had a measure of responsibility and which thus came within the Complaint Regulations. The Council was criticised by the LGO for not having followed the processes under the Complaint Regulations when it initially adjudicated on this complaint. Mr Oldham KC has

stressed that this aspect of the LGO report is not in dispute and it is not the subject of this challenge.

26. The second difficulty for the Council is that the response to Mr X's complaint did not engage with the core complaint he made. It was factually correct for the Council to say that "*Tops offers free entitlement places during the non-core hours*". However, that response did not engage with Mr X's complaint that parents should not have been charged additional sums for any FEEE funded hours, whether those hours were within or outside core hours. The fact that Mr X could, at least in theory, have avoided these charges by booking his daughter into the Nursery for non-core hours is not an answer to his complaint. In practice, only booking his daughter into the nursery for non-core hours may not have been a practical option for Mr X if, as will be the case for many working parents, his working arrangements required him (and possibly his spouse or partner) to be at work during core hours. The response from the Council failed to engage with the main point raised by Mr X, namely whether the Nursery was entitled to raise a mandatory charge of £1.84 per hour for any FEEE funded hour of childcare.

Mr X's complaint to the LGO.

27. Mr X was dissatisfied with the Council's response and immediately complained to the LGO. The LGO contacted the Council on the same day as the complaint was lodged with them. The LGO then engaged in an extensive process of investigation and engagement with the Council which, to some extent, I will have to examine below.

28. The Council asked further questions from the Nursery about the £1.84 fee for core hours. In an email dated 2 July 2021, Ms Micah Faure, the Nursery's Legal Director said:

> *"General extras are not the same as the additional activities and consumables which you are referring to. These are extra-curricular activities*

(Cooking School, Forest School) which we offer in line with the statutory guidance.....

The [fees] help us deliver our services to our brand standard"

29. Ms Faure also explained that the increase in the charge from £1.79 to £1.84 was a commercial decision which reflected the costs pressures on the Nursery from suppliers and an increase in the minimum wage. These responses make it clear that, contrary to the way that the general charges were described in the Nursery's Terms and Conditions, the £1.84 per hour charge was not being levied for any identifiable "consumables". Instead, it was a general charge levied on parents who accessed funded hours during core hours with the aim of increasing the overall revenue of the Nursery. Ms Faure said that the charge was needed to meet the costs incurred by the Nursery in delivering childcare provision "*to our brand standard"*. The Nursery has not taken part in these proceedings and thus I express no view on whether, if the Nursery had done so, it could have provided evidence to support that assertion. However, I have no reason to doubt that this was genuinely how Ms Faure saw the situation.

30. LGO investigated Mr X's complaint and produced a series of draft reports on which she invited comment from the Council.

The LGO's final report.

31. The LGO then produced a final written decision dated 10 October 2022 ("**the Report**"). The material parts of the Report are in paragraphs 24 to 30 which said as follows:

"24. The Council's position is that the nursery's provision of FEEE places is in line with the Guidance and the Provider Agreement. The Council therefore did not have to take any action to address the nursery's practice as the

nursery was not doing anything wrong. We have investigated that statement further.

25. We agree that providers can choose to offer FEEE only at certain hours of the day. However, any FEEE hours offered must be free, or only subject to voluntary charges.

26. We agree that providers, can, if certain conditions are met, make additional charges on a FEEE place. Parents are expected to pay for extras such as meals, consumables or services such as trips. We note the nursery has a list of those additional charges in its price list.

27. But the Guidance and the Council's Agreement both say that charges on a FEEE place should be voluntary and that, if a parent is not willing or able to pay, the provider should offer options within its policy to address this.

28. That was not the case here.

- *The parents could not choose whether to pay the extra charges during core hours.*
- *The nursery admitted in its correspondence that the 'extra charges' when mandatory, not voluntary.*

- *The nursery's pricing policy did not allow any alternative options to parents whose children accessed FEEE during core hours.*

29. We do not accept the argument that the charges were voluntary because the parents 'chose' to send the child to the nursery during core hours. If the hours that a child attends are being claimed as FEEE hours, the charging for those hours must comply with the FEEE rules, and all charges in respect of them must be voluntary. Accordingly, if the nursery's core hours were not

FEEE hours, then parents could not use their FEEE to pay for those hours. If they were FEEE hours, then there could be no mandatory charges applied in respect of them.

30. The nursery was offering FEEE places during core hours, therefore it should adhere to the Guidance and the Provider Agreement. It should offer the places for free and only make charges in line with the Guidance and Agreement"

32. The Report then concluded that "*Mr X has suffered injustice as he has been wrongly charged top-up fees*" and it recommended that the 'general extras' fees which were required to be paid by Mr X should be repaid to him by the Council. The Report also made a number of recommendations including that the Council should apologise to Mr X for not upholding his complaint and should ask the Nursery to change its pricing policy. The Report also said:

"if the nursery refuses to change its pricing policy, the Council should consider its powers to terminate the Agreement and withdraw funding in whole or in part"

33. The Report also recommended that the local authority should send a letter to other FEEE providers in its area to inform them of the decision and to remind them of the LGO's expectations in terms of pricing.

The Council's judicial review challenge to the Report.

34. The Council brings this judicial review challenge against the Report. There was a long and unfortunate delay between the issuing of these proceedings and the matter being referred to a Judge for a paper decision on permission. Permission for this challenge was granted on all but one of the pleaded grounds by Mr CMG Ockleton, sitting as a Judge of the High Court, on 23 February 2024. The Council renews its application in respect of that one ground and also applies to amend its grounds to raise two fresh grounds of challenge based (a) on a complaint that the

LGO ought to have refused to investigate this complaint because Mr X had a legal remedy as an alternative to making a complaint and (b) based on alleged inconsistencies between the Report and other LGO decisions where, on similar facts, the LGO had reached different decisions. The LGO has served Detailed Grounds of Resistance and both parties have filed evidence. I shall consider the grounds of challenge below but first it is necessary to set out the statutory frameworks and reach conclusions on the main issue between the parties, namely whether mandatory additional charges are permissible within the statutory scheme.

The statutory framework relating to the LGO.

35. The statutory framework relating to the LGO is provided by the Local Government Act 1974 ("**the 1974 Act**") and was helpfully summarised in the Council's written submissions. S23(1)(a) of the 1974 Act provides for the establishment of "*body of persons*" known as the Commission for Local Administration. S23(3) provides that a "Local Commissioner" is a reference to a person who is a member of the Commission for Local Administration.

36. S24A of the 1974 Act gives LGO powers to investigate matters including where a complaint is made by a member of the public. The complaints which may be investigated include any alleged *"maladministration"* or *"failure in a [local authority] service*" either of which has caused *"injustice"*. S26 provides, in summary, that the LGO shall not investigate a complaint where the complainant has a *"remedy by way of proceedings in any court of law*", unless the LGO decides that "*in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it"*.

37. Once the LGO has completed its investigation, she is entitled to produce a report explaining the findings of the investigation. The report of a completed investigation, or a statement of reasons, must be sent to the complainant and the affected local authority. A report may include recommendations. The purpose of recommendations is to *"remedy any injustice sustained"* by the complainant and

“to prevent injustice being caused in the future”. It is a matter for a local authority to decide how to respond to recommendations made by the LGO. The 1974 Act provides that a meeting of the members of the local authority must decide what action it proposes to take if it receives an LGO report upholding a complaint against the local authority, but the local authority must notify the LGO how it proposes to respond.

38. If the LGO is not satisfied with the local authority’s response to an initial report, the LGO must make a further report with further recommendations. That further report is required to be sent to the parties, and the local authority then has to decide what action to take on its receipt. If the LGO is not satisfied with the response to the further report, it can require the local authority to publish a notice explaining what the LGO recommended.

39. Section 31B of the 1974 Act provides that a Local Commissioner may publish all or part of a report, statement or further report, or a summary “*if, after taking into account the public interest as well as the interests of the complainant (if any) and of other persons, he considers it appropriate to do so*”. The LGO publishes a large number of reports, no doubt on the basis that this will encourage good practice, whether the decision goes for or against a local authority. The LGO website contains a series of reports in other cases where the LGO has investigated complaints from parents relating to fees charged by nurseries who are providing FEEE hours.

Legal challenges to LGO decisions.

40. There is a considerable body of law concerning challenges to decisions of various Ombudsmen (a term which cover the situation as here where a woman is acting as an “Ombudsman”). Each Ombudsmen operates under a slightly different statutory scheme. The courts have recognised that whether conduct by a public body amounts to maladministration is a matter for the judgment of the Ombudsman. The cases acknowledge that the Ombudsman has a wide measure of discretion to decide whether administrative conduct by a public body amounts to

"maladministration" or not. In *R (Miller & Anor) v The Health Service Commissioner for England* [2018] EWCA Civ 144 Sir Ernest Ryder said as follows at paragraphs 71 and 72:

> *"71. In R (Rapp) v The Parliamentary and Health Service Ombudsman [2015] EWHC 1344 (Admin), Andrews J was concerned with the Parliamentary Commissioner Act 1967. She extracted several general propositions from the case law, and made the following conclusion at [38(v)]:*
>
> > *"It is for the Ombudsman to decide and explain what standard he or she is going to apply in determining whether there was maladministration, whether there was a failure to adhere to that standard, and what the consequences are; that standard will not be interfered with by a court unless it reflects an unreasonable approach."*
>
> *72. The breadth of the ombudsman's discretion to determine the manner in which investigations are carried out is well established. In R v Local Commissioner for Administration ex p Bradford CC [1979] QB 287 per Lord Denning MR at 311 it was held that Parliament had "deliberately left it to the ombudsman himself to interpret ... as best he could: and to do it by building up a body of case law on the subject". Whether the subject matter of the investigation is maladministration or service failure that principle remains sound. It follows that the court can only interfere with the standard adopted if it is Wednesbury unreasonable. Whether a standard lacks clarity, is incapable of being readily discerned or tends to produce inconsistent decisions are issues relevant to whether the standard is unreasonable"*

41. That is the approach that I propose to take in this case, subject to one caveat. It is common ground that the LGO has to proceed in making its assessment on a proper understanding of the legal framework within which the local authority is operating. It is also common ground that it not lawfully open to the LGO to find the Council responsible for maladministration if, without a finding of other administrative fault,

the LGO's criticisms are based on a misunderstanding of the statutory scheme or the statutory obligations placed on the Council. A report can also be challenged on the grounds that or that, in reaching her decision, the LGO is responsible for any other form of public law wrong.

The statutory framework for FEEE childcare.

42. Section 6(1) of the Childcare Act 2006 ("**CA**") provides:

> "*An English local authority must secure, so far as is reasonably practicable, that the provision of childcare (whether or not by them) is sufficient to meet the requirements of parents in their area who require childcare in order to enable them—*
>
> *(a) to take up, or remain in, work, or*
>
> *(b) to undertake education or training which could reasonably be expected to assist them to obtain work.*"

43. "Childcare" is defined in S18 CA as meaning "*any form of care for a child*". The statutory purpose of the provision of childcare under this section is to assist parents to be able to work or take up education. Childcare for pre-school children will, no doubt, have considerable benefits for children but the statutory purpose of the scheme is not focused on the benefits to children of childcare but it is focused on increasing the opportunities for work and education for parents. This wider duty under s6 CA must include both childcare which is paid for parents and childcare which is funded by the state. I accept the submission of Mr Oldham KC for the Council that this section sets up a "target duty" as that term is explained by Mr Justice Chamberlain in *R (AAA & Ors) v NHS England* [2023] EWHC 43 (Admin) [2023] PTSR 608 as opposed to providing a duty which requires a specific and measurable objective to be achieved.

44. Section 7 CA provides:

"(1) An English local authority must secure that early years provision of such description as may be prescribed is available free of charge, in accordance with any regulations under this subsection, for each young child in their area who—

(a) is under compulsory school age, and

(b) is of such description as may be prescribed.

(2) Regulations under subsection (1) may in particular include provision about—

(a) how much early years provision is to be made available in pursuance of the duty imposed by subsection (1);

(b) the times at which, and periods over which, early years provision is to be made available in pursuance of that duty.

(3) In discharging the duty under subsection (1) a local authority must have regard to any guidance given from time to time by the Secretary of State."

45. The Council is an English local authority for the purposes of this section. Ms Slarks submits (a) that the duty is duty is placed directly on "English local authorities", not on providers of childcare services and (b) the duty is to secure that, where required by Regulations, childcare to defined cohorts of children is available to parents "*free of charge*". Neither point was disputed by Mr Oldham KC and I accept both points. S7 thus imposes a duty on each relevant local authority to "*secure*" that early years provision is "*available*" for each young child in their area where the relevant Regulations provide that a parent has the right to access such funded early years provision. Section 20 CA provides that "*early years provision*" means the provision of childcare for a young child. In my judgment, a duty on a local authority to

"secure" that something shall happen for the benefit of a defined cohort of persons imposes a duty of delivery on the local authority: see *R (Elkundi) v Birmingham City Council* [2022] EWCA Civ 601 at para 77. Each local authority must therefore take all steps available to it ensure that, where the relevant Regulations provide that FEEE funded childcare services should be available to relevant parents of pre-school children in its area, those places are available to parents "*free of charge"* at the point that a parent acquires the right under the Regulations to access that provision.

The 2014 Regulations.

46. Section 7A enables Regulations to be made which require a local authority to discharge this duty by making arrangements with providers of childcare services. The Secretary of State has exercised his powers under these sections to make the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014/2147 ("**the 2014 Regulations**"). Regulation 4 provides:

> *"For the purposes of section 7(1) of the 2006 Act, an English local authority must secure that the prescribed early years provision is available for each young child for a period of 570 hours in any year and during no fewer than 38 weeks in any year"*

47. There is no requirement in the scheme that these hours are to be provided at a particular time of the day or on specified days of the week. Thus, I accept Ms Slarks' submission that the Nursery would have been entitled to say to parents that they could only access FEEE hours for periods outside "core hours", provided the FEEE hours then available to parents amounted to at least 570 hours per year. However, as both counsel accepted, this is not what the Nursery chose to do.

48. Regulation 5 of the 2014 Regulations imposes the requirement outlined in s7A CA as follows:

"(1) An English local authority must discharge its duty to a young child under section 7 of the 2006 Act by making arrangements which secure that an early years provider chosen by a parent of the child provides the early years provision to which the child is entitled in cases where—

(a) the early years provider is willing to provide it, and

(b) the early years provider is also willing to accept—

(i) any terms as to the payments which would be made to him or her in respect of the provision, and

(ii) any requirements which would be imposed in respect of it"

49. It follows that nurseries in each local authority area have a choice. They cannot be obliged to take part in the FEEE scheme. But, if any nursery agrees to take part in the scheme, it must be willing to accept (a) the payment terms for the provision of FEEE hours on offer from the local authority and (b) it must accept "*any requirements*" imposed on the nursery by the local authority. Any lawful set of arrangements between a local authority and a nursery must secure that a contracted nursery delivers "*the early years provision to which the child is entitled",* namely childcare which is "*available free of charge*" to the parents: see s7(1) CA.

50. Ms Slarks submits that the s7 duty only takes effect when a parent agrees to place their child with a participating nursery for specific hours. Whilst I accept that this is the effect of Regulation 5, that construction ignores the wider effect of Regulation 4 which places a statutory duty on each local authority to "*secure*" that childcare is available for every relevant child in its area for the stated number of hours per year. That is a duty of delivery on the local authority though I accept, of course, that if a local authority showed that it had used all reasonable endeavours to persuade nurseries in its area to participate in the scheme and it could not recruit enough

providers, the High Court is highly unlikely to enforce that duty by way of a mandatory order.

The statutory guidance.

51. In 2018 the Secretary of State issued "Early Education and childcare: statutory guidance for local authorities" ("**the 2018 Guidance**"). S7(2) CA provides that each local authority has a legal obligation to "*have regard*" to the 2018 Guidance. That duty does not mean that local authorities had an obligation slavishly to follow every aspect of the 2018 Guidance; but does mean that the Council had a duty to read, understand and consider the 2018 Guidance and only to depart from it for a good reason: see *R (The Pharmaceutical Services Negotiating Committee & Anor) v The Secretary of State for Health* [2018] EWCA Civ 1925 at paras 82 and 83. The 2018 Guidance was the current guidance at the time that the LGO issued his report and thus is the relevant guidance for present purposes. It has now been updated by 2024 Guidance as I note below.

52. The 2018 Guidance provided guidance about the fees that a nursery could charge when delivering FEEE hours as follows:

> *"**Charging***
>
> *Government funding is intended to deliver 15 or 30 hours a week of free, high quality, flexible childcare. It is not intended to cover the costs of meals, other consumables, additional hours or additional services.*
>
> *Local authorities should:*
>
> *A1.25 Ensure that providers are aware that they can charge for meals and snacks as part of a free entitlement place and that they can also charge for consumables such as nappies or sun cream, and for services such as trips and specialist tuition. Parents can therefore be expected to pay for these, although these charges must be voluntary for the parent. Where parents are*

unable or unwilling to pay for meals and consumables, providers who choose to offer the free entitlements are responsible for setting their own policy on how to respond, with options including allowing parents to supply their own meals or nappies, or waiving or reducing the cost of meals and snacks. Local authorities should ensure that providers are mindful of the impact of additional charges on the most disadvantaged parents....

A1.29 Ensure that providers are completely transparent about any additional charges, for example, for those parents opting to purchase additional hours or additional services.

A1.30 Work with providers and parents to ensure all parents, including disadvantaged families, have fair access to a free place, which must be delivered completely free of charge. Ensure that providers do not:

- *charge parents "top-up" fees (any difference between a provider's normal charge to parents and the funding they receive from the local authority to deliver free places).*
- *require parents to pay a registration fee as a condition of taking up their child's free place.*

A1.33 Work with providers to ensure their invoices and receipts are clear, transparent and itemised allowing parents to see that they have received their child's free entitlement completely free of charge and understand fees paid for additional hours or services."

The central issue: Are additional mandatory charges permitted under the statutory scheme?

53. The central dispute in this case is whether nurseries participating in the FEEE scheme are entitled to impose additional mandatory charges on parents. That dispute, in part, involves the Court determining the correct meaning of the words of the Guidance. Both counsel accept that the correct meaning of guidance is a

matter for the court. It is also agreed that guidance should be given a common sense meaning and that it should not be interpreted as if it were a statute: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983. It is the Council's case that the statutory scheme and guidance does not have the effect of requiring LAs to ensure that there are no compulsory charges and that there is no strict rule on exactly what goods and/or services must be free when delivered along with FEEE funded childcare. This, Mr Oldham KC submits, is because provision, and what is on offer, will legitimately vary across providers.

54. Mr Oldham KC relies on the fact that the Guidance refers to the provisions around charging as being matters that the local authority "*should*" do, not something that they "*must*" do. The difference between the words "*should*" and "*must*" is explained at the outset of the Guidance document. He submits that properly understood, para A1.25 of the 2018 Guidance does not say that charges to parents who access FEEE hours cannot be compulsory. He invites me to read the paragraph as meaning that local authorities should ensure providers know they can make charges and that parents can be expected to pay some charges. He also relies on the part of the Guidance which provides that, if parents don't pay charges, the nursery alone decides what to do to resolve that situation. Mr Oldham submits that one permissible option for a nursery is making such charges mandatory. A key part of Mr Oldham's argument is that the expression "top-up fees" should be strictly limited to the way that this expression is explained in the 2018 Guidance, namely that it can only mean "*any difference between a provider's normal charge to parents and the funding they receive from the local authority to deliver free places"*. Mr Oldham KC argues that a mandatory fee to cover, for example, "consumables" would not be a top-up fee and thus is not prohibited by the Guidance.

55. In contrast, Ms Slarks submits, in effect, that starting with the Guidance looks at the matter from the wrong end of the telescope. She submits that, in order to resolve the question as to whether additional mandatory charges are permitted, it is necessary to start with the statutory scheme. She submits that the primary aim

of the statutory scheme is set out in s7(1) CA, namely to provide early years provision to parents which is "*free of charge*". She relies on s20 which provides that early years provision means "*the provision of childcare for a young child*". She also relies on the wide definition of "*childcare*" in s18 CA which provides *"Childcare" means any form of care for a child and, subject to subsection (3), care includes (a) education for a child, and (b) any other supervised activity for a child"*. She relies on the fact that the provision of childcare is an activity which is regulated by Ofsted under a separate legislative regime. That regime sets the standards for those who are providing childcare and explains, for example, the minimum staffing ratios which have to maintained by a provider and the minimum specification for any premises used for providing childcare. In answer to Mr Oldham KC's objection that the CA does not define what is and is not included within the meaning of the term "childcare", Ms Slarks refers to the parallel system of Ofsted regulation of childcare and the fact that the 2014 Regulations make express reference for the need for nursery providers taking part in the FEEE scheme to have been awarded a grade of "good," or better, in the most recent early years provision inspection report published in respect of the provision: see Regulation 6(1) of the 2014 Regulations.

56. Thus, in summary, Ms Slarks says that the statutory purpose of the FEEE scheme is that qualifying parents should be able to access free childcare provision during hours that have been agreed between the nursery and the parents. She submits that this means that, as a minimum, qualifying parents are provided with a service from a qualifying provider under which they are able to drop their child off at the agreed time and pick the child up at an agreed time, with parents being assured that, whilst in the care of the provider, the child being cared for by the provider during those hours to a standard consistent with Ofsted requirements. Ms Slarks submits, that this service must be made available to qualifying parents "*free of charge*". She says that this means that qualifying parents cannot be required to make a payment for this service to the nursery or to anyone else. She then invites me to read the Guidance in the light of the statutory scheme.

57. Ms Slarks submits that the natural reading of the Guidance is consistent with her interpretation of the statutory scheme. Ms Slarks highlights the provision in the Guidance that, whilst it is open to a nursery to seek to charge parents for various aspects of the overall provision of childcare the Guidance states that "*these charges must be voluntary for the parent*". She submits that, although the word "must" appears within a paragraph which starts with the would "should", the word "must" is consistent with the statutory scheme and has been chosen deliberately. She submits that the meaning of the words "*these charges must be voluntary to the parent*" is crystal clear, especially when the paragraph went on to give examples of how the charges could be made voluntary to the parent.

58. I broadly accept the submissions of Ms Slarks on this point. In my judgment the primary statutory duty on local authorities is to ensure that FEEE hours are available to all qualifying parents of pre-school children on a "*free of charge*" basis: see s7(1) CA. The key point (as made by Mr X) is that if nurseries are permitted by local authorities to impose compulsory charges on parents as a condition of accessing FEEE hours then, by definition, FEEE funded childcare would not be free of charge to parents. A service which is only available to those parents who agreed to pay the additional fees cannot, in my judgment, be properly described as being a "free" service. Subject to one point, I have no difficulty in interpreting the Guidance in a way that is consistent with that legal framework.

59. The one area where there is a lack of clarity is over what the guidance refers to as "consumables" and it is not necessary for me to reach any final view on that issue in this judgment. Ms Slarks' full argument would lead to a conclusion that items which were consumed in a nursery which were part and parcel of the essential provision of childcare to the standards mandated by Ofsted are part of the service for which the provider is being paid by the local authority. That would tend to suggest that such items should not be part of a separate charge to parents. The childcare service would not be "free of charge" to parents if there was a mandatory charge for toilet paper, light bulbs or wet wipes. The point does not strictly arise in this case because the Nursery made it clear that the general charges of £1.84 per

hour for any hour which was utilised within core hours was not charged for defined consumables. It may be argued that the term "consumables" in the Guidance could have been intended to mean extra items which are consumed in a nursery for a particular child other than items which are part and parcel of the essential provision of childcare to the standards mandated by Ofsted. I do not express any final views on the extent to which "consumables" can or cannot be subject to additional charges because here the Nursery made it clear that the general charges were not for identifiable consumables and thus the point does not fall for a decision in this case.

60. It follows that, in my judgment, the LGO is right to submit that the arrangements set up by local authorities are required by the statutory scheme to ensure that FEEE hours are available to be accessed by qualifying parents without those parents being required to pay mandatory fees to the nursery provider. That interpretation is consistent with the terms of the model provider agreement. I also note that is what the agreement between the Council and the Nursery provided in this case. It would not, in my judgment, have been open to the Secretary of State to issue statutory guidance which sought to depart from that core element of the statutory scheme. The construction of the Guidance advanced by Mr Oldham KC on behalf of the Council would, in my judgment, have contradicted that core element of the FEEE scheme. I would therefore be reluctant to read the 2018 Guidance in that way unless forced to do so.

61. However, in my judgment and read as a whole, the relevant paragraphs of the 2018 Guidance (as quoted above) are consistent with the statutory scheme. These paragraphs make clear that FEEE hours must be available to be accessed by a parent (or parents) without a parent being required to pay anything to the nursery provider. In my judgment, Ms Slarks is right to say that the "*must*" in the sentence that charges "*must be voluntary*" means "must" in the sense explained in the Guidance, namely it is a requirement of the statutory scheme. The use of that word properly reflects the statutory scheme and thus draws the attention of local authorities to the fact that, under the statutory scheme that local authorities are

operating on behalf of the Secretary of State, any proposed charges for FEEE hours must be voluntary.

Is there a special meaning in the Guidance to the term "top-up fees"?

62. The 2018 Guidance uses the phrase "top-up fees" to refer to any charge imposed on qualifying parents to make up the difference between a provider's normal charges to parents who pay for childcare provision and the funding they receive from the local authority to deliver free places. That form of words seems to me to include mandatory fees which are charged to qualifying parents accessing FEEE hours which are intended to cover any of the general running costs of a nursery to meet Ofsted standards.

63. Mr Oldham KC argues that the LGO erred because a charge for consumables or attending additional activities cannot be a "top-up charge" because that is limited to a bridging sum to cover the difference between the government and private rate. Mr Oldham KC then argues that the expression "top-up fees" should not be interpreted to cover charges for goods or services provided by the Nursery, which he says was what was occurring here. I do not accept that submission for several reasons. First, as explained above, I do not accept that the charge here was wholly for additional goods or services. Part of it may have been justified as reflecting the cost of the nursery providing child yoga or boogie mites, but at least part of the charge was to meet general running costs. Secondly, parents who paid privately did not pay separately for child yoga or boogie mites, and thus, even on his case, this was a top-up charge.

64. Thirdly, Mr Oldham invited me to treat the words of the Guidance which refer to top-up fees in a way akin to the interpretation of a statutory provision and that the term "fees" had a different meaning to "charges". I do not accept that is right. Both words seem to me to refer to financial sums sought from parents who are accessing FEEE funded hours. Mr Oldham KC argued that nurseries had a general right to impose mandatory charges for anything outside that very limited definition. I do not accept that submission in relation to the facts of this case for a variety of reasons.

In my judgment, the Guidance should not be read as a statute and a general term such as "top-up fee" should not have a strained and limited meaning as Mr Oldham KC has suggested. For example, if funded parents were charged for "consumables" and privately paying parents were not so charged, the consumables charge would be a bridging charge and thus would be a "top-up" charge as that term as explained in the Guidance. I also note that the LGO's main criticism of the Council was that they had failed to recognise that the objectionable feature of the fees was that they were mandatory, and that the mandatory nature of the fees went against the statutory scheme and the Guidance. The term used by the LGO to describe these additional mandatory fees is only a secondary consideration which cannot make that primary conclusion unlawful.

65. It seems to me that the expression "top-up fees" in the Guidance can cover any additional compulsory fees that are levied on a parent in addition to the sums that the nursery are paid by the local authority. Looking at the 2018 Guidance as a whole it seems to me that the words "top-up fees" refer to any compulsory fee which the nursery seeks to require parents accessing FEEE hours to pay which has the effect of topping up the sums that the nursery receives from the local authority. It could thus apply to a fee for a meal which the nursery provides to the child, a fee for an extra activity or a general charge which seeks to bridge any part of the gap between the fee the nursery gets from the local authority and the fee that the nursery would charge parents on a private basis.

66. I therefore accept the submission of the LGO that both the statutory scheme and the Guidance provides that the duty on local authorities is required to ensure that, if a nursery is taking part in the state-funded FEEE scheme, parents must be able to access FEEE funded childcare without making additional payments. That means that arrangements between the nursery and parents have to be structured so that parents are able to refuse to pay any proposed charges for additional goods or services.

67. It does not seem to me that interpreting the statutory scheme and the Guidance in this way makes the FEEE scheme unworkable. Nurseries are private sector businesses and can chose whether the take part in the FEEE scheme or not. To take an example which was raised in argument, a nursery is fully entitled to charge parents for a meal provided to a child. But if the parent declines to pay that sum, the nursery must make arrangements under which the child can eat food provided by the parents whilst other children are eating the nursery provided food. If an additional charge is levied for provided yoga or a trip out to a local forest (one example raised in the papers), the nursery would be fully entitled to withdraw the child from that activity and provide the child with care elsewhere in the nursery where parents cannot or will not pay that additional charge. If a nursery elects to accept payment under the FEEE scheme for an hour's childcare, the statutory scheme imposes a duty on the local authority to ensure that parents have the ability to access that FEEE funded hour of childcare without being required to pay any additional sums to the nursery.

68. The 2018 Guidance has now been replaced by Guidance published in March 2024. The 2024 Guidance removes part of the paragraph which was in paragraph A1.25 of the 2018 Guidance which states that charges must be voluntary. I have been provided with a letter in which the government stated that it was not the purpose of the Guidance or to the 2024, I do not consider that it would be appropriate for me to express any view on the 2024 Guidance.

The Council's grounds of challenge.

69. The Council has raised multiple grounds of challenge to the Report and applies to add additional grounds. I will deal with the grounds in order.

Ground 1: Did the LGO misunderstand the statutory scheme.

70. The Council here submits that the LGO made an error of law in its approach to the statutory scheme because, as the case was put by Mr Oldham KC, it failed to understand that the 2018 Guidance recognises that if a parent with FEEE entitlement chooses to send their child to a provider during core hours, the provider

is entitled to charge an extra fee to cover its costs during those hours. For the reasons set out above, I do not accept that submission.

71. The Council also submits as part of this ground that, in effect, these were wholly matters between the Nursery and Mr X and the Council should not, in effect, be asked to intervene in such arrangements. I do not accept that the Council's role is as limited as the Council suggests. This is the ground on which Mr Ockleton refused permission. The Council sought to renew that application but in my judgment it is without merit. The Council has a public law legal duty under s7 CA to ensure that nursery providers who are part of the statutory scheme are providing childcare to eligible children "*free of charge*". It has entered into a contract with the Nursery under which the Nursery agreed to "*deliver the funded entitlements consistently to all parents, whether in receipt of 15 or 30 hours and regardless of whether they opt to pay for optional services or consumables*": see clause 2.2. It also agreed that "*Funded early education is part time place for each eligible child and must be completely free at the point of delivery*". I thus do not accept that the Council had no responsibilities in ensuring that the Nursery delivered on its commitments as part of the scheme. I thus refuse the Council permission on this part of its case.

Ground 2: Did the LGO confuse "top-ups" with other charges.

72. The Council submits that the LGO's final report did not reach any conclusion as to whether the charges which were labelled "general extras" were (a) charges which were intended to bridge part of the difference between the government rate and the private rate or (b) were genuine charges for additional services provided by the Nursery or consumables. I accept that is correct. However, there would only be an error of law by the LGO if the LGO needed to do so in order to resolve this complaint. In my judgment, criticising LGO over allegedly incorrect labelling of different types of mandatory charges does not assist the Council. It was sufficient for the LGO to conclude that the charges were mandatory (as it did) and that, in making mandatory charges, the Nursery was acting outside of the statutory scheme and in breach of the terms of its Provider Agreement with the Council. Once that conclusion was reached it was open to the LGO to conclude that it was maladministration for the

Council to have rejected Mr X's complaint and, by implication, not to have responded appropriately to the actions of the Nursery which was incorrectly imposing mandatory additional fees. The label given to those additional fees by the LGO does not seem to me to be particularly important.

73. The LGO was right in my judgment to conclude that any form of mandatory fee should not have been charged in connection with the provision of a FEEE hour. Further, reading the information provided by the Nursery (as set out above) I can fully understand why the LGO did not reach a conclusion as to whether the "general extras" were charged for extra activities such as yoga and boogie mites or, as an alternative, were charges to cover the general costs of providing childcare to Ofsted standards. A fair reading of the information provided by the Nursery tends to suggest the fee was intended to cover a mixture of both elements but the precise way that it was calculated was unclear. In my judgment the LGO rightly identified the compulsory nature of the fee as being the objectionable element and thus the question as to precisely what the fee was intended to cover was of less importance. In any event, as I have indicated above, it does not appear to me that the expression "top-up" fees in the Guidance should be limited in the way the Council submits. I therefore reject the Council's case under ground 2.

Proposed ground 2A: The Council's application to amend its grounds based on an alleged breach of the duty under section 26(6) of the Local Government Act 1974.

74. This issue comes before the court via a slightly unusual route. The Council accepts that it appreciated the s26(6) point prior to issue but decided not to raise this issue. Then, following the grant of permission, the Council changed its mind and applied for permission to amend its grounds on the basis that it now wished to take the point. In response the LGO accepted in writing that this ground of challenge had merit and offered to quash the report on this ground alone and reconsider Mr X's complaint. The Council were not prepared to proceed on that basis unless the LGO also accepted that the report should be quashed based on its substantive grounds relating to mandatory charges. The LGO was not prepared to agree that the report

should be quashed on those additional grounds and thus there was no agreement between the parties. The case thus proceeded to a hearing.

75. At the opening of the case, I raised the question as to whether the LGO's correct acceptance that there was a legal error in the way that this investigation and report writing process were undertaken would not necessarily lead to the Council being given permission to amend and a quashing order because of provisions in s31 of the Senior Courts Act 1981 ("**the SCA**"). Once that issue was raised the LGO reflected on the impact of section 31 SCA and changed its position. The LGO now submits that, notwithstanding it accepted that there had been an error of law, the Court should not give permission to the Council to raise this issue because it would make no difference to the outcome for the Council, or if permission is granted then no relief should be provided. It is fair to say that the Council, through Mr Oldham KC, was strongly resistant to the LGO changing its position. He submitted with considerable force that both the Court and the LGO were in error in suggesting that the court should look at this issue through the prism of s31 SCA or he strongly resisted the suggestion permission should be refused on the ground that the outcome for the Council would be unchanged.

76. Section 26(6) of the Local Government Act 1974 provides:

> "*(6) A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say, ...*
>
> > *(c) any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law:*
>
> *Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it"*

77. The reason for this rule was explained by Lord Denning MR in *R v Local Commissioner for Administration for the North and East of England ex parte Bradford Metropolitan City Council* [1979] QB 287, at 310 where he said:

> *"Parliament was at pains to ensure that the commissioners should not conduct an investigation which might trespass in any way on the jurisdiction of the courts of law or of any tribunals."*

78. It is clear that s26(6) should be given a wide meaning, as explained by Stuart-Smith LJ in *R (Milburn) v Local Government and Social Care Ombudsman* [2023] EWCA Civ 207 who said at paragraph 60:

> *"It seems to me that the most natural meaning to be given to section 26(6)(a) is that it excludes the jurisdiction of the Ombudsman when there may be an overlap and consequent risk of trespass between the issues that may be raised for determination in Tribunal proceedings, on the one hand, and that may be raised by the prospective investigation, on the other. Dealing always with substance (and trying not to be distracted by tendentious formulations) this means that the forbidden overlap is not merely in relation to the main subject or substance of the appeal (as was the case in ER) but includes those ancillary issues that may fall to be decided by the Tribunal. Trivia may, of course, be ignored. But, typically, matters that arise in the course of Tribunal proceedings, such as procedural failings or conduct that is said to be in breach of the Rules, practice directions or directions or that is said to be unreasonable, are included within the ambit of section 26(6)(a)"*

79. The Council's proposed amended pleadings advance the case that it would have been open to Mr X to have commenced judicial review proceedings "*on whether the Council failed to comply with its statutory obligation in respect of FEEE and/or departed unlawfully from the Guidance*". In this case a ground based upon a complaint that the LGO wrongly disallowed the Council to depart from Guidance was not pursued in these proceedings. Thus, the real issue is whether the LGO

should have refused to investigate Mr X's complaint because it ought to have realised that Mr X could have brought judicial review proceedings against the Council on the basis that it had failed to comply with its statutory obligations in respect of FEEE.

80. It was not part of the Council's proposed amended pleadings that the LGO ought to have realised that Mr X had a private law remedy in that he had a cause of action to sue the Nursery in the small claims court in order to recover any sums paid by way of charges which Mr X contends should not have been levied. In written submissions put in between the first and second day's hearing Mr Oldham sought to amend his position by arguing that the LGO ought to have considered whether Mr X did indeed have a separate private law cause of action against the Nursery on either the grounds that the term of the contract which provided for recovery of those sums was unenforceable or in restitution. As a matter of case management, I am not prepared to allow the Council to change its proposed case at such a late stage, particularly where the question as to whether Mr X might or might not have such a cause of action is hugely legally complex because he was a party to a legal contract with the Nursery under which he agreed to pay the fees for general extras if he booked core hours for his daughter and he has paid those fees. I propose to rule on this matter on the basis of the proposed pleaded case. It would, in my judgment, be a breach of the duty to maintain procedural rigour in judicial review proceedings as set out by the Court of Appeal in *R (Talpada) v The Secretary of State for the Home Department* [2018] EWCA Civ 841 to allow the Council to expand its case beyond the pleaded case.

81. It is common ground that the LGO failed to examine the question as to whether s26(6) applied to this complaint. On that basis, the LGO accepted in open correspondence that it was responsible for a material error of law in the way that this complaint was adjudicated upon. The LGO offered to quash the report on that basis alone but, as explained above, that offer was not accepted by the Council.

82. The Council's case is that Mr X could have brought a Judicial Review action against the Council seeking to quash the adjudication on his complaint either because the Council had failed to follow the proper procedure under the Complaints Regulations or on the basis that the Council had failed to appreciate that the imposition of mandatory fees by the Nursery was a breach of the terms of the FEEE scheme and a breach of the terms of the Council's contract with the Nursery. Given my findings under grounds 1 and 2 above, I accept that Mr X would have had good prospects of success in such a claim.

83. Part of Mr X's complaint was a claim for reimbursement of the sums he was required to pay to the Nursery by way of general charges. As I explain below, the LGO has now accepted that the Council should only have to reimburse Mr X for those fees from the date of his complaint. Any fees he paid prior to that date do not need to be reimbursed. Whilst it is trite law that a public law wrong does not give rise to a private law right to damages for any loss suffered by a claimant, a claimant is nonetheless entitled to include a claim for damages within a judicial review claim if "*the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application*": see 31(4)(b) of the Senior Courts Act 1981. It seems to me that it was arguable (and I put the matter no higher) that, if the Council had realised that the Nursery were acting wrongly in charging fees when Mr X complained, the Council could have used its influence or contractual powers to stop those fees being charged. It may therefore be (just) arguable that Mr X would have had a claim in restitution arising out this public law wrong following cases such as *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB).

The legal effect of the LGO's error.

84. The effect of a breach by the LGO of the duty under s26(6) has recently been considered by the Court of Appeal in *R (Piffs Elm Ltd) v Commission for Local Administration in England & Anor* [2023] EWCA Civ 486. The facts of that case are somewhat complex but they led to the LGO submitting that a failure by the LGO to

consider s26(6) meant that a report produced by the LGO without having taken that step was produced without jurisdiction and thus should be quashed. Laing LJ said at para 111:

> *"If the Ombudsman fails to consider the issue posed by section 26(6)(c) in a case in which it arises, he errs in law, and any subsequent investigation or report would be made without jurisdiction. As this is a jurisdictional question, it does not matter whether or not the Ombudsman considers it at the time. Any court which later considers the decision-making process must decide, as an objective question of law, whether the Ombudsman had jurisdiction, regardless of his own approach to the question. The jurisdictional bar is to be given a wide construction: see, in relation to the analogous provision in section 26(6)(a), R (Milburn) v the Local Government and Social Care Ombudsman [2023] EWCA Civ 207."*

85. I thus accept that (a) the LGO erred in law in failing to consider s26(6), and (b) that, as consideration of the issues under s26(6) is a matter of jurisdiction, the effect of this error was that this report was made without the LGO having, at that time, any legal power to hand down a report.

86. Section 31(2A) SCA provides:

> *"The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review, and*
>
> *(b) may not make an award under subsection (4) on such an application,*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"*

87. That provision is supplemented by s31(3C) and (3D) SCA which provides:

> *"(3C) When considering whether to grant leave to make an application for judicial review, the High Court—*
>
> *(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and*
>
> *(b) must consider that question if the defendant asks it to do so.*
>
> *(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave"*

88. The duty under s31(2A) and (3C) SCA is placed on the court. Although I was not initially invited by the LGO to ask myself whether it was "*highly likely that the outcome for the applicant would not have been substantially different",* I considered it appropriate to undertake the exercise under s31(3C)(a) SCA on the basis that the underlying policy of the section suggests that the time of the Court should not be used to investigate and adjudicate on errors of law which are highly unlikely to make any difference in practice. Thus, whilst I fully accept that the LGO ought to have asked itself the s26(6) question and that it erred in law in not doing so, it would be inappropriate for the court to investigate this ground of challenge if it was highly likely not to have affected the outcome.

89. Mr Oldham KC argued that s31 has no application because, if the amendment is permitted, the "outcome" for the Council would be that this particular report would be quashed because it was made at a time that the LGO had no jurisdiction to issue a report. In contrast, Ms Slarks submits that the term "outcome" in s31 is not limited to the immediate outcome of the judicial review action but the wider question as to whether, if this particular report were to be quashed and the LGO

was required to reconsider Mr X's complaint, it is highly likely that the LGO would (a) have reached the decision that it was unreasonable to have expected Mr X to issue judicial review proceedings against the Council as an alternative to making his complaint and (b) having got the law right on the issue of mandatory fees, there is no reason to think that the LGO would not issue the same or substantially the same report.

90. Step (a) in Ms Slarks' reasoning seems to me to be plainly correct. It seems to me totally fanciful to suggest that, if the LGO had undertaken this process, she would have concluded anything other than it would have been unreasonable to have required Mr X to issue judicial review proceedings as an alternative to considering his complaint. I accept Ms Slarks' submission that I can be confident looking at the matter as a whole that, it was highly likely that, if this matter had been considered, the LGO would have not have insisted that Mr X issued judicial review proceedings. I reach that conclusion for several reasons. First, I accept Ms Slarks' point that the LGO has adjudicated on many complaints of this type before and has never suggested that, instead of complaining to the LGO, the complainant should seek a remedy by way of judicial review instead. Secondly, the LGO would have been bound to consider that judicial review proceedings would have involved Mr X in a substantial amount of work and expense and would have exposed him to a serious potential adverse costs order which was wholly out of proportion with the amounts of money he was complaining about. Whilst I have no direct evidence on the matter, it seems to me almost inevitable that the LGO was highly likely to have concluded that it would not have been reasonable to expect Mr X to have exposed himself to that costs risk in judicial review proceedings.

91. Thirdly, the LGO would have had regard to the often stated policy of the Courts that judicial review should be a remedy of last resort and that where a complainant has an alternative remedy, the complainant should use the alternative processes as opposed to seeking an adjudication from the High Court. This court has consistently emphasised that judicial review is a remedy of last resort, and it is only in exceptional cases that permission will be given if the Claimant has an alternative

remedy: see *R (Cowl & Ors) v Plymouth City Council* [2001] EWCA Civ 1935 [2002] WLR 803 and *R (Archer) v Commissioner for HM Revenue and Customs* [2019] EWCA Civ 1021, [2019] 1 WLR 6355. This approach is confirmed in the Administrative Law Guide 2024 which provides at paragraph 6.3.3.1:

> *"Judicial review is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review"*

92. The "alternative remedies" referred to in the Administrative Law Guide include complaints procedures, and thus must include matters being dealt with by the LGO. I thus consider that, if the LGO had considered this matter properly (as she accepts she ought to have done), it is highly likely if not inevitable that the LGO would have concluded that any application by Mr X for judicial review against the Council would have been refused permission because the court would have considered that Mr X had an appropriate and more convenient other remedy, namely continuing his complaint against the Council through the LGO.

93. I also accept that, if the LGO had properly considered the matter and gone on to adjudicate on the issues on its merits, the LGO would be highly likely to have produced very largely the same report as the report that was provided to the Council and Mr X in this case. As I indicated above, the LGO got the law right in its analysis and was justified in saying that the Council was wrong to have rejected Mr X's complaint. If the LGO had to reconsider and produce a fresh report, there is no basis for suggesting that the conclusions of the report would be changed.

94. It seems to me that the words "*outcome for the applicant*" in s31(3C) means the outcome of the LGO's adjudication process and not just the outcome within the judicial review process: see *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161 at para 55. Thus, it seems to me

that the Defendant has shown that it is highly likely that the outcome for the Claimant would not have been any different.

95. However, even outside s31, I would have refused permission to the Claimant to amend on the twin ground that this amendment was made at too late a stage and that, given that the parties agree that I should rule on the other issues in the case in any event, the question as to whether this report should be quashed and a near identical one is published at a later date makes this issue academic. Prior to the recent changes to s31, the Court of Appeal addressed this issue in *R (FDA) v Secretary of State for Work and Pensions and another* [2013] 1 WLR 444. Lord Neuberger said at para 69:

> *"There is, in theory at least, a possibility that, even if the court concludes that it ought otherwise to set aside a decision on the ground that a legally irrelevant factor was taken into account, it can none the less uphold the decision, if it is satisfied that it would be pointless to require the decision-maker to reconsider the question afresh, because he would reach the same answer"*

I consider that where, as here, the dispute was essentially one of law rather than administrative discretionary decision making, it would be pointless to quash this report and to ask the LGO to reconsider the matter because it is highly likely, if not inevitable, that the LGO will produce the same report again. Thus, for all those reasons, I refuse permission to the Council to amend its grounds so as to raise this point.

96. This point seems to me of considerable importance to the LGO because there is no limit on the types of "remedy by way of proceedings in any court of law" in s26(6). I thus accept that s26(6) applies to judicial review proceedings as much as it applies to private law causes of action. It thus follows that the LGO is under a duty to consider s26(6) in every complaint of maladministration which also potentially amounts to a breach of the local authority's legal duties in every case referred to it.

Ground 3: Pre-determination and apparent bias.

97. Pre-determination and bias are related but are not the same concepts. It is clear that a report by an Ombudsman can be quashed if the court were to find either pre-determination or bias: see *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144 [2018] PTSR 801. In that case Sir Ernest Ryder, who gave the lead judgment, adopted the test for pre-determination formulated by Jackson LJ in *Lanes Group v Galliford Try Infrastructure* [2011] EWCA 1617 where the Judge held at paragraph 45 that:

> *"Pre-determination arises when a judge or other decision maker reaches a final conclusion before he or she is in possession of all the relevant evidence and arguments."*

98. In the context of an Ombudsman, the Judge said at paragraph 62:

> *"The question is whether a fair-minded and impartial observer would conclude that the ombudsman had pre-determined the outcome of the complaint both at the outset of the investigation and at the Draft Report stage"*

99. In order to deal with this ground, it is necessary to say a little about an earlier case in which the LGO had to deal with a complaint about a nursery which charged fees to a qualifying parent who was provided with childcare by a nursery under the FEEE scheme, and a Press Release that the LGO put out following the adjudication in that case.

The LGO Leicestershire County Council decision.

100. The earlier case involved an investigation by the LGO into a complaint against Leicestershire County Council ("**LCC**"), under the LGO's reference number 19 004 977. In that case the LGO found that Kiddi Caru Day Nursery and Preschool in Market Harborough had been charging a parent who was provided with childcare by a nursery under the FEEE scheme an additional £1.08 per hour. Paras 11 and 12 of the LGO's report dated 21 October 2001 said:

“The guidance says the free places must be delivered completely free of charge. Councils should ensure that providers do not charge parents “top-up” fees (any difference between a provider’s normal charge to parents and the funding they receive from the local authority to deliver free places). ***(Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.30).***

12. Providers can charge for meals and snacks, and consumables such as nappies or sun cream, as part of a free entitlement place, although these charges must be voluntary. ***(Early education and childcare. Statutory guidance for local authorities published by the Department for Education in June 2018, paragraph A1.25)”***

The LGO then found fault with LCC in failing to ensure that this top-up charge was removed. It follows from the conclusions set out above that these paragraphs and the eventual decision correctly set out the relevant legal framework and properly interpret the Guidance.

The LGO Press Release.

101. The LGO also issued a Press Release dated 28 January 2021 to highlight the consequences for other local authorities of this adjudication. This Press Release said:

“The [LGO} is urging councils to have better oversight of nurseries offering free early years places, after a nursery chain was found to be charging Leicestershire parents a ‘top up’ fee.

Government guidance states that the free places must be free but Kiddi Caru nursery in Market Harborough charged parents the difference between the

amount Leicestershire County Council paid the chain for the places and the amount they charged private customers. .....

Michael King, the [LGO] said:

> *"Whilst I acknowledge local authorities - on the early years sector - are struggling financially, the government's intentions have always been that these places are provided free of charge to parents, and it is up to local authorities to administer them accordingly.*
>
> *Guidance states that council should work with providers to ensure invoices are clear, transparent and itemised. Free must mean free, but in this case it was not possible for the man to see how the invoice was calculated or whether his daughter was receiving her entitlement free of charge.*
>
> *We are concerned that local authorities may not be delivering on the government's pledge to parents, so I would urge other councils across the country to check their processes to ensure providers in their area are not making the same errors"*

102. In my judgment, this adjudication applied the law correctly and the LGO was perfectly entitled to issue this Press Release. I would only observe that it is somewhat unfortunate that its clear messages not only failed to be heeded by staff working in other local authorities but, as can be seen below, were not heeded by staff working for the LGO, because a stream of further LGO reports were published following the issue of this Press Release which were inconsistent with the reasoning set out in this Press Release.

The Draft Reports.

103. The LGO produced three draft reports and invited the Council to comment on each iteration of the report. The first draft report was dated 14th July 2021, a

second draft was dated 6th January 2022 and a third draft report was dated 15 June 2022. At each point the Council were invited by the LGO to comment on the draft Report's conclusions. As noted above, the final report was dated 10th October 2022. It is correct, as the Council observed, that reference was made in each of the reports to the January 2021 Press Release.

104. In paragraph 44 of the Grounds, as part of the bias and/or predetermination case, the Council complained about paragraph 24 of the first draft report. This paragraph and the preceding two paragraphs set out the LGO's view that mandatory charges may not be imposed on parents accessing FEEE hours. Para 23 said:

> *"TOPS is free to restrict take up of free places to non-core hours, in line with the guidance which states that providers may not be able to offer fully flexible places. However, the Council has failed to advise Tops that if it wishes to allow parents to use their FEEE during core hours it may not then impose a mandatory additional charge when those places are taken up.*
>
> *Mr X has suffered injustice in that he has been wrongly charged, and paid top up fees. Mr X share it is invoices from Tops with me. I recommend that the general extras fees be refunded"*

105. The Council, in its Statement of Facts and Grounds, complained about this part of the draft report. It claimed that the draft report contained the following inaccuracies:

> *"The First Draft said at [24] that Mr X had "paid top-up fees" (note, not "disguised top-up fees") because the Council had "failed to advise" the Nursery that it could not impose mandatory charges for Extras during core hours. That was incorrect for at least three reasons: first, the Guidance recognised that the Nursery could charge whatever it wished during core hours and the Nursery was acting more generously towards parents*

exercising the FEEE during core hours in making only charges for Extras mandatory and not charging its full commercial rate; second, the Council had not "failed to advise" the Nursery in any respect, since the Provider Agreement accorded with the Guidance (paragraph 25 above); and third, this case had nothing to do with top-up fees in any event since top-up fees are different from charges for Extras"

106. This paragraph makes complaints which are based on a misunderstanding of the legal framework applying to the FEEE statutory scheme. It is not correct to say that "*the Guidance recognised that the Nursery could charge whatever it wished during core hours"*. That sentence is only correct in respect of privately paying parents. Further, as the draft report acknowledged, the Nursery was not obliged to offer FEEE funded hours during its self-defined core hours. However, if the nursery did offer parents the ability to access FEEE funded hours during its core hours, it was obliged by its contract with the Council to offer those to parents free of charge (see clause 11.1 on the contract between the Council and the Nursery). Thus, it is an inaccurate complaint to assert that the Nursery was acting "*more generously… in making only charges for Extras"*. The correct position is that, in making these mandatory charges, the Nursery was breaching the terms of the FEEE scheme and was acting in breach of the terms of its contract with the Council. The second complaint is also without merit because the LGO was justified in criticising the Council, which was on notice that the Nursery was acting in breach of the terms of its contract with the Council, in failing but to take appropriate action in response to that breach. Finally, I reject the criticism that this case has "*nothing to do with top-up fees"*. The charge for general extras was only levied on parents accessing FEEE hours and did not apply to parents who paid the Nursery's standard charges. It was thus a top-up fee as it sought to bridge the gap between the income the Nursery got from privately paying parents and its income for providing hours under the FEEE scheme.

107. The Council also complained that the draft report said that the Council "*must follow the Guidance*". The Council objected that this was legally erroneous. I

note that the final report said at paragraph 7 that the Council must follow the Guidance unless it has a good reason to depart from the Guidance. The Council obtained permission to advance a ground relating to departing from Guidance but that has not been pursued. No complaint is now made about the wording in paragraph 7 of the final report. In those circumstances, there is nothing in this point save that it supports the case made by the LGO that, in sharing the draft reports with the Council, the LGO was genuinely seeking a response from the Council and was prepared to make changes to the report where the Council showed that a change was appropriate.

108. The Council's Statement of Facts and Grounds makes similar complaints about the second and third draft reports. In my judgment the additional complaints made about further drafts do not add anything material to the complaints made about the first draft. In summary, the Council continued to complain that the LGO was wrong to conclude that charging FEEE parents mandatory fees were not permissible whereas, in my judgment, that was a correct position in law and the LGO was thus entitled to adjudicate on the complaint on that basis.

109. The core of the Council's complaint about bias and/or predetermination is at paragraphs 69 and 70 of the Statement of Facts and Grounds which says:

> *"69. From the start of the investigation, the LGO has proceeded on the basis that "free must mean free": paragraph 44(1) above. This was because the investigators seem to have thought that they should act in accordance with their understanding of what Mr King said after the Leicestershire top-up case. Mr King was the former LGO, and the former head of the organisation for which the investigators worked.*
>
> *70. For reasons explained at paragraph 26-8 above, this was a serious oversimplification. But it led the investigators to a blinkered and incorrect view of the facts and how the Guidance should apply. Their view that the*

Nursery had in some way acted contrary to the Guidance, whether by way of a "top-up" or "disguised top-up" or in some other way, was pre-determined"

110. In my judgment, the complaint that the approach of the LGO demonstrated bias or predetermination in sticking to its view of the relevant legal framework is misconceived. I noted the common ground above that LGO is under a duty to understand the relevant statutory scheme underpinning the decisions that the Council has made and, in assessing whether the Council is guilty of maladministration, the LGO needs to understand what the Council is required to do and where it has room for making discretionary decisions. The Council's real complaint here is that the LGO allegedly had a closed mind to the Council's arguments that, as a matter of the proper construction of the FEEE statutory scheme, the Nursery was entitled to impose mandatory charges. There are two separate answers to that point advanced by the LGO. First, Ms Slarks says that the reports were clearly marked as being in draft and the LGO was genuinely open to making changes if it was persuaded that changes were appropriate. She relies on the changes which were made in response to each draft, including the change in respect of the Council's duties in relation to Guidance. I accept that submission. That is a complete answer to the bias or predetermination case.

111. However, her second submission is that a decision maker cannot be guilty of bias or predetermination if it correctly describes the legal framework in a draft report and then does not change its view of the correct legal framework in response to representations that try to persuade the decision maker to adopt a different and incorrect view of the relevant legal framework. It seems to me that this submission must be correct and is apposite here. A decision maker such as the LGO has a duty to understand and apply the relevant legal framework. This is not an area of discretionary judgment but is a duty on the LGO. I accept that the Council had a different view of the relevant legal framework here and sought to persuade the LGO that their view was correct and that, as a result, the mandatory charges imposed by the Nursery were permissible under the statutory scheme. On this issue, for the reasons set out above, the Council were incorrect in their

analysis and the LGO was correct. In those circumstances, the LGO cannot have been biased or be guilty of predetermination when it followed a decision-making process which allowed the Council the opportunity to make representations on the relevant legal framework and then rightly rejected them. I thus reject the Council's case under ground 3.

112. If this was a case about an evaluative assessment of the merits of the Council's response to the Nursery's conduct then there could have been some merit in the Council's objections. However, in my judgment, that is not the case. It was very clear from an early stage that the Nursery was imposing mandatory fees on Mr X as a condition for accessing FEEE supported hours. The Council knew that was the case but nonetheless dismissed Mr X's complaint. It can only have done so based on the mistaken basis that imposing mandatory charges did not amount to a breach of scheme and that there was no breach by the Nursery of its agreement with the Council. However, for the reasons set out above, I have concluded that any form of mandatory charges were not permitted by the FEEE scheme.

113. Contrary to the submissions advanced on behalf of the Council, I do not consider that there is any evidence of bias or pre-determination in the LGO's approach to a case involving mandatory fees. On the contrary, and contrary to the position of the Council, I consider that when approaching the facts related to this complaint, the LGO had a proper understanding of the statutory scheme and was entitled to approach this case on the basis that the Council ought to have realised that any proposed changes were required to be voluntary. What was in dispute here was whether it was a breach of the terms of the statutory scheme for a nursery provider to charge mandatory fees. The LGO had decided in the Leicestershire case that mandatory fees were impermissible. Whilst the Council disagreed, in my judgment that disagreement was based on a misunderstanding of the statutory scheme. What was at stake here was an issue of law, not an issue of evaluative assessment. I don't accept that the LGO can have been guilty of either bias or predetermination on the basis that it approached this case with a correct understanding of the legal framework in contrast to the Council's misunderstanding of that framework.

114. I accept the Council's case that the LGO approached this investigation on the basis that mandatory charges were not permitted by the statutory scheme. That is, as I read it, what is meant by the expression "free must mean free". However, in my judgment that was a correct approach because this was the core element of the statutory scheme. Hence the LGO was entitled to approach the case in that way. It cannot be unlawful for the LGO to approach an investigation with an accurate understanding of the statutory scheme.

115. That also means that the Council's case on bias must be dismissed. An adjudicator cannot be biased by approaching a case with a proper understanding of the statutory scheme applying to the duties placed on the Council.

New ground 3A: Inconsistency.

116. The Council applies to amend its Grounds to plead that the LGO acted unlawfully in this case by failing to act consistently. The Council refers to a case involving Trafford Borough Council in its proposed amended grounds. The core paragraphs of that decision, which also concerned mandatory fees imposed on a parent accessing FEEE funded hours, were as follow:

> *"23 The nursery is entitled to charge for consumables and it is for the nursery, not the Council, to decide how to respond if parents are unable to pay or do not want to pay the charge.*
>
> *24 The nursery has decided to waive the charge for children who are eligible for the early years pupil premium. As Mr F is not eligible, the nursery is entitled to charge him for consumables. There is no fault by the Council"*

117. The LGO accepts that the decision in the Trafford case was wrong and is inconsistent with both the statutory scheme and the decision reached in the present case. The LGO also accepts that the LGO has made a series of other decisions, both before and after the decision in this case, where parents have

complained about mandatory fees imposed on them when accessing FEEE funded hours. The Council claims that these inconsistencies mean that the present report should be quashed. The Council's proposed case is:

> *"75E. Contrary to these reports, the LGSCO in the current case decided that, so far from charges being a matter for the nursery, the Council had somehow to force the Nursery not to charge.*
>
> *75F. This inconsistency is contrary to the fundamental rule, derived from the obligation act to rationally and not capriciously, that decision makers, particularly quasi-judicial decision makers such as the LGSCO, should make consistent decisions. Furthermore if the LGSCO does not act consistently, parents, nurseries and local authorities will not know what rules or norms they are expected to be guided by"*

118. The LGO advances a number of defences to this ground. First, she submits that it is too late to advance a new ground. She accepts that these decisions were only supplied recently by the LGO to the Council but submits that they were all published decisions that were available on the LGO's website. Ms Slarks thus submits that undertaking research into past decisions was as easy for the Council as it was for the LGO. I accept Ms Slarks' submission that, in the absence of a challenge based on consistency with other reports, there was no duty on the LGO to make disclosure of other reports. However, although these reports were publicly available, as permission has been given and the approach of the LGO is under judicial scrutiny, the fact that the parties have only recently alighted on this point is not, of itself, strong enough to justify refusing to look at this ground on its merits.

119. Secondly the LGO submits that these cases all turn on their own facts and that different decisions are justified by different facts. I do not accept that submission. The alleged, and to a large extent admitted, lack of consistency is about the LGO's understanding of the legal framework applying to these complaints. In summary the Council's case is that the LGO has failed to adopt a consistent approach and

has thus reached inconsistent decisions in different cases. To that extent, Ms Slarks accepts the substance of the Council's case because the LGO now accepts that a significant number of these decisions were taken by applying principles which were different to the principles applied in the instant case.

120. I accept the Council's submission that the reports show clearly that no consistent approach has been taken by the LGO concerning the operation of the statutory FEEE scheme, about whether mandatory fees for consumables or additional services are permissible and what was or was not expected of a local authority where a nursery has charged mandatory fees which ought not to have been charged. Ms Slarks frankly accepts that, some of the decisions were simply wrong because the LGO either misunderstood the relevant statutory framework or failed properly to apply that framework to the facts. Whilst there are times when an LGO report has adopted the same approach as demonstrated in this case, it is common ground that the LGO has produced a series of other reports that are not consistent with each other and are not consistent with the LGO's present understanding of the FEEE legal framework. There have been substantial delays in bringing this case to trial and I also accept the Council's point that some of those inconsistent prior reports pre-dated the report examined in this case and others post-dated this report.

121. The Council prays in aid the principles set out in *Matadeen v Pointu* [1999] 1 AC 98, para 109 where the Privy Council said:

> *"Is it of the essence of democracy that there should be a general justiciable principle of equality? ... Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational."*

122. I note however, Lord Hoffmann said as follows in the same case:

> *"… Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied." (see now the current edition of De Smith's Judicial Review 8th ed (2018) paras 11.061ff)"*

123. *Matadeen* was a Privy Council case and that case must be seen through the prism of the decision in *R (Gallaher Group Ltd & Ors) v The Competition and Markets Authority* [2018] UKSC 25 ("*Gallaher ")* where Lord Carnworth said at 24:

> *"Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said in the passage relied on by the appellant (para 19 above), is a "generally desirable" objective, but not an absolute rule"*

124. It was common ground that the need for an element of consistency should be treated as an aspect of rational behaviour by public law decision makers. Thus, the

key question is not whether the decision maker has acted inconsistently but whether the decision maker has rational grounds for any inconsistency. Where a public body acts inconsistently, the first question is whether the public body has a rational reason for acting in the way that it did. In this case in summary the LGO says that she departed from previous decisions because she reached a final and settled view of the legal framework relating to the FEEE scheme and that, as a result, she declined to follow previous decisions which applied a different legal framework or which were inconsistent with her now settled understanding of the legal framework. As I mentioned above, it is common ground that the LGO is required to understand the relevant legal framework when making decisions and thus changing the LGO's approach away from approaches taken in prior reports to comply with that duty cannot be irrational.

125. Thus the Council would only have a ground to complain if the LGO's conduct gave rise to conspicuous unfairness amounting to irrationality given the way that the public body has acted to date. The principles established in *Gallaher* mean that a public body is not legally bound to act in precisely the same manner as it has in the past. It can treat apparently like cases differently as long as it has a rational reason for the difference of treatment. In this case the LGO is following the line set out in the LCC case, as confirmed in a Press Release. This Council and other local authorities were thus on notice that this was how the LGO saw the obligations on local authorities in relation to additional charges being imposed on parents who were accessing FEEE funded childcare. Whilst I accept that the LGO has not consistently followed the approach set out in the Press Release in subsequent decisions (as it ought to have done), I do not accept that it was conspicuously unfair for the LGO to decide this case in a way that was consistent with the LCC Press Release.

126. Ms Slarks makes two further points in relation to this ground, both of which I accept. First, she submits that the only LGO report which is being challenged in these proceedings is the one published in response to Mr X's complaint. No challenges have been made in respect of other LGO reports. The fact that the LGO now

accepts that these decisions were made applying an incorrect legal framework does not mean that they fall to be quashed in these proceedings. Those other reports have not been the subject of any timely challenge. Secondly, she relies on *R (Piffs Elm Ltd) v Commission for Local Administration in England & Anor* [2023] EWCA Civ 486 for the proposition that, once the LGO has published a final report, the LGO is *functus officio* and has no power to re-write an earlier report, even if the LGO subsequently reaches the view that the conclusions reached in those reports were based on a misunderstanding of the relevant statutory scheme.

127. As a result of these proceedings, I am told that the LGO has now settled its position concerning the legal framework applying to mandatory additional fees charged to parents accessing FEEE funded childcare. I have decided that the LGO has, in making this decision, properly understood the legal framework. That might lead the LGO to reflect on whether to continue to publish existing decisions which contradict that position or to add a caveat to those published decisions to the effect that they may not reflect the correct legal framework. However embarrassing it may be for the LGO to have to admit to having published a series of past decisions which failed to reflect the correct legal framework, I cannot see that that justifies the quashing of a report which is based on a correct understanding of the legal relevant framework.

Ground 4: departure from Guidance.

128. Mr Oldham KC obtained permission on ground 4, namely a failure by the LGO to accept that there were good reasons for a departure from the Guidance. However, he did not press that ground and I dismiss it.

Ground 5: Complaints about the terms of the LGO's recommendations and publication.

129. Having found that Mr X suffered an injustice, the Report made the following recommendations:

"37. We recommend that within one month of the date of this report the Council:

- *reimburses Mr X for any "general extras" fees he has paid the nursery to date;*
- *pays Mr X £200 to compensate for his time and trouble in bringing the complaint;*
- *apologises to Mr X*
- *asks the nursery to change its pricing policy so that it is in line with the Guidance and the Provider Agreement. If the nursery refuses to change its pricing policy, the Council should consider its powers to terminate the agreement and withdraw funding in whole or in part; and*
- *send a letter to other FEEE providers in its area and inform[s] them of our decision and reminds them of its expectations in terms of pricing.*

38. The primary purpose of this report was to examine the wider public interest issues raised by this complaint. Having done that, or expectation is that the Council will focus from here forwards on addressing the underlying faults identified in its contracts for free early years entitlement, and its complaint handling. We do not anticipate conducting further investigations into the same issue, unless the Council fails to address the concerns we have identified, or unless we decide there is significant personal injustice in other complaints we see. Instead, we expect the Council to learn lessons from this complaint to improve service for all residents in future."

130. Those recommendations are attacked in Ground 5 which submits that the LGO erred in the way that it made its recommendations. Mr Oldham accepted that the effect of ss 30(1A) and 31(2A) of the 1974 Act was that the LGO was empowered to make recommendations under s 31(2BA). Section 31(2BA) provides:

"(2BA) Where the report relates to a failure in, or to provide, a service which it was the function of the authority to provide, those recommendations are recommendations with respect to action which, in the Local Commissioner's opinion, the authority concerned should take—

(a) to remedy any injustice sustained by the person affected in consequence of the failure, and

(b) to prevent injustice being caused in the future in consequence of a similar failure in, or to provide, a service which it is the function of the authority to provide"

131. Mr Oldham accepted that s31(2BA) gave the LGO a broad discretion about the type of recommendation that it could make but he makes a series of complaints about the following individual recommendations.

Ground 5A: The compensation recommendation.

132. The report recommended that the Council "*reimburses Mr X for any "general extras" fees he has paid the nursery to date"*. In its grounds the Council submitted that, under s 26B, the time period for making a complaint to the LGO is 12 months from the point at which the complainant becomes aware of the matter, subject to the LGO's power to extend time. It thus argued that, since there is a presumptive time limit of 12 months for making a complaint, it follows that any remedy should generally limited to the 12 month period prior to complaint. However, the LGO went further in its response and accepted that its Guidance provided as follows:

"If we find fault by the Council in not properly considering whether the additional charges are in line with the guidance, or in delaying and reasonably making that decision, we have to consider the injustice to the complainant. The injustice could be they continued to be charged an additional fee when they should not be. We should recommend the Council reimburse additional fees wrongly paid to the nursery from the date at which the Council could have reasonably intervened to put things right"

133. In this case Mr X complained to the Council on 28 January 2021. The LGO now accepts that its own guidance should be followed and that this recommendation should have been framed so that the recommendation was limited to any period after 28 January 2021. The LGO invites me to amend this line of the report on the basis that the LGO had relevant guidance that it was obliged as a matter of public law to follow unless there was a good reason not to do so, and that the LGO accepts that it did not have a good reason not to follow its own guidance. The Council invited me to amend the paragraph in any published version of the report to say that the recommendation should read:

> *"reimburses Mr X for any "general extras" fees he has paid the nursery relating to any period after 28 January 2021"*

134. In limited circumstances the court has power to quash a decision and to substitute its own decision under s31(5)(b) of the Senior Courts Act 1981. However, that power can only be exercised where a decision is made by a court or tribunal, which is not the case here: see s31(5B)(a). The question as to whether the Court has power to substitute a decision for a quashed decision in any other case was recently left open by Singh LJ in Secretary of State for the *Home Department v EK and others* [2024] EWCA Civ 1601. This decision was not made by a court or tribunal and so I doubt that I have the power to amend the Report as the Council suggests. However, even if I have a power to substitute a new paragraph in the report, given the statutory framework, I would only exercise that power if I thought there was a compelling reason to do so.

135. The LGO has explained that local authorities frequently do not accept recommendations in full but instead a compromise is reached under which the local authority proposes to take specified action in response to a recommendation and this is accepted by the LGO. That seems to me to be an alternative route open to local authorities to responding to a recommendation in an LGO report and, in effect, results in an agreed way forward. That has happened in this case and I am

told, happens in many other cases. Given that procedure and the fact that the way forward has been agreed in this case, I see no reason to quash the Report and decline to do so.

Ground 5B: The recommendation to get the Nursery to change its pricing policy.

136. The Council submits that it was unlawful for the LGO to recommend that the Council should "*ask.. the nursery to change its pricing policy so that it is in line with the Guidance and the Provider Agreement"*. The Council submits that this recommendation is unacceptably vague because it does not state which parts of the Guidance and Provider Agreement are referred to, and the Council submit that "*it is not possible to make an educated guess, given the lack of Report's lack of clarity, and the breadth of the fault found in [33] of the Report*".

137. In response the LGO submits the Report is clear and further states that when the Council eventually complained about a lack of clarity in its pre-action letter, the LGO clarified the position, for the avoidance of any doubt. It said that "*the Council should ask the nursery to change its pricing policy so that it does not make any mandatory charges in respect of FEEE hours and invoices transparently identify what goods and services are being charged for in respect of each element of a charge*". I doubt that this clarification was necessary because it seems to me clear what the LGO was recommending. However, in the light of that clarification, the LGO submits that there is nothing further that the LGO could sensibly be ordered by this Court to explain.

138. In my judgment there was no merit in the original complaint, and is especially no merit after the clarification was given as explained above. I consider that the LGO has a wide discretion to make recommendations and, in the end, these are only recommendations. It ought to have been abundantly clear to the Council that the main concern raised by the LGO was that the Nursery was charging mandatory additional fees and that this was not permissible under either the statutory scheme or under the Provider Agreement. I fully accept that officers of the Council may have concerns that giving a clear message to this Nursery and other nurseries in

their area that any charges to parents who are accessing FEEE hours are required to be voluntary may be a difficult message to deliver and that the officers might have legitimate concerns that some nurseries may respond to that message by reducing the scope of the FEEE hours that they make available to local parents.

139. It seems to me that the more important principle is that the Council is a statutory body and its officers are required to work within the legal frameworks imposed on them by Parliament. S.7 CA provides that "*early years provision of such description as may be prescribed is available free of charge, in accordance with any regulations under this subsection*". FEEE hours are hours of childcare that are delivered in accordance with the Regulations and thus any nursery which takes the benefit of the FEEE payments must also accept the burden that such hours must be "*free of charge*" to parents, and hence no mandatory additional charges should be imposed. Whilst it clearly would be unfortunate if communicating that message to participating nurseries in a clear manner may reduce the scope of the FEEE hours that nurseries make available to local parents, that cannot be a good reason to permit nurseries to act in breach of the terms of the scheme and/or in breach of the terms of their provider agreements with the Council. I therefore reject this ground of challenge.

Ground 5C: The recommendation that the Council should write to other providers.

140. The LGO report included the recommendation that the Council should "*send a letter to other FEEE providers in its area and inform[s] them of our decision and reminds them of its expectations in terms of pricing*". Section 31(2BA) of the 1974 Act permits the LGO to make recommendations which seek "*to prevent injustice being caused in the future in consequence of a similar failure in, or to provide, a service which it is the function of the authority to provide*".

141. The Council submits that this recommendation is "*inappropriate and untoward and does not accord with the purposes for which the power of recommendation is given*". I do not accept that submission. In my judgment, Ms Slarks is right to submit that Parliament recognised that the LGO is entitled to consider that there is

a risk of injustice in other similar cases. She submits that, in limb (b), Parliament has given the LGO the right to make a recommendation to try to prevent that potential injustice. In this case, she submits that it was rational to make such a recommendation. I accept that submission because the LGO was entitled, in my judgment, to be concerned that other providers of FEEE funded childcare in the Council's area may be adopting a similar approach by imposing mandatory fees and that they also should be reminded that this is impermissible under the statutory scheme. I therefore reject this ground of challenge.

Ground 6: Publication of the report.

142. In its final ground, the Council seeks an order to prevent the LGO publishing this report. This ground is slightly unusual for 2 reasons. First, the LGO says that it has not yet made a decision whether to publish and so the challenge is premature. Secondly, the Council has not applied for an order to prevent it being identified as the local authority which is the subject of these proceedings. It follows that, as this judgment will become public in due course, all of the material parts of the report will come into the public domain in any event. It thus appears to me that there are serious questions about the utility of the relief that the Council seeks.

143. S30 of the 1974 Act governs the obligations on the LGO in relation to publication of either the report or a statement of reasons for the decision. In this case the LGO has decided to produce a report and I am not therefore concerned with the alternative approach involving a statement of reasons. S30(1) provides that the LGO must "*send a copy to each of the persons concerned*". In this case, those persons would be Mr X, the Council and the Nursery: see S30(1D).

144. Section 30(3) provides:

> *"Apart from identifying the authority or authorities concerned, the report shall not,*
>
> *(a) mention the name of any person, or*

(b) contain any particulars which, in the opinion of the Local Commissioner, are likely to identify any person and can be omitted without impairing the effectiveness of the report,

unless, after taking into account the public interest as well as the interests of the complainant (if any) and of other persons, the Local Commissioner considers it necessary to mention the name of that person or to include in the report any such particulars"

145. In this case Mr X was not named in the report. S30(4) and (5) then provides a mechanism which requires the relevant local authority to permit members of the public to read the report. They provide:

"(4) Subject to the provisions of subsection (7) below, the authority concerned shall for a period of three weeks make copies of the report available for inspection by the public without charge at all reasonable hours at one or more of their offices; and any person shall be entitled to take copies of, or extracts from, the report when so made available.

(5) Not later than two weeks after the report is received by the authority concerned, the proper officer of the authority shall give public notice, by advertisement in newspapers and such other ways as appear to him appropriate, that the copies of the report will be available as provided by subsections (4) and (4A) subsection (4) above, and shall specify the date, being a date after the giving of the public notice, from which the period of three weeks will begin."

146. It follows that, once the report has been delivered by the LGO, the Council are under a duty to publicise the fact that the report has been made. That may well lead local journalists to seek information about the LGO report and, if a journalist did so, the journalist would be entitled to publicise the outcome including quoting from the report. S30(7) allows the LGO to direct that the above procedures shall not be

followed "*if he thinks fit after taking into account the public interest as well as the interests of the complainant (if any) and of other persons*".

147. As the legislation already makes provisions relating to publication within the area of the affected local authority, any powers that the LGO has to publish the report must be primarily concerned with ensuring that any maladministration identified in the report should be drawn to the attention of other local authorities with a view to changing practice, where needed, in other local authority areas. The powers of the LGO to publish reports more widely are set out at s31B(1) of the 1974 Act which provides that the LGO may publish the report:

> *"if, after taking into account the public interest as well as the interests of the complainant (if any) and of other persons, he considers it appropriate to do so"*

148. The LGO's manual has identified 6 criteria by which the LGO will decide whether the public interest justifies publication of a report. There has been correspondence between the LGO and the Council about publication which, whatever may have been said, does not in my judgment, to a decision by the LGO which can be challenged in these proceedings because the LGO has not yet taken a decision. The Council also sought to rely on an out of date statement on the LGO website which suggests that it always publishes reports. That statement is no longer on the LGO website and, as the LGO has made clear in correspondence, she now accepts that she has a discretion to decide whether to publish or not.

149. The material before me does not support a case that the LGO has already made a decision whether to publish this report or is minded to approach a future decision about publication with a closed mind. I thus see no basis for reaching the decision at this point that any future decision that the LGO takes will be an unlawful decision. In those circumstances and given that the substance of the Report will become public through this judgment in any event, I refuse the Council's case on this ground.

Summary.

150. It follows that this challenge fails and is dismissed.