OUTER HOUSE, COURT OF SESSION

[2018] CSOH 67

P742/17

OPINION OF LORD UIST

in the Petition of

INNOCENCE NURSERY LIMITED

Petitioner

for

Judicial Review of a refusal to grant "partnership status" by East Renfrewshire Council

Respondent

Petitioner: Robertson; Drummond Miller LLP
Respondent: O'Neill (sol adv); Brodies LLP

20 June 2018

Introduction

[1] In this application to the supervisory jurisdiction of the court the petitioner, which operates a nursery for children in Newton Mearns, seeks reduction of a decision of the respondent dated 11 May 2017 to refuse partnership status to it. The respondent is a local authority with obligations and powers in relation to pre-school children. It is obliged to secure provision of early learning and child care under Part 6 of the Children and Young People (Scotland) Act 2014 and otherwise. The respondent operated a scheme whereby providers of care could become "partners" with it. Such partnership indicated approval of the provider and involved the provision of funding to enable the attendance of children at

nurseries which were partners. In the absence of partnership status on the part of the provider the respondent did not fund the provision of care by that provider. Partnership status therefore brought with it a potentially significant financial benefit to a child-care provider, such as the petitioner.

The pleadings

[2] The petitioner avers that its application for partnership status for the year 2016-17 was refused by the respondent on the ground that the numerical score given was less than the minimum threshold score for recommendation for partnership status. The petitioner subsequently applied for partnership status for the year 2017-18. It was provided with an "Assessment Pro-Forma", together with information in a covering letter dated 30 March 2017. In terms of the process an applicant required to score 14 out of a potential score of 27, applying the documentation used by the respondent. The petitioner scored 3 "satisfactory" for "Quality of Improvement Plan and Standards and Quality Report", -1 "Unsatisfactory" for "testimonials from departmental staff" and a total of 11 points. A difference of 3 points or more in any score would have resulted in approval by the respondent of the petitioner's application for partnership status.

[3] In order to obtain the scores for "testimonials from departmental staff" the respondent sent a Ms Carlton to visit the nursery. Before she attended she was privy to an email from a Ms Rodriguez dated 3 May 2017 in which the latter narrated that "they have been in partnership before but they had low grades in the second last inspection and lost it". The petitioner avers that that information was and is untrue because neither the petitioner nor its directors or employees was responsible for the previous enterprise, there being no connection between any old nursery referred to in that email and the nursery run by the

petitioner. The email also stated "The paperwork they have shared looks good though it's all about the environment and experiences for them." The email also referred to another nursery to be inspected at 10.30am (the 10.30am nursery) about which it stated:

> "The manager is [name], she is fairly new and was appointed after previous disastrous care inspectorate, recently inspected in Jan 17 they did much better so for them it's all about the journey and what's improved. Janice might wave the score with -7 as it covers the bad inspection which the owner disputed was conducted fairly."

The pro-forma in respect of that nursery, which subsequently obtained partnership status, listed the "number of requirements given by the Care Inspectorate in last 2 reports" as -7. In order for the 10.30am nursery to meet the threshold for partnership status it would have required to have obtained either a waiver by the respondent of the -7 score or a rating of 6 (excellent) or full marks for the "testimonial from departmental staff". No other nursery had received a rating of excellent. It was inherently unlikely that any nursery would score full marks on a real-life assessment. The petitioner avers that it believes that the respondent waived the -7 score attributed to the 10.30am nursery when deciding whether or not to grant it partnership status.

[4] On 4 May 2017 Ms Carlton attended at the nursery to assess it, using a pro-forma provided to her by the respondent. The pro-forma which was used in relation to "testimonials from departmental staff" related to 5 factors or quality indicators. It was a form that had been used by the respondent for at least 8 years. The respondent claimed that these factors related to the factors in Education Scotland's document "How good is our early learning and childcare?" (2016), which lists 15 factors. Following the assessment by Miss Carlton, the petitioner's application for partnership status was refused by letter from the respondent dated 11 May 2017. The petitioner has clientele which uses its services on a regular basis. They have lost some of them as a result of the respondent's decision not to

award them partnership status. That clientele included clients whose children would not in the past have been eligible for local authority funding but in the year 2016-2017 would have been. The petitioner has also lost funding which it would have received directly from the respondent if it had been granted partnership status. If it had been granted partnership status the petitioner would have provided care for children who would have been funded at least in part by the respondent and estimate their losses as being in the region of £100,000.

[5] The petitioner was dissatisfied with the decision of the respondent to refuse it partnership status and sought to challenge it in an email dated 12 May 2017. The respondent replied by email dated 16 May 2017 stating that there was no appeal process. The petitioner's solicitor wrote a letter to the respondent dated 31 May 2017, to which the respondent replied by letter dated 19 June 2017 stating that it refused to reconsider its decision.

[6] The petitioner avers that the decision of the respondent is irrational. The underlying assessment used only 5 out of 15 factors that were relevant to the decision. No reasonable decision-maker would have relied upon such a narrow assessment. Indicators 1.3, 1.4, 1.5, 2.1, 2.4, 2.5, 2.6, 2.7, 3.1 and 3.3 in the document "How good is our early learning and childcare?" were not assessed. If, as the respondent maintains, that document was the basis of the assessment, then it had failed to apply the quality indicators in a rational or fair way. It had also failed to use a system of assessment in which the methodology of the document was applied. For the rating to be 3 or satisfactory the assessor required only to conclude that "the strengths just outweigh weaknesses". That involved a weighing-up exercise which required (1) accurate, fair and comprehensive identification of strengths; (2) accurate, fair and comprehensive identification of weaknesses; (3) proper use of all relevant quality indicators in the process of appraisal of those strengths and weaknesses; (4) adding up

strengths and weaknesses respectively; and (5) making an accurate, fair and realistic assessment of whether aggregate strengths outweighed aggregate weaknesses or vice versa so that an appropriate rating might be given. A decision which failed to do that was irrational, especially since the design of the scoring system using the 11 elements had more regard to items 8, 9 and 10. The experience of parents well placed to offer views on the nursery's provision of care and educational support were, by contrast, not given significant weight. The final item "Parents' Testimonial received" attracted a score of 1 if received and 0 if not. The respondent did not seek to establish the views or concerns of parents by any means other than relying on the objective scoring of their assessor in the circumstances described. Further, the decision was irrational because Ms Rodriguez, having described the paperwork as "looks good" then went on to award it a 3 for satisfactory rather than a 4 for good.

[7] The petitioner also avers that the decision was unfair because the assessor was wrongly informed that the nursery had been in partnership but had "lost it". Such information was suggestive of lower standards than required and tended to create an unfavourable impression in the mind of anyone privy to that information. Ms Rodriguez, who either advised the decision-maker, Janice, or was herself the decision-maker, was of the view that this erroneous information was accurate. The assessor and the decision-maker were both under the erroneous impression that inaccurate information deleterious to the petitioner was true. The conduct of Ms Carlton did not indicate that she had identified the error in this information. She had carried out the assessment in the mistaken belief that the petitioner had previously lost its partnership status by failing to meet the required standards. The decision was therefore affected by apparent bias. The decision-maker had chosen to waive some of the elements on the pro-forma for the 10.30am nursery on the basis

of a factual dispute. No consideration was given to disputed elements in the assessment of the petitioner. Waiver of a poor score was apparently a possibility for the 10.30am nursery, but not for the petitioner. In those circumstances the decision-maker appeared to have been biased in favour of the 10.30am nursery over the petitioner.

[8] The petitioner also avers that the respondent did not properly exercise its discretion by focussing unduly on "environment and experiences" in accordance with the instructions given to Ms Carlton in the statement of intent form Ms Rodriguez. Such a focus to the exclusion of other relevant factors was a fettering by the respondent of its discretion and so unlawful.

[9] Lastly, the petitioner avers that the scheme operated by the respondent was insufficiently certain and foreseeable in its application. There was no formal application procedure and there were no leaflets or other sources of information about the process provided to applicants. The petitioner was provided with the assessment pro-forma ahead of time together with some information in a covering letter dated 30 March 2017, but it was not and is not clear what "Quality of Improvement Plan and Standards and Quality Report (one score)" or "Testimonials from department staff" meant. It could reasonably be thought that a "testimonial" related to someone who already had had experience with the nursery (as was the case in relation to Parents' testimonial"), but it did not. By email dated 20 April 2017 the petitioner enquired of the respondent, in relation to testimonials from departmental staff, what the phrase "to be completed by Partnership teachers" meant. The respondent replied that it would arrange for one of the partnership teachers to come out and visit. The petitioner was not provided with the assessor's "Partnership Teacher's Evaluation Pro-Forma" before the assessment. Moreover, it was not apparent before and at the time of the assessment what differentiated one level of competence (excellent, very good etc) from

another. This was particularly important in the case of the petitioner, where a difference of 3 points would have resulted in the threshold being reached. It was not evident that 5 out of 15 possible relevant quality indicators would be considered. It was and is not apparent why these 5 indicators were of relevance and the other 10 were not. It was and is not apparent what weighting was given to each of the indicators. It was not apparent whether there was any right of appeal. It was and is not apparent whether there was or is any way in which to make representations to affect the assessment or the decision. It appeared that the 10.30am nursery was able to obtain a waiver in one of its scores in the pro-forma, or at least that was a possibility. The petitioner was entirely unaware how it could obtain a similar waiver from the respondent as there was no indication from the respondent of how the petitioner might do so. The petitioner did not know ahead of time in what way it could regulate its behaviour in order to obtain partnership status. Nor could it have done so with appropriate advice. The respondent had not reconsidered its decision.

[10] In answer the respondent avers that the principal feature of partnership status for a nursery is the funding by the respondent of places for children attending those nurseries. The respondent had operated such a scheme for more than 8 years. The petitioner first applied for partnership status in January 2016. The petitioner was aware of the nature of the scheme, and of the information relied upon by the respondent to make decisions about partnership status, from at least January 2016. The petitioner submitted information to the respondent in 2016 in support of its application. The nursery was visited by a member of the respondent's staff in February 2016 as part of the assessment process used by the respondent. It was assessed in March 2016 as not meeting the threshold score required for partnership status and provided with a copy of the assessment pro-forma used by the respondent. The petitioner did not then challenge the fairness, transparency or lawfulness

of the assessment process. On 30 March 2017 the respondent wrote to the petitioner inviting it to apply for partnership status for the academic session 2017-2018, enclosing information about the selection process including (a) the assessment pro-forma; (b) a blank "Early years Workforce Qualifications Audit" on which the petitioner was expected to provide details of its staff; (c) a blank parent testimonial form to be completed by a parent selected by the petitioner. The petitioner completed the paperwork provided and submitted its application for partnership status. The petitioner was aware of the respondent's scheme for granting partnership status by, at the very latest, 30 March 2017. The proceedings, so far as directed against the operation of the scheme, were therefore time-barred, having been raised more than 3 months after 30 March 2017 (Court of Session Act 1988, section 27A). The respondent enjoyed discretion as to the manner in which it discharged its duties under Part 6 of the 2014 Act. It did so using a range of mechanisms. It funded and operated its own nurseries. It also funded places for children under school age who attended nurseries operated by private sector providers such as the petitioner, where such providers met the minimum standards necessary to be awarded partnership status. The respondent required each such provider to attain a minimum overall score before the provider would be recommended for partnership status. The criteria used, and the range of scores available, were set out on the assessment pro-forma. The criteria included the qualifications and suitability of the nursery manager, the ratio of qualified staff, the percentage of staff holding additional qualifications and the average score from the nursery's most recent Education Scotland and Care Inspectorate inspections. A further requirement was a testimonial from departmental staff. The assessment pro-forma made clear that this testimonial was to be submitted by partnership teachers. The assessment pro-forma disclosed that the maximum score available was 27 and that the threshold for a recommendation for partnership was 14. The

respondent did not operate a "quota" or other system for limiting the number of nurseries that might be awarded partnership status. For the session 2017-2018 12 nurseries had been awarded partnership status and 2 (including the petitioner) were refused. The petitioner was refused partnership status for the session 2016-2017 on the basis that (as for session 2017-2018) it did not meet the minimum level for recommendation for partnership status. A visit to the nursery was made by a member of the respondent's staff on 23 February 2016. The petitioner obtained a score of 3 for that element of its application for 2016-2017. The petitioner was scored by reference to 11 separate criteria, 4 of which were listed on the assessment pro-forma under the heading of "Risk" and the remaining 7 listed under the heading of "quality". The petitioner achieved a total score of 12 for the session 2016-2017 and a total score of 11 for the session 2017-2018. The petitioner achieved the same or a higher score for some criteria in each year and for other criteria achieved a score in 2017-2018 which was lower than it had been in 2016-2017. The petitioner was not challenging those scores which were the same as or higher than the scores achieved in the previous year.

The submissions

[11] The petitioner submitted that the decision of the respondent of 11 May 2017 to refuse the petitioner partnership status was irrational, relying on *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1KB 223 at p230 and *Council for Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 at p410. The case of *Shetland Line (1984) Ltd* v *Secretary of State for Scotland* 1996 SLT 653 fell to be distinguished in respect that the key point which led to dismissal of the petition in that case did not apply to the facts and circumstances of the present case. In that case it was held that irrationality could involve an

error of fact where it related to the facts material to the decision, but that it was not sufficient for the error to be discovered by a process of hindsight. The petitioner contended that a proper analysis of the facts in the present case showed that there was irrationality at the time of the decision-making process. In reply the respondent submitted that the choice by it of the 5 quality indicators which it used for assessment came nowhere close to meeting the test of irrationality.

[12] So far as apparent bias was concerned, the petitioner submitted that the respondent's decision of 20 May 2017 was the outcome of a process which involved Ms Rodriguez sending instructions and inaccurate information to the assessor, Ms Carlton. The inaccuracy consisted of the statement that the petitioner's nursery had previously lost its partnership status, which was seriously detrimental to the assessment of the petitioner's nursery and tainted the decision by apparent bias. Reliance was placed on the decision by the House of Lords in *Porter* v *Magill* [2002] 2 AC 357, particularly the speech of Lord Hope of Craighouse at paragraphs 60, 61 and 103. At paragraph 103 he stated that the question was whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The petitioner also referred to the decision of Lord Hodge in the Outer House in the case of *Kiani* v *Secretary of State for Business, Innovation and Skills* [2013] CSOH 121 and sought to distinguish it on the ground that the detailed averments in the present case were clearly distinguishable from the bare averments which were the subject of criticism in that case. In response the respondent submitted that there was nothing in the terms of Ms Rodriguez's email of 3 May 2017 to suggest favouritism in favour of any nursery at the expense of that of the petitioner. The contents of that email were not such as to meet the test of apparent bias set out by Lord Hope at paragraph 103 of *Porter* v *Magill*.

[13] The petitioner also submitted that the respondent had fettered its discretion by stipulating only that certain areas were important for consideration and that by narrowing the focus to "environments and experiences" its decision-making process was flawed because it disregarded other relevant factors which were vital to a balanced decision. The respondent submitted that that contention was without foundation as its decision not to award partnership status to the petitioner was based on an assessment carried out by reference to 11 criteria. Ms Carlton's visit to the nursery, which provided the basis for the scoring of one of those criteria, involved assessment of the nursery by reference to 5 quality indicators. Neither the overall assessment nor Ms Carlton's visit was constrained by Ms Rodriguez's email.

Discussion

[14] In my opinion there is no substance in the petitioner's grounds of challenges based on irrationality and fettering of discretion, essentially for the reasons given by the respondent in its submissions. The respondent enjoyed a wide ambit of discretion in deciding how to go about awarding partnership status for nurseries, providing the process was conducted fairly. I find nothing in the system operated by it which amounts to irrationality or fettering of discretion. It had in place a system for the assessing of nurseries which it was entitled to employ and contained no illegality.

[15] On the other hand, I have concluded that there is merit in the petitioner's complaint based on apparent bias, which I would prefer to categorise as proceeding on the basis of an incorrect material fact. In my opinion the respondent really had no answer to this ground of challenge. Ms Rodriguez, in the email which she sent to Ms Carlton on 3 May 2017, stated, with reference to the petitioner's nursery:

> "The manager is Sam Kiyani, they had been in partnership before but they had low grades in the second last inspection so lost it. The paperwork they have shared looks good though, so it's all about the environments and experiences for them."

In a letter dated 31 May 2017 to the respondent's Director of Education the petitioner's solicitor stated:

> "Further, it has come to Ms Kiyani's attention that the assessor was provided with erroneous information by Rosamund Rodriguez, who is understood to be the quality assurance individual at East Renfrewshire Council, in relation to the nursery prior to the visits. It is understood that Ms Collins was advised that the nursery had previously been in partnership but had lost that because of poor scoring. That is false. This nursery has never been in partnership previously, largely because it not *(sic)* met the qualifying criteria. It is unclear whether the information related to a previous nursery which has traded from the same premises, but, if so, Innocence Nursery had no connection with that or any other nursery. Ms Kiyani has not previously operated any nursery as principal."

In its response dated 19 June 2017 the respondent accepted that the petitioner had never worked in partnership with the respondent.

[16] It was therefore accepted by the respondent that it was not true that the petitioner had been in partnership before but had low grades and lost it. Ms Carlton was accordingly provided with information about the nursery containing what was an incorrect material fact before she carried out her inspection. In my view it cannot be maintained that this incorrect statement was not material. While it was true that the petitioner had failed to obtain partnership status the previous year, it was not true that before then it had enjoyed partnership status which it had lost. I consider that there is a clear difference between having and then losing partnership status due to low scores and never having had partnership status at all. The former is worse than the latter because it shows that the applicant had previously been able to meet the requisite standard but later failed to do so. In addition, the provider of the incorrect information was the respondent itself, the body

which took the ultimate decision to refuse partnership status to the petitioner. The incorrect material fact therefore pervaded the whole decision-making process.

[17] Quite apart from that, even if the information had been true, it would have been damaging to the petitioner as it would have put it at a clear disadvantage in the mind of Ms Carlton at the outset of her inspection. Ms Carlton, although she was only carrying out an inspection to assist the eventual administrative decision-maker and not herself taking a judicial decision, was obliged to approach her task with an open mind and not be affected by the adverse outcome of any previous inspection. Her task was to inspect the nursery for the 2017-2018 session. Although she obviously required to be provided with some information about the nursery, the adverse outcome of a previous inspection was irrelevant as far as her task was concerned, and had the potential to give rise to apparent bias on her part.

Damages

[18] The petitioner originally sought damages by way of just satisfaction under section 8(3) of the Human Rights Act 1998 but it was refused permission to proceed with its challenge based on human rights grounds. It has no relevant case for an award of damages on any other basis. In the area of discretionary decision making by public bodies damages are available at common law only in cases of misfeasance in office or abuse of power amounting to bad faith (*Shetland Line* at p658) and an allegation of apparent bias does not meet that threshold (*Kiani* at paragraph 18). An allegation of recklessness or negligence is insufficient. The petitioner's claim for damages is therefore irrelevant. In any event, the petitioner has failed to make relevant and specific averments of loss of profit or loss of value in its business in order to found a claim for damages.

Decision

[19] As I have concluded that Ms Carlton carried out her inspection of the petitioner's nursery on the basis of an incorrect material fact and that this has tainted the decision complained of I shall grant decree of reduction of that decision.