CO/2241/2009

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

B E T W E E N:-

THE QUEEN
on the application of

SHARON SHOESMITH

Claimant

and

(1) OFSTED
(2) SECRETARY OF STATE FOR CHILDREN SCHOOLS AND FAMILIES
(3) LONDON BOROUGH OF HARINGEY

Defendants

OFSTED'S SUBMISSIONS ON CONSEQUENTIAL ORDERS

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1. Ofsted makes the following submissions as to the disposal of this claim. Its preference would be for the Court to deal with these issues in writing and without a hearing, if the Court thinks fit.

Disposal of the challenge

2. Ofsted seeks an order that the claim against it should be dismissed.

Permission to appeal

3. Ofsted opposes the Claimant's application for permission to appeal. The test provided by CPR Pt 52.3(6) is not satisfied.

4. First, the appeal would not have a reasonable prospect of success. The claim against Ofsted is a claim on its facts; it does not turn on contested issues of law. The factual issues were comprehensively analysed by the learned Judge.

5. Secondly, there is not "some other compelling reason why the appeal should be heard". There is a strong interest for all concerned in achieving finality in this litigation.

Costs of the post-trial period

6. On 12 November 2009 ("the November Order"), the Learned Judge ordered:

> "8. The Claimant's reasonable costs of and occasioned by preparation for and attendance at the hearing of 10 November 2009 by paid by Ofsted, such costs to be the subject of detailed assessment if not agreed and to be assessed on the indemnity basis."
>
> 9. The Claimant's reasonable costs of and occasioned by reviewing and responding to the documents referred to at 1 -4 above be paid by Ofsted, such costs to be the subject of detailed assessment if not agreed. The issue of whether such costs are to be assessed on the indemnity or standard basis is reserved."

7. Paragraphs 1 – 4 of the November Order dealt with disclosure made by Ofsted following conclusion of the trial.

8. On 15 December 2009, following the further hearing of 11 December 2009, the learned Judge ordered ("the December Order"):

> "9. The Claimant's reasonable costs of and occasioned by preparation for and attendance at the hearing on 11 December 2009, reviewing and responding to the documents and information referred to at paragraphs 1 – 4 of the November Order and paragraphs 2 -4 of this order, be paid by Ofsted, such costs to be the subject of detailed assessment if not agreed. The issue of whether such costs are to be assessed on the indemnity or standard basis is reserved."

9. Paragraphs 2 -4 of the December Order required Ofsted to provide certain further evidence, information and documents.

10. Ofsted does not oppose an order that the assessment referred to in paragraph 9 of the November Order and 9 of the December Order should be on an indemnity basis.

Costs up to and including trial

11. Ofsted seeks its costs of the proceedings up to and including the trial of 7 – 12th October 2009, to be assessed if not agreed.

12. First, Ofsted's submissions were substantially accepted and the claim failed in its entirety.

13. Secondly, the documents disclosed after the trial had no material impact on its outcome; see eg paras 40, 43, 268, 457, 478 of the Judgment.

14. Thirdly, it cannot be said that the late disclosure increased the costs of the period up to and including the trial itself. It would be unrealistic to suggest that the Claimant would have abandoned, or reduced the scope of her challenge, had the disclosure been made earlier. Following the post-trial disclosure, the Claimant maintained her original case that:

> "not even the gist of what are now said to be very serious concerns were communicated to her and thus the content of the 2008 JAR Report came largely, and unfairly, as a surprise to her."
>
> (Response On Behalf of the Claimant to Ofsted's Post-Trial Disclosure, dated 9 February 2009, paragraph 9).

15. The Rejoinder served by the Claimant on 9 March 2010 stated (para 4):

> "There is at least an implicit suggestion ... that the Claimant's case against Ofsted has somehow changed. It has not."

16. Thus, the Claimant maintained the entirety of her challenge in light of the post-trial disclosure; she did not reduce its scope at all.

17. In the communication of 15 March 2010, Appendix 1 to the Judgment, the learned Judge observed that:"I may need some persuading that Ofsted should be the beneficiary of any positive order for costs in its favour from any other party in the proceedings. However all that is for another day if the issue arises": para 15. Ofsted would respectfully point out that at that stage, the learned Judge had not yet fully considered the submissions on the post-trial disclosure: para 3.

18. Ofsted accordingly submits that costs should follow the event, in accordance with the "general rule": CPR Pt 44.3(2), and see 54.6.17 in the context of judicial review

19. In the alternative, Ofsted submits that there should be no order as to costs for the period up to and including the trial.

20. In the course of finalising this submission, Ofsted received the Claimant's submissions on relief. It respectfully resists the suggestion it should pay 50% of the Claimant's costs up to and including the trial:

    a. As to the overall complaint of lack of proportionality, Ofsted had no choice but to give a detailed account of the inspection in order to meet the Claimant's claim.

b. The issues arising out of disclosure following the trial are reflected in the costs order already made for that period, and in respect of which Ofsted does not oppose an order for indemnity costs.

c. In the course of his judgment, the Judge commented on the "lateness" of some of the evidence served before trial (para 44). It should be recalled the Claimant herself served very substantial evidence on 21 September 2009. Ofsted fundamentally disagreed with much of what it said and had no realistic choice but to respond to it.

d. Whilst the Judge was critical of Ofsted's failure to disclose an email of Steve Hart that related to the duty room feedback meeting (para 221 of the judgment), the Claimant's case was unaltered in light of its disclosure. She maintained her broad denial of Ofsted's account of this, and other fundamental features of the inspection process. There is no reason to suppose its late disclosure had any impact on the level of her costs up to and including the trial.

e. Paragraph 543 of the judgment also relied upon by the Claimant is of no bearing on the question of costs up to and including the trial itself.

f. The Claimant refers to the lack of contemporaneous record, but the RoE was available and served in the course of preparation for trial.

Protective Costs Order

21. The Claimant has indicated that she proposes to apply to the Court of Appeal for a protective costs order. Ofsted makes no submissions on that application at this stage but will address it if such an application is made.

TIM WARD

BEN LASK

28 JUNE 2010