Neutral Citation Number: [2021] EWHC 1174 (QB)

Case No: QB-2021-001693

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
URGENT APPLICATIONS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th May 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

SUZ	**Claimant**
- and -	
THE MOUNT SCHOOL LIMITED	**Defendant**

- -
- -

James Gray (instructed by Kuits Steinhart Levy LLP) for the **Claimant**
The **Defendant** did not appear and was not represented

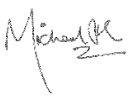
Hearing dates: 4.5.21 and 5.5.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Timing of hearing

1. This is an application for urgent interim relief. It came before me yesterday afternoon but I was anxious to ensure that the Defendant had every possible opportunity to be able to address the Court if it wished to do so. I have read all the various email traffic that has been generated. I was minded to put this case back further during the day but it was confirmed, in that email traffic, that what was being suggested on the part of the Defendant was a period of time – to consider materials and instruct Counsel – that would necessarily have pushed this urgent interim relief hearing beyond the point of utility. I am quite satisfied that a fair opportunity, in all the circumstances, has been given. I am quite sure that it is appropriate and necessary, in the interests of justice, now to grasp this nettle.

Mode of hearing

2. The mode of hearing was by BT conference call. It was fully justified and appropriate and involved no prejudice to anyone. Indeed, it made access to the hearing the more readily available to those who wished to observe. Open justice was secured. Although it is not a listed case, the Urgent Applications Court is a published activity in the cause list which also supplies email addresses available for any member of the press or public who would wish to observe a remote hearing. The hearing was recorded. This judgment is released in the public domain.

Anonymity

3. I made an anonymity order at the hearing – protectively, because of the urgency – being satisfied that, on the face of it, the order was justified, but with liberty to apply. I am going to require that the question of anonymity is revisited later in the day by me, with Counsel's assistance, so far as the precise terms of the order are concerned. I have in mind that there will need to be access to documents from the court file, but an opportunity to ensure that those documents have been appropriately redacted. The order I made this morning was this. Pending further order, the identity of no pupil shall be disclosed or published; and no document shall be released from the court file to any third party pursuant to CPR 5.4C or CPR 5.4D without prior notice to the parties' solicitors; with liberty to any person to apply to vary or discharge that order. The context of the case concerns pupils at a school and there is a strong public prima facie basis for protecting anonymity for reasons given in the third witness statement of Mr McNally. I record that I gave an opportunity at the hearing for anyone to raise any question or objection and there was none.

The issue

4. The question before me, and the nettle which I need to grasp, is whether the pupil at the heart of this case, who is what is (in old money) an "upper 6th", A level student, should be permitted to be in school lessons in person for the rest of this week. That is the urgent issue, and it is the only issue with which I need to deal at today's hearing. I have to approach that question by considering whether there is a triable issue and its strength, particularly in circumstances where the clock cannot be turned back, either for the Claimant or the Defendant, in relation to what now happens in the rest of this week;

and I have to have regard to the balance of convenience and justice and all the factors which inform it.

The context

5. The context for the application for the purposes of today can sufficiently be encapsulated as follows. The pupil was suspended on 23 March 2021. An appeal against that suspension was dismissed yesterday on 4 May 2021. A right of further review, by way of "complaint" or "review", has been acknowledged in the decision letter communicating dismissal of the appeal. It may very well be that that right of complaint or review is the one described in paragraph 8.16 of the school's Parent Contract (review by the Governors). That point certainly seems at least arguable.

6. There is clearly a discretion, on the part of the relevant decision makers within the school, as to whether a pupil should be permitted to continue to attend lessons in person pending an ongoing process. In the context of the appeal, that discretion was recognised by the school explicitly. In the context of the next steps, and the complaint (or review by the governors), a power is explicitly recognised in a (perhaps inelegantly worded) clause 8.17 of the Parent Contract. That is a provision which is dealing with the "pupil's status pending [the] procedure" and states that the head teacher "will advise the parents". Necessarily implicit in that, at least arguably, is that there is an important discretion as to what position will apply pending the ongoing process. It seems to me obvious, but it is sufficient that it is arguable, that there must be a discretionary power as to what should happen in the interim where there is an ongoing process. There must also be a power for a decision-maker, in determining an appeal against suspension, to decide whether the immediate consequence of dismissing the appeal should be that the student cannot attend any further lessons, or whether the reasonable fair and proportionate response may involve allowing a further short grace period. These are all discretionary matters that belong to the school. They do not belong to me. On the face of it, a highly relevant provision is clause 8.1 of the Parent Contract. It speaks of the head teacher as having a "wide discretion" in relation to the school's "regime" and provides that the head will exercise that discretion "in a reasonable and lawful manner and with procedural fairness when the status of a pupil is in issue". Mr Gray has persuaded me, at least arguably, that that ("the status of [the] pupil is in issue") is this case. But even if it is not, there is a very strong case in my judgment for considering that a similar discretionary power must arise.

Duties

7. I have emphasised that the school is the primary decision-maker and I am not. We are in the area of private law proceedings – with express and implied duties of lawfulness, reasonableness, fairness and proportionality – which can for the purposes of today confidently be taken as broadly equivalent to those encountered in public law. This is a contractual case. The Claimant is a parent who has a contract with the school. I have been taken by Mr Gray through the most relevant provisions of the most relevant instruments.

Triable issue

8. So far as the triable issue is concerned, I am quite satisfied that there is on the face of this case a sufficient concern as clearly to cross that threshold. There are clearly

questions of the justification and proportionality of the school's response. I have formed no view, and should not be taken as having done so, but there is an important issue.

9. More relevant and immediate, for the purposes of today, is what seems to be an obvious point relating to due process, at least so far as the speed with which the appeal hearing was set up is concerned. The suspension was 23 March 2021 and there followed communications about when the hearing would be, but no specific dates. On Friday 30 April 2021 – a month and a week later – at 15:26 the school notified the Claimant's representatives that the hearing was going to be noon on Tuesday 3 May 2021. Two features are worth having in mind. The first is that that was a bank holiday weekend. The second is that this week is the final week of lessons. Lessons continue for two more days, until Friday 7 May 2021. In communications on Bank Holiday Monday the Claimant's representatives explained that the Claimant and her husband were not in a position to attend the hearing at 12 noon the next day. The school was reminded of previous correspondence, in particular on 15 April 2021, which explained that the Claimant has "professional responsibilities [which] include prearranged patient clinics, 'on-call' work as a GP leading the Covid vaccination response at her surgery, and/or working at a palliative hospice" and that her husband is a "serving police officer". The school was told, in terms, on Bank Holiday Monday that neither parent would be able to attend at the hearing. The school was asked to defer the hearing and declined to do so. Forwarded to the school (at 16:57 on Monday) was an email from the Claimant herself stating: "I have not been able to get cover for a surgery I hold tomorrow. [My husband] is working on a shift and could not properly secure cover". I am not resolving them, or expressing a view about them beyond the fact that they are in my judgment clearly arguable, but there are issues relating to the express and implied contractual duties of due process and procedural fairness which the school owed to the parents, and as to whether those duties have been breached in this case. A number of other points are raised but I need not get into them.

10. For the purposes of today, as it seems to me, what possibly matters most is this. The school had the discretion – both (a) in making its decision on the appeal and (b) in deciding what should happen pending an ongoing and available complaint or review process – to decide whether the pupil should be permitted to continue to attend lessons in person. In my judgment, it is clearly arguable that the school has not acted compatibly with its legal duties in the way in which it has approached those two undoubted discretions. I say no more than that.

Balance of convenience and justice

11. When I turn to the balance of convenience and justice, I am fully satisfied that these considerations strongly militate in favour of the grant of interim relief. An order from this Court today has the consequence of securing the position which has been in place since 23 March 2021. It is a position which the school could perfectly well have adopted for this week, without in any way accepting that substantively or procedurally anything had gone wrong on its part in this case. The school recognised on 23 March 2021, at the time of the suspension, that it was appropriate in this case that the pupil should be able to continue to attend lessons. That was a discretionary decision. That position continued over a six-week period (admittedly including the Easter break) right up until yesterday. It continued right up to the eve of the lessons being completed: this Friday, on 7 May 2021.

12. If this were a case where there were a serious imperative concern – such as arising out of behaviour in lessons, or the protection of other students – then the school could hardly have allowed the position to continue, as it properly did, during the six-week period in which the procedural process of the appeal was in play. There is now a further procedural process available and in play – complaint (or review) – which the school expressly has recognised.

13. A key feature of this case is that it is a matter of a few days: in reality, two more days. It is true, on both sides, that the order made by this Court today effectively determines the question of substance so far as this week is concerned. That is inescapable. The pupil is at the stage of the final few days of receiving lessons. But they are not just any final few days. They are the final days of teaching, prior to breaking before the exam period begins between 10 May 2021 and 21 May 2021. This is in circumstances where the school recognises that in-person arrangements need to be able to be made for the pupil to attend those exams. As I have said, it is impossible to turn the clock back. There is no remedy a court could give that would give the pupil the in-school lessons missed during the final days prior to the A-level exams. Those are important considerations.

14. I have had carefully in mind the fact that remote attendance at lessons is the solution put forward by the school. I am told that there is at least one student who, trapped abroad by the pandemic, is attending lessons in that observational way. On the evidence, there have already been significant problems this morning with remote access by the pupil. This, moreover, is a case in which there has been recognition – including a letter as recently as 27 April 2021 – of this pupil's particular position so far as "reasonable adjustments" are concerned.

15. When I raised the particular focus which permeates this ruling – the exercise of a discretion to continue the arrangement for a short further period, in the context of an ongoing available process – at the beginning of today's hearing (at 1145), I was anxious that the school should have the opportunity to respond to it and give reasons if it wished to do so. I have been able by email at 1330, to get the school's response. That is thanks to the very considerable efforts of Gareth Chapman the CEO at the school, to whom this Court is extremely grateful. The question I had in mind – about preserving the status quo for a few further days given that there is an acknowledged further process and the school clearly has a discretion – is a slightly different question from the one which had been put. The Claimant's representatives had asked for a continuation of in-person attendance, pending and adjourned inter parties hearing of this application. To that suggestion, the response was that the school was not prepared to "undo the decision which has been made on the appeal". But that isn't really the key question, at least so far as I see it. All parties are able to preserve their positions, on the rights and wrongs of everything that has and hasn't happened in this case. The critical question is whether, in circumstances where there are a few days left, a few days of considerable importance, and where an ongoing due process entitlement is recognised, the 6 week period should extend for a 7th week. If not, why not?

16. Thanks to Mr Chapman's considerable endeavours, I have had the opportunity of receiving a reasoned response from the head and deputy head. That is to decline any in-person return to school. The reasons given are these. First, that it will be disruptive. Second, that it will compromise the school's ability to discipline pupils. Thirdly, that lessons will be online and available. I respect the position that the school has reached, and the speed with which it has today considered the question. But the reasons that had

been put forward do not begin to persuade me that the balance of convenience and justice favours the refusal rather than the grant of interim relief. The question of disruptiveness, and the compromising of discipline, will no doubt have been at the heart of the exercise of discretion on 23 March 2021 as to whether the pupil should continue to attend lessons in-person, in circumstances where he had been suspended and there was an appeal. The school, at that stage, recognised that it was appropriate that he should continue. That was notwithstanding that a decision to suspend him had been reached and that it was considered by the decision-maker to be justified. Had there been serious concerns relating to disruption and lessons, or about compromising the ability to discipline students, those matters would have been engaged in relation to that 6 week period. I cannot accept that they now arise, and with such a weight, as to support the refusal of interim relief by this court by reference to those considerations. The grant of interim relief does not change the fact that the pupil is suspended. Nor does it change the fact that the appeal has been refused. It occupies the space in which the school has a discretion, and the court has a jurisdiction, in the particular circumstances of this case.

17. So far as the lessons being online and available that too could have been an overriding consideration, if it were thought that there was some justification for precluding the pupil from attending lessons from the time of suspension on 23 March 2021. The recognition that he should be entitled to attend, alongside particular circumstances relating to him (there is a relevant observation expressed in the court bundle at page 81 on 25 March 2021 which it is not necessary for me to read out or paraphrase), as well as the observations that arise out of "reasonable adjustments" being necessary for reasons relating to this particular pupil, all strongly resonate for the question as to what is appropriate over the next two days. Alongside that, I cannot ignore the evidence before the Court of the difficulties that were experienced, this morning, in relation to the pupil's online access. We all have learned that there are ways in which remote attendance can work satisfactorily, and that there are ways in which it introduces very particular challenges and stresses.

18. If there were evidence in this case of an imperative, regarding disruptiveness or protection of other students, engaged by the pupil's attendance in class in-person, that would have been very different.

My order

19. The order that I make does no more – alongside each party's position being fully reserved – than require the school to continue, for a further brief period, the very arrangements that it already had in place. I will order as follows. The school shall continue until further order the current arrangements, being those that existed between 23 March 2021 and 30 April 2021. I shall direct that the claim must be commenced if it has not already been. I shall direct a return date for an inter partes hearing as to any continuation of an order: I suggest 7 days but the parties can now liaise in case they have a different agreed position. I will direct liberty to apply. The return date will allow the Court, on a more fully informed basis, at a hearing at which the school can be represented, to consider the ongoing position in the light of all the circumstances and what arrangements should continue, as well as any question of directions regarding the ongoing pursuit of these proceedings.

What next

20. I will leave it to Mr Gray, Counsel for the Claimant, to provide later in the day a draft order which reflects what I have said in this ruling, together with an anonymity order but which provides for third party access from the court file, with proper protection for the anonymity of the pupils. It is clear to all parties, including those who on behalf of the school had been able to attend the hearings today to observe, what is now required. And I trust that the return to the arrangements that applied only last week is something that can be achieved smoothly, recognising that each party's position is fully reserved on all matters concerned with the substantive dispute in this claim. I will reserve the question of costs.

4.5.21