**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 95**

**P625/22**

OPINION OF LORD YOUNG

In the petition of

REDCROFT CARE HOMES LIMITED

Petitioner

for

Judicial Review of a decision of Edinburgh Health and Social Care Partnership

**Petitioner: D Edwards; BTO**
**Respondent: C MacNeill KC, D Anderson: City of Edinburgh Council Legal Department**

21 December 2023

**Issue**

[1] This is a petition for judicial review seeking an order to quash a decision by the Edinburgh Health and Social Care Partnership (EHSCP) intimated to the petitioner by letter dated 6 May 2022 ("the decision letter"). In terms of the decision letter, the EHSCP refused a request to make a payment of £284,100.78 to cover a deficit in funding.

[2] In the answers lodged on behalf of EHSCP, it is averred that the City of Edinburgh Council has legal responsibility for the decision complained of and ought to have been called as respondent. Ultimately, nothing turns on this distinction as Mr MacNeill KC, who appeared at the substantive hearing on behalf of the respondent, made clear that his

instructions came from the City of Edinburgh Council. He accepted that the relevant decision was taken on behalf of the Council by the EHSCP. For simplicity, where I use the term "respondent" that is to be taken to encompass both the City of Edinburgh Council and EHSCP insofar as that body was acting on behalf of the Council.

**Background**

[3] The petitioner operates a care facility at Redcroft House, Edinburgh. This facility provides a residential service for adults with learning disabilities and complex needs. The number of service users accommodated at Redcroft House is small with the consequence that any reduction in the number of service users is likely to have a significant impact on the financial viability of the petitioner's business. The respondent provides funding for a number of service users at Redcroft House. That funding is provided under a Framework Agreement originally dated 16 June 2014. The Framework Agreement has been extended by agreement between the parties and remained in force for the period in respect of which the deficit funding was sought. There have been ongoing discussions with regard to entering into a new updated Framework Agreement since around 2018 with much of that discussion concerning the weekly and daily rates to be charged.

[4] As at 2018, the respondent funded nine service users at Redcroft House. In February 2019, the respondent announced a large scale investigation ("LSI") into the services being provided at Redcroft House. Once the LSI had been instigated, a moratorium on funding new placements came into operation. The LSI was completed by October 2020. While the moratorium was in place, the number of service users funded by the respondent dropped over time to six by October 2020.

[5] The petitioner approached the respondent with two separate claims for additional payments. It was accepted that both of these claims for payment fell outwith the terms of the Framework Agreement. Adopting the terminology from the decision letter, one claim for payment was in relation to a deficit caused by a reduction in the occupancy rate from nine service users to six service users ("the occupancy rate claim"). This claim for payment sought to address issues of financial viability which arose due to the lower level of payments being received. It is the decision to refuse this claim for payment which the petitioner now seeks to quash. The other claim for payment was in respect of changes to the overnight staffing arrangements ("the overnight staffing claim"). This related to the additional cost of providing a "waken night" carer for one of the service users commencing in January 2019. The respondent subsequently agreed to this claim for payment. While the overnight staffing claim is not the subject of this application for judicial review, the petitioner seeks to draw an inference of irrationality by comparing the acceptance of that claim by the respondent with its decision to refuse the occupancy rate claim.

[6] Prior to the decision in relation to these claims, there were meetings and discussions between Rajen Mawjee, the petitioner's managing director, and various employees of the respondent. The petition narrates part of one email sent by Marc Long, a contracts officer for the respondent, to Mr Mawjee on 9 February 2022. That email stated:

> "Firstly, regarding the discussed statement of how the costs arose and why payment is needed, after my discussion with the Finance team, we would need confirmation that this payment will be put towards the refurbishment and some details of the plan for accomplishing. This would also help when included with the committee report as the work is required as part of the service and whatever payment is made will definitely be used for this work will aid in receiving a positive result. I am aware you have emailed me some information of this but I feel having it in writing as part of the full statement on the 'backpayment', and hopefully more detail, will be helpful. Regarding the rate, below are the 1 to 1 and day care rates I have been able to find for 2018 until present. These are not for calculating staffing hours for the core costs but instead to help you factor in the 1 to 1 and day care figures received and

> separate the core costs from the total payments etc received and the total expenses where relevant.
>
> 1 to 1/Day Care rates 21/22 20/21 19/20 18/19 £17.84 £17.46 £16.90 £16.60.
>
> At the moment I have been unable to find the rates for the core service in the documents I have access to, I am looking into where I might be able to find this information but I don't know if I will likely be able to find anything at this time. However, with the 1 to 1/Day care rates removed from the totals the rest should be core costs and where necessary the weekly rates can be those. I hope this is helpful for progressing forward."

[7] The petitioner collated the vouching and information requested in this email which was then submitted to the respondent in order that a decision could be taken. By letter dated 6 May 2022, the respondent made an offer of payment in relation to the overnight staffing claim but declined to make an offer in relation to the occupancy rate claim.

[8] The decision letter commenced by dealing with the overnight staffing claim. In that regard, the respondent stated:

> "Further to our discussions, representation at our Executive Management Team, and subject to receipt of satisfactory evidence as below, the Edinburgh Health and Social Care Partnership propose a payment of £253,256.64 to Redcroft Care Services (Redcroft House) in recognition of the amendment made to the overnight staffing arrangements between the period 01/01/2019 to 31/03/2022, which was an overall increase in staff hours from those specified in the initial Framework Agreement … I would hope this proposed back-dated payment fully meets the expectation of the service."

[9] The decision letter then dealt with the occupancy rate claim. In that regard, the decision letter stated:

> "A further request was made by Redcroft Care Services for backdated funding for the amount of £284,100.78 to cover for a deficit caused by a reduction in occupancy rates. I can confirm that the Executive Management Team did not support this request on the basis that the care home was subject to a Large Scale Investigation during the period of this claim, part of which saw a moratorium on placements to the care home to safeguard existing residents."

[10] First orders in this petition for judicial review were granted on 4 August 2022. As originally drafted, the petition challenged the decision on two grounds, unreasonableness

and irrationality. On 4 November 2022, I granted an interlocutor discharging the substantive hearing scheduled for 16 December 2022 and sisting proceedings while parties discussed possible settlement. The sist was renewed on two occasions finally expiring on 13 April 2023. Following the failure to achieve an extra-judicial settlement, a substantive hearing on the petition and answers was fixed for 14 July 2023. Approximately one week before that hearing, the petitioner lodged a minute of amendment seeking to add new averments contending that there had been a breach of the petitioner's legitimate expectation and/or procedural unfairness. A late affidavit from Mr Mawjee was also produced at that time. I allowed the minute of amendment to be received into process and for the affidavit to be received late. The petition and answers were amended in terms of the minute of amendment and the respondent's answers thereto at the commencement of the hearing on 14 July 2023.

**Submissions of the petitioner**.

[11] On behalf of the petitioner it was submitted that the supervisory jurisdiction of the Court of Session was engaged. Under reference to *C* v *Advocate General for Scotland* 2011 CSOH 124 at paragraph [23], it was submitted that the familiar tripartite test was one to be applied with flexibility. A contractual background could provide the tripartite relationship in some cases although it was not suggested that this was such a case. The Framework Agreement was part of the background but its existence did not indicate that this was a purely contractual matter between the parties. The respondent was exercising the functions and discretionary powers under the Social Work (Scotland) Act 1968. The payments which the petitioner sought were in relation to the care arrangements which the respondent had made under section 12 of the 1968 Act. As it was accepted by both petitioner and

respondent that the Framework Agreement gave no contractual entitlement to this payment it followed that when the respondent took the decision whether to make the payment or not, it was exercising a discretion under this statutory power. This was sufficient to bring the matter under the purview of the supervisory jurisdiction.

[12] Before noting the petitioner's submissions on breach of legitimate expectations, it should be noted how the proposition was advanced by the petitioner in both its pleadings and in terms of Mr Mawjee's affidavit. In terms of the petition, it was averred that:

> "The understanding of the petitioner, on which it legitimately relied at all material times, based upon what was said by the respondent at the meetings before and after February 2021 was that the parties had reached agreement that the petitioner was entitled to the payments it sought and that payment would be made as soon as vouching was provided by the petitioner".

It can be seen that these averments identify the legitimate expectation as being that payment had been agreed subject only to vouching of the amount. The basis for that expectation is said to arise from discussions at various meetings. The affidavit from Mr Mawjee does not deal with the petitioner's expectations to any significant extent other than at paragraph 19 where it is stated:

> "During the time we dealt with Mr Long and well before, there was agreement that the 2014 Framework Agreement rates were outdated and insufficient, that what was called a 'backpayment' should be made to Redcroft to redress the position and that EHSCP simply needed vouching of the increases in our costs. See for example the attached email 'Exhibit A' from Marc Long which refers in terms to a 'back payment'".

My reading of this affidavit is that Mr Mawjee's expectation was that a backpayment would be made once vouching was produced, and that this expectation arose from both meetings and an email. However, Mr Mawjee's affidavit identifies the historical rates paid under the Framework Agreement as being the underlying problem rather than the reduction in the occupancy rate.

[13] In his submissions on behalf of the petitioner, Mr Edwards characterised the legitimate expectation slightly differently. The argument was advanced by reference to the email sent on 9 February 2022 by Mr Long. It was accepted that the petitioner had no legitimate expectation that it would receive a payment in respect of the occupancy rate claim. The respondent could say yes or no to the claim. Rather, it was argued, the petitioner had a legitimate expectation that the fact of the LSI would not be a relevant consideration in the decision. It was submitted that the email amounted to a clear and unambiguous representation that the respondent's decision would proceed on the basis of vouching and other documentation provided by the petitioner alone without regard to the fact that there had been a LSI. The petitioner had relied upon that representation to provide detailed vouching and information at considerable expense. If the fact of the LSI was going to be a relevant factor in the decision making, there was no point in the petitioner being asked to go through the process of collating this documentation. It was submitted that the overriding principle was one of fairness in which a decision maker could not change the criteria on which the decision would be taken. The legitimate expectation arguments were advanced with reference to *Attorney General of Hong Kong* v *Ng Yuen Shiu* [1983] 2 AC 629 at pp 636-638; *R* v *Secretary of State for Home Department ex parte Khan* [1984] 1 WR 1337 at pp 1343, 1344 and 1347; and *Lochore* v *Moray District Council* 1991 SCLR 741 at pp 748-749.

[14] Alternatively, it was submitted that it was procedurally unfair to consider the LSI as a relevant consideration without notifying the petitioner about its relevance or giving the petitioner an opportunity to make representations in respect of it. Further the respondent's decision was irrational. It was submitted that it was irrational to refuse the occupancy rate claim because of the existence of the LSI while agreeing to satisfy the overnight staffing claim which was also in respect of a period when the LSI was taking place. Further, it was

said to be irrational to reject the whole of the occupancy rate claim as it included a period of time after the LSI had been completed.

**Submissions of the respondent**

[15] The respondent sought dismissal of the petition as incompetent since the petition raised no issue for the supervisory jurisdiction of the court. The respondent had statutory responsibilities for the provision of social welfare services including the provision of residential care. The respondent made arrangements to fulfil those statutory obligations owed to individuals by entering into contractual arrangements with care providers such as the petitioner. These were purely commercial agreements with various care providers. In the present case, the Framework Agreement governed the services which the petitioner would provide to the respondent in order that the respondent could fulfil its statutory duties. The Framework Agreement provided that the petitioner's entitlement to be paid was in respect of each service user. As the number of service users happened to reduce during the LSI as a consequence of the moratorium, it followed that the contractual entitlement to remuneration dropped accordingly. In deciding whether to make an additional payment not governed by the Framework Agreement, the respondent was not exercising any jurisdiction, power or authority subject to the supervisory jurisdiction. A public authority will normally be acting under some statutory power when it enters into a contract, such as an employment contract with a member of staff, but that did not engage the supervisory jurisdiction.

[16] *Esto* the petition was competent, there was no unlawful decision. It was accepted on all sides that there was no contractual entitlement to the payment sought. The email from Mr Long could not create a legitimate expectation on the part of the petitioner. It was not a

clear and unambiguous representation or promise that the final decision would not take account of any particular factor. Rather, it was clear from the email that Mr Long was not the decision maker. He was not saying what criteria might or might not be relevant to the decision maker. At most, the email could be construed as indicating that by providing the information sought, the petitioner would have a "hope" of the final decision being favourable. This was very far from being a clear and unambiguous statement that a particular factor would or would not be considered relevant in the decision making process. Nor did the email provide that payment would follow once vouching had been verified. The email did not state or imply that the decision would be taken only on the documentation to be submitted by the petitioner.

[17] In response to the petitioner's argument based on procedural unfairness it was submitted that there could be no procedural unfairness in what were commercial negotiations for an *ex gratia* payment. The respondent had a wide discretion whether to grant or decline the petitioner's request for an additional payment. The petitioner's argument based on irrationality fell to be rejected because there were good reasons to differentiate between the two claims. The overnight staffing claim was made in respect of additional services provided by the petitioner in respect of the specific needs of one service user identified as part of the LSI process. The petitioner had incurred those additional costs in meeting that particular service user's needs. The occupancy rate claim was effectively compensation sought following a reduction in the payments made as a consequence of the reduced number of service users. It was inherently rational for the respondent to refuse the occupancy rate claim in respect of a service which it was not provided with. As a public authority, the respondent had to ensure that public monies were used appropriately.

**Decision**

[18] I have little difficulty in rejecting the petitioner's argument in relation to the competency of this petition. The supervisory jurisdiction is engaged where a public authority possesses a legally circumscribed jurisdiction, power or authority and the court is called upon to ensure that the public authority exercises its functions within the limitations to which it is subject (*Crocket* v *Tantallon Golf Club* 2005 SLT 663 at para 37). Those limitations may be set by statutory provision, contractual terms or by common law. In answering the question whether the decision under review is truly one to which the supervisory jurisdiction applies, it is necessary to focus closely upon the nature of the act or decision under challenge (*G* v *Watson* 2014 CSIH 81 at para 23).

[19] The parties agreed that the Framework Agreement governed the provision of care services but that it did not provide a contractual basis for the occupancy rate claim. Neither party suggested that the Framework Agreement set out any criteria or mechanism which governed how the parties required to approach a request for an additional payment outwith the terms of that document. The discussions surrounding the request for these additional payments took place against a backdrop of an ongoing commercial relationship, including negotiation of an updated agreement, but the parties were contractually unconstrained as to the merits of these claims. It is correct that the respondent would be acting under the relevant statutory power in the event that it decided to make an additional payment. For obvious reasons, it was no part of the petitioner's case that the respondent did not have statutory power to make such a payment. In essence, the respondent had to decide whether it considered it appropriate to make an *ex gratia* payment to the petitioner to compensate for the drop in the occupancy rate while the moratorium was in place. That decision was not one conferred upon it under any jurisdiction, authority or power. It arose because of a gap

within the Framework Agreement which did not provide for the circumstances which had arisen while the LSI was in place. Ultimately, the respondent decided to hold the petitioner to the terms of the Framework Agreement and refused to make payment in respect of the occupancy rate claim. This was a unilateral decision which the respondent considered appropriate in the circumstances. The fact that the respondent would have been acting under a statutory power if it had elected to make good on the petitioner's claim is insufficient on its own to engage the supervisory jurisdiction. For these reasons, I consider that the respondent's decision communicated in May 2022 is not one which is amendable to judicial review and the petition falls to be dismissed as incompetent.

[20] In the event that this matter proceeds further, I shall briefly explain what my decision would have been on the merits of the petition.

[21] In my opinion, it was telling that the precise formulation of the legitimate expectation varied between the averments in the petition, the affidavit and the oral submissions. This lack of consistency calls into question just how clear and unambiguous any representation or conduct was. I do not accept that a fair reading of the email could have led the petitioner to conclude that the existence of the LSI was to be left out of account when the decision came to be made. There are a number of reasons for that conclusion. In the first place, the email indicates that Mr Long was passing on information derived from his discussions with the Finance team and he also referred to what should be included in the committee report. At no stage did Mr Long indicate that he was part of the decision making process with the authority to say what factors the decision maker would be considering as relevant to their decision. In the second place, I agree with the respondent that the email does not state or infer that the LSI would be ignored as a factor in the final decision, or that the decision would be taken only on the basis of the vouching and information being sought

by the email. The email is silent about the fact of the LSI. In the third place, there is an artificiality about the petitioner's argument that the fact of the LSI was hidden as being a relevant factor in the decision. The LSI gave rise to the moratorium which in turn prevented service users being replaced thus causing the financial difficulties experienced by the petitioner. The fact of the LSI was the very trigger for the occupancy rate claim and would have been an obvious background fact on which that claim was founded.

[22] I also reject the petitioner's arguments in relation to procedural unfairness. The procedural unfairness argument does not, in my view, go beyond the legitimate expectation argument which I have rejected. There was no procedural unfairness generated by Mr Long's email. The petitioner was not misled as to the factors which the decision maker would be considering. The petitioner knew that the LSI led to a moratorium with a resultant reduction in the contractual payments and that it would require to persuade the respondent why an additional payment going beyond their contractual obligations was appropriate. The terms of the email did not misdirect or mislead the petitioner in that regard.

[23] In terms of the irrationality argument, it was submitted by the petitioner that there had been a lack of candour on the part of the respondent as to the reasoning which underpinned the decision. Shortly before the substantive hearing, I had refused a motion for commission and diligence by the petitioner seeking any documentation showing the underlying reasoning behind the decision letter. I refused that motion primarily as it came too late. Facing up to that difficulty, Mr Edwards argued that the respondent ought to have been candid from the outset as to the underlying reasoning for the decision and that the court should be cautious about any explanation put forward now to explain the rationale for the decision.

[24] I have to deal with the irrationality argument on the basis of the pleadings. It is for the petitioner to persuade the court that there is substance in the argument that the respondent's decision was irrational. The irrationality argument had featured in the pleadings from the outset based on the decision letter alone. No attempt was made in the pleadings to go behind the decision letter to challenge the respondent's underlying reasoning.

[25] I am not persuaded that the decision letter demonstrates an irrational decision when a comparison is made between the overnight staffing claim which was agreed by the respondent and the occupancy rate claim which was rejected. In short, there is no *prima facie* inference of irrationality raised by the different treatment of these claims. The overnight staffing claim reflected additional waking hours' costs incurred by the petitioner to provide a service to one of the service users. It is perfectly understandable that the respondent would consider it appropriate to pay for an additional service provided by the petitioner to a service user even though it was not covered by the terms of the Framework Agreement. This additional service was actually provided during part of the period covered by the LSI. The occupancy rate claim was different. It was sought to compensate the petitioner for the loss of revenue due to the reduction in services provided at Redcroft House. No doubt this claim raised difficult issues for the respondent including the risk that a refusal might affect the viability of the petitioner's business with potential consequences for the remaining service users at Redcroft House, but there is a rational basis for the respondent's decision to differentiate between these two additional payments sought by the petitioner.

[26] There was a further irrationality argument advanced by the petitioner based upon the fact that the occupancy rate claim covered a period extending beyond the completion of the LSI in October 2020. Thus, it was argued, it was irrational to refuse the whole of the

payment based on the fact of the LSI alone. I think it fair to say that this argument was advanced fairly briefly at the end of the petitioner's submission and the respondent's response was equally brief. I also reject this argument. The reduced payments occurred when service users left and were not replaced during the moratorium. It was not the commencement or ending of the LSI itself which immediately resulted in alterations to the levels of payment. When the LSI ended, the petitioner was still operating with a reduced number of service users and was only contractually entitled to payment corresponding to that number of service users. The respondent's decision to refuse the occupancy rate claim and to pay only their contractual liability was a rational one. The lifting of the LSI did not, in itself, alter the underlying rationality of that decision.

**Disposal**

[27] I shall sustain the first, third and fourth pleas-in-law for the respondent and dismiss the petition. I was not addressed in relation to expenses so I shall make no order at this time. If parties are unable to reach agreement on expenses, they should ask for the matter to be put out by order so that I can be addressed on that issue.