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Gillian Keegan MP
Parliamentary Under Secretary of State for Apprenticeships
and Skills
Sanctuary Buildings
20 Great Smith Street
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27 April 2020

Dear Minister,

Supplier Relief in response to COVID- 19

We write on behalf of the Association of Employment and Learning Providers (the AELP) in connection with the application of Government Guidance to suppliers of levy funded apprenticeships. We have also instructed James Goudie QC of 11 KBW.

The AELP represents the interests of suppliers, including registered Independent Training Providers (ITPs), further education colleges, higher education institutions and other provider types who deliver apprenticeship services for employers.

The ITPs and others are suppliers of contractual services. They are in need of supplier relief during the current Covid-19 crisis, in accordance with Government Guidance. It is not however being supplied, even though it involves no more money than that already allocated for apprenticeships. It is in connection with that failure to follow the Government's own published Guidance that we write.

Suppliers of levy funded apprenticeships fall within the scope of Government Guidance. Our client is concerned that they are currently being excluded from supplier relief. We have set out our reasons below:

1. We refer to your letter dated 17 April 2020 to MPs. You state (emphasis added) : *"In line with Cabinet Office guidance, we WILL provide relief where delivery has been impacted under providers' adult education and apprenticeship contracts with the Education and Skills Funding Agency"*.

This is entirely correct. Providers of apprenticeship contracts are entitled to relief. That is the nub of the matter.

2. However, your letter went on to say: *"This does not apply in relation to apprenticeships funded from employer digital accounts where the contractual relationship is between the employer and the provider"*.

This is comprehensively wrong in at least three respects. First, the source of funding is simply irrelevant. Second, there is a contractual relationship for the provision of apprenticeship services. Third, there is more than one contractual relationship and it is important to focus on the right one.

Lawyers & Parliamentary Agents

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The Guidance does not include any exclusion as you suggest.

3. The Guidance of course is the March 2020 Cabinet Office Procurement Policy Action Note PPN 02/20 on "Supplier Relief due to Covid-19". We refer to this crucial document as "the Guidance". It relates to exactly what its title states: Supplier Relief. The ITPs and others are suppliers. They need Covid-19 relief. There is no basis for making an exception in their case.

The Guidance is clear and emphatic, in the following, amongst other important, respects.

First, the Guidance applies to any supplier who is "at risk". It is made clear that this is a broad concept, to ensure continuity.

Second, the Guidance requires "Action", which includes (emphasis added) that all contracting authorities should: *"inform suppliers who they believe are at risk that they WILL continue to be paid as normal (even if service delivery is disrupted or temporarily suspended) until at least the end of June."* This is repeated further on in the Guidance.

Third, on the important matter for present purposes of "scope", the Guidance states that it *"covers goods, services and works contracts being delivered in the UK."*

4. ITPs and other suppliers of levy funded apprenticeships deliver services. They do so in England. They do so pursuant to contracts. These are public service contracts, by way of duly procured framework agreements and all providers had to go through an application process with the ESFA to pass quality and financial thresholds to be admitted onto the Register of Apprenticeship Training Providers (RoATP).

Our clients are calling for no more, and no less, than the straightforward application to their situation of straightforward Guidance.

5. We referred above to the need to apply the Guidance to the correct contractual relationship. That is the contract for services. Under the Apprenticeship Service (note "Service") operated by the ESFA, a public authority for the purposes of the Guidance, employers with a turnover above £3 million pay an apprenticeship levy to HM Treasury. Paying the levy entitles an employer to engage apprentices. Non-levy employers who are not required to pay the levy, may now also engage with providers who do not have a non-levy contract through the Apprenticeship Service. The mechanics are that they use a digital account. The employer enters into an agreement with, say, an ITP on the RoATP. That is the relevant contract. It is a services contract. In connection with that services contract, the ITP complies with the conditions of its registration. That includes a requirement that it enters into a funding agreement with the ESFA, which addresses the mechanics and routing of payments. Whilst there may be more than one contract, the funding agreement is part of the overarching arrangement and does not detract from what this is essentially about: the provision of contractual services.

6. Our client's case is that, properly understood, they have a plain and obvious entitlement by way of legitimate expectation to supplier relief under the Guidance. The point does not need further development, but in any event it is not possible to take matters further at this stage because it is unclear on what the failure to pay is based.

7. What we can say is that it is apparent that the failure not to provide supplier relief, if persisted in, will be unlawful. This is on each of two broad grounds. First, the failure is not in accordance with, but is contrary to, the Guidance. Second, it is discriminatory. Both grounds have a number of aspects.

As to the first of these two grounds, the failure displays a multiplicity of legal errors:

- It is a misinterpretation of the Guidance to fail to recognise that the apprenticeships are contracts of services within the Guidance.
- It is a misinterpretation of the Guidance to suppose that levy funded apprenticeships are excluded by the Guidance.
- It is a misinterpretation of the Guidance and/or the contractual relationships to fail to recognise that the object or main object of the contractual arrangements is the provision of services.
- It is a misinterpretation to suppose that what matters is the source of and/or manner of distribution of the funding for the undoubted services.
- All the foregoing involve misdirections in law, failure to take into account relevant considerations, taking into account irrelevant considerations, and irrationality.
- The policy in the Guidance gives rise to legitimate expectations.
- The promises in the Guidance are clear, unambiguous and devoid of relevant qualification, and give rise to legitimate expectations.
- Not to comply with the Guidance is an abuse of power.
- There is a procedural legitimate expectation of sufficient reasons being given for the exclusion and there being adequate well informed consultation.

As to the second of these grounds, there is unjustified and unlawful discrimination and/or unequal treatment in at least two respects:

- By comparison with suppliers of apprenticeships not funded by the levy (i.e. non-levy contracts) or providers who are funded through grant funding agreements for further education delivery (such as Further Education Colleges and Local Authorities) for the same types of learners
- By comparison with providers of adult education who are contract funded through the non-devolved Adult Education Budget (AEB)

each of whom, as we understand it, will be entitled to benefit from supplier relief.

We understand that you are conducting a review. We trust that the threatened injustice will speedily be removed.

Yours faithfully

Veale Wasbrough Vizards LLP