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SERVICE CHANGE

R (W) v Croydon BC – flawed family consultation prior to decision to move service user to supported housing rendered the decision unlawful

Consultation with the family of a disabled person should not be treated as a tick-box exercise. To be effective, it requires the family to be given adequate time to respond. That was lacking in this case. As a result, a decision to move an adult with severe learning disabilities from a care home to supported housing was quashed.

KEY POINTS

- A council were required to consult the parents of a severely disabled adult before deciding that he should move from residential care to supported housing
- The consultative obligation arose under the Choice of Accommodation Direction and the Community Care Assessment Directions
- The consultation carried out by the council was flawed because it gave the parents inadequate time to respond
- The council should also have consulted the adult's current care provider

What happened?

The relevant events in this case were as follows:

(i) 21 year old SW had autism and severe learning disabilities. Croydon Council were paying for him to live in a residential unit, known as Hesley Village, in South Yorkshire. The placement was made under s.21 of the National Assistance Act 1948.

(ii) The council had concerns about Hesley Village. One was financial. Its fees were nearly £5,000 per week which the council considered about twice as expensive as comparable facilities elsewhere. The other concern was that the placement was not doing enough to promote SW's independence.

(iii) The council reassessed SW's needs. The assessment report said that Hesley Village was not meeting SW's needs because it was not doing enough to promote his independence.

(iv) The council then decided that SW should leave Hesley Village and move to supported housing in the community.

(v) SW (acting through a litigation friend as he lacked the mental capacity to conduct litigation) brought a claim for judicial review. The main ground of challenge was of insufficient consultation with SW's parents prior to the decision to move him to a new placement. Additionally, the decision was challenged on the basis that it was taken without consulting SW's current care providers Hesley Village.

Why was the decision that SW should move to supported housing quashed?

The High Court allowed the claim for judicial review and quashed the council's decision. The Court held that the parents were not properly consulted by the council, as was required by law, before it took the decision that SW should move to a supported housing project.

The consultation failing concerned a meeting held to discuss SW's future. When SW's parents arrived at the meeting venue, they were given a copy of the report of his reassessment of needs (which expressed the view that his need for independence was not being met at Hesley Village).

The Court held that the parents were given insufficient time to consider the reassessment documentation before that crucial meeting. The consultation carried out with them therefore failed to meet the minimum standards for a consultation exercise as required by the law.

Consultation with the young man's parents: what was its legal basis?

This was a relatively brief High Court decision. It identified the sources of the council's duty to consult the parents but it did not analyse their requirements in great detail in deciding that the council acted unlawfully. It is instructive, therefore, to consider in more depth the legal sources of the duty to consult the parents as identified by the High Court.

Choice of Accommodation Directions. The High Court considered that parental consultation was required under the National Assistance Act 1948 (Choice of Accommodation) Directions 1992. However, those Directions operate by reference to the service user's expressed placement preference and SW was considered mentally incapable of expressing a view about where to live. Why, then, were the 1992 Directions applicable? The answer probably lies in a decision that was not referred to by the High Court: *R (Alloway) v Bromley LBC* [2004] EWHC 2108 (Admin) (see issue 17). In that case, the High Court accepted that the preferred accommodation of an incapacitated severely disabled adult's parent should be treated as the adult's preferred accommodation for the purposes of the Directions. So, in the present case, it seems that SW's parents were considered able under the Directions to choose his preferred accommodation. Clearly, therefore, it was necessary to consult with them before making a decision not to fund the preferred accommodation.

The Community Care Assessment Directions. In 2004, the Department of Health issued directions to local authorities in England with community care responsibilities requiring them, in various ways, to work with service users. This is what the directions say:

> "(1) In assessing the needs of a person under Section 47(1) of the [NHS and Community Care Act 1991, i.e. carrying out an assessment of a person's needs for community care services] a local authority must comply with Paragraphs (2) to (4).
>
> (2) The local authority must consult the person, consider whether the person has any carers and, where they think it appropriate, consult those carers.

(3) The local authority must take all reasonable steps to reach agreement with the person and, where they think it appropriate, any carers of that person, on the Community Care Services which they are considering providing to him to meet his needs.

(4) The local authority must provide information to the person and, where they think it appropriate, any carers of that person, about the amount of the payment (if any) which the person will be liable to make in respect of the Community Care Services which they are considering providing to him."

It seems likely that Directions 2 and 3 were breached by Croydon council in the present case on the basis that SW's parents were persons whom Croydon council were obliged to consider it appropriate to consult.

Directions must be complied with (and so they are a stronger legal instrument than statutory guidance). A local authority that contravenes a direction acts unlawfully. It is therefore surprising that, since the directions were issued, they have seldom been relied on in judicial reviews of community care decision making. This may be because, not having to be officially published, they are less accessible than Acts of Parliament or regulations. Whatever the reason, the decision in the present case and the High Court's March 2009 decision in *R (B) v Cornwall CC* [2009] EWHC 491 (Admin) (see Issue 57) may mean that more local authorities are held to account for failing to comply with the directions. This should be welcomed because there is no point in having laws that are not enforced. Those advising service users and their families may therefore find it useful to refer to the High Court's description in the *Cornwall* case of the requirements of the directions:

"Decision-making rests in the responsible authority, but their powers are only to be exercised after appropriate engagement with the service user and any relevant carers (who may include for example the service user's parents or other family). Prior to coming to a concluded view on needs, they should consult; prior to coming to a decision on steps to be taken to meet that need, they should attempt to reach agreement."

Consultation with the care provider: what was its legal basis?

Interestingly, the High Court also concluded that the council should have consulted with SW's care provider, Hesley Village, before deciding to cease funding his placement with them. This element of the decision may well be of particular interest to independent care providers some of whom complain that funding councils do not properly engage with them when deciding to cease funding.

The High Court said that the legal basis of the requirement to consult Hesley Village was the Mental Capacity Act 2005. The 2005 Act imposes a set of requirements whenever a decision is being made under the Act for or on behalf of a person. Clearly, the High Court considered that Croydon council's funding decision was taken under the 2005 Act (rather than simply under the community care legislation) so that the 2005 Act's requirements applied. The Court found that the council had overlooked section 4 of the 2005 Act when making a decision for SW. Section 4 of the 2005 Act sets out how a person or body is to go about deciding if a decision is in a person's best interests (as decisions under the Act must be). The person making the decision must, if practicable and appropriate, take into account the views of "anyone engaged in caring for the person". The Court considered that this required the council to consult Hesley Village staff before deciding whether it was in SW's best interests to move to a different placement.

What are the minimum legal standards for consultation?

Given the outcome in this case, it is worth providing a reminder of what the law requires of a consultation exercise. The minimum standards were set out in *R (Coughlan) v N & E Devon Health Authority* [1999] EWCA Civ 1871). This establishes that a public authority's consultation exercise must comply with at least the following requirements:

(i) consultation must take place at a time when proposals are still at a formative stage – so the decision maker must have an open mind; and

(ii) the authority must give sufficient reasons for a proposal so as to enable intelligent consideration and response by consultees; and

(iii) adequate time must be given for consideration of the proposals by consultees; and

(iv) consultation responses must be conscientiously taken into account before a final decision is taken.

The High Court (Ouseley J) gave its decision in R (W) v Croydon BC on 3 March 2011: [2011] EWHC 696 (Admin).

CONSULTATION

R (H) v Birmingham CC – council entitled to consult simply on question of how a Resource Allocation System should operate rather than on whether to have a System at all

Councils are entitled to use Resource Allocation System (RAS) software as part of their decision-making processes for determining adult care service entitlements. This was the latest decision to prove that point.

Birmingham council's re-organisation of its short breaks service

Birmingham council wanted to re-organise their short breaks for carers service. They decided to carry out a consultation exercise. Despite not being obliged to consult, the fact that the council had decided to do so imposed certain legal obligations. The consultation exercise had to comply with the minimum legal standards for consultation as set out in the *Coughlan* decision (see the previous article for details of those standards). A service user brought a claim for judicial review. This alleged that Birmingham's consultation exercise was defective because those legal standards were not met.

The context to the consultation exercise should be outlined. Birmingham intended to deploy Resource Allocation System (RAS) software as part of the process of deciding how many hours of respite care would be funded. RAS software provides an indicative personal budget allocation. As we saw in issue 70 when considering the Court of Appeal's decision in *R (Savva) v Royal Borough of Kensington & Chelsea* [2010] EWCA Civ 1209, attempts to use the law to challenge the role of RAS computer programmes in quantifying personal budgets are meeting with little success. Local authorities seem to appreciate (or realise when they are challenged) that they should have real people checking the output of RAS programmes. In part, this case was a continuation of that trend.

Why was the challenge to the consultation exercise rejected?

The High Court rejected the challenge to the lawfulness of Birmingham's consultation exercise. The Court's main findings of interest were as follows:

(i) It could not be argued that Birmingham were planning to introduce an unlawful system for deciding on the amount of respite care to which a service user was entitled. The RAS case law stresses the need for councils to ensure that social care professionals check RAS allocations to ensure that the sum indicated can in fact be used to purchase services that will meet assessed eligible needs. Birmingham's proposed scheme complied with the case law. It was not a scheme under which there would be an unthinking translation of a RAS allocation into a fixed personal budget.

(ii) A sufficient opportunity was given for interested persons to respond to the council's proposals. Six public meetings were held over a period of at least three months.

(iii) It was argued that the consultation exercise was a sham because Birmingham had already decided to adopt a RAS-based approach to quantifying individual respite care entitlements. The premise to this argument was correct; the conclusion, however, was not. It was true that Birmingham had made a pre-consultation decision to deploy RAS. But that was perfectly lawful. They were entitled to decide without consultation to adopt RAS, as part of a wider project to reflect national personalisation guidance in the provision of respite care. It followed that the council were entitled simply to consult on how the RAS process should be operated in the respite care context. In the Court's words:

> "21...The principle of RAS did not need a new consultation process of its own, nor did the principle of a self-assessment questionnaire."

Respite care – a service for carers or the person being cared for?

There was actually a history to this dispute. The council had previously made an earlier decision to re-organise its short breaks service. That decision assumed that short breaks are only ever provided under the carers legislation contained in s.2 of the Carers and Disabled Children Act 2000. That was important because the carers legislation takes an entirely discretionary approach when it comes to the provision of services. In this respect, it is unlike the community care legislation (s.2 of the Chronically Sick and Disabled Persons Act 1970).

An earlier legal challenge resulted in the council withdrawing those plans and accepting that it had made an error of law in assuming that respite care breaks fell outside the mainstream community care legislation. While, therefore, the present case was not directly concerned with the council's earlier view of the law the High Court did set out why it considered that short breaks principally designed to provide respite for carers could also be provided as a service for the person being cared for under the community care legislation:

> "22...Many would automatically assume, as the defendant council appears to have done at least initially in this case, that the whole point of respite care was to deal with the needs of carers for respite. However, it is now accepted that this is only one part of the equation. Respite care also provides service users with an improved quality of life by the provision of an alternative to the pressures, humdrum and repetitiveness of daily life. "

The High Court (HHJ Purle QC, sitting as a Deputy High Court judge) gave its decision in R (H) v Birmingham City Council on 7 December 2010: [2010] EWHC 3754 (Admin).

CARE HOMES

FEES

R (Forest Care Home) v Pembrokeshire CC – flawed operation of Economic Model for setting care home fees

Unimpressive is a term that could be used to describe the general success rate of legal challenges to councils' care home fee-setting decisions. But that should not lead councils to become blasé about the legal controls to which they are subject when setting fees. This case shows that the High Court, in the exercise of its judicial review jurisdiction, can and will intervene to quash a decision to set a fee at a particular level. The Court carried out a detailed analysis of an Economic Model used to quantify fees before concluding that its operation had generated a fee-setting decision that was legally unsustainable.

More generally, the decision illustrates that it is one thing to announce spending cuts, and quite another to carry them out. The council concerned relied simply on its financial position to justify its decision to set a fee at a particular level. This approach was too insular. It needed to address whether, in setting the fee at the level it did, it was rendering unviable the care homes which it had commissioned to care for residents for whom the council was responsible.

KEY POINTS

- Setting unviable fees for a care home may breach publicly-funded residents' rights to respect for their homes under Article 8 of the European Convention on Human Rights
- Fees should be set at a level which allows a care home provider to comply with the care standards regulatory regime
- Where a council decides to use an accurate Economic Model to set fees, it should have compelling reasons for departing from the fee generated by correct operation of the Model
- But incorrect operation of the model may well render unlawful a decision to set the fee suggested by the Model
- The element of a care home fee which represented a return on capital invested should not have been reduced to reflect non-compliance with the full range of regulatory requirements
- Fee reductions for non-compliance with regulatory requirements should have been accompanied by a system for assessing compliance
- Higher local staffing costs, inflation and expensive changes in employment legislation should have been taken into account in setting a fee

What happened?

Pembrokeshire council were obliged to secure care home accommodation for a number of older people with mental health problems. This obligation arose under s.21 of the National Assistance Act 1948 (the statutory authority for the placement of many thousands of older and disabled persons in care homes across England and Wales). In order to discharge the obligation, the council entered into placement agreements with a number of care homes in Pembrokeshire. For some time, the providers of the homes complained that their businesses were economically unviable at the weekly fees paid by the council.

The fee under direct challenge was set by the council at £390 per week. This was the council's 'very dependent elderly' rate. Local care home providers informed the council that their business were unviable at this rate. Effectively, the council's response was that there was no more money available to pay for a higher rate and, in any event, the rate had been set using a computer model specifically designed to identify a fair rate. A care home provider brought a claim for judicial review.

Legal framework: (1) statutory provisions and administrative law principles

Before analysing the precise failings identified by the High Court in this complex case, we should set out the legal framework beginning with the relevant primary legislation. This is Part III of the National Assistance Act 1948 which in fact says very little about how councils should set care home fee rates. Section 26 of the 1948 simply provides that arrangements made with an independent care home provider "shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements". However, that power must be exercised in accordance with the general principles of administrative law. For example, without taking into account irrelevant considerations or acting in a way in which no reasonable council would act (sometimes referred to as *Wednesbury* unreasonableness or irrationality).

Legal framework: (2) statutory guidance

A highly significant aspect of the legal framework is statutory guidance. In this case, there was directly relevant Welsh statutory guidance. Being issued under s.7 of the Local Authority Social Services Act 1970, this is what is sometimes called strong statutory guidance. Its legal effect is that councils must "follow the path charted by the...guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so...but without the freedom to take a substantially different course" (*R v London Borough of Islington ex parte Rixon* [1997] ELR 66). What this means is that local authorities must construct decision-making processes that reflect the provisions of statutory guidance. That includes ensuring that any economic Models used to assist decision making are constructed to accord with and not undermine any relevant statutory guidance.

The relevant statutory guidance in the present case was issued by the Welsh Ministers in August 2010. It was entitled *Fulfilled Lives, Supportive Communities: Commissioning Framework Guidance and Good Practice*. Some of the more relevant parts of the 2010 guidance in the determination of this case were as follows:

(i) The guidance contained a standard 7 which stated that "short term considerations should not threaten medium to long term service delivery. Unrealistic fees, for example, may ease the pressure on the budget of the commissioner this year but if the service ceases to operate due to financial difficulties the savings will prove self defeating".

(ii) Standard 10 stated that "fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost-effective ways of working. The fees need to be adequate to enable providers to meet the specifications set by the commissioners together with regulatory requirements".

Legal framework: (3) Article 8 of the European Convention on Human Rights

The High Court also identified Article 8 of the European Convention on Human Rights (as given effect by the Human Rights Act 1998) as forming part of the relevant legal framework. By virtue of s.6 of the Human Rights Act 1998, a council must act compatibly with Article 8 when exercising its functions. What this meant in the present context was described as follows by the High Court:

> "44...So far as the Council is concerned, it is a public body and, as such, where it makes a decision which may result in the removal of a vulnerable person from their home, with the potential associated stress, distress and adverse impact on his or her health, then that engages Article 8 of the European Convention on Human Rights; and removal may constitute an interference with those rights such that it will be allowed only if the removal is proportionate and justified in pursuit of a legitimate public aim (*Watts v United Kingdom* (2010) 51 EHRR SE5 (Application No 53586/09) at paragraph 97; and *Manchester City Council v Pinner* [2010] UKSC 45; [2010] 3 WLR 1441 at paragraphs 45 and 51-52). In making its decisions in relation to section 21, the Council is required to bear that in mind and make the appropriate proportionality balancing exercise where necessary".

At this point, it is worth recalling what the 'proportionality balancing exercise' involves in law. This is because proportionality is likely to be the main focus of any analysis of whether a fee-setting decision breaches Article 8. Firstly, a 'legitimate aim' must be identified. It seems likely that in most cases a council will be pursuing a legitimate aim in setting fees at a particular level. In the language of Article 8, that aim is likely to be "the economic well-being" of the country. In more conventional language, the authority is seeking to make the most efficient use of public resources. But the fact that a legitimate aim is pursued is not enough. The actions taken in pursuit of that aim must be proportionate.

The term 'proportionality' is referred to more regularly than it is explained. An accessible explanation is given in a leading work *Human Rights Practice* (Sweet & Maxwell). At para. 8.060 this states:

> "A measure will only be proportionate to the legitimate aim pursued if supported by sufficiently persuasive [or relevant and sufficient] reasons. In determining whether the reasons advanced are sufficient, regard must be had to the nature and degree of the particular interference with the individual's rights."

How does this play out in care home fee-setting cases? This discussion is predicated on the assumption that, as a result of a fee being set at too low a level, a care home will become unviable and residents will have to leave so that (a) a resident's right to respect for his/her home is interfered with, or (b) a resident's right to respect for his/her private life is interfered with. It also assumes that a resident's care home is his/her 'home' for the purposes of Article 8 (it is clear that for many longer-term residents the care home will be his/her home for Article 8 purposes given the nature and degree of the ties between an individual and the care home: (*Gillow v UK* (1986) 11 EHRR 335). If a care home is not a person's home (which may be the case if s/he has only lived there for a matter of weeks), Article 8, to the extent that it is concerned with a person's home, is inapplicable.

Taken together, those assumptions result in a publicly-funded resident's Article 8 rights being interfered with if fees are set so low that a care home becomes unviable. What, then, does this mean for a council? First of all, it should be aware of whether or not the proposed fee is likely to result in the home becoming unviable. It does not have to take a care home provider's assertions of unviability at face value but it should turn its mind to whether its proposed fee is likely to render the home unviable. Otherwise, it lays itself open to a claim that it has not acted in accordance with Article 8 – if a council has not recognised that its fee would lead to a home's closure, it will be difficult for the council to show that, if the home does close, it is acting proportionately. Similarly, if it accepts that its fee level is likely to lead to a home's closure, it should be prepared to show that it has a reasonable basis for concluding that suitable alternative placements will be available for those residents whose fees it meets. Otherwise, the authority is unlikely to be able to show that it has relevant and sufficient reasons to justify what it is doing. So this aspect of Article 8 may in practice impose greater obligations in the case of a sparsely populated area like Pembrokeshire than in the case of an urban area with many readily available care homes.

Legal Framework (4) – regulatory compliance costs

Care homes are subject to a detailed regulatory regime. This obliges homes to meet certain requirements (as this was a Welsh case, the relevant requirements were contained in the Care Homes (Wales) Regulations 2002). Additionally, care homes that accommodate residents who are funded by local authorities under the National Assistance Act 1948 are subject to the requirements of the Human Rights Act 1998 (by virtue of s.145 of the Health & Social Care Act 2008). And, of course, there is also health and safety and employment legislation such as the minimum wage legislation.

Complying with these regimes costs money. As mentioned above, the applicable statutory guidance provided that fees should be set at such a level as to enable providers to meet regulatory requirements. But it is clear that, even in the absence of guidance, a council must have regard to a care home's legal obligations to comply with regulatory requirements when fixing fee levels. A council could not possibly be acting reasonably if it were to set fees at a level which made it impossible for the home to comply with its regulatory obligations.

The Legal Framework – the Court's summary

In summing up the legal obligations of a council when setting care home fees, the High Court made the following statement which appeared to distil many of the aspects of the legal framework identified above:

> "In making strategic or individual decisions, an authority must have proper regard to the consequences such decisions will or may have on both providers and, especially, the residents of care homes. As with any such assessment, the authority must have regard to both the nature of potential adverse consequences, and the chance of such consequences coming about. A potential, or even actual, adverse consequence for providers or residents or both will not necessarily be determinative of a decision – an authority

does not have to guarantee that its decision will not have adverse consequences for some interested party – however, an authority cannot make a decision that may have such consequences without proper consideration and compelling reasons. That requires an authority to identify any relevant risks, and then assess those risks in terms of the chances of the adverse event occurring and the seriousness of the potential consequences if it does.

That is particular so in respect of potentially adverse consequences for residents, who are necessarily elderly and vulnerable and whose interests are at the heart of the commissioning of care services. An authority cannot make a decision which potentially has adverse consequences for a resident, such as a move to another home or a reduction in the level of care, without proper consideration and compelling reasons".

What did this council do wrong?

Pembrokeshire council used a computer model as part of its fee-setting decision making process. It did so with the agreement of a local care homes representative body the members of which included the claimants in the judicial review claim. The model used was the 'Laing 2004 Wales model' which aimed to calculate the reasonable operating costs of efficient care homes in Wales. As set out below, in a number of respects, the way in which the Model was used was flawed.

(i) **Excessive reduction in return on capital figure.** By the time that the claim came to court, the council conceded that in one respect, their use of the Model was flawed. The Model provided for a rate of return on capital invested in a care home business. In Wales, there are two sets of National Minimum Standards for the physical environment (PE) of care homes. One is for older care homes for which less rigorous standards are expected. Under the Model, the return on capital figure relates to newer homes. For this reason, the council applied a reduction of about 75% in the return on capital figure for the care homes with which this case was concerned. This was because they only met the lower standards. The council accepted that this was an error. The reduction should only have been 50% which, apparently, is also the approach taken under the commonly used computer Model for care homes in England. In practical terms, this meant that the council had reduced the weekly fee per resident by £73 when it should only have been reduced by £55.

(ii) **Blanket reduction in return from capital figure.** The council's approach involved a blanket reduction in the return on capital figure for homes that did not meet the new physical environment (PE) Standards. This was unlawful; it penalised providers who were taking steps to improve their care homes. On this point, the Court said:

"110...a policy to discourage or not to encourage providers from raising the physical environmental standards of their homes would deviate from Welsh Assembly Government policy and guidance the Council is bound to follow, unless it has compelling grounds to deviate, there is no basis upon which I could make the bold assumption...that the Council has a policy not to encourage providers to enhance the PE standards of care homes."

(iii) **Failure to assess homes' compliance with standards.** The fee generated by the Model was further reduced to take account of compliance with other National Minimum Standards. This resulted in an additional reduction in the return on capital element per resident per week of £27.50 per week. However, this reduction was predicated on the council developing a process for assessing the extent to which these Standards were complied with (so that if they were fully complied with no reduction would in fact be applied). But it seems that no such process was developed. The council conceded that it erred in law "in failing to implement a scheme of assessment of standards of care in homes, meaning that homes with the highest standards were being deprived of £27.50 per resident per week – and all other homes were being deprived of pro rata payment in respect of care standards, and the incentive to better standards of care in their homes".

(iv) **Payment for actual capital costs reduced for non-compliance with non-capital standards.** In any event, it was irrational for the council to make a deduction from the return on capital element of the fee in respect of non-compliance with non-physical care home standards. The High Court said that any deduction "would inevitably be arbitrary, because *no* part of capital costs is rationally referable to non-PE standards of care". But, it should be noted, the High Court judge acknowledged that in principle it is perfectly reasonable for a council to link its care home fees to compliance with non-physical care home standards:

"118. I fully accept that it would be open to an authority to incentivise the raising of non-PE standards of care in some way. The Laing 2008 England model suggests one way, namely that the floor for capital costs based upon PE standards should be half the ceiling – and then making any allocation within that range conditional upon particular non-PE care standards being maintained. However, that is, of course, a very different logical approach from that adopted in this case. In working on the basis that there is an element of capital costs representing the difference between minimum and maximum non-PE care standards – which can be allocated on the basis of extent of compliance with such maximum standards – [the council] did not, in my judgment, adopt a logically defensible or legally rational approach."

(v) **Local staffing pressures.** There was evidence that the care standards regulator for Wales (the Care and Social Services Inspectorate Wales, part of Welsh central government) maintains different care home staffing ratios for different parts of Wales. This appears to be a relic from the time when standards were set locally. But when the council operated the Economic Model it adopted a National benchmark staffing figure. It should have considered whether this was appropriate in the light of evidence that the regulator expected higher staffing levels in Pembrokeshire. In the Court's words:

"129. Therefore, whilst national benchmark staffing levels may be an appropriate starting point, an authority must at least consider whether any local factors militate against the use of a particular benchmark in particular circumstances. In this case, the Council had evidence that they may. In any event, the Council had evidence...that the actual levels of care were higher than those for which the Council proposed to include in the costs assessment model, and a reduction in staffing levels could have an adverse impact on residents. The Council was therefore bound to take into account the potential adverse consequences for residents before setting a rate on that basis. There is no evidence that it did."

(vi) **No absolute requirement to meet actual staffing costs.** However, the Court did accept that a council is not required to meet a provider's actual staff costs:

"123. I accept that actual levels of care in terms of non-nursing hours cannot be determinative of the reasonable hours that an authority should pay for on a cost basis. That would only be an encouragement for providers to use staffing ratios that are higher than are necessary to give residents appropriate levels of care under section 21 [of the National Assistance Act 1948]."

(vii) **Inefficient small homes.** Most care homes in Pembrokeshire are small with fewer than 20 registered places. This makes them relatively inefficient as they cannot benefit from economies of scale to the same extent as larger homes. When Pembrokeshire council populated the Economic Model with data, it only used data that related to the unit costs of running larger homes. While this may in principle be acceptable (so as not to reward inefficiency) a council should be alive to the possible adverse consequences for the local care economy of doing so. This council did not address this point. That was a further error of law. In the Court's words:

"134. Where, as in Pembrokeshire, a significant proportion of residential homes are small and population is sparse, setting a fee rate on the basis of homes that may benefit from economies of scale, may have the effect of putting smaller homes out of commercial business, which may result in residents being moved. That move may be to a less convenient home in the area (e.g. less local for the resident), or even, where places in homes in the area are generally occupied, movement out of the area altogether.

135. In the case of Pembrokeshire, the Council was aware that a significant proportion of homes are small, the occupancy level is very high and providers have been expressing concerns about the fee rates in the context of their business. In the circumstances, the Council, if determined to set one rate for all homes large and small...ought to have taken into consideration the local circumstances, and the possible consequences to providers and residents of setting a fee rate based upon only those homes which benefited from the economies of scale. There is no evidence that it did so."

(viii) **Inflation and employment legislation.** There was also no evidence that in setting its fee level the council had regard to the possibility of inflation and a statutory increase in minimum holiday entitlements (under the working time legislation) placing the viability of the care homes at further risk:

"139...it does not appear [that the council] had in mind the potential consequences for providers and residents of inflation and the change in the Working Hours Regulations which represented a cut in fee in real, although not money, terms. There is no evidence that the Council considered at all the effect of the cut in real terms that it was imposing."

(ix) **Relevance of limited financial resources.** The council was entitled to take its limited resources into account in setting fee levels. But its limited resources could not permit it to ignore its statutory obligations which is what seemed to have happened. In the Court's words:

"143...when exercising its discretion in a manner which is adverse to an interested party – e.g. in this context, a provider or resident – the Council's own financial position is of course not necessarily determinative. It is bound to take into account and balance all relevant factors; and in particular it is bound to balance such matters as the quality of the service it provides and the need to maintain stability in the care services sector on the one hand, against the resources with which it has to provide that service on the other. The interests and rights of residents are of particular weight in that balance. The 2003 and now 2010 guidance makes them so, as does Article 8.

144. In my judgment, the Council was fully entitled to take into account its own financial position when determining the level of accommodation and care services upon the minimum required by section 21, and in setting the fee rate for those who provide those services. However, it erred in law in failing properly to take into account other factors which I have identified in this judgment, such as the potential adverse consequences of the decision for providers and residents, which it was required to balance against the constraints on its own resources. The manner in which the Council dealt with capital costs for the purposes of setting the rate was simply methodologically wrong; but the other sub-grounds succeed, because the Council failed to take into account matters other than its own financial resources in a proper and lawful way."

Was the care home's attempt to secure third-party contributions a breach of contract?

A separate element of this case was whether a care home is entitled to seek a contribution from a resident's family because it considers that council fees are sub-cost. At one stage, the care home providers suggested that they would seek family contributions to counteract the allegedly unviable fees offered by the council. The council's view was that this would be a breach of contract. The High Court considered that the council was right and that the care homes were contractually prevented from seeking family contributions. At para. 150 of its judgment, the Court reasoned as follows:

"(1) The contract [between the council and the providers] provides that the fee rate is set out in schedule 2 [th the contract], as reviewed from time to time by the Council. It is not a matter for agreement. Further, the rate that is current applies until another rate is set by the Council.

(2) The contract does allow for third party funding, where the services are more expensive than those which the Council would normally purchase. However, [the contract requires] (i) the resident to exercise choice and wishes to make use of the particular service; and, more importantly to this claim, (ii) the Council's agreement to any such funding arrangement. As a matter of contract between the Council and the claimant, it was not open to the claimants to seek third party contribution to funding without the resident exercising that choice, *and* the Council giving that agreement...The agreement of the Council is vital because, by virtue of..."Guidance on the National Assistance Act 1948 (Choice of Accommodation) Directions 1993", under any third party contribution arrangement, the Council becomes liable for the entire fee (including that contribution), and must therefore be assured that the contribution will be forthcoming from the third party before agreeing to it

...They were not entitled to any contribution from any third party unless they had obtained the Council's agreement, which they do not suggest they sought or intended to seek. The claimants appeared intent on breaching their contracts with the Council by soliciting contributions from third parties without the Council's consent. In the circumstances, the Council were entitled to prevent such a breach of contract in the manner of the modest steps that they took [writing to family members asking to be informed if extra funding was sought from them]".

The Court added that "Nor are these provisions a possible breach of Article 8 [of the European Convention on Human Rights]. There is no blanket prohibition of co-funding here. The contractual provisions, supported by the guidance, do provide a mechanism – a contractual mechanism – for contributions from third parties. It was a mechanism that the claimants failed to follow."

Summary of practical implications

(i) **Computer-aided social care decision making.** This case involved a computer-aided decision making process. The quantification of personal budgets, using Resource Allocation System, or RAS, programmes is another instance of computer programmes being used as part of the process of care provision. However, legal challenges to the use of RAS programmes have failed: see, for example, the decision of the Court of Appeal in *R (Savva) v Royal Borough of Kensington & Chelsea* [2010] EWCA Civ 1209 (issue 70) and the claim against Birmingham council considered above in this issue. The RAS challenges all involved councils in which the ultimate decision as to the amount of a person's personal budget was reserved to social workers who would make the decision in the exercise of their professional judgement. It is possible that a similar approach could be taken to lessen the chances of a successful challenge to a decision to fix a fee under a process which involves use of an economic Model. This would, it is suggested, involve council officers checking the Model's fee against prevailing market rates and adjusting it if it seems necessary in order to ensure a viable supply of placements for those persons whom it is obliged to secure accommodation under s.21 of the National Assistance Act 1948.

(ii) **Transparent decision making.** This was a case in which the High Court was willing to undertake a forensic analysis of the financial assumptions and considerations upon which a council's care home fee rate was based. This was relatively unusual. Many of the cases show both a marked reluctance on the part of the High Court to probe deeply into such matters and a tendency to assume that a fee level was arrived at rationally. Indeed, in the present case the Court accepted that there was a "margin of appreciation" open to a council in populating a fee-generating computer model with data. But it went on closely to scrutinise the data entered by the council. What might have made this case different? A relevant factor may have been a lack of transparency in the decision-making of the council concerned. The High Court judge observed that "I have been hampered by the lack of contemporaneous documents from the Council". For example, important meetings to discuss fee levels were not minuted, decisions were made without being recorded in writing and a number of months passed between the decision being taken to fix a fee of £390 and the providers being informed of the decision. The Court concluded that the council's approach to decision making meant that it would not be afforded the benefit of the doubt where there was uncertainty as to whether it had acted properly in setting fee levels:

> "83. There may be an assumption, in some circumstances, that an authority has acted lawfully: but, where it has apparently acted in deviation from governmental guidance to which it is subject and the parameters of an economic model for the assessment of a fair rate which it has adopted, any such assumption must give way...the absence of documentary records makes it more difficult for an authority to show that it has taken decisions in a rational and reasoned way, having taken into account all relevant factors. That is why, as I have said, good administrative practice demands that decisions, including essential reasons for decisions, are recorded."

(iii) **Departing from the Economic Model's fee.** The Court also considered the legal obligations that flow from a council's decision to use a computer model to generate fee levels. It made the point that a council is not bound to adopt the fee generated by the model: "the model is the servant of the decision-maker in setting a rate, not his master". However, it went on to state that while "it is open to a decision-maker to deviate from the parameters of the model or the rate figure produced" "given the nature of the model and the Council's policy decision to use it, any departure would have to be for compelling reasons". In fact, there were compelling reasons to depart from the model in the present case and in fact it should have been departed from. Those compelling reasons were the flaws in the data entered into the model as explained above in this article.

(iv) **Court scrutiny of operation of Economic Model.** As the outcome in this case shows, a council's decisions when data-populating a computer model for generating fee levels are not beyond the scrutiny of the High Court on a claim for judicial review. In the Court's words:

> "79...any criteria used must be capable of rational justification by the decision-maker. Most criteria will easily be justified on the basis of the model itself, and the Laing 2004 Wales report which supports them. They will not need any further justification. However, where the criteria the model demands are not inherently obvious, the data used may be justifiable and justified by reference to external criteria. In those circumstances, it is important that the authority makes a rational and reasoned decision to use a particular criterion in the context of the model it has adopted".

(v) **Use of external experts.** Pembrokeshire council commissioned an external professional to populate the economic Model with data. Many of the adverse findings made against the council were as a result of flaws in the approach adopted by this external professional. While it may in a general sense have been reasonable for the council's officers to have followed the expert's advice, the council itself could not avoid liability by pointing out that it had in good faith acted in external advice. If that advice was flawed, the council's decisions based on that advice were also flawed. But the council may of course have a separate contractual claim against an adviser who has provided flawed advice.

(vi) **Sharing Economic Models.** It appears that there was some reluctance on the part of the council in this case to share with care home providers details of how it was populating the computer model with date. The High Court was critical. The providers should have been given details of how the system was being operated to generate a particular fee level.

(vii) **High Court does not itself set a fee.** The High Court is not a court of appeal from a council's fee-setting decision. The Court stressed that it would not fix a rate itself. Its role was simply to decide whether the council's decision was made in a lawful manner. That is why it simply quashed the council's decision to set a fee of £390 per week rather than fixing a fee itself.

The High Court (Hickinbottom J) gave its decision in R (Forest Care Home Ltd, Mavalon Ltd and Woodhill Care Ltd) v Pembrokeshire County Council on 21 December 2010: [2010] EWHC 3514 (Admin).

CARERS

CARERS ALLOWANCE

Carers Allowance and students: analysis of the legislation and case law

A series of recent cases have considered students' entitlements to Carers Allowance. Disappointingly for claimants, these make it makes it very difficult for a carer who is on a designated full-time course to retain entitlement to Carer's Allowance.

Not impossible however. Recent decisions of the Upper Tribunal show that a refusal to award Carers Allowance to a student can be challenged and so should not unthinkingly be accepted. This article sets out the current state of the law on the topic and identifies the type of courses that, despite being designated as full-time, might allow a participant to retain entitlement to Carers Allowance.

KEY POINTS

- **The Court of Appeal has made it very difficult for students on full-time courses to receive Carer's Allowance**
- **A person attending a course of education for at least 21 hours a week is deemed to be a full-time student**
- **A person with fewer hours of attendance than that is also likely to be treated as a full-time student if s/he is on a designated full-time course**
- **However, that is not a rule especially in the case of less traditional courses.**

Students and entitlement to Carers Allowance: what does the legislation say?

This is what the relevant legislation provides:

(i) Section 70(3) of the Social Security Contributions and Benefits Act 1992 says that a person is not entitled to Carers Allowance if s/he is "receiving full-time education".

(ii) Section 70(8) of that Act goes on to allow regulations to be made to set out what it means for a person to be "receiving full-time education".

(iii) Regulations have been made. Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976 (a) state that a person is receiving full-time education where s/he attends a course of education at, for example, a university or college, for 21 or more hours per week, and (b) go on to describe in some detail how to determine whether a person is attending a course of education for at least 21 hours a week. For example, it draws a distinction between supervised study (which counts towards the total) and unsupervised study (which does not).

(iv) It will be seen that the regulations take an 'actual hours' approach. Apparently, therefore, the regulations leave open the possibility that a person who is on a 'full-time course' may successfully argue that s/he in fact attends the course for less than 21 hours per week and so is not receiving full-time education for Carers Allowance purposes.

Secretary of State v Deane: how is the legislation to be interpreted?

The question of how the above legislation operates was recently considered by the Court of Appeal in *Secretary of State for Work & Pensions v Deane* [2010] EWCA Civ 699, [2010] ELR 662. This can now be considered the leading case on the topic. Here are the Court's conclusions:

(i) It is clear that, if a person falls within regulation 5's description of a person who is receiving full-time education, s/he is, on that basis, disentitled to Carers Allowance.

(ii) However, the definition in the Regulations is not exhaustive. The Court of Appeal held, in effect, that it is just one case of a person being in full-time education.

(iii) Accordingly, if it is clear that a person is in full-time education according to the ordinary meaning of that term then there is no need to consider whether regulation 5 applies. In the words of the Court of Appeal:

> "40...If it is clear on the ordinary meaning to be given to section 70(3) [that is the ordinary meaning of "receiving full-time education"] that a person is in fact receiving full-time education, then one need not resort to Regulation 5 to see whether he is to be so treated".

(iv) In any event, even where resort is had to regulation 5, "concentration on the hours actually spent is the wrong approach" and "the fundamental question is whether the applicant for CA "is receiving full-time education"" (both quotes taken from paragraph 51 of the Court of Appeal's judgment). The Court went on:

> "51...If in ordinary circumstances the course upon which the student is enrolled is one offered as a full-time university course, as opposed to a part-time university course, then there must be..."some presumption" that the recipient is in full-time education. There are always exceptions to the rule, for example, the student granted exemptions from part of the course but the task of the fact-finding tribunal is, having balanced what is offered and what is expected of the student against the student's actual performance of the demands made by the course, to look at the matter in the round and ask by way of testing the conclusion, is this applicant **receiving** full-time education?"

(v) *Deane* was recently considered by the Upper Tribunal in *Secretary of State v ZC* (see below). In *ZC* the Department for Work and Pensions (DWP) submitted that *Deane* disqualifies from Carers Allowance anyone on a designated 'full-time' course. The Upper Tribunal rejected this argument. There is a presumption to that effect, but not a rule. As para. 51 of the Court of Appeal's decision (quoted above) states, there are

exceptions to the presumption, for example in the case of a student granted exemptions from part of a course perhaps due to accredited prior learning. However, it seems clear from *ZC* that the presumption that it is difficult to displace and displacement is likely to be found in the case of courses that differ from a typical undergraduate degree course (which is acknowledged in the DWP's recent advice to decision makers on the topic(a)). A recent example of that is the Upper Tribunal's decision in *Secretary of State v PW* (see below).

Did Deane change in the law?

Prior to *Deane*, many assumed that the issue in Carer's Allowance student cases was simply to assess whether a person fell within regulation 5's description of what it means to be receiving full-time education, i.e. working out if there were 21 hours attendance per week. But *Deane* means that that assumption is incorrect (and apparently contradictory decisions such as that of the Northern Ireland Court of Appeal in *Wright-Turner v Department for Social Development* (2002) NICA 2 should not be followed, at least not in England and Wales). Under that assumption, the focus was on actual hours of attendance at a course rather than whether it was designated as a full-time course by the course provider. This provided an opportunity for poor attenders to secure or maintain entitlement to Carers Allowance. That opportunity has now virtually disappeared.

Applying Deane: example 1

Deane itself involved the mother of a severely disabled child who went to University to pursue what was described as a full-time degree course. Prior to going to University, Ms D had received Carers Allowance.

Ms D said that, despite her course being designated as full-time and the University considering that it called for 27 hours of supervised study per week, she only attended it for 12 hours a week. The demands of caring for her severely disabled child were, she said, so great that she could not devote more than 12 hours a week on the course. She was "doing the minimum necessary to scrape through".

The DWP Disability and Carers Service decided that, as a result of Ms D being in full-time education, she ceased to be entitled to Carers Allowance. That conclusion was upheld by the Court of Appeal which held that Ms D was receiving full-time education. She was undertaking a course considered full-time by her University and it seems the Court of Appeal was more than satisfied that this was not a special case where Ms D could be treated as a part-time student. Her entitlement to Carers Allowance therefore ceased.

Applying Deane: example 2

We now come to the Upper Tribunal's decision in *Secretary of State for Work & Pensions v ZC* [2011] UKUT 2 AAC. A 20 year old claimant was on a course described by her University as full-time. Her claim for Carers Allowance, based on the care she provided for her severely disabled father, came before the First-tier Tribunal (FtT). It decided that the claimant was entitled because she was not a full-time student. It accepted her evidence that she had 14 hours of face-to-face teaching per week which she supplemented with 6 hours of supervised self-study. This was less self-study than was expected but she said that due to her prior knowledge, at A-Level standard, she was nevertheless able to cope with the demands of the course. The DWP appealed to the Upper Tribunal.

The Upper Tribunal allowed the appeal. There was nothing in this student's circumstances to displace the presumption that a person on a "full-time" course is a full-time student. In particular, her reliance on her previous study could not displace the presumption:

> "26...if the value of her prior study was so great as to affect the full-time nature of the education which she required to receive in order to obtain her degree, one would have expected to have seen it reflected in a formal exemption, given that the university had a structure for conferring them".

What this shows is that an argument that a student is not receiving full-time education because s/he has already covered much of the course in prior study is unlikely to be accepted in the absence of a formal exemption from particular parts or modules of a course.

Applying Deane: example 3

Secretary of State for Work & Pensions v PW [2011] UKUT 3 (AAC) concerned a young person on an 'entry to employment' course. The course provider said it was full-time although it only provided 18 hours of instruction per week (with no requirement for additional self-study). But an additional factor was that some of the young persons on the course were periodically provided with work placements. Typically, a work placement would involve 30 hours attendance per week at the host employer's business. The DWP decided that the young person was a full-time student and so not entitled to Carers Allowance.

The case came before the First-tier Tribunal (FtT). The FtT disagreed with the DWP and held that the young person was not a full-time student. The Upper Tribunal rejected an appeal against that decision. In so doing, it made the following findings of note:

(i) The course provider's statement that the course was considered full-time did not compel the conclusion that the young person was a full-time student. In this case, an alternative conclusion was open to the FtT, for reasons described as follows by the Upper Tribunal:

> "13...The DWP had made the initial enquiry, without making it clear what was meant by "full-time" when asking [the course provider] whether the course was indeed full-time. Institutions may have their own definitions or others which they need to apply, which may or may not correspond to what is relevant for benefit purposes. There was no indication of the ability of the person replying to the questionnaire to speak authoritatively as to the matter. The answers given were incomplete. In short, it was not compelling evidence."

(ii) The FtT discounted the work placement element of the course. It was entitled to do so. The evidence showed that work placements were allocated haphazardly so that there was no guarantee of a student being allocated one. And, even if one were allocated, a student was not required to take up the work placement or even complete a placement that s/he had begun.

(iii) In fact, the Upper Tribunal held that the FtT had made the right decision:

> "on the facts of this case a course for four mornings and one two hour period per week, involving no other work, and of which any placements did not form part of the course, was a part-time and not a full-time course for the purposes of section 70(3)"

(a) DMG 04/11 Carer's Allowance: Full Time Education, available at http://www.dwp.gov.uk/docs/m-04-11.pdf

The Court of Appeal gave its decision in Secretary of State for Work & Pensions v Deane on 23 June 2010: [2010] EWCA Civ 699. The Court was comprised of Ward, Hallett and Hughes LJJ.

The Upper Tribunal (Judge Ward) gave its decision in Secretary of State for Work & Pensions v ZC on 4 January 2011: [2011] UKUT 2 (AAC).

The Upper Tribunal (Judge Ward) gave its decision in Secretary of State for Work & Pensions v PW on 4 January 2011: [2011] UKUT 3 (AAC).

WALES

The Carers Strategies (Wales) Measure 2010: an analysis

Towards the end of last year, the National Assembly for Wales enacted a form of primary legislation called the Carers' Strategies (Wales) Measure 2010. This article contains a brief guide to the Measure. The Measure establishes a framework for the production of carers strategies by relevant authorities in Wales. The Measure does not itself require the production of strategies. It simply allows regulations to require carers strategies to be produced.

KEY POINTS

- **The Measure provides a legal framework under which councils and NHS bodies in Wales could be required to have statutory carers strategies**
- **Currently, however, no such requirement has been imposed**
- **Strategies will be subject to the approval of the Welsh Ministers (Welsh central government)**
- **The Welsh Ministers will also be able to extend the range of Welsh bodies which are required to have carers strategies**

What is a carer?

Section 1 of the Measure defines 'carer'. It encompasses both carers for disabled adults and children. But only persons who spend a significant amount of time caring (a "substantial amount of care on a regular basis") are caught by the definition.

Are professional and volunteer carers excluded? As with most carers legislation, the answer is 'yes'. A person is not a carer for the purposes of the Measure if s/he "provides or intends to provide care—

(a) by virtue of a contract of employment or other contract with any person, or

(b) as a volunteer for any body (whether or not incorporated)."

Carers Strategies

Section 2 of the Measure provides for local authorities and NHS bodies (principally, Health Boards) in Wales to prepare and publish carers' strategies. The duty is not contained on the face of the Measure. Instead, this section allows the Welsh Ministers to make regulations to impose a requirement on authorities in Wales to prepare and publish a carers strategy.

The anticipated contents of carers' strategies are, however, set out in section 2 of the Measure. They will:

(i) set out how the authority will provide "appropriate information and advice" to carers (such information and advice must be provided free of charge: section 3 of the Measure),

(ii) require authorities to consult carers before deciding what services (if any) are to be provided to the carer or the person being cared for (regulations may set out the consultative steps: section 4),

(iii) require authorities to consult carers before making decisions of "a general nature regarding the provision of services to or for carers and the persons they care for" (regulations may set out the consultative steps: see section 4).

As at April 2011, no regulations had been made under this section and, accordingly, authorities in Wales were not at that date required to prepare and publish carers' strategies.

Control over and publicity of carers strategies

Under section 6 of the Measure, a carers strategy does not become effective until it is approved by the Welsh Ministers. Section 8 of the Measure also allows the Welsh Ministers to extend the ambit of the Measure by requiring further bodies to prepare and publish carers' strategies.

Section 7 of the Measure requires an authority to make its carers strategy available for inspection, free of charge, at its principal office.

Links – www.legislation.gov.uk/mwa/2010/5/contents - the full text of the Measure is available here.

MENTAL CAPACITY & COURT OF PROTECTION

BEST INTERESTS

AH v Hertfordshire Partnership NHS Foundation Trust – not in adult's best interests to move from rural campus-style accommodation to urban supported housing

Community living has changed the lives of thousands of persons with learning disabilities for the better. But it should not be assumed that it suits everyone. To do so comes close to the paternalistic mindset which for many years left persons with learning disabilities languishing in long-stay hospitals. Instead, the guiding principle should be an adult's welfare. That is the message from this case.

What happened?

In rural Hertfordshire an NHS Trust ran a self-contained campus-style residential facility for adults with autism and severe learning disabilities. Department of Health national policy is to promote the migration of adults from facilities such as this to supported living projects in the community.

One of the adults at the facility, who had lived there for about 20 years, was placed by Ealing council. In pursuit of the national policy, Ealing proposed that the adult should move to a supported housing project in London. Ealing contended that such a move would be in the adult's best interests as it would promote his independence.

Ealing's proposal was strongly objected to by the adults' parents. The adult lacked the mental capacity to decide where to live. It fell to the Court of Protection to decide whether a move to the London supported house would be in the adult's best interests.

What did the Court of Protection decide?

Having heard expert evidence, the Court decided that it would not be in the adult's best interests to leave the campus-style facility and move into supported housing. The adult's severe form of autism meant that he was highly sensitive to changes in his routine. In itself that mitigated against a move. But in addition the rural setting of the Hertfordshire unit was a much more suitable environment for him than a busy, built-up urban area of London.

The Court ended its decision by criticising the assumption that the optimum caring environment for all adults with severe learning disabilities must be a supported housing project in the community. Insightfully, the Court pointed out that this runs counter to the personalisation philosophy that guides national care policy:

> "guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect. The very existence of [the Hertfordshire facility], after most of the institutional population had been resettled in the community, is perhaps the exception that proves this rule. These residents are not an anomaly simply because they are among the few remaining recipients of this style of social care. They might better be seen as a good example of the kind of personal planning that lies at the heart of the philosophy of care in the community."

The Court of Protection gave its decision in AH (by his litigation friend RH) v Hertfordshire Partnership NHS Foundation Trust & Ealing Primary Care Trust on 17 February 2011: [2011] EWHC 276 (CoP).

CHILDREN

B (a Local Authority) v RM & Others – guidance on transferring an application for a care order to the Court of Protection

Local authorities will need to modify their care planning systems for at risk older disabled children in the light of this case. It identifies an alternative formal legal basis to a care order for an authority's role in relation to such a child, namely an order of the Court of Protection. The High Court's judgment in the present case illustrates that sometimes this will be the optimum course to take. Accordingly, it should be considered as part of the care planning process given that the purposes of that process is to try and identify the best possible future for a disabled child.

What were the underlying care issues?

A 16 year old girl with severe learning disabilities and autism, including a propensity to self-harm, was of Islamic heritage. Her family's religious views led them to resist local authority involvement in the girl's care. For the local authority, this was a problem because they considered that the family had insufficient skills adequately to care for the girl. It should however be noted that the family were a very important part of the girl's life and there was a great deal of mutual affection between them.

KEY POINTS

- The Court of Protection was a more suitable forum for making decisions about a severely disabled 16 year old's future than care proceedings
- A care order was inappropriate due to the message it would send to the girl's family
- Voluntary care was inappropriate because it would be too unstable
- The Court set out factors to be considered in deciding if it is just and convenient to transfer a care case to the Court of Protection
- The overarching question is whether a disabled child's needs would be better met by the Court of Protection than under a care order

Ultimately, the local authority brought care proceedings - while the proceedings were undetermined, the girl was living away from her family in a residential school. The family conceded that the 'significant harm' threshold to the making of a care order was met (s.31 of the Children Act 1989). As with any application for a care order, that did not mean that a care order would automatically follow. The court must consider the matters of principle set out in s.1 of the Children Act 1989, for example:

(i) Under s.1(1) of the Children Act 1989, the requirement that in considering any question with respect to a child's upbringing, the child's welfare shall be the court's paramount consideration.

(ii) The 'no order' principle contained in s.1(5) of the Children Act 1989. This states that that an order under the Children Act 1989 shall not be made unless making an order would be better than making no order at all.

Those matters of principle caused the court hearing the care proceedings to pause to consider whether an order under the Children Act 1989 was called for or whether, alternatively, it might be in the girl's interest for her case to be transferred to the Court of Protection. In outcome terms, what the Court of Protection can achieve in the exercise of its personal welfare jurisdiction is similar in many ways to what a care order can achieve by re-distributing roles in relation to the ongoing care of a young person. The Court of Protection can effect an outcome under which a young person does not live at home with his/her parents and where the parental role in decision making is circumscribed. But unlike the Children Act jurisdiction the Court of Protection's jurisdiction persists following the young person's 18th birthday.

Does a family court have power to transfer a care case to the Court of Protection?

It is sometimes overlooked that the Court of Protection is not exclusively a court for adults. As the High Court stated, at para. 25 of its judgment in the present case, "by section 2(5) of the [Mental Capacity Act 2005] the [Court of Protection] may not exercise jurisdiction in respect of any person under the age of 16"**(a)**. It follows that the Court retains powers in relation to children aged 16 or 17 such as the girl with whom this case was concerned.

In fact, secondary legislation has anticipated the possibility of transferring care cases to the Court of Protection. This is the Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 (S.I. 2007/1899). Article 3 of the Order confers power on a court hearing proceedings under the Children Act 1989 to transfer the whole or part of the proceedings to the Court of Protection (Article 2 provides for transfers in the other direction, from the Court of Protection to a court having jurisdiction under the Children Act 1989).

According to what criteria should the power to transfer a case to the Court of Protection be exercised?

The 2007 Order does not create a bare power. It contains a pre-condition - the power may only be exercised where the court "considers that in all circumstances, it is just and convenient to transfer the proceedings" (Article 3(2) of the 2007 Order). Article 3(3) goes on to specify matters that must be taken into account by the court when deciding to transfer (the implication being that these are matters that the court considers when arriving at a view as to whether it is "just and convenient" to transfer). The matters to which regard must be had are as follows:

> "(a) whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection;
>
> (b) whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings;
>
> (c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18; and
>
> (d) any other matter that the court considers relevant".

In the present case, the High Court usefully identified some factors that would often be considered relevant (and so have to be taken into account under Article 3(3)(d) of the Order:

> "28...One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings [if the child did have capacity in relation to those decisions then the Court of Protection would have no power to make them for the child, rendering the transfer pointless]? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority. Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Article 3(3); no doubt, other issues will arise in other cases."

The High Court also went on to identify what could be viewed as an organising principle for the court's decision-making processes in cases such as this:

> "28...The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare would be better safeguarded within the Court of Protection than it would be under the Children Act."

Why did the High Court order the case to be transferred to the Court of Protection?

The High Court decided that it would be just and convenient to transfer the proceedings to the Court of Protection so that future care planning would take place under the auspices of that Court. It was important for the parties to know that, if they cannot agree the girl's future care arrangements, the matter can be put before the Court of Protection for decision. This should inhibit the development of impasses.

The High Court judge then proceeded to reconstitute himself as a judge of the Court of Protection (he was a High Court judge, Hedley J, authorised

to exercise both the Children Act and the Court of Protection jurisdiction). The judge declared that the girl's continued placement at the residential school, but with regular and frequent contact with her parents, was lawful. The declaration also stated that it was in the girl's best interests for the council to begin the process of preparing the girl for transfer to a new residential setting closer to her family's home. The judge added:

> "34...The parties shall have liberty to restore this matter, reserved to me but are not encouraged to do so unless and until they are deadlocked on a matter of substance. This is a case in which [the girl's] interests are not served by conflict. The Local Authority must proceed with reasonable expedition and the family with patience. The outcome which all seek is a prize well worth negotiation, compromise and patience and I believe it well within the capacity of this Local Authority and this family to see the matter though on their own without the direction of the Court."

Why were the other possible means of disposing of the case rejected?

It may assist care planning in cases with similar features to this if we set out why the High Court rejected the options for disposal of this case favoured by the girl's mother and the local authority.

The girl's mother argued that neither a care order nor transfer to the Court of Protection was justified. Her suggested alternative was for the girl to be voluntarily accommodated in her current residential school under s.20 of the Children Act 1989. That would leave her family free to remove her from the school at any time. The High Court agreed with the local authority that it was not appropriate for care arrangements to be left on that informal basis. The girl's care arrangements needed a stable basis in order for effective planning to be carried out.

So, a voluntary care arrangement would not best serve the girl's welfare. But neither would a care order. The Court's reluctance to make a care order appears to have in large part been based on its view that a care order might be inappropriate in a case involving a family who wanted to be fully involved in their child's care. A care order would allow the local authority to decide the extent to which the girl's parents could exercise their parental responsibility in relation to the girl (s.33(3) Children Act 1989). The Court's decision gives the impression that in this case it would not be right for the local authority to have that dominant role in relation to the girl's care. The judge said:

> "23...I have serious reservations about a care order in circumstances where first, there is a proved commitment over time and in devotion to contact and secondly, that the family remain the key constant for the future of this young person. If one asks oneself who will still be in her life in 10 years' time, the probabilities are that answer will be family members only...It is a family which everyone recognises is committed to the welfare of [the girl]. I would have no difficulty in understanding a sense of rebuff and feelings of marginalisation were a care order to be made, even one that only lasts for 12 months and no more."

Practice points for managing cases of conflict between a local authority and family of a severely disabled child

Throughout its decision, the Court made a number of recommendations as to how the authority and the family should work together. These may be useful for professionals in a similar position to those in this case. The main points were as follows:

(i) Care planning should reflect the strength of the emotional bond between the girl and her family. If at all possible, the girl should be placed in a residential setting closer to the family home to make it easier for family links to be maintained. Similarly, future care arrangements for the girl should facilitate contact between her and her family.

(ii) It was vitally important for the local authority to make strenuous efforts to maintain a good working relationship with the girl's family:

> "15...she will require the life-long emotional commitment essential for her welfare which is, of course, likely only to come from the family themselves and that of course is where both the mother and [the girl's] brothers and sisters have a central role to play. Hence, it is vital that they are not subject to any unnecessary discouragement. In short, they have a central role to play in her future."

(iii) The need to involve the girl's family, in particular her mother, in her care was not to be left at a strategic or care-planning level. It should also include matters of day-to-day routine including, for example, intimate care arrangements:

> "It is of course not for the Court to dictate to [the residential school] as to how they organise their affairs but it is...vital that the mother is included as far as possible in the care of [the girl] and is not simply left as a spectator to intimate care."

(iv) The girl's complex needs could not be met by a single care provider. For example, the girl's family were the only persons who were capable of fully meeting her emotional needs. That was one particularly important reason for ensuring that her care arrangements were fixed in consultation with her family and other bodies in involved in looking after her. This is what the High Court judge hearing the case said in this respect:

> "12. [the girl] has very serious physical, emotional and educational needs and it is unlikely in my view that all those needs are going to be met from the same source. This is a case in which those who meet physical needs may well have to cooperate with those who fundamentally meet emotional needs, who in their turn may have to cooperate with those who meet educational needs."

(v) If the girl is to be moved, "she should only have one move [from her current residential school] and that that move must succeed and must be her last move". This was because "any change is likely to induce considerable anxiety and to be difficult; that is why everyone agrees that there must only be one move". Accordingly, the move needs to be very carefully planned.

(vi) The Court stressed the need for close liaison between the authority's children's and adult's services Departments to ensure as seamless a handover of responsibility as possible when the girl becomes a woman.

(a) But see section 18(3) of the Mental Capacity Act 2005 which acknowledges that the Court of Protection has certain powers in relation to the property and affairs of a child aged under 16.

The High Court (Hedley J) gave its decision in B (a Local Authority) v RM, AM & MM on 15 October 2010 (case no. FD08PO1576).

DEPRIVATION OF LIBERTY

Care Quality Commission's Annual Report – analysis

The Deprivation of Liberty Safeguards (DOLS) scheme, contained in the Mental Capacity Act 2005, contains an unusual mix of precision and imprecision. The core concept is itself vague – what is a deprivation of liberty. But the processes that flow from an application to authorise deprivation of liberty are set out precisely in some bureaucratic detail. In March 2010, the Care Quality Commission (CQC) published a report entitled *The Operation of the Deprivation of Liberty Safeguards in England 2010*. This collates the CQC's inspection findings in so far as they relate to the operation of the DOLS in England and makes recommendations for improvement in practice. The report shows that some PCTs and, to a lesser extent, councils, are still struggling to get to grips with DOLS. Both its imprecise and precise features continue to pose compliance challenges for many councils and PCTs.

KEY POINTS

- In some areas, DOLS has yet adequately to bed in
- Joint working between PCTs and councils in the exercise of DOLS functions is encouraged
- Location of DOLS officers within adult safeguarding units should not lead to a dilution of the least restrictive intervention principle
- Excessive restraint in care homes is causing the Care Quality Commission (CQC) concern
- The CQC have provided an illustrative list of cases in which a deprivation of liberty might be occurring

Key general points in the report

(i) **Joint-working.** The CQC is of the view that it is often desirable for councils and PCTs to work closely in discharging the functions as DOLS supervisory bodies (in England councils are the supervisory body for care homes, PCTs for hospitals). The report states that "many PCTs and councils have worked effectively together, and established joint teams to fulfil their supervisory role"

(ii) **Staff awareness.** The CQC are concerned about lack of awareness of DOLS amongst many hospital and care home staff. The report states that there were "too many examples of managers and staff in hospitals and care homes who were unaware of the Safeguards or who had received no training on them, even towards the end of 2009/10".

(iii) **Bureaucracy.** The CQC acknowledge that may professionals view DOLS as being over bureaucratic. It recommends that the Department of Health "consider whether it may be possible to reduce the amount of paperwork needed to use the Safeguards."

(iv) **Care Planning.** The report stresses the importance of good care planning in avoiding a deprivation of liberty in the first place. For example, close liaison and involvement of family members in fixing care arrangements may avoid a deprivation of liberty. It could inhibit a person from trying to leave a care home or avoid a situation in which a care home provider feels to need to prevent family members from making visits.

(v) **Statistics.** The report includes some interesting findings about the make-up of the DOLS population. 75% of DOLS applications have been made to councils (i.e. in respect of care home residents). And the most frequently encountered cause of lack of capacity within the DOLS population was dementia.

(vi) **Regional variations.** The report identifies significant regional variations in use of DOLS. For example, DOLS authorisations were three times more likely to be sought in the East Midlands than in the region with the lowest DOLs use, the South West.

(vii) **Under-use of DOLS**. Concern has previously been expressed about the low use of DOLS in some areas. In August 2010, the Department of Health wrote to councils and NHS bodies about the suspiciously low use of DOLS in some areas saying that "Chief executives are reminded that they have a statutory responsibility for ensuring that no NHS care or treatment is offered without the necessary DOL safeguards in situations which amount to a deprivation of liberty". These concerns are reflected in the CQC report which states that 5 PCTs and 3 local authorities received no DOLS applications whatsoever in 2009/10. However, the report does note a steady general increase in the use of DOLS.

Key points for councils

(i) **Safeguarding services.** The CQC observes that within councils the DOLS function is part of the council's adult safeguarding service. It strikes a note of organisational caution in this respect:

> "While this may appear sensible, it also raises some concerns. These designated teams may be considering the Deprivation of Liberty Safeguards as an extension of the safeguarding role, potentially leading to staff not being mindful of the requirement for the least restrictive practice. Furthermore, staff may also be unaware that it is inappropriate for someone to be deprived of their liberty as part of a safeguarding plan unless they are also subject to Deprivation of Liberty Safeguards assessments and authorisation".

(ii) **Restraint.** The report expresses concern that in some care homes staff unthinkingly use restraint upon residents. Two particular problems are identified. First, whether restraint is being used in accordance with the Mental Capacity Act 2005 – only to prevent harm and as a proportionate response to the likelihood and seriousness of the harm. Second, a failure to appreciate that regular use of restraint might mean that a resident is being deprived of liberty so that a DOLS authorisation is required in order for it lawfully to continue

Key points for PCTs

(i) **PCT concerns.** Generally, it seems fair to say that the CQC is more concerned about the discharge of DOLS functions by PCTS than by local authorities. More PCTs than councils failed to provide information to the CQC about their DOLS activities and, where they did, on average they showed lower levels of understanding.

(ii) **Mental Health Act 1983.** PCTs tend to reject more applications than councils. The report thinks this might be because in some cases the PCT

concludes that the individual is ineligible under DOLS because Mental Health Act 1983 powers should be used instead. The interface between the two regimes is complex and was something that we considered in depth in issue 63 when analysing the decision of Charles J in *GJ v the Foundation Trust; the PCT and the Secretary of State for Health* [2009] EWHC 2972 (Fam), (2009) 12 CCL Rep 600, [2010] Fam Law 139, [2010] 1 FLR 1251.

(iii) **Informal mental health patients.** The report raises concerns about the position of informal patients on locked wards. In some cases, a situation of de facto deprivation of liberty seems to have occurred. This is what the report says:

> "On some visits, we found that informal patients in these units were not free to leave and locked doors or keypads were used to restrict entry and exit to and from the units for all patients.
>
> This raises concerns that some informal patients in such facilities are at risk of 'de facto' detention, or a deprivation of liberty without legal authority, and this is not acceptable practice. To ensure that the rights of informal patients on these units are protected, all staff in these units must be trained appropriately to ensure that they are aware of the Mental Capacity Act and the Deprivation of Liberty Safeguards and the impact of these on the care they provide".

Does the report help in identifying what amounts to a deprivation of liberty?

The DOLS safeguards operate by reference to the concept of deprivation of liberty under Article 5 of the European Convention on Human Rights. This creates a difficulty for those who are subject to, and charged with operating, DOLS. Under European Court of Human Rights case law there is no precise definition of what amounts to a deprivation of liberty and no clear demarcation between deprivation of and mere restriction of liberty (to which DOLS does not apply). For example, in *Guzzardi* [1981] 3 EHRR 333, the Court said that "the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance".

The CQC report acknowledges that the inherent lack of precision as to what amounts to a deprivation of liberty has made it difficult for some professionals to know whether a DOLS authorisation should be sought. To assist care professionals to recognise a deprivation of liberty, the CQC recommend that the Department of Health "consider developing clear and concise briefings [on the topic] that are accessible and easily applied to practice".

The report also provides some assistance in this respect. It has distilled from the case law certain features which tend to show that a deprivation of liberty is occurring (so that a DOLS authorisation should be sought). These are as follows:

- Restraint was used to admit a person to a hospital or care home when they were resisting admission.
- Medication was given forcibly, against a patient's will.
- Staff exercised complete control over a person's care and movements.
- Staff made all decisions on a person's behalf, including choices relating to assessments, treatment, visitors and where they could live.
- Hospital or care home staff took responsibility for deciding if a person could be released into the care of others or allowed to live elsewhere.
- When carers requested that a person be discharged into their care, hospital, or care home staff refused.
- A person was prevented from seeing friends or family because the hospital or care home restricted access to them.
- A person was unable to make choices about what they wanted to do and how they wanted to live, because hospital or care home staff exercised continuous supervision and control over them.

Links – www.cqc.org.uk/_db/_documents/20110304_DoLS_Report_v4_201103144159.pdf – the full report is available here.

DISABLED CHILDREN

LEGAL STATUS

R (RO) v East Riding of Yorkshire Council – child accommodated in residential special school was a looked after child as placement was not wholly or mainly for educational purposes

The regular co-occurence of educational and emotional / care needs makes this a highly significant decision of the Court of Appeal. It is likely to mean that many children in residential special schools are in law looked after children. As such, they are owed a range of welfare duties under the Children Act 1989 and also likely upon attaining adulthood to be entitled to leaving care services.

Summary of the decision

The case concerned a boy whose statement of Special Educational Needs named a residential special school. As a result, his council funded his placement there. The council contended that the legal basis for the placement was solely the education legislation. If this were correct, the boy

could not be a looked after child. However, the Court of Appeal held that it was not correct. As the placement was not wholly or mainly to meet the boy's educational needs (it also met his care needs) its legal basis (or one of its legal bases) was the Children Act 1989. That rendered the boy a looked after child. As many children in residential special schools have significant care needs which the placement is designed to address, it is likely that many children's placements meet the legal tests applied by the Court of Appeal in this case. That makes them in law looked after children.

Who was this case about?

The 14 year old boy at the heart of this case had an autistic spectrum disorder together with ADHD. His parents found it very difficult to cope with him at home and his council accommodated him in a registered children's home. Initially, the council accepted that he was a looked after child by virtue of his being voluntarily accommodated by them (in the children's home) under s.20 of the Children Act 1989 (s.22(1) of that Act provides that where a child is accommodated under s.20 for more than 24 hours s/he is a looked after child).

Subsequently, a statement of Special Educational Needs was produced naming a 52 week a year placement at a residential special school, an option which the boy's parents had been urging for some time. Accordingly, the local authority were obliged to, and did, fund the boy's placement at that special school under s.324 of the Education Act 1996.

The issue was whether the boy remained a looked after child following his move to the residential special school. His parents were keen for him to retain 'looked after' status. This would impose a range of obligations upon the local authority in relation to the boy's welfare as well as potentially lead to a future entitlement to leaving care services.

What did the High Court decide?

At first instance, the High Court held that the boy was no longer a looked after child. Children in care (under a care order) are automatically considered looked after children. But for other children, including this boy, looked after status is an entirely consequential matter. It depends on whether a child is accommodated under certain statutory provisions that 'count' for this purpose. If a child is so accommodated, the consequence is that s/he is a looked after child. As mentioned above, one of those statutory provisions is section 20 of the Children Act 1989.

The High Court's view was that the boy's residential school placement was provided under the Education Act 1996. Therefore he was not being accommodated under a statutory provision, such as s.20 of the Children Act 1989, which triggers looked after status. And that meant he could not be a looked after child. The High Court went on to reject the argument that, in providing the placement under the Education Act 1996, the local authority were improperly side-stepping an obligation to provide accommodation under the Children Act 1989.

Why did the Court of Appeal overturn the High Court's decision?

The boy (acting through a litigation friend) appealed to the Court of Appeal. The Court of Appeal held that the High Court was mistaken in assuming that simply because the council were obliged to fund the placement under the education legislation that it could not also be treated as being provided under s.20 of the Children Act 1989.

How did the Court of Appeal identify the boy's placement as being one which was provided under s.20 of the Children Act 1989? The approach it took was to ask itself the following questions:

(i) It first asked whether the statutory conditions which trigger a council's duty to accommodate a child under s.20 of the Children Act 1989 were met. They were met. This was because, by reference to those conditions, the boy was (a) a child in need; and (b) he required accommodation; and (c) that requirement was as a result of his parents being unable, due to his extremely challenging behaviour, to provide him with suitable accommodation or care.

(ii) The Court then asked itself whether the boy's placement was "solely or mainly to meet [his] educational needs". This was the test it deployed to distinguish between accommodate that was provided solely under the education legislation (so as not to generate looked after status) and accommodation that was, at least in part, provided under the Children Act 1989 (which would generate looked after status). In this case, it was clear that the purpose of the placement was not solely or mainly to meet the boy's educational needs. There were a whole range of expert reports that had concluded that a residential educational placement was the optimum means of meeting both the boy's educational (on the one hand) and emotional / care needs (on the other). In the Court of Appeal's words:

> "114...It was plain, and it was plain to the council, that [the boy] required full-time accommodation in his specialist placement in order to give him the care, as well as the educational assistance, which his needs, and his parents' inability to cope with and control him, demanded."

As the answer to both of those questions was 'yes', the boy remained accommodated under s.20 of the Children Act 1989 despite having moved to a placement named in the child's statement of SEN. The council therefore erred in law by assuming that his looked after status came to an end upon the commencement of his placement in the residential special school.

The Court of Appeal gave its decision in R (RO, by his father, his litigation friend) v East Riding of Yorkshire Council (intervener: Secretary of State for Education) on 2 March 2011: [2011] EWCA Civ 196. The Court was comprised of Rix, Smith and Richards LJJ.

PROFESSIONAL & EMPLOYMENT MATTERS

EMPLOYMENT

Carr Gomm Scotland Ltd v Sneddon – housing association entitled to dismiss support worker for shouting at client

The simple message from this decision for persons working in supported and sheltered housing is: don't mistreat service users. Any mistreatment of service users by support workers runs a high risk of dismissal. In this case, the Employment Appeal Tribunal decided that a housing association was fully entitled to dismiss a support worker who aggressively shouted at a vulnerable adult.

What happened?

Mr S was a Housing Association support worker employed by Carr Gomm Scotland. He was part of a team providing 24 hour care for a vulnerable adult with mental health problems. The vulnerable adult's neighbour reported to the Association that she had heard someone shouting at him aggressively during the night.

An investigation was carried out which revealed that Mr S was the carer in attendance that night and was the person heard shouting at the vulnerable adult. The investigation also concluded that Mr S had sworn sarcastically at the vulnerable adult in the presence of other support workers. Mr S accepted that he had done so.

The Housing Association dismissed Mr S for gross misconduct. Mr S brought a claim for unfair dismissal to the Employment Tribunal. The Tribunal decided that Mr S had been unfairly dismissed. It held that there was an insufficient investigation into the overnight shouting incident – the neighbour should have been re-interviewed following Mr S's denial of any shouting incident. The insufficient investigation meant, according to the Tribunal, that the shouting incident could not be relied on to dismiss Mr S. That just left the swearing incident which, on its own, was insufficient to justify dismissal.

The Employment Tribunal awarded Mr Sneddon £27,000 compensation for unfair dismissal. Carr Gomm appealed to the Employment Appeal Tribunal.

What did the Employment Appeal Tribunal decide?

Carr Gomm's appeal was allowed and the Employment Tribunal's decision was set aside. The Employment Tribunal's criticisms of the shouting investigation were unwarranted. Carr Gomm had been entitled to conclude that the shouting took place.

Once the shouting incident had been established, Carr Gomm were entitled to conclude that Mr S was guilty of gross misconduct and to dismiss him. Mr S knew that he was not supposed to shout at clients and, in addition, knew that this particular vulnerable adult became very distressed by raised voices. Overall, the Employment Appeal Tribunal decided that this was not a case in which an employer's actions fell outside the range of reasonable responses to staff misconduct. Therefore, a finding of unfair dismissal was unjustified.

The Employment Appeal Tribunal gave its decision in Carr Gomm Scotland Ltd v Sneddon on 3 February 2011: [2011] UKEAT 0031_10_0302.

WELFARE BENEFITS

DISABILITY LIVING ALLOWANCE

KE v Secretary of State for Work & Pensions – benefits tribunal should have explained why it felt able to rely on flawed disability report

Many advisers complain that benefits decision makers and some tribunals unthinkingly adopt medical reports commissioned by the Department for Work & Pensions (DWP). This case was proof that that does happen. It was a particularly bad case. The report in question had itself been criticised in an internal review of Atos Healthcare (the company which supplies reporting healthcare professionals for the DWP). Despite that, a tribunal relied on the report without adverse comment. This was an error of law. Clearly, medical reports that have been criticised by the DWP's own contractor should be approached with caution.

What happened?

A working-age claimant with hand tremors made a claim for Disability Living Allowance. His condition meant that an award of lower rate care component was a realistic possibility under the cooking test (that is, on the basis that he was so physically disabled that he could not prepare a cooked main meal: s.72 Social Security Contributions and Benefits Act 1992).

A DWP-contracted Health Care Professional (HCP) examined the claimant. As regards hand use, the HCP's report noted "essential tremor of outstretched hands" but did not go on to evaluate the functional limitations which resulted from the claimant's tremors. The claimant complained about the HCP's report to Atos Healthcare ltd (the company who supply HCPs). The complaint was upheld on the basis that the report was not "complete, justified and consistent" in that it did not analyse the extent of the claimant's disability.

Despite the complaint having been upheld, the HCP's report was relied on by a decision maker to refuse to make any award of DLA. The claimant appealed and the matter came on before the First-tier Tribunal (FtT).

First-tier Tribunal's flawed reliance on the HCP report

The FtT rejected the appeal. In so doing, it relied heavily on the HCP report, rather than the claimant's account of his symptoms. The FtT said that

the report was given "by an independent expert who has no personal interest in the outcome of the appeal, and who took a formal history, and carried out a clinical examination and then formed an opinion which was consistent with the findings arising from the examination". The FtT made no mention of the earlier adverse findings about the report, despite that information being in the papers before it. The claimant appealed to the Upper Tribunal.

The Upper Tribunal allowed the appeal. Clearly the earlier complaint about the report should have been a clear warning sign to the FtT to exercise caution before relying on it. But the FtT's decision gave no indication that it had turned its mind to the obvious flaws in the HCP report. In fact the Upper Tribunal noted that the FtT's reasons for relying on the HCP report "were in essence formulaic". Its failure to spell out clearly why it felt able to rely on the HCP report rendered its reasons inadequate. That was an error of law and its decision would have to be set aside. Similarly, the FtT's failure to explain why, despite the claimant's hand tremors, it concluded that he was able to prepare a cooked main meal was also an error of law.

The Upper Tribunal (Judge Ward) gave its decision in KE v Secretary of State for Work & Pensions on 20 January 2011: [2011] UKUT 27 (AAC).

EMPLOYMENT & SUPPORT ALLOWANCE

Revised official Workbook for Health Care Professionals carrying out Work Capability Assessment examinations

The Department for Work & Pensions have published a revised Handbook for Health Care Professionals (HCPs) carrying out Work Capability Assessment medical examinations. The Work Capability Assessment (WCA) is used to decide if someone is entitled to Employment & Support Allowance – the replacement for incapacity benefit. The revisions are necessary to reflect recent amendments to the Work Capability Assessment (effected by way of amendments to the Employment and Support Allowance Regulations 2008)(a).

At over 180 pages, the Workbook is a detailed publication. The parts of most interest to advisers will be (a) section 2.3 (pages 19 to 31) which give examples of what types of severe disability are likely to merit a person falling within the 'support group' (persons who are not expected to do work-related activity) and (b) sections 3.3 to 3.6 (pages 64 to 113) as this is where detailed advice is given to HCPs about the WCA descriptors and what sort of conditions should lead to a recommendation that a particular descriptor is met. Overall, these sections are useful if an adviser or client wants to know what a HCP is 'really' looking for.

The Workbook also gives detailed advice to HCPs on how they should conduct themselves during an examination. This could be useful reference material for those cases where a person wishes to make a complaint about an examination. The Workbook also confirms, if any confirmation were necessary, that an examination commences as soon as an individual enters the examination room. The Workbook in a number of places emphasises that HCPs should closely monitor an individual throughout the period of the examination and not simply take into account the individual's responses to instructions given and questions asked.

(a) The amending instrument was the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011 (S.I. 2011/228).

www.dwp.gov.uk/docs/wca-handbook.pdf - the Workbook is available here.

SOCIAL FUND

New official guide to Social Fund published

In April 2011, the Department for Work & Pensions published a detailed new guide to the Social Fund. It sets out the different payment streams within the Social Fund, e.g. Community Care Grants and Crisis Loans, describes the eligibility criteria for each and explains rights of challenge for disappointed applicants.

www.dwp.gov.uk/publications/specialist-guides/technical-guidance/sb16-a-guide-to-the-social/ - the Guide is available here.

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