All England Official Transcripts (1997-2008)

R (on the application of Carton and another) v Coventry City Council

[2000] Lexis Citation 4249

CO/425/2000, (Transcript: Smith Bernal)

Social security - Disability benefit - Day-care services - Local authority introducing means testing charging policy - Charging policy treating as income available for care in the day sums of disability living allowance paid in respect of attendance at night - Whether charging policy lawful.

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SIR RICHARD TUCKER

30 NOVEMBER 2000

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R Drabble QC for the Applicants

M Kushner for the Respondents

Tyndallwoods Solicitors, Birmingham; The Legal Services, Coventry City Council

SIR RICHARD TUCKER

[1] I have before me applications for judicial review made on behalf of four claimants who are seriously disabled people residing in the Social Service area of which the defendants, the Coventry City Council, are the relevant authority. Despite their disabilities, the claimants, who are in their 20s or early 30s, continue to live at home. They are looked after by their parents, and by other carers, with day care services provided by the defendants.

[2] The claimants challenge the introduction by the defendants on 3 January of this year of what the claimants contend is a substantially altered structure for charging for day care provision. The applications are made on two grounds. First, that it was unfair in the circumstances for the defendants to make substantial changes to their charging policy, to the claimants' detriment, without consultation; second, that it was irrational, unlawful and unfair for the defendants to apply a new charging policy, which treated as "income" available for care in the day, sums of Disability Living Allowance (DLA) paid in respect of watching over, or attention needed, at night, in connection with bodily functions.

[3] The claimants do not dispute the defendants' entitlement to charge for the services they provide. Their right to do so is contained in s.17 of the Health and Social Security Adjudication Act 1983. Until October

1998, the defendants charged a flat rate for day care services. They then introduced a means-tested charging system. Disability-related benefits were taken into account in assessing needs, but an allowance was made for disability-related costs. Before adopting this charging structure, the defendants carried out a detailed consultation exercise of users and local groups of interested people and bodies. However, 15 months afterwards, the defendants introduced a new scheme which, it is contended, radically altered the structure of charging and made fundamental changes to the claimants' detriment. There were no consultations on this occasion.

[4] The defendants contend that there was no major structural change. The structure was still means tested and took into account disability-related costs of living. Moreover, the defendants submit that consultation had taken place in the recent past (ie in September and October 1996), and that views expressed on that occasion were taken into account when considering what they describe as adjustments to the former scheme.

[5] Therefore, one of the matters I have to consider is whether the changes could properly be described as radical or fundamental, on the one hand, or whether they should be more aptly described as adjustments, on the other. To some extent, this is a matter of degree, but it may also be a matter of principle.

[6] In order to assist me, counsel for the claimants have produced a very helpful analysis of the changes in charging structures. The main changes are as follows.

[7] Under the old scheme:

1. People on income support, housing benefit or council tax benefit who did not receive disability-related benefits were exempt from charges for care.

2. Where there was some assessable income, this was reduced by an allowance for disability-related expenses to take account of the extra costs of living experienced by disabled people.

3. There was a buffer zone of £20 per week, which meant that if assessable income fell below that amount, no charges would be made for day care.

4. As to charges to be paid, there was a sliding scale of percentage of cost against disposal income.

[8] Under the new scheme:

1. Assessable income is calculated with no allowance for any disability-related costs. Disability benefits are included as assessable income.

2. The buffer zone is halved to £10 per week.

3. Instead of the sliding scale of charges, all service users with an assessable income of over £10 per week pay 40 % of their disposable income, unless this exceeds the maximum charge payable for services or hits the £10 buffer.

[9] In each case, DLA was included as income, but under the old scheme there was an individually calculated applicable amount for disability-related costs, and this included a standard amount of £16.40 per week for recipients of higher rate DLA payable under the provisions of the Social Security Contributions and Benefits Act 1992 (ie those with needs at night as well as in the day).

[10] Under the new scheme, there is no individual calculation and no automatic disregard for the night component of higher rate DLA.

[11] This is a matter upon which Mr Drabble QC, for the defendants, places considerable emphasis, and which he submits represents a significant alteration of the charging policy. Under the new scheme, monies which were intended to reflect the cost of care at night are being treated as income available for care in the day.

[12] Moreover, Mr Drabble submits that it was clearly an intention of Parliament that those in receipt of higher rate DLA should have a benefit which was in fact £16 per week, but that this has been removed or eroded by the structure of the new charging policy.

[13] The claimants' first complaint is that it was procedurally unfair to introduce these changes without warning and without any process of consultation, which would have enabled representations to be made against them. The question posed by Mr Drabble is whether, in the circumstances of this case, fairness demands at least some consultation on the proposals before they are implemented. His answer is yes, because of the impact on users of the changes, and also because the defendants have recognised the appropriateness of consultation in first devising a scheme of this sort.

[14] Both sides rely on passages in the judgment of Dillon LJ in *R v Devon County Council, ex parte Baker and another* [1995] 1 All ER 73, 11 BMLR 141 the most helpful of which I find at page 85 of the former report between letters C and D:

> "Obviously it could be said to be best practice, in modern thinking, that before an administrative decision is made there should be consultation in some form, with those who will clearly be adversely affected by the decision. But judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly."

[15] Simon Brown LJ dealt with the question of legitimate expectation to be consulted, and summed up the matter on page 91D, in these words:

> "The fact is that it still remains for the court to say, unassisted by authority save only in so far as there may exist other cases analogous on their facts, whether that legitimate expectation ought to be recognised and, if so, precisely what are the demands of fairness in the way of an opportunity to comment and so forth."

[16] The defendants do not accept that the previous consultation exercise raised a reasonable expectation that there would be further consultation prior to what Miss Kushner on their behalf describes as any adjustments of the charges.

[17] The defendants contend that it was always envisaged that there would be flexibility within the system, that it would be under review, and that charges would be adjusted in the light of the overall financial position. The defendants submit that there has been no major structural change. I disagree. I note that the defendants'

own document, prepared on 12 July 1999, recognised as a disadvantage to the charge the fact that:

> "The policy has been developed over a long period of time with detailed debate on each issue. Changing this fundamental aspect now is incompatible with the previous consultative and considered approach."

[18] These were indeed fundamental changes to the charging structure. In my view, fairness required that there should be proper consultation before they were introduced, and there was none. The changes adopted are more than a mere uprating: they constitute changes to the policy, and to the way in which the defendants charged for their services. The practical effect of these changes is graphically illustrated in the before and after examples contained in the claimants' bundle of documents. To people in the claimants' position, they represent not only significant, but also substantial, changes. To them, these were not mere adjustments to the charges. They were fundamental changes. They were introduced unfairly, without the consultations which the claimants could justifiably, reasonably or legitimately have expected. There is no proper or adequate explanation from the defendants to explain the failure to consult.

[19] Moreover, it was irrational, unlawful and unfair for the defendants to apply a new charging policy which treated as income available for day care sums of DLA paid in respect of night care.

[20] Accordingly, I grant the relief sought.

Application allowed.