

NEATH PORT TALBOT COUNTY BOROUGH COUNCIL

POLICY AND RESOURCES SCRUTINY COMMITTEE

31 March 2016

Report of the Head of Legal Services

Matter for Information

Wards Affected: All Wards

Judicial Review update

Purpose of the Report

1. Members have requested a report providing them with a briefing on current general Judicial Review cases in the Local Government Sector.

Background

The general nature of Judicial Review

2. Judicial Review is the means by which persons who are aggrieved at decisions of public bodies may request that the Courts review those decisions. It is not open to the Court to simply substitute its own decision for that of the public body. The question is whether the public body has fallen into error in the way in which it has made the decision. In some cases no reasonable public body could come to the decision which has been made but in most cases, it is simply a question of how the decision was made. Grounds of Judicial Review may include such issues as failure to consult properly, a failure to consider relevant issues or acting in contravention of human rights without proper justification.

3. Judicial Review cases often attract a lot of publicity and can cause some embarrassment to local authorities in the conduct of their business. For lawyers however, whilst we would go to great lengths to avoid Judicial Review of decision making, these cases are part of the general structure of legal decision making and, whilst not routine, are to be expected particularly in current financial circumstances.
4. What follows is a very brief account of some cases which may be of interest to Members:-

School reorganisations

5. There have been several recent challenges to school reorganisations under the School Standards and Organisation (Wales) Act 2013.
6. Key obligations for a local authority to be aware of in this context are: consultation; publication of proposals in a statutory notice; consideration of objections to proposals; making a determination about its proposals; publication of a summary of the objections received and the local authority's response; publication of the local authority's determination; and notification of the local authority's determination to bodies specified in the legislation.
7. In dealing with questions and objections, an authority is under a duty to provide the relevant information which has informed their proposals¹.
8. Challenges to proposals for reorganisation may arise in relation to the consultation or over failure by the local authority to have regard to how the proposals would affect its compliance with statutory duties.
9. One local authority's decision to close a school was quashed because of its failure to comply with the requirements of the legislation and the statutory School Organisation Code and comments about the educational benefit of school closure that were not supported by evidence². The Court stated that "taken together, those failures can, in my view, be seen to be both a cause of an inadequate approach to the decision-making process and symptomatic of a failure to engage with the ethos of the statutory

¹ R (Wiggins & Another) v NPTCBC

² R(McCann) v Bridgend CBC

provisions”. The Court said that the council had simply claimed that its proposal was the best option, “apparently because its officers had reached that conclusion”. That was not what the statutory process required, and it undermined the clear purposes inherent in that process.

10. A challenge to a local authority’s decision to reduce its support for nursery education failed as the consultation was fair and dealt adequately with the issue of realistic alternatives. The issue of childcare was approached on the basis of a correct appreciation of the local authority’s statutory duty³.

Transport

11. A local authority successfully defended its decision to close its passenger transport unit (PTU) and make alternative arrangements for users⁴. The closure of the PTU could not be equated with the withdrawal of a service and the decision was linked with the search for alternative transport arrangements. The authority took the steps reasonably required to acquaint itself with the relevant information to enable it to make a lawful decision.
12. The court found that the consultation process as a whole was not unfair. The authority did have due regard to the Public Sector Equality Duty in section 149 of the Equality Act 2010 in relation to the disabled adults potentially affected by the decision to close the PTU.
13. Through the carrying out of individual transport assessments and a lawful consultation exercise, the authority had obtained sufficient information to discharge the duty of inquiry for the purposes of section 149.

³ R (Morris & another) v Rhondda Cynon Taff CBC, in contrast to a successful challenge in 2014 when the local authority decision to reduce its support for nursery education for 3 year olds was found to be unlawful because of the local authority failure to have regard to its duty to secure the provision of nursery education for children of a prescribed age was sufficient for its area.

⁴R (Robson & Another) v Salford City Council

Care Home Fees

14. A recent Court of Appeal judgment has concerned the respective funding obligations of local authorities and NHS Local Health Boards with respect to the cost of the provision by registered nurses of nursing care to residents in care homes who require some nursing care, but for whom this is not a primary need⁵.
15. The case arose in circumstances where the registered nurse recruited by the care home provided both nursing care, in the sense of medical and clinical care, and social care, in the sense of care of a kind which does not depend upon the skill and experience of a registered nurse and can be provided by non-specialist care workers. The Court of Appeal agreed with the NHS' argument that the relevant statutory regime requires a distinction to be drawn between nursing and social services, with the former being paid for by the NHS and the latter by local authorities.
16. Therefore the NHS can lawfully set the rate they pay to care homes to reflect time spent, directly or indirectly, on nursing tasks that have to be carried out by a nurse, but excluding time spent on social care. The latter will have to be funded by the care homes or local authorities, or, subject to their means, the residents of the care homes.
17. This case is subject to further proceedings.

Consultation

18. There have been numerous cases which have considered the issue of consultation on alternatives when a local authority is proposing a change to or withdrawal of services i.e. whether a public body must consult on proposals which it has, itself, rejected⁶.
19. As part of presenting information in a clear way, a local authority may present its preferred option. Part of the available information to be presented to the public may be alternative options for change. What is an

⁵ Forge Care Homes Ltd v Cardiff and Vale University Health Board

⁶ See Moseley v Haringey – in the context of a scheme such as a council tax reduction scheme with which the general public could not be expected to be familiar the consultation document itself should have contained a brief outline of the alternative options and the reasons for their rejection.

alternative option will depend on the factual and context specific circumstances of the consultation in question⁷.

20. Much will depend on the relevant statutory provision and only sometimes fairness will require that interested persons be consulted not only upon the preferred option, but also upon discarded alternative options⁸. The requirement in respect of the level of information required is a requirement to provide sufficient information to permit an informed response.
21. Therefore there is no rule that alternatives must be consulted upon in every consultation. The issue is context specific.

Equality Act & the Public Sector Equality Duty (PSED)

22. In summary the PSED requires that a public authority must in the exercise of its functions have due regard to the need to eliminate discrimination and advance equality of opportunity⁹. Complying with the PSED may well involve having to conduct further inquiries and may frequently involve a consultation. It is a fundamental principle that there must be compliance with the PSED before the decision in question is taken because that process is meant to inform and influence the decision¹⁰. Members will be familiar with the Equality Impact Assessments used by this Council.
23. A recent case provides a useful reminder to local authorities making decisions about the importance of ensuring that all decision-makers have had sight of and had an opportunity to look at key reports and documents¹¹.
24. The High Court held that changes to a council tax scheme were not discriminatory for the purposes of the PSED. However, the Court did find that there had been a failure by the full council to have due regard to the PSED because not every member of the council had been provided with

⁷ R (Morris) v Rhondda Cynon Taff CBC

⁸ See R (Robson) v Salford CC & R(L) v Warwickshire CC

⁹ See section 149 Equality Act 2010

¹⁰ R(West Berkshire District Council) v Secretary of State for Communities and Local Government

¹¹ R(Logan) v London Borough of Havering

a report and accompanying equality impact assessment looking at the possible adverse impact of the changes.

Duty of candour

25. A public authority defendant in judicial review proceedings has a duty of candour and co-operation so as to assist the court in understanding its decision-making process and deal with the issues fairly¹².
26. Steps have been identified which a public authority ought to take, if it cannot, for financial reasons, defend its own decision in court in judicial review proceedings. In particular a public authority should consider: disclosing all relevant documents; filing a witness statement to assist the court in understanding its decision-making process and dealing with the claim for judicial review fairly; filing an acknowledgement of service, with summary grounds of resistance, even if only in outline form; and sending a representative of the authority to be present in court at any hearing.

Financial Impact

27. None required

Equality Impact Assessment

28. None required for this information report.

Workforce Impacts

29. None

Legal Impacts

30. None

¹² R (Midcounties Co-operative) v Forest of Dean Council

Risk Management

31. Judicial Review and potential judicial review matters are considered as part of the risk management process.

Consultation

32. This is not required in this case.

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