

Briefing Paper

R v Isle of Wight Council [2011] EWHC 2911

December 2011

Introduction

In the case of R v Isle of Wight, Adrian Waite of 'AWICS' was asked to assist as an expert witness in support of the claimants. The Claimant's challenge related to the Local Authorities consultation and decision to restrict eligibility for adult social care to those with 'critical' needs and those with 'substantial needs that place people at greatest risk of not being able to remain at home and be safe' with the intention of making savings from its Adult Social Care budget. The Claimants contended that the consequence of this would be that the needs of the Claimants (in part) and other severely disabled people who fall within the 'substantial' eligibility band would no longer be met. The claimants were represented by Irwin Mitchell (solicitors) and Doughty Street Chambers (barristers).

While the case principally related to whether the Council had discharged its duty to consult adequately under the Disability Discrimination Act; it also related to whether the Council had been obliged to restrict eligibility because of the local government financial settlement or whether it chose to use its discretion to limit eligibility.

Summary of the Case

The claimants were two severely disabled adults who applied for judicial review of a decision of the defendant local authority to restrict, as part of a budget plan designed to reduce its overall expenditure, its eligibility threshold for adult social care.

The claimants' case was that the Isle of Wight Council when deciding to restrict eligibility criteria for access to adult social care, had acted in breach of statutory guidance and that it had also failed to conduct the rigorous analysis and consideration that was required to satisfy the "due regard" duty under the Disability Discrimination Act 1995 s.49A.

The local authority had decided that the eligibility criteria for access to adult care services should be changed from 1st April 2011 so that it would continue to meet fully the needs of all people who had been assessed as "critical" while for those who were assessed as having needs defined as "substantial" it would only meet those areas of need that placed them at greatest risk of not being able to remain at home and of not being safe.

The claimants argued that the local authority had acted unlawfully by (1) failing to comply with the requirements of the statutory guidance, namely "Prioritising Need in the context of Putting People First: A whole system approach for eligibility for social care", which governed the provision of adult social care; (2) failing to comply with the public sector equality duty in the Disability Discrimination Act 1995 s.49A.

AWICS Advise to Claimants

The AWICS advice, in response to specific questions from the claimants' solicitors was as follows.

Adult Social Care and the Comprehensive Spending Review 2010

We were asked to explain the changes to the funding of adult social care that followed the 2010 Comprehensive Spending Review and the different attitudes towards it of the government and those in the sector.

The government stated when it announced the Comprehensive Spending Review that it believes that Social care plays a vital role in helping to keep people healthy and independent and that it also supports some of the most vulnerable people in society. The Spending Review therefore made available what the government regarded as sufficient resources for local authorities so that they would not need to reduce access to services, and could fund new approaches that improved outcomes for those receiving social care:

- The Department for Health grant to local authorities for social care, the Personal Social Services grant, was increased by £1billion in real terms by 2014/15. To reduce administrative burdens and increase flexibility for local authorities, this grant was merged into local government formula grant.
- The National Health Service set aside funding growing to £1billion by 2014/15 within their settlement to fund new ways of providing services, including re-ablement services provided by the National Health Service. The government considered that this would help to break down the long-standing barriers between health and social care, leading to benefits across the health and social care system.

Personal budgets for adult social care were extended. The Personal Social Services Grant for Social Care was increased to £2.4billion a year by 2014/15 and then included in the formula grant. The government considered that local authorities would not need to reduce access to social care services. In the government's comprehensive spending review documents the following is shown for personal social services grant being merged into local government funding for the years 2010/11 to 2014/15:

| 2010/11 | 2011/12 | 2012/13 | 2013/14 | 2014/15 |
|----------|----------|----------|----------|----------|
| £billion | £billion | £billion | £billion | £billion |
| 1.3 | 1.9 | 2.3 | 2.4 | 2.4 |

Source: HM Treasury Comprehensive Spending Review document table 2.3

The government considered that this funding would also enable local authorities to deliver the necessary efficiency savings, reforms and service improvements that would release savings and put social care services on a stable footing for the entire Spending Review period.

In introducing the Comprehensive Spending Review 2010, George Osborne MP, Chancellor of the Exchequer said:

“Some in local government have concerns about the financing of social care. I can announce that grant funding for social care will be increased by an additional £1billion by the fourth year of the Spending Review. And a further £1billion for social care will be provided through the NHS to support joint working with councils – so that elderly people do not continue to fall through the crack between two systems. That’s a total of £2billion additional funding for social care to protect the most vulnerable.”

In October 2010, David Behan, the Director General for Social Care at the Department for Health, wrote to local authorities and health authorities about the 2010 Comprehensive Spending Review and its effects on social care. His letter states that:

“National Health Service support for social care... funding will be up to £1billion in 2014/15. This £1billion includes up to £300million per annum for re-enablement to help avoid demand upon social care, while the remainder will be used to support other social care services. We will expect local authorities and the National Health Service to work together to agree how this funding should be best used to support social care services.

“In recognition of the importance of social care in communities throughout the country, additional grant funding, rising to £1billion by 2014/15 will be made available for social care. This funding will be allocated in addition to the Department’s existing social care grants, which will rise in line with inflation. In total, grant funding for social care will reach £2.4billion by 2014/15.

“In addition to the £2.4billion grant funding for social care and the additional funding from the National Health Service set out above, there will be two new grants issued from the Department over the spending review period: Learning Disabilities and Health Reform Grant (an un-ring fenced specific grant worth around £1.3billion from 2011/12) and the Public Health Grant (which will be introduced from 2013/14). These two grants reflect a forthcoming transfer of responsibility for services from the National Health Service to local authorities. “This is a highly positive settlement for social care, providing sufficient resources to protect people’s access to care and avoiding further restrictions on services.”

In November 2010, Andrew Lansley MP, Secretary of State for Health, told the Health Select Committee that there is: *“No need in our view for local authorities to reduce eligibility for social care”*.

In January 2011, Grant Shapps MP, Minister of State at the Department of Communities & Local Government, was quoted in ‘Hansard’ (column 531) as saying:

“It is very important to get out to all local authorities across the country the message that the most vulnerable people should be protected in this spending settlement. That is an important point, because one of the principal ways in which vulnerable people are protected is through the Supporting People programme. Its budget has been pretty much kept intact. I will send out the message from a despatch box now that the reduction in Supporting People is just 2.7% per annum so there is no reason for local authorities to use that as an excuse to cut services to vulnerable people.”

However, the additional funding for social care was ‘earmarked’ rather than ‘ring fenced’. This led to fears that local authorities would not actually spend the resources on social care but would merely use the funding to mitigate economies elsewhere. In practice this has often occurred because Councils have been faced with reduced resources of which only a small proportion is ring-fenced and so have taken the decision to make economies in adult social care as well as other services.

Observations from people who work in the sector follow.

Jennifer Dixon, Director of the Nuffield Trust was quoted in 'Public Finance' as saying:

"The reality is that local authority budgets will be stretched and funds for social care are not ring fenced."

Michelle Mitchell, Charity Director of Age Concern United Kingdom, was quoted in 'Public Finance' as saying:

"The purported £2billion additional funding for social care in fact just replaces cuts (the government) is simultaneously making to local government budgets. Over the four year period covered by the Comprehensive Spending Review, we predict that spending on care will suffer a modest fall in real terms."

Nigel Edwards, Acting Director of the National Health Service Confederation, was quoted in 'Public Finance' as saying:

"We do need to be cautious because the money is not ring fenced. With severe pressure on council budgets, we are worried that these funds will not get through to the people who need it."

Andrew Cozens, Strategic Advisor for Children, Adults and Health at the Local Government Association was quoted by the Local Government Chronicle as saying:

"If social care budgets are protected, there would be a disastrous impact on other services, such as housing, culture and leisure services, which have an important contribution [to social care]."

The government made increased provision for spending on adult social care and ministers questioned whether there was a need for local authorities to reduce eligibility. However, ministers did not ring-fence those resources, leaving it for local authorities to decide which budgets to protect and where to make economies.

The Comprehensive Spending Review leaves local authorities, including the Isle of Wight Council, in the following position:

- Funding from central government through general grants and specific grants is being reduced in 2011/12 and throughout the period of the Comprehensive Spending Review (2011 to 2015).
- Most specific grants are being abolished and ring-fencing removed so that it is up to local authorities to determine where they allocate their resources and where they make economies.
- Councils are being offered an additional grant, equal in value to a 2.5% increase in Council Tax, if they freeze their Council Tax.
- Councils are obliged to identify their priorities and identify those services where they consider it is appropriate to make economies.

Isle of Wight Council - The Adult Social Care Budget

We were asked to explain the context of the adult social care budget of the Isle of Wight Council.

The 2011/12 local government financial settlement obliged the Isle of Wight Council to make reductions in expenditure. The Council's 'spending power' reduced by £6.0million (3.9%). Within this the Council exercised its discretion to make differing levels of economies in different services and to increase expenditure on some services.

The Council's budget consultation appears to have focused on which services should face the greatest economies; while the consultation on adult social care appears to have assumed that economies of £3.4million needed to be made in Community wellbeing and social care and focused on the Council's specific proposals. Neither consultation invited observations on the overall budget strategy and neither included financial information that would have enabled consultees to consider the overall budget strategy.

Some resources are ring-fenced, most notably the Dedicated Schools Grant and Pupil Premium. However, the Council will receive £140.1million in Revenue Support Grant, Non-Domestic Rates, Council Tax, Council Tax Freeze Grant and other un-ring-fenced resources that it is free to decide how to allocate between the various services. It will also receive income from fees and charges. There is therefore significant scope within the Council's budgets to reallocate money between services and to make choices about where reductions in expenditure will be made.

The Isle of Wight Council had a relatively favourable revenue support grant settlement in 2011/12 in comparison with most English local authorities (see below).

Isle of Wight Council overspent its Adult Social Care budget in 2009/10 and 2010/11. In 2009/10 the overspend was £4.763million. On 14th September 2010 the Cabinet committee report on the second budget review stated with regard to Community Services that: *"The July report highlighted a total risk of £3.656million, a risk of under-achievement of savings of £2.163million, service volume pressure of £1.380million and a reduction of Area Based Grant of £113,000.*

"The latest budget monitoring projection indicates a potential overspend of £3.6million.

"In light of this and in accordance with the July decisions a number of proposals for a revised approach to adult social care have been investigated and developed. These proposals will take some months to progress through consultation and final impact assessment and therefore will not have an impact until the 2011/12 financial year, if implemented. The full year savings would be in the order of £3.6million which would equal the current overspend position and ensure that this overspend position will not be repeated during 2011/12.

"Following the July budget review, substantial action has been taken to address budget pressures, contain spending and secure further savings where possible... In overall terms, taking everything into account, the main area that is unlikely to be contained is the projected £3.6million overspend on Adult Services. The further action proposed for Adult Services in this report, if agreed after the consultation of the full impact assessment, will not impact directly in 2010/11 but will deliver a projected full year saving of £3.6million in 2011/12."

The report went on to recommend that:

“Officers undertake the necessary consultation and impact assessments on the proposals set out in (the report) i.e. change the eligibility threshold in line with FACS (Fair Access to Care Services) criteria used to determine who the Council provides Adult Social Care services to so that those with the greatest needs are assured of support while those at greatest risk are also provided with targeted support in those areas in which they are most vulnerable (a full year saving of £1.5million).”

In September 2010 it was envisaged that these economies would be required to enable the service to operate within approved budgets. They did not appear to offer any additional savings that would have allowed the Council to reduce its budgets.

In February 2011 the Council agreed its budget for 2011/12. This included additional resources for adult social care to reflect the under-provision in the existing budget and demographic pressures as well as savings. It was reported to both Cabinet and Full Council that:

“It is clear that the budget needs to reflect a proper assessment of need and be put on a stable base before savings strategies are counted to reduce it. The proposed budget therefore allows for a base budget adjustment of £3.4million and assessed further demographic factors of £2.2million. To offset this there are savings proposals that if agreed would save £4million in 2011/12 still leaving a net increase of £1.6million over the current year’s budget. This is before the health transfer of £2.13million which would be used to support existing provision which benefits health.”

On 8th February 2011 Cabinet considered a report on the Council’s revenue budget. This report identified three options for the Cabinet to consider regarding the review of eligibility criteria and recommended that the first be agreed:

- Proceed with the proposal as consulted upon
- Reduce further the level of investment and preventative services for people within the substantial band
- Leave the eligibility threshold as it currently is, so that the full care and support needs of people within the substantial band are met.

The proposal as consulted upon was that the eligibility criteria for access to adult care services be changed from 1st April 2011 so that the Council will continue to meet fully the needs of all people who have been assessed as critical while for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe.

On charging policy, the report recommended that the Cabinet agree to the original proposal that was consulted on, namely to:

- Cease to provide free home care for people over the age eighty and require them to be financially assessed for a contribution in the same way as people aged under eighty.
- Remove the upper limit for charges.
- Charge all people on the same basis regardless of their specific disability.
- Charge all people against the value of their ‘personal budget’ or the true cost of the services that they are receiving if they are not yet on a ‘personal budget’ and that these changes should be introduced with effect from 1st April 2011.

Cabinet was also recommended to agree that the Director for Community Wellbeing and Social Care explores the suggestions of the Westminster House staff team to reduce unit costs and increase income while at the same time putting in place a market testing programme that will explore both the feasibility of transferring the facility to a social enterprise model and of transferring it to a private or voluntary sector provider.

In addition, it was agreed that the Director for Community Wellbeing and Social Care will explore opportunities to reduce costs and generate more income at the Gouddings and the Adelaide to achieve the anticipated savings of £200,000 in 2011/12 and provide a report to Cabinet in July 2011 on progress being made. This will include consideration being given to ceasing being a direct provider of services.

The savings that were made in 2011/12 in the Community Well-Being and Social Care budget are summarised below:

| | |
|---|-------|
| Social Care | |
| Changes to adult social care charging policy | 1,500 |
| Adjust adult social care eligibility criteria | 1,000 |
| Removal of direct provision of general care | 200 |
| Re-provide in-house home care | 125 |
| Reduce care management costs | 80 |
| Other services | |
| Review of library services | 400 |
| Ventnor Botanical Gardens / Dinosaur Isle | 82 |
| Review of archives and museums | 50 |
| Total | 3,437 |

These savings that relate to social care are described as follows:

- Charging Policy – Additional income will be generated by:
 - Removing the entitlement to free home care for people aged over eighty.
 - Applying the charging policy to all people receiving adult social care support on an equitable basis regardless of their age or the nature of their disability.
 - Charging against either the value of the ‘personal budget’ or the actual cost of services delivered.
 - Removing an upper charge limit for those who are able to afford it.
 - 2011/12 saving £1.5million. Full-year effect £2million.
- Eligibility criteria – Raising the eligibility threshold for adult social care services to critical while focusing support for those with substantial needs on their areas of greatest risk will reduce expenditure on this group by £1million while still investing £6.3million to support them. 2011/12 saving £1million. Full-year effect £1.6million.
- Removal of direct provision of general care – in the current year the main focus will be on reducing the cost base while retaining quality of delivery while also identifying and implementing opportunities for increased income generation. 2011/12 saving £200,000. Full-year effect £837,000.
- Re-provide in-house home care – in the current year the main focus will be on reducing the cost base while retaining quality of delivery while also identifying and implementing opportunities for increased income generation. At the same time officers will be exploring possible options for transferring these services to alternative management arrangements. 2011/12 saving £125,000. Full-year effect £464,000.
- Reduction in care management costs – As personal budgets become the norm the role of care management in organising and monitoring care provision will be significantly reduced. 2011/12 saving £80,000. Full-year effect £330,000.

Whether there were any alternatives to reducing funding for Adult Social Care

We were asked whether there were any alternatives to reducing funding for Adult social Care (specifically the changes in relation to the eligibility criteria) were open to the Council. In particular, we were asked to advise whether the cut to the budget or the saving attributable to the change in eligibility criteria could have been avoided given the levels of Government grants awards to the Council for this and the next spending period; the financial reserves held by the Council; ending of 'ring fenced' services and greater flexibility this entails; whether cuts to other areas of Council spending (i.e. areas other than Adult Social Care) should have been considered; and whether a Council Tax rise would have been a viable means of avoiding cuts to Adult Social Care provision.

This question related to whether the Council had any alternative options available to it that could have enabled it to avoid making the economies in adult social care. The question referred specifically to government grants and ring-fencing; reserves; options for economies in other service areas; and Council Tax. We also considered other options.

We concluded that the Council could not have avoided making reductions in expenditure following the 2011/12 local government finance settlement but that it did have considerable flexibility in determining how and where to make reductions in its expenditure. We concluded that it could have avoided making the specific reductions in adult social care budgets that it did if it had decided to make savings in other budgets (through reducing expenditure or increasing income) or if it had taken a different approach to Reserves, Council Tax or the Capital Programme.

We considered that the Council could have taken alternative decisions about its budget that could have enabled it to delay the implementation of the economies in adult social care.

We considered that the Council could have reinstated some or all of the economies in adult social care in 2011/12 and in 2012/13 if it considered this to be appropriate by reducing balances and / or making reductions in the net expenditure of other services. In particular it appears that there are sufficient resources in balances to reinstate the economies that have been made in the adult social care budget by restricting eligibility.

The report of the Leader of the Council and Cabinet Member for Finance, Governance & School Improvement to Cabinet on 14th September 2010 on the second budget review of 2010/11 stated with regard to balances that: *"General fund balances of at least £5million need to be maintained on top of earmarked reserves to provide a sustainable position which protects the financial health of the Council in the medium term."*

Following the closedown of the 2010/11 accounts the Council had £8.1million in general fund balances - £0.8million more in balances than it anticipated at the time that the budget was set and £3million more than was identified as necessary in September 2010. It therefore appears that up to £3million would have been available to the Council to spend as appropriate if a decision had been taken to set balances at £5million. Instead the Council's budget papers show a balanced budget for 2011/12 and 2012/13 with balances of £8.0million being retained. The only potential charge to balances that is mentioned in the budget papers is a cost of £1.5million to £2.0million of redundancy and pension costs that the Council states would be partly met by savings with the balance being met through capitalisation or reserves. It could also be argued that the Council could have reduced its balances if it had found an alternative way of managing the risk of 'overspending' through improved budgetary control procedures.

It was also considered whether it would be financially possible for the Council to introduce the different elements of the proposals at a later date or implement the other proposed changes to Adult Social Care individually or collectively or in a staged way (separate from any change to the eligibility criteria).

We demonstrated that the Council could have taken alternative decisions on many aspects of its budget that could have reduced the need to make economies in the adult social care budget. This same flexibility could have been used to delay the implementation of the economies in the adult social care budget. We concluded that the Council could have taken alternative decisions about its budget that could have enabled it to delay the implementation of the economies in adult social care.

Was the Isle of Wight in a comparatively worse financial position than other local authorities in England such that its decision to justify the restriction in eligibility criteria is necessary?

In announcing the revenue support grant settlement for 2011/12 the government introduced a new concept of local authority 'spending power'. This compared the resources that local authorities have from Council Tax, Formula Grant and Specific Grants between years. The comparison for the Isle of Wight Council in 2011/12 is shown below:

| | 2010/11 £million | 2011/12 £million |
|-----------------------------|---------------------|---------------------|
| Council Tax | 72.6 | 72.6 |
| Formula Grant (adjusted) | 72.6 | 63.6 |
| Specific Grants | 9.3 | 10.1 |
| NHS Funding for Social Care | 0.0 | 2.1 |
| Revenue Spending Power | 154.4 | 148.4 |
| Change in Spending Power | 6.0 – | 3.9% - |

The equivalent national figures are as follows:

| | 2010/11 £million | 2011/12 £million |
|-----------------------------|---------------------|---------------------|
| Council Tax | 23,168 | 23,168 |
| Formula Grant (adjusted) | 25,737 | 22,862 |
| Specific Grants | 5,091 | 4,767 |
| NHS Funding for Social Care | 0 | 648 |
| Revenue Spending Power | 53,996 | 51,445 |
| Change in Spending Power | 2,551 – | 4.7% - |

It will be seen that the Isle of Wight Council received a relatively favourable settlement. According to the government's calculation the Isle of Wight Council ranked 267th worst hit out of 354 local authorities.

The Council has argued that the revenue support grant settlement leaves it with a larger reduction in 'spending power' than has been calculated by the government. However, it is likely that similar arguments could be made by other local authorities. The Isle of Wight Council does not appear to be in a worse position than most other local authorities.

The Isle of Wight Council had a relatively favourable revenue support grant settlement in 2011/12 in comparison with most English local authorities.

Decision of the Court

The application was granted; (1) In prioritising the risk factors of not being able to remain at home and not being safe, ahead of other risk factors within the "substantial" band, the local authority had created a "hierarchy of needs" and restricted eligibility in a way which was contrary to the guidance. Further, in the "eligibility review" which it had carried out, the local authority had introduced criteria based on the likelihood that a particular risk would occur and how frequently it might occur. That had the effect of downgrading the needs of users with fluctuating and/or long-term conditions and was contrary to the guidance and (2) The local authority had not conducted the rigorous analysis and consideration required to satisfy the "due regard" duty under s.49A of the 1995 Act, principally because it did not gather the information required to do so properly. The consultation document prepared by the local authority provided insufficient information to enable those consulted "to give intelligent consideration and an intelligent response".

Neither did it provide any detail about the numbers of users whose support would be reduced or about the costs and potential savings, nor did it explain what types of services would or would not be included under the revised criteria. Further, there was no consultation in relation to the revised criteria adopted in the eligibility review, which was used as the basis for the reassessment of users. The local authority members were therefore deprived of important information as to the potential impact of the proposed changes, which meant that they had insufficient information when they were discharging their s.49A duties.

Moreover, there were flaws in the equality impact assessment which the local authority had conducted. Among other things, it contained no evidence-based information about the specific impact on disabled people of the proposals; it did not explain the nature of the "substantial" needs that would be excluded from funding by the revised eligibility criteria or what the detriment would be to disabled people; it did not state how many disabled people would be detrimentally affected; the suggestions made in it for mitigating the effects of the proposal were therefore made without a proper understanding of the potential detriment. Thus, although the assessment was provided to members, it did not provide the analysis and the information which they needed to discharge adequately their s.49A duty.

Conclusions

This judicial review was one of many that followed the Comprehensive Spending Review of 2010 and the Local Government Financial Settlement for 2011/12. It was part of a pattern in which service users who were adversely affected by reductions in Council budgets sought to resist those budget reductions through legal and other means. In this case the claimants were successful.

The case underlines the need for local authorities to consult adequately on proposed changes to budgets and services regardless of the financial imperatives that they face; and underlines the potential for citizens to use the law to protect services that they benefit from and value.

Adam M. Waite
December 2011

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