

Co/4536/2015

Neutral Citation Number: [2016] EWHC 996 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Birmingham Civil and Family Justice Hearing Centre
Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Thursday, 11th February 2016

B e f o r e:

MRS JUSTICE PATTERSON DBE

Between:

THE QUEEN ON THE APPLICATION OF COLLINS_

Claimant

v

NOTTINGHAMSHIRE COUNTY COUNCIL_

Defendant

and

DIRECT PAYMENTS SERVICE

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(Official Shorthand Writers to the Court)

Mr De Mello appeared on behalf of the **Claimant**

Mr Auburn appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

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1. MRS JUSTICE PATTERSON: This is a renewed application for leave to bring judicial review proceedings against the decision of the defendant to suspend the interested party, Direct Payment Service Users Ltd, to be known for the rest of this short judgment as "DPSU", from the defendant's list of accredited providers of direct payment support services. The decision to do so was contained in a letter dated 21st August 2015 to each of the three claimants.
2. Each of three claimants has significant social care needs. As a result they are entitled to receive social care from the defendant which is the local authority responsible for the provision of social care in their area. Instead of receiving their social care direct from the defendant each of the claimants and in respect of the third claimant, his mother, as his litigation friend, had chosen to receive direct payments which they used to purchase social care services for themselves. They have all used DPSU, the interested party, to manage and maintain their direct payments for them. What that means is that the relevant payments are made direct to DPSU which is then responsible for the administration of the money on behalf of the claimants. That means that DPSU pays for such carers as may be required for the claimants, it pays for services required by the claimants, as well as accounting for all the tax requirements. In short, DPSU acts as a direct payment support service.
3. The claim was lodged on 18th September 2015 and sought also urgent interim and injunctive relief. The applications for interim and injunctive relief were dismissed on 28th September 2015 by His Honour Judge David Cooke, acting as a Deputy High Court Judge. The defendant filed an acknowledgement of service on 9th October 2015 and on 20th November 2015 permission was refused by Whipple J on a variety of grounds including section 31 of the Senior Courts Act. I will deal with the position in relation to section 31 at the end of this judgment.
4. The matter therefore comes before me as a renewed application, as I have said. Mr De Mello, who has acted for the claimants, in response to a question narrowed his grounds of challenge to five. He abandoned what was ground four. The remaining grounds are these. First, that in acting as it did the defendant acted in breach of the duty imposed upon it under section 1 of the Care Act 2014. Second, that the defendant acted in breach of its duty under section 42 of the Care Act 2014, to carry out safeguarding enquiries in circumstances where the defendant had reason to believe that the claimants were at risk of, or were experiencing financial abuse. Third, that the policy that the defendant operated, namely, that only accredited providers could provide direct payment services is unlawful and contrary to statutory guidance provided under the Care Act. Fifth, that in acting as it did, there was a breach of Article 8 rights to secure the claimant's views taken into account. Sixth, that the decision on the part of the defendant was irrational. It is fair to say at the outset that the latter two grounds were not developed in the same way as have the first three.
5. To understand the grounds it is necessary to set out a short account of the background to the current position.
6. Background

7. Some time in 2014 two former employees of DPSU raised concerns with the Adult Social Care Department of the defendant about DPSU's conduct and financial practises. Those concerns led to discussions with both the police and the Trading Standards Department. The Trading Standards Department then commenced a criminal investigation into DPSU.
8. In March 2015 the Trading Standards Department approached the Adult Social Care Department of the defendant and told them that a criminal investigation into DPSU was progressing, and that there were more specific concerns about financial malpractice at DPSU. There was difficulty in disclosing the more specific concerns because of issues relating to data sharing. By July 2015, having received legal advice on data sharing, Trading Standards was then able to raise specific concerns about DPSU. Those concerns included the fact that DPSU had, or was believed to have operated business bank accounts which had not been declared to the Charity Commission at Companies House; that it had made debits from service users' bank accounts for reasons other than paying for services arranged for the service user, in contravention of DPSU's contracts and agreements with service users; that DPSU had been moving money from service users' bank accounts to an undeclared DPSU account; that individuals employed at DPSU were making personal financial gains, sourced directly from service users' bank accounts; that DPSU had been taking money out of services users' bank accounts after their care had ceased; that it had been deducting insurance payments from services users' bank accounts inappropriately; that it appeared to operate duplicated accounts for a small number of service users and that it had been transferring money out of service users' bank accounts to DPSU controlled accounts with no reason for that being given.
9. As a result the Trading Standards Department was concerned that issues of apparent fraudulent dealings, in relation to the service users' accounts were in play. It was not dealing simply with issues of poor management.
10. Since July 2015 there have been continuing discussions between the Adult Social Care Department and the Trading Standards Department as to the strength of evidence which has been gathered and the seriousness of issues which have emerged and the prospect of criminal charges.
11. As a result of that information the Adult Social Care Department wrote, on 30th July 2015, to the Chief Executive Officer of DPSU giving notice that the defendant was considering suspending DPSU's accreditation on Nottinghamshire County Council's accredited list of direct payments providers and setting out the reasons for that provisional view. The letter gave DPSU until 6th August to make such representations as they wished to make. The matters that were set out in the letter of 30th July as the basis for possible suspension are consistent with those matters that I have set out earlier that were of concern to the Trading Standards.
12. DPSU responded the following day. Within that response DPSU made the point that a short time scale had been imposed upon them. The response also said that DPSU wanted to carry out a thorough investigation into all of the points raised to see whether there was any validity in the accusations that had been made. It then went on to say that

as DPSU had no contractual agreement with the council, they would not be providing any of the information that was requested.

13. The defendant considered that response to be unsatisfactory. Miss Briar, who is the service director for the strategic commissioning access and safeguarding in the Adult Social Care and Health and Public Protection Department of the defendant has put in a witness statement which deals with the background. In that statement she says, as a result of the response that the defendant received, the view was taken that DPSU had plainly failed to engage in a meaningful way with the numerous serious issues raised concerning client accounts. The defendant had expected that, given the importance of the issues and the obvious concern for vulnerable service users DPSU would have made far more of an effort to engage with the issues which had been raised.
14. Faced with that difficulty and cognisant of the fact that, the investigation was ongoing, so that nothing had been proven the defendant Adult Social Care Department was extremely concerned about the risk of fraudulent dealings into the affairs of vulnerable Nottinghamshire citizens and the possible dissipation of public resources. As a result, the defendant concluded that the most appropriate course to take was to effectively suspend DPSU from dealing with funds of potentially vulnerable individuals and from using and administering public funds. What the defendant required, according to Miss Briar, was that the recipients of direct payments were not to use DPSU, which meant that another direct payment support service provider had to be brought in.
15. On 18th August, therefore, the defendant wrote to the Board of Directors of DPSU, saying that they were suspended from being an accredited direct payment support service provider until further notice. In the course of the letter it was made clear that the defendant council was not saying that its residents may no longer receive their care by way of direct payments. What the council was saying was that, for the time being, any such payments may not be to or through DPSU:

"As a matter of practicality it may be difficult to determine, identify or arrange alternative direct payments service providers immediately and as a result an alternative to direct payments made be needed as an interim measure, to ensure that residents continue to receive care uninterrupted."
(sic)

The letter continued:

"However, there is certainly no bar on residents receiving direct payments per se, just that this is not to be to or through DPSU for the time being."

16. The concern then on behalf of the defendant was that the transfer of service users to another direct service support provider should be done in as orderly a way as possible, and in a way that was determined to be most appropriate to ensure that there was continuity of care and support services to meet the individual's assessed needs for social care and support. Since that date that has been the action which has been pursued on the part of the defendant.

17. The position is one, therefore, which I am told is entirely exceptional. It is not known whether any other local authority has had a comparable difficulty in relation to a direct payment support services user but, because of the exceptional circumstances in Nottinghamshire, it was necessary to take relatively prompt action to ensure both that public funds were being appropriately used and certainly not abused and that the care of vulnerable members of the community was able to be continued.
18. Against that background although there has been, it is right just to record, continued contact between DPSU and the defendant with DPSU contending that the defendant has been acting improperly and unlawfully and the defendant contending that DPSU has been active in attempting to frustrate the safeguarding action that the defendant has had to take, this claim comes into play.

Grounds of Challenge

19. I turn then to ground 1. That is an alleged breach of section 1 of the Care Act 2014. In relation to that Mr De Mello, who acts on behalf of the three claimants, contends that section 1 of the Care Act imposes a general duty but one which is focused upon the well-being of an individual. In exercising a function under Part 1 of the Care Act a local authority has to have regard to the various criteria set out in subsection 1(3) of the Care Act, which include the need to ensure that any restriction on an individual's rights or freedom of action that is involved in the exercise of the function under section 1 is kept to a minimum necessary for achieving the purpose for which the function is to be exercised.
20. In short, Mr De Mello submits that the defendant had no lawful basis to act as it did. There was nothing here to indicate that even if the concerns about DPSU were well-founded the various conditions which are required under section 31, for adults with capacity to request direct payments, section 32, which deals with the statutory position for adults without capacity and section 33, which deals with further provisions for direct payments were met. In particular, Mr De Mello submits that there was nothing here which indicated that the claimants individually were not able to make the decision for themselves and there should have been individual consultation with them prior to the defendant taking any action that it did, if it thought it was appropriate to so do.
21. In relation to that ground section 1 of the Care Act, as is accepted, provides a general duty to promote individual well-being. There is no complete definition of "well-being" but subsection (2) sets out a series of criteria to be taken into account. Amongst those is 2(c) the protection of an individual from abuse and neglect. Under subsection (3)(a) there is an emphasis on the importance of beginning with the assumption that the individual is best placed to judge the individual's well-being and, generally, the importance of the individual's involvement as part of a decision-making process is one of the matters to which a local authority has to have regard. Subsection (3)(g) notes also that "to have regard to" includes the need to protect people from abuse and neglect.
22. As the defendant submits there is, also, here the very pressing issue of the use of public funds. The fact that there was a reasonable basis upon which the defendant could

conclude that there was a risk in relation to abuse on behalf of the service users, and that abuse arose from possible financial impropriety, meant that the defendant had to act with appropriate promptitude in the circumstances. There are in Nottinghamshire a large number of people involved in receipt of a direct payments: between 3,000 to 3,500. They are vulnerable people and so it was important that what action the defendant took, took into account the sensitive nature of the client group with which it was dealing.

23. The defendant set up a special response team comprising between 8 to 50 people who initiated contact with the service users so as to be able to transfer the administration of their direct payments to another DPSS. Therefore, it was submitted, what the defendant was doing was, in effect, implementing the general duty under section 1 in relation to the well-being of the service users. There was no basis to defer any suspensory action to await criminal charges; indeed, if the defendant had done that there was a further risk in relation to public money and it could be said that the defendant was guilty of maladministration. All of those submissions I accept as providing a reasonable basis for action on the part of the defendant.
24. Further, so far as the points made by the claimants about the relevance of section 31, 32 and 33 of the Care Act those sections are in play in relation to whether a service user is entitled to direct payments. The heading for section 31 and 32 deals with adults with or without capacity, depending on the relevant section, to request direct payments. The subsections within each of those relevant sections deal with conditions that are to be satisfied when a direct payment is to be made. Section 33 also provides, through the making of regulations, four further steps that may be necessary in relation to the payment of direct payments. The position here, as is clear from the evidence before the court and the letters that were sent at the relevant time, is that direct payments have continued to be made and that remains the position. The local authority was faced with, not only a highly sensitive situation, as I have said already, but also with one which was delicate, delicate both in terms of the financial implications but delicate also in terms of the service users who were affected by the decision.
25. There was an alternative, which was impose a condition on the direct payment to ensure that its continued receipt was on the basis that there had been no involvement with DPSU but the defendant thought that it was better at the time to move the recipients of direct payments onto another provider so as to minimise the distress caused to them by an inevitable new arrangement. Those concerns were justified in the situation but it follows from that that in relation to ground 1 the matters relied upon by the claimant are not of application here and it is unarguable that there was any breach in relation to section 1 of the Care Act.
26. Ground 2 relates to section 42 of the Care Act. Section 42 is worded as follows:

"Enquiry by local authority

(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—

(a) has needs for care and support (whether or not the authority is meeting any of those needs)

(b) is experiencing, or is at risk of, abuse or neglect, and

(c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

(2) The local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom.

(3) 'Abuse' includes financial abuse; and for that purpose 'financial abuse' includes—

(a) having money or other property stolen

(b) being defrauded

(c) being put under pressure in relation to money or other property, and

(d) having money or other property misused."

27. To some extent points in relation to ground 2 overlap with points in relation to ground 1. Section 42 imposes a power on a local authority to commence enquiries where a local authority has reasonable cause to suspect that an adult with needs for care and support is experiencing or is at risk of abuse. Abuse includes financial abuse and, as a result of the service users needs for care and support, is unable to protect himself or herself against the abuse or risk of that abuse taking place.
28. The claimant in relation to this ground says that it may well be that the claimants were at risk of financial abuse given the position in relation to DPSU, but there is nothing by way of evidence to show that the claimants were unable to protect themselves against the risk of that abuse. Therefore, the defendant had no power to act as it did. Those submissions, in my judgment, are unarguable.
29. The reason for that is as follows. So far as the local authority is concerned there was clear evidence that the service users including the claimants were at risk of financial abuse. What had been uncovered was a wide spread issue and there was an ongoing criminal investigation. As a result of that it was appropriate for the defendant to commence safeguarding enquiries and act in response to those enquiries. The defendant's decision to suspend DPSU was part of that safeguarding duty. The requirements of section 42(1)(c) are clearly met because one is dealing with vulnerable service users and the evidence is, in relation to at least two of the claimants, that Trading Standards are in possession of information which provided a basis for a conclusion that there may well have been financial impropriety in relation to the claimant's accounts. The fact that those claimants have been unaware of that taking place, or have not taken any action in relation to it is clear evidence that they were

unable to protect themselves from either actual abuse or risk of the abuse which may have taken place.

30. By reason of section 42 the local authority has the power to decide when it has reasonable grounds to suspect that the case is such that enquires need to be made. Here, the defendant has done what it has thought is necessary in accordance with section 42(2). The submission is made by Mr Auburn, who appears on behalf of the defendant, that it cannot be the case that if there is a fraudulent DPSS or someone in respect of whom there is a real reason to suspect that they are such a person to enable them to continue to deal with public money is dereliction of public duty. That submission is clearly correct in the circumstances of this case. The claimants refer to the fact that they offered, in their pre-action correspondence, alternative dispute resolution. They indeed did so in the correspondence which I have been shown. However, alternative dispute resolution in relation to three claimants is no answer to the scale of the problem which was facing the defendant and in the circumstances it is not a realistic option. In my judgment, there is no basis at all for contending that there is any breach of the section 42 duty.
31. Ground 3 concerns an allegation that the policy on the part of the defendant only to have accredited providers for direct payments service support is unlawful and contrary to the statutory guidance under the Care Act. In particular, the claimants submit that their choice is circumscribed by the fact that they have to use another provider who is on the list compiled by the defendant and reliance is placed, in particular, on paragraph 10.48 of the statutory guidance which indicates that limited lists of providers do not fit within the government's vision for the new social care situation after the passing of the Care Act.
32. The defendant says, in relation to that, that it had a list of accredited DPSS providers in April 2011. That number had reduced to seven, including DPSU, by August 2015. They were, in fact, in the throes of reviewing the list of accredited providers when the issues arising from DPSU came to its attention. As a result, the defendant took the view that it was better to maintain the list, given the entirely exceptional circumstances that it was dealing with, as providing some indication of other providers with appropriate experience and probity. As a result, the defendant took the action that it did.
33. It is quite right that, in the face of the statutory guidance, to restrict a choice to accredited providers is not consistent with the new approach to social care provision. However, guidance is there to be departed from if, and only if, there is good reason. As the defendant submits, it was dealing with an exceptional circumstance here and, in that situation, it was entirely appropriate for it to take the action that it did in seeking to move on the service users to other providers who were within the list maintained by the local authority. What the local authority was doing was seeking to protect the well-being of the service users in a very difficult position.
34. Further, as the defendant submitted, this issue is academic in relation to these particular claimants because they have not said that they do not want to use another provider who

is not on the list. What they have said is that they want to continue to use DPSU: that wish is not reasonable in the circumstances here.

35. Whether or not the defendant's action is irrational forms the basis of ground 6 and it is appropriate to deal with that at this time. It cannot, in my judgment, be said to be irrational for a local authority, faced as it was with the revelation of apparent financial impropriety to act as it did. In my judgment, therefore, ground 3 is unarguable also as is ground 6.
36. That leaves the ground which was ground 5, which deals with breach of Article 8 rights to secure that the claimant's views were taken to account. To some extent I have dealt with that earlier on in this judgment. In the exceptional situation here it is not realistic or practical to have embarked upon individual consultation which would have the effect of perpetuating a situation of both possible abuse of public funds and the retention of an apparently flawed DPPS provider, in circumstances which were known to the defendant. The public interest was such that there clearly was no breach of Article 8 rights.
37. In addition, the defendant requests that the court consider section 31 of the Senior Courts Act. Just before I do, I need to add in one part in relation to ground 3, which is this. It had also come to the attention on the part of the defendant that certain officers from DPSU were in fact establishing a new company to provide DPSS. That came to light last week, namely the first week in February and that clearly adds, in my judgment, to the good reasons to depart from the guidance here. The fact that certain officers have thought it appropriate in the circumstances to set up a further providing service whilst they clearly are aware of an ongoing investigation is of some weight in support of the defendant taking the action that it did, even though that of course has come to light after the event.
38. I turn back finally to deal with section 31. That is something which I have to deal with as the defendant has asked that I do so. The claimant contends that there is provision within section 31 to disregard the requirements of section 31(3)(d) if it is appropriate to do so with exceptional public interest. It is submitted that that is the case here because of the public interest in service users and the receipt of their direct payments. The defendant contends that there is exceptional public interest for saying that the decision will have been highly likely to have been the same as the conclusion that it came to anyway because of the issue of management of public funds. This is a strong exceptional case for reasons that have been set out earlier in this judgment. Further, even if the accusations against DPSU are found to be ill-founded and even if they are acquitted of any criminal charges that may be laid against them, which have not yet been laid but which the court was told are to be laid in the near future, the position with regard to the defendant is dealt with in the witness statement of Miss Briar. That makes it clear, in paragraph 83, that even if the claimants were right the outcome for them would have been the same in terms of the decision made by the adult social care services team. That is because there is good reason to suspect DPSU had engaged in numerous serious acts of fraudulent financial mismanagement of the funds of Nottinghamshire and direct payments recipients. In those circumstances, it was

inconceivable, Miss Briar says, that they would have reached any other decision than the one that they had.

39. I agree with what Miss Briar has said as to the likelihood being highly likely that the decision would not have been substantially different and in that circumstance I must refuse to grant leave, which I do on that ground as well as on all the other grounds which I have dealt with.
40. MRS JUSTICE PATTERSON: Thank you both very much. I am sorry that was a bit longer than I would have thought.
41. MR AUBURN: My Lady very briefly, we would simply seek an order that the claimants pay the defendant's cost in preparing and filing the acknowledgement of service and summary grounds subject to the usual wording the claimant to be public funded. We have not filed a schedule as such given that the practicalities and reality of enforcement (inaudible). So we are only seeking an order.
42. MRS JUSTICE PATTERSON: You are seeking?
43. MR AUBURN: Yes, yes we are.
44. MRS JUSTICE PATTERSON: But in the usual way.
45. MR AUBURN: Yes.
46. MRS JUSTICE PATTERSON: Mr De Mello, do you have anything to say?
47. MR DE MELLO: No.
48. MRS JUSTICE PATTERSON: I certainly order that the claimants are to pay the costs of the defendant's acknowledgement of service subject to them having means to do so. They are all in receipt of public funding, given that they are all currently in receipt of public funding. Unless there is anything else. Thank you very much.