



Neutral Citation Number: [2009] EWHC 3279 (Admin)

Case No: CO/1810/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2009

Before :

MR JUSTICE HOLMAN

Between:

**ANDREW CRAIG COLLINS (a protected party
by Guy Petter Eskell his litigation friend)**

Claimant

- and -

PLYMOUTH CITY COUNCIL

Defendant

Mr James Neill (instructed by Pardoes) for the Claimant
Miss Lisa Sullivan (instructed by Plymouth City Council) for the Defendant

Hearing date: 3rd December 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

James Holman

11 December 2009

Mr Justice Holman

The Issue

1. A local authority provide non residential services to a disabled person. They make, and seek to recover from him, a charge, taking into account his income from an award of damages for personal injury. The issue is whether they acted unlawfully in making a discretionary decision to take that income into account.

The facts and claim

2. The essential facts are as follows. In 1984 the claimant, then aged 9, suffered severe injuries in a road traffic accident. He is now aged 35 and has life long paraplegia with cerebral palsy, and requires constant care. Liability for the accident was apportioned 80:20 and in 1995 a global award of damages was agreed and made of £1,139,000. Since 1992 a solicitor, Mr Guy Eskell, has acted as receiver (now financial deputy) under orders of the Court of Protection to manage the fund. Part was applied in buying, adapting and equipping a suitable home for the claimant, where he is mainly looked after by his parents with the utmost devotion. So his residential and accommodation needs are entirely provided out of his own funds. The balance of his damages award is invested and now stands at around £700,000. The claimant has no other capital than that fund and no other income than a range of state benefits to which he is entitled and the income from the invested fund. As at February 2009 (the date of Mr Eskell's statement) his total state benefits were about £180 per week and his gross annual income from the fund was about £26,000.
3. Since 2006 the Plymouth City Council (Plymouth) have provided and continue to provide day care services to the claimant. These are (i) the provision of care in his home (domiciliary care), and (ii) the provision of attendance at a day care centre (day services). The precise number of hours provided seems to vary a little from week to week, but recent invoices indicate the following broad picture: provision of about 13 hours' domiciliary care a week at, currently, £11.65 per hour, or £151.45 per week; and provision of day services on two days a week at, currently, £5.80 per day, or £11.60 per week, making a total weekly charge of about £163 in most (but not all) weeks. Plymouth have assessed that that sum is less than the maximum amount which the claimant could be required to contribute and accordingly have billed Mr Eskell, as the claimant's deputy (formerly, receiver), in these amounts. For a period Mr Eskell paid the billed charges. He has paid in total the sum of £7,626.99 on invoices covering the period from week ending 17 December 2006 to week ending 20 April 2008. He has declined to pay subsequent invoices covering the week ending 20 April 2008 to date and now totalling (to week ending 1 November 2009) £9,623.58. (There seems to be some double accounting in the invoices and documents in respect of the week ending 20 April 2008 itself, but that is irrelevant to the substance of this case.)
4. The present claim for judicial review is brought by Mr Eskell on behalf of, and as litigation friend for, the claimant who, because of his injuries, lacks capacity to litigate on his own behalf. Mr Eskell asserts and seeks a declaration that the decision of Plymouth to make charges was reached unlawfully for reasons which I will explain. He seeks to recover the £7,629.99 already paid, and a declaration that he is not required to pay the outstanding invoices. As I understand it, Mr James Neill, on

behalf of the claimant, accepts that Plymouth could now lawfully make a fresh decision, correctly exercising their discretion, to levy charges in the future; and I am not asked to make any declaration to the effect that Plymouth cannot or should not make a charge in the future. The claimant's schedule of the costs of these proceedings totals about £46,000. I do not have any corresponding figure from Plymouth, but if their costs are even half that amount the total costs of this litigation is around £70,000. The total charges in issue to date are around £17,250 (9,623 plus 7,630). One can only wonder at the cost effectiveness and proportionality of this contest.

The statutory framework

5. The essential statutory framework is clear and, in my view, straightforward. It is not in issue that Plymouth are entitled to make and recover such charge (if any) for the services that they have provided and continue to provide as they consider reasonable.
6. The services in question are provided under section 29 of the National Assistance Act 1948, which it is not necessary to quote. There is no issue in this case as to the suitability or sufficiency of the domiciliary care and day services which are in fact provided for the claimant.
7. So far as is material, section 17 of the Health and Social Services and Social Security Adjudications Act 1983 (HASSASSAA) provides as follows:-

“17. Charges for local authority services in England and Wales

(1) Subject to subsection (3) below, an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.

(2) This section applies to services provided under the following enactments –

(a) section 29 of the National Assistance Act 1948

.....

(3) If a person –

(a) avails himself of a service to which this section applies, and

(b) satisfies the authority providing the service that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay for it,

the authority shall not require him to pay more for it than it appears to them that it is reasonably practicable for him to pay.

(4) Any charge under this section may, without prejudice to any other method of recovery, be recovered summarily as a civil debt.

(5) This section has effect subject to any regulations under section 15 of the Community Care (Delayed Discharges etc.) Act 2003 (power to require certain community care services and services for carers to be free of charge)."

8. The services provided to the claimant are not services which require to be provided free of charge under the regulations to which section 17(5) refers.
9. The combined effect of subsections 17(1) and (3) is that a local authority may charge and recover whichever is the lesser of such charge (if any) for the services(s) as they consider reasonable, or, if subsection (3) applies, the amount which it appears to the local authority it is reasonably practicable for the person who avails himself of the service(s) to pay. However, the means of the claimant are such that it is not suggested in the present case that subsection (3) applies. In short, on the facts of this case, only subsection (1) is in point and Plymouth "may recover such charge (if any) for [the services] as they consider reasonable."
10. Plainly that gives to Plymouth, and to any local authority, a very broad discretion; but in exercising their discretion they must not act in a way which is Wednesbury unreasonable or otherwise unlawful. Further, since the issues in this case relate to the exercise of social services functions, section 7 of the Local Authority Social Services Act 1970 (LASSA) applies. That provides as follows:

"7. Local authorities to exercise social services functions under guidance of Secretary of State

(1) Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."

11. The Secretary of State has issued guidance in the general territory of this case but not actually dealing with the situation that arises in this case. Plymouth have made considerable reference to that guidance in documents (both letters and their pleadings in this case) which explain why they decided to levy the charges. The claimant argues that Plymouth either wrongly considered that the guidance applies to the situation in this case; or alternatively wrongly fettered their discretion by having any regard at all to guidance which does not in fact apply. Plymouth say that they have merely, and permissibly, had regard to the guidance, and that their own policy is no less generous than that guidance but could lawfully be less generous than it in fact is.

The guidance

12. For many years the Department of Health has published a local authority circular, expressly issued under section 7(1) of LASSA, called "Charging for Residential

Accommodation Guide” (CRAG), which has been the subject over the years of many amendments. As its name makes clear, CRAG concerns charges for residential accommodation, not day services, and so it is patently not directly in point in the present case. It gives detailed guidance under which, by virtue of LASSA, local authorities must act, as to the basis of charging for the provision of residential accommodation. In part the guidance reproduces, or summarises the effect of, regulations of the National Assistance (Assessment of Resources) Regulations 1992. Paragraph 6.028 of CRAG (reflecting paragraphs 10 and 19 of Schedule 4 to the regulations) states that “the value of funds held in trust or administered by a court which derive from a payment for personal injury....” are disregarded indefinitely. By amendment number 19 made in March 2003 paragraph 10.026 provided that:

“10.026 The following periodical payments are disregarded:

- Payments from a trust whose funds are derived from a payment made in consequence of any personal injury.
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The payments in 10.026 are fully disregarded if intended and used to pay for any item which was not taken into account when the standard rate was fixed for the accommodation provided. Otherwise, £20 is disregarded.”

13. The last limb of paragraph 10.026, in italics above, was deleted by a further amendment made in April 2009. In the case of provision of residential accommodation, to which the regulations and CRAG directly apply, the effect of that amendment may be very considerable. Between March 2003 and April 2009 the disregard was £20 unless the payments were intended and used to pay for any item which was not taken into account when the standard rate was fixed. Since April 2009 the disregard is total.
14. The Department of Health has also issued a document entitled “Fairer Charging Policies for Home Care and other non-residential Social Services – Guidance for Councils with Social Services Responsibilities” (“Fairer Charging”). This guidance is also expressly issued under section 7 of LASSA and states that councils “are expected to implement it” under LASSA. I quote from the version issued in September 2003. The “Executive Summary” at the outset makes plain that the guidance “does not make any presumption that councils will charge for non-residential services, nor does it introduce any requirement to charge”; “it aims to help local councils, who decide to charge for any non-residential services, to design reasonable and fair charging policies. It seeks to ensure greater consistency in charging policies.” The services provided for the claimant all fall within the types of non-residential social services identified in paragraph 9 of Fairer Charging. Paragraph 15 of Fairer Charging contains the general proposition that: