

Social Care Bulletin November 2011 – Sefton Care Association Judgement

Sefton Care Association and others v. Sefton Council

On 9 November 2011, the Administrative Court in Manchester issued its Judgment in the matter of the Sefton Care Association and others v. Sefton Council. The case will be very useful to care providers in England and builds on recent precedents such as the Forest Care Home case (a ground-breaking Welsh case decided in December 2010) and two English cases decided earlier this year, R (W) v Birmingham City Council and JG and MB v Lancashire County Council.

The Claimants in this case were the Sefton Care Association (an unincorporated care association with 40 members) and four care home proprietors, who were also members of the Association. The Claimants asked the Court to review a decision taken by the Sefton Council in December 2010 to give no increase in the fees it paid to care homes for residential and nursing care for the second year in a row.

The Claimants asserted seven grounds for judicial review. They argued their case mostly on due process grounds, asserting that the Council had failed to take various required factors into account. For example, the Claimants argued that the Council had failed to: -

- Take into account the actual cost of care;
- Assess the risks of its decision for care homes and their residents properly;
- Take into account local factors relevant to the cost of care; and
- Consult with care providers.

The Claimants made the point that as a result of failing to take relevant factors into account, the Council was not able to show that its fees levels were sufficient to provide the required levels of care. The Claimants also argued that the Council's decision was driven by too great an extent by its own budgetary problems and that it had failed to comply with its general equality duty under section 49A of the Disability Discrimination Act 1995.

The Claimants won the case on several grounds, including their argument that the Council had failed to consult with them meaningfully. Perhaps the most groundbreaking and interesting part of the Judgment, however, is the Court's findings about the actual cost of care. The Court accepted the Claimants' argument that the Council had failed to investigate or address the actual costs of care with providers and therefore failed to have due regard to the costs of care, contrary to statutory guidance set out in Local Authority Circular (LAC) (2004) 20 (the "Guidance") and an agreement entitled "Building Capacity and Partnership in Care" (the "Agreement").

During the proceedings, the parties argued about the "usual cost" of care, as mentioned in the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 (the "Directions"). To paraphrase the Directions, a local authority will only have to provide for the cost of a service user's preferred accommodation if "the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs". This is known as the "usual cost" of care. The Council argued that the "usual cost" of care (the fees it had set) had "nothing to do with the actual cost of care". It argued that if the Council, by virtue of its dominant market position, could obtain care at less than its actual cost, then the "usual cost" could be less than the actual cost. The Council further argued that if it could meet the needs of residents for this lower "usual cost", then it would have fulfilled its obligations to service users.

The Court disagreed with the Council and stated that there should not be a significant imbalance between the fees set by the Council and the actual cost of care. If a local authority consciously fixes the usual cost of care at a figure much less than the actual cost, this would cause an “inevitable reduction in the quality of service provision”, which “may put individuals at risk”.

Interestingly, in this case, the Claimant providers had not actually submitted evidence to the Council about their actual costs. The Council argued that the onus was on the providers to volunteer this information. However, the Court decided that the Council should have asked providers to substantiate their argument that the Council’s placements were under-funded by submitting detailed information regarding the actual cost of care.

The Court also took into account evidence from the Laing and Buisson “Fair Price for Care” costing model and a report that Laing & Buisson had prepared in relation to fees paid in Wirral, which is close to Sefton. The Court stated that Sefton Council was not obliged to follow the Laing and Buisson materials, but it did take them as evidence that the fees being paid by Sefton Council might not be sufficient to meet the actual costs of care.

The Court quashed the decision of the Council setting fees for 2011/12, but this is not the end of the story. The Council now has until 9 February 2012 to make its decision setting fees again. The Judgment envisages that the Claimant providers will make further submissions to the Council regarding the actual cost of care and has set out the relevant factors that the Council should take into account when it makes its decision again. Following on from the Forest Care Home case, the Court also directed that the Council should take into account local factors, such as local pay levels and property costs. Interestingly, the Court also held that the Council should consider its own dominant market position and the effect that position has in making care homes vulnerable if fees do not reflect actual costs.

We view this decision as a very positive precedent that paves the way for care providers in England to challenge the decisions of local authorities when setting care fees. If you would like to discuss a particular issue regarding your locality with us, please contact Andrew Putin, Mei-Ling Huang or Hazel Phillips.

andrew.putin@qsbdlaw.com

DD 0117 930 7506

mei-ling.huang@qsbdlaw.com

DD 0117 930 8449

hazel.phillips@qsbdlaw.com

DD 0017 930 9478

© Copyright QualitySolicitors



Bristol Office
14 Charlotte Street, Bristol BS1 5PT
T.0117 929 0333 F.0117 929 0335
E. contact@qsbdlaw.com
W. qualitysolicitors.com/burroughsday

North Somerset Office
Combe House, Combe Road
Portishead BS20 6BJ
T.01275 843213
F.01275 849232

