

GLS Administrative Law Webinar

CASE REFERENCE

R. (on the application of Morgan) v Coventry City Council
R. (on the application of Carton) v Coventry City Council

Queen's Bench Division (Administrative Court)
30 November 2000

Westlaw Case Analysis 2 pages

Official Transcript 7 pages

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Case Analysis

Where Reported

(2001) 4 C.C.L. Rep. 41; [\[2001\] A.C.D. 80](#); Independent, January 15, 2001; [Official Transcript](#)

Case Digest

Subject: Social security

Keywords: Consultation; Disability living allowance; Disabled persons; Procedural impropriety

Summary: C, who was seriously disabled, challenged the decision of CCC to change the charging structure applicable to day care provision so as to take into account as income that part of higher rate Disability Living Allowance payable for night time care. C contended that (1) it was procedurally unfair to introduce such fundamental changes in the absence of prior consultation with those affected, and (2) the decision was irrational. The court held that (1) having regard to the effect on C and other claimants, the changes were significant rather than being merely alterations to the scheme and as such it was reasonable and justified for the claimants to have a legitimate expectation that they would be consulted, and (2) it was irrational for CCC to treat monies intended for night time care as being income available for day time care.

Abstract: C, who was seriously disabled, challenged the decision of CCC to change the charging structure applicable to day care provision so as to take into account as income that part of higher rate Disability Living Allowance, DLA, payable for night time care. Previously CCC had charged a flat rate for the services they provided but had subsequently introduced a means tested system following a detailed consultation exercise with claimants and other interested parties. However, the decision to take into account DLA payable for night time care was taken without any consultation and C contended that (1) it was procedurally unfair to introduce such fundamental changes in the absence of prior consultation with those affected, and (2) the decision was irrational. CC contended that there had been no major structural change in that the structure remained means tested and took into account disability related living costs.

Held, granting the application, that (1) having regard to the detrimental effect on C and other claimants, the changes were significant rather than merely constituting alterations to the scheme and as such it was reasonable and justified for the claimants to have a legitimate expectation that they would be consulted. CCC had already recognised the appropriateness of consultation in first devising the scheme, [R. v Devon CC Ex p. Baker \[1995\] 1 All E.R. 73](#) considered, and (2) it was irrational, unfair and unlawful for CCC to treat monies intended for night time care as being income available for day time care.

Judge: Sir Richard Tucker

Counsel: For C: Richard Drabble Q.C. and Helen Mountfield. . For the local authority: Martine Kushner.

Solicitor: For C: Tyndallwoods (Birmingham). . For the local authority: Council Solicitor.

Significant Cases Cited **R. v Devon CC Ex p. Baker**

[\[1995\] 1 All E.R. 73; 91 L.G.R. 479; \(1994\) 6 Admin. L.R. 113;](#)
[\[1993\] C.O.D. 253; Times, January 21, 1993; Independent, February 22, 1993;](#) CA (Civ Div)

All Cases Cited **R. v Devon CC Ex p. Baker**

[\[1995\] 1 All E.R. 73; 91 L.G.R. 479; \(1994\) 6 Admin. L.R. 113;](#)
[\[1993\] C.O.D. 253; Times, January 21, 1993; Independent, February 22, 1993;](#) CA (Civ Div)

Legislation Cited

[Health and Social Services and Social Security Adjudications Act 1983 \(c.41\) s.17](#)

[Social Security Contributions and Benefits Act 1992 \(c.4\)](#)

Journal Articles

Social security.

Consultation; Disability living allowance; Procedural impropriety.

[J.L.G.L. 2001, 4\(6\), D109](#)

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

CO/425/2000
CO/789/2000

Royal Courts of Justice
Strand
London WC2

Thursday, 30th November 2000

B e f o r e:

SIR RICHARD TUCKER

(Sitting as a Deputy High Court Judge)

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THE QUEEN ON THE APPLICATION OF

(1) SARAH CARTON

(by her Litigation Friend Jean Carton)

(2) SARA LARRAD

(by her Litigation Friend Joy Larrad)

-v-

COVENTRY CITY COUNCIL

and

(1) GARRY MORGAN

(by his Litigation Friend Barbara Sanders)

(2) JACQUELINE PICKERING

(by her Litigation Friend Monica Pickering)

-v-

COVENTRY CITY COUNCIL

- - - - -

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Official Shorthand Writers to the Court)

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J U D G M E N T
(As Approved by the Court)

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MR R DRABBLE QC and MISS H MOUNTFIELD (instructed by Messrs Tyndallwoods Solicitors, Windsor House, Temple Row, Birmingham B2 5TS) appeared on behalf of the Applicants.

MISS M KUSHNER (instructed by The Legal Services, Coventry City Council, Council House, Coventry CV1 5RR) appeared on behalf of the Respondents.

Thursday, 30th November 2000

J U D G M E N T

1. SIR RICHARD TUCKER: I have before me applications for judicial review made on behalf of four claimants who are seriously disabled people residing in the Social Service area of which the defendants, the Coventry City Council, are the relevant authority. Despite their disabilities, the claimants, who are in their 20s or early 30s, continue to live at home. They are looked after by their parents, and by other carers, with day care services provided by the defendants.

2. The claimants challenge the introduction by the defendants on 3 January of this year of what the claimants contend is a substantially altered structure for charging for day care provision. The applications are made on two grounds. First, that it was unfair in the circumstances for the defendants to make substantial changes to their charging policy, to the claimants' detriment, without consultation; second, that it was irrational, unlawful and unfair for the defendants to apply a new charging policy, which treated as "income" available for care in the day, sums of Disability Living Allowance (DLA) paid in respect of watching over, or attention needed, at night, in connection with bodily functions.

3. The claimants do not dispute the defendants' entitlement to charge for the services they provide. Their right to do so is contained in section 17 of the Health and Social Security Adjudication Act 1983. Until October 1998, the defendants charged a flat rate for day care services. They then introduced a means-tested charging system. Disability-related benefits were taken into account in assessing needs, but an allowance was made for disability-related costs. Before adopting this charging structure, the defendants carried out a detailed consultation exercise of users and local groups of interested people and bodies. However, 15 months afterwards, the defendants introduced a new scheme which, it is contended, radically altered the structure of charging and made fundamental changes to the claimants' detriment. There were no consultations on this occasion.

4. The defendants contend that there was no major structural change. The structure was still means tested and took into account disability-related costs of living. Moreover, the defendants submit that consultation had taken place in the recent past (i.e. in September and October 1996), and that views expressed on that occasion were taken into account when considering what they describe as adjustments to the former scheme.

5. Therefore, one of the matters I have to consider is whether the changes could properly be

described as radical or fundamental, on the one hand, or whether they should be more aptly described as adjustments, on the other. To some extent, this is a matter of degree, but it may also be a matter of principle.

6. In order to assist me, counsel for the claimants have produced a very helpful analysis of the changes in charging structures. The main changes are as follows.

7. Under the old scheme:

1. People on income support, housing benefit or council tax benefit who did not receive disability-related benefits were exempt from charges for care.

2. Where there was some assessable income, this was reduced by an allowance for disability-related expenses to take account of the extra costs of living experienced by disabled people.

3. There was a buffer zone of £20 per week, which meant that if assessable income fell below that amount, no charges would be made for day care.

4. As to charges to be paid, there was a sliding scale of percentage of cost against disposal income.

8. Under the new scheme:

1. Assessable income is calculated with no allowance for any disability-related costs. Disability benefits are included as assessable income.

2. The buffer zone is halved to £10 per week.

3. Instead of the sliding scale of charges, all service users with an assessable income of over £10 per week pay 40 per cent of their disposable income, unless this exceeds the maximum charge payable for services or hits the £10 buffer.

9. In each case, DLA was included as income, but under the old scheme there was an individually calculated applicable amount for disability-related costs, and this included a standard amount of £16.40 per week for recipients of higher rate DLA payable under the provisions of the Social Security Contributions and Benefits Act 1992 (i.e. those with needs at night as well as in the day).

10. Under the new scheme, there is no individual calculation and no automatic disregard for the night component of higher rate DLA.

11. This is a matter upon which Mr Drabble QC, for the defendants, places considerable emphasis, and which he submits represents a significant alteration of the charging policy. Under the new scheme, monies which were intended to reflect the cost of care at night are being treated as

income available for care in the day.

12. Moreover, Mr Drabble submits that it was clearly an intention of Parliament that those in receipt of higher rate DLA should have a benefit which was in fact £16 per week, but that this has been removed or eroded by the structure of the new charging policy.

13. The claimants' first complaint is that it was procedurally unfair to introduce these changes without warning and without any process of consultation, which would have enabled representations to be made against them. The question posed by Mr Drabble is whether, in the circumstances of this case, fairness demands at least some consultation on the proposals before they are implemented. His answer is yes, because of the impact on users of the changes, and also because the defendants have recognised the appropriateness of consultation in first devising a scheme of this sort.

14. Both sides rely on passages in the judgment of Dillon LJ in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73, the most helpful of which I find at page 85 between letters C and D:

"Obviously it could be said to be best practice, in modern thinking, that before an administrative decision is made there should be consultation in some form, with those who will clearly be adversely affected by the decision. But judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly."

15. Simon Brown LJ dealt with the question of legitimate expectation to be consulted, and summed up the matter on page 91D, in these words:

"The fact is that it still remains for the court to say, unassisted by authority save only in so far as there may exist other cases analogous on their facts, whether that legitimate expectation ought to be recognised and, if so, precisely what are the demands of fairness in the way of an opportunity to comment and so forth."

16. The defendants do not accept that the previous consultation exercise raised a reasonable expectation that there would be further consultation prior to what Miss Kushner on their behalf describes as any adjustments of the charges.

17. The defendants contend that it was always envisaged that there would be flexibility within the system, that it would be under review, and that charges would be adjusted in the light of the overall financial position. The defendants submit that there has been no major structural change. I disagree. I note that the defendants' own document, prepared on 12 July 1999, recognised as a disadvantage to the charge the fact that:

"The policy has been developed over a long period of time with detailed debate on each issue. Changing this fundamental aspect now is incompatible with the previous consultative and considered approach."

18. These were indeed fundamental changes to the charging structure. In my view, fairness required that there should be proper consultation before they were introduced, and there was none. The changes adopted are more than a mere uprating: they constitute changes to the policy, and to the way in which the defendants charged for their services. The practical effect of these changes is graphically illustrated in the before and after examples contained in the claimants' bundle of documents. To people in the claimants' position, they represent not only significant, but also substantial, changes. To them, these were not mere adjustments to the charges. They were fundamental changes. They were introduced unfairly, without the consultations which the claimants could justifiably, reasonably or legitimately have expected. There is no proper or adequate explanation from the defendants to explain the failure to consult.

19. Moreover, it was irrational, unlawful and unfair for the defendants to apply a new charging policy which treated as income available for day care sums of DLA paid in respect of night care.

20. Accordingly, I grant the relief sought.

21. Miss Mountfield, you will have to tell me what precise relief you seek and the precise terms of the order. The problem is that the defendants are not present here.

22. MISS MOUNTFIELD: Yes.

23. SIR RICHARD TUCKER: Do you want me to wait for some representative to be present? Can you conveniently come back later this morning?

24. MISS MOUNTFIELD: I can come back later this morning, not terribly conveniently, I have to admit.

25. What we asked for was for the charging policy to be quashed, and I wonder if one approach might be to order that, with liberty for the defendants to apply if they felt there was something they wished to say on it.

26. SIR RICHARD TUCKER: Yes.

27. MISS MOUNTFIELD: I do not imagine that there would be. It would be said the policy is irrational, as well as having been introduced without --

28. SIR RICHARD TUCKER: But that would satisfy you, would it, if I were to order the charging policy to be quashed?

29. MISS MOUNTFIELD: Yes. The decision of -- sorry, I do not have the date.

30. SIR RICHARD TUCKER: Let us see what the claimants are asking for.

31. MISS MOUNTFIELD: It was introduced on 3 January this year, and that that new policy implemented on that date be quashed.

32. SIR RICHARD TUCKER: Yes. You want the charging policy declared on 3 January of this year to be quashed.
33. MISS MOUNTFIELD: Yes, my Lord.
34. SIR RICHARD TUCKER: So be it.
35. MISS MOUNTFIELD: May I ask for costs of the application on like terms. I do not imagine —
36. SIR RICHARD TUCKER: I do not see how anyone could resist that.
37. MISS MOUNTFIELD: I am very grateful.
38. SIR RICHARD TUCKER: But I make those orders with liberty to the defendants to appear and argue against them if they see fit, but provided they do so within seven days.
39. MISS MOUNTFIELD: Yes, and on notice to the claimants.
40. SIR RICHARD TUCKER: On notice, of course, to the claimants.
41. MISS MOUNTFIELD: I am very grateful, my Lord. Thank you.
42. SIR RICHARD TUCKER: How will they be notified of my order?
43. THE CLERK OF THE COURT: My Lord, I will send a copy of the order to Coventry.
44. SIR RICHARD TUCKER: I would be grateful. Thank you very much. Thank you for your attendance, Miss Mountfield.