



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 109

P422/19

NOTE BY LADY WOLFFE

In the petition of

TERRI McCUE as guardian of ANDREW McCUE

Petitioner

for

JUDICIAL REVIEW

of Glasgow City Council's policy on the calculation of charges for community care services  
and its failure to act

**Petitioner: Dailly, sol adv; Drummond Miller LLP**

**Respondent: Roxburgh; Morton Fraser LLP**

20 December 2019

**Background**

[1] The petitioner is the mother of Andrew McCue ("Andrew"). Andrew, who is 24 years of age, has Down's Syndrome and lives with his parents. His mother, Terri McCue, is his carer and guardian. Andrew is disabled within the meaning of section 6 of the Equality Act 2010 (the "2010 Act").

[2] The petitioner is entitled in law to community care services from the respondent in terms of section 12A of the Social Work (Scotland) Act 1968 (the "1968 Act") and section 5 of the Social Care (Self-directed Support) (Scotland) Act 2013 (the "2013 Act"). The respondent's "Support Plan" for Andrew provides him with non-personal care between 9am

and 3pm during weekdays at certain locations. It is important to note that no challenge is made to the support plan, which is accepted as adequately meeting Andrew's needs as a disabled person and which the respondent is under a duty to meet.

*The issue arising in these proceedings*

[3] This dispute concerns the respondent's calculation under section 87 (1A) of the 1968 Act of the charges for social care which a local authority may require a recipient of social care services to pay. In particular, the petitioner wished certain items of regular expenditure incurred by Andrew to be taken into account as part of that calculation. To the extent that this expenditure was accepted as "disability related expenditure" ("DRE"), it would be deducted from the "income" of the recipient of social care, with the effect that the discretionary income from which a recipient was expected to make a contribution towards his or her social care would be reduced. Conversely, the refusal to deduct such expenditure would increase the sum assessable as available for making a contribution to the costs of social care provided by or on behalf of the local authority. (The practical effect would be an increase in the amount payable.)

*The 1968 Act*

[4] Section 87(1) of the 1968 Act provides that the respondent *may* recover charges as it considers reasonable for community care services. Section 87(1A)(b) provides that if the claimant:

"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 practicable for him to pay".

### *The respondent's Charging Policy*

[5] The respondent has a Charging Policy ("the Charging Policy") that sets out how it calculates its charges for community care services. The relevant parts of the Charging Policy are contained in paragraph 12 of the Policy (see Statement 7 of the petition). The mobility component of Personal Independence Payments (PIP, which replaced Disability Living Allowance ("DLA")) is disregarded as part of the petitioner's income: paragraph 12.2 of the Charging Policy.

[6] The respondent calculated that the petitioner was due to contribute the sum of £21.10 per week to the respondent payable from his social security benefits for his community care services during 2018/19. (The calculation is set out in production 6/5(3).) The respondent accepted that the costs that the petitioner incurred for specialist footwear and for clothing alterations were DRE, and deducted the sum of £6.25 per week for these items when it made its charging calculation.

### **Petitioner's grounds of challenge**

[7] The petitioner advances the following contentions:

1. That the respondent's reasons for refusing to take DRE into account in its letter of 14 August 2018 were irrational, unlawful and *Wednesbury* unreasonable.
2. That the respondent has a duty when calculating social care charges under section 87(1A) of the 1968 Act to take all of the petitioner's DRE into account, in compliance with sections 15, 20 and 21 of the 2010 Act.

I shall refer to the arguments in paras (1) and (2) as the "merits challenge" to the Decision.

3. That the respondent's failure to act in relation to the petitioner's complaint was irrational, *Wednesbury* unreasonable and unlawful.
4. That the respondent's Charging Policy is unlawful as it discriminates against disabled persons, contrary to sections 15, 20 and 21 of the Equality Act 2010 (the "2010 Act").
5. In reply to the Respondent's preliminary plea, the petitioner argues that she took all reasonable steps to exhaust Andrew's remedies and the Scottish Public Services Ombudsman (the "Ombudsman") has no jurisdiction to determine judicial review grounds or questions of *vires* and rationality.

At the hearing, the petitioner's solicitor advocate, Mr Dailly, invited the court to sustain all of the petitioner's pleas.

### **Discussion**

[8] I have had regard to the parties' full and helpful notes of argument, as augmented by their oral submissions at the continued hearing last week, which I do not propose to repeat, and to the productions and volume of authorities produced and referred to. For the purposes of this Note, I do not propose to repeat those materials. At the hearing on this petition for judicial review, each party insisted on all of its pleas. I disposed of these proceedings by an *ex tempore* decision at the continued hearing. This Note, which is produced in response to the petitioner's reclaiming motion, records the reasons for my decision.

***Preliminary issue: Failure to exhaust remedies***

*The issue*

[9] This issue turned on the proper interpretation of section 5 and 7 of the SPSO Act 2002, as amended by SSI 2016/157 (“the 2016 SSI”), and in particular, on the proper interpretation of new subsections (2C) to (2E) to section 9, inserted by the 2016 SSI with effect from 1 April 2017. It was suggested that these provisions have not yet been considered by the courts. It appeared to be common ground that the former procedure for dealing with social work complaints, under section 5B of the 1968 Act, had been replaced by the new procedure introduced via the 2016 SSI.

*The petitioner’s argument*

[10] The petitioner’s argument, in short, and advanced principally under reference to section 7(8) of the 1968 Act, was that the Ombudsman was unable to investigate any matter in respect of which the aggrieved person had “a remedy by way of proceedings in any court of law” (*per* section 7(8)(c) of the 2002 Act). However, in his submission, it could not have been the intent of the 2002 Act to “oust the jurisdiction of the Court of Session” (as Mr Dailly put it). In his submissions the Ombudsman generally dealt with complaints of “maladministration” which had “nothing to do with the nature, quality or reasonableness of the decision itself” (*per* Lord Donaldson MR in *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire and Lincolnshire and Cambridgeshire, ex-parte Eastleigh Borough Council* [1988] QB 855 at 863). The Ombudsman was able only to investigate issues of maladministration. He was unable to entertain challenges to the *vires* of local authority policies or to grant remedies for such challenges. As any redress available

from the Ombudsman was not effective, there was no duty first to exhaust that remedy before the petitioner could resort to this application for judicial review.

*The respondent's reply*

[11] Miss Roxburgh, counsel for the respondent, submitted in support of the respondent's plea of no jurisdiction, that it was not competent to seek judicial review where an alternative remedy, whether statutory or non-statutory, is available to the applicant and the applicant has not resorted to or exhausted that alternative remedy. In this case, the petitioner had an alternative remedy in the form of a complaint to the Ombudsman as provided for in section 5 of the 2002 Act.

[12] The respondent's submission was that on the proper interpretation of the 2002 Act, the petitioner's criticisms of the respondent's decision were the very kinds of matters which were *within* the jurisdiction of the Ombudsman. The petitioner's criticism of the decision fell within section 7(2C) of the 2002 Act (as amended) and the criticism for failure to respond (as an instance of maladministration) fell within section 5(1)(a). In relation to the challenge to the Charging Policy, this would always be expressed in the form of a decision, challenge to which would be within the Ombudsman's jurisdiction. Accordingly, having failed first to exhaust that alternative remedy, the respondent's preliminary plea should be sustained.

*Discussion of the preliminary issue*

[13] I proceed on the basis that the parties' common position is correct, which I believe it to be, that the provisions introduced by the 2016 SSI created a new complaints procedure in place of the former procedure under section 5B of the 1968 Act. Looking at those new provisions, the terms of section 5 and 7 of the 2002 Act, defining the matters within and

outwith the jurisdiction of the Ombudsman, are less than straightforward. In broad terms, section 5(1) sets out what matters may be investigated by the Ombudsman. The apparent width of this –“any action taken by or on behalf of a local authority (other than an action consisting of a service failure) in the exercise of administrative functions” – is matched by the apparent width of the restrictions on matters which may be investigated in section 7(1), providing that the Ombudsman was not entitled to “question the merits of a decision taken without maladministration...by [a local authority] in the exercise of a discretion vested” in it.

[14] While the petitioner refers to section 7(8), in my view, that does not have the effect the petitioner suggested. In particular, I do not accept that this prevents the Ombudsman from considering a complaint on the basis that an individual could bring proceedings for judicial review. If section 7(8) had the meaning the petitioner attributed to it, it would be difficult to identify what sorts of complaints the Ombudsman would have jurisdiction to consider. Having regard to the clear words of the provision, and construing those statutory words in the context of the whole statute, it respectfully seems to me that they mean what they say: that the Ombudsman does not have jurisdiction to hear a complaint where Parliament has provided for

- (i) an appeal to a Minister of the Crown, or the Scottish Ministers; or
- (ii) an appeal to a Tribunal; or
- (iii) an appeal, or right of review, before the Courts.

While an application to the supervisory jurisdiction of the Court of Session made by an application for judicial review is necessarily brought in “the courts”, that is not a specific right of review expressly provided for in legislation, as envisaged by section 7(8).

Accordingly, the petitioner's reliance on this to meet the respondent's plea of no jurisdiction is in my view misplaced.

[15] Turning to the provisions defining the scope of the Ombudsman's jurisdiction, subsection (2C) of section 7 disapples the restriction in section 7(1) in respect of "the merits of a decision taken by ...a [local authority] in pursuance of a social work function to the extent that the decision was taken in consequence of the exercise of the professional judgement of the social worker or other person discharging the function". While awkwardly framed as an exception (ie in section 7(2C)) to a restriction (in section 7(1)), the effect is that the Ombudsman has jurisdiction over the subject matter of 7(2C). This would extend to the respondent's decision on the merits as to what items of claimed expenditure did or did not properly fall within DRE for the purpose of the calculation taken under section 87(1A) of the 1968 Act.

[16] In respect of the other elements of the petitioner's challenge, I also accept that the asserted failure of the respondents to respond (or to respond timeously) to the petitioner's letter potentially fell within section 5(1)(c) (a "service failure"), provided that the additional criteria of section 5(3) are met (and which includes maladministration).

[17] In relation to the *vires* challenge, I accept the respondent's submission that this will always be expressed or applied via a concrete decision, bringing it within the exception to the restriction (ie s 7(2C)), already discussed. Under reference to section 11, which requires the Ombudsman to issue reasons where s/he declines to investigate or discontinues an investigation, Ms Roxburgh suggested that this would inform a person making a complaint of the reasons the complaint did not progress further. This would clarify the circumstances in which a judicial review might then become competent, if the public authority did not address the substance of the complaint.



[18] Nothing in the foregoing persuades me that this would have been a case in which the petitioner's failure to exhaust the alternative remedy might be excused, particularly because as Ms Roxburgh points out, the respondent advised the petitioner in terms that this is what she must do and, further, the petitioner is not unfamiliar with judicial review and the respondent's complaints procedures. (The petitioner has previously challenged a decision of the respondent by judicial review proceedings: *McCue, Petitioner* 2014 CSOH 124.)

*Decision on preliminary issue*

[19] In light of the foregoing, the petitioner had an available alternative remedy in the form of a complaint or application to the Ombudsman for all of the grounds of challenge contained within her petition. Accordingly, I sustain the respondent's first plea of no jurisdiction.

[20] That determination is sufficient to dispose of the petition by dismissal. However, in deference to the careful arguments ably presented by the petitioner's solicitor advocate and by the respondent's junior counsel, I indicate briefly my views on the other principal arguments.

*The challenge to the merits: what is relevant as DRE for the purpose of the calculation?*

[21] In respect of the merits of the decision (as I have termed it), this turns on the proper understanding of what constitutes DRE. The petitioner argues that the respondent erred by failing to take into account additional expenditure, said to be incurred by reason of Andrew's disability and which therefore should have been taken into account, with the ultimate practical consequence of reducing Andrew's contribution towards his social care.

[22] As the petitioner's solicitor advocate, Mr Dailly, compelling put it, disability is "experienced for 24 hours in a day; not just during the hours of A's care plan". Accordingly, so this argument ran, the petitioner was entitled to claim for *all* additional expenditure incurred as a consequence of Andrew's disability whether that expenditure was to meet an assessed need or for other discretionary spending intended to take advantage of more fulfilling opportunities outwith his home, particularly in the evening hours.

[23] The respondent's argument, in reply to the petitioner's challenge on the merits, is to point out that two criteria require to be met before it could deduct expenditure as DRE for the purposes of the calculation under section 87 (1A) of the 1968 Act. These were, first, that the expenditure claimed must be meeting a *need* which is not otherwise met by the respondent and, secondly, the need (or the increased cost of meeting the need), must relate to the individual's disability.

[24] I begin by noting that in the course of his submissions Mr Dailly confirmed that it was no part of the petitioner's case to challenge the care plan – the appropriateness and sufficiency of which the petitioner entirely accepted- and no part of the petitioner's case to challenge this by the back door, as it were. This concession, which in my view is rightly made, effectively undermines the petitioner's arguments on the merits.

[25] In my view, the petitioner's approach has no statutory support. In this specific context, DRE means the additional expenditure incurred as a consequence of disability and used to meet the assessed needs of the individual in receipt of social care. Putting it another way, if the petitioner were correct, the local authority would be obliged to meet the additional expenditure arising because of disability for *any and all* activities a disabled individual wished to engage in, or all items desired, even if these were of a purely discretionary nature in the sense that these were outwith the assessed needs of the

individual. In my view, this is to ignore the statutory context in which these deductions for DRE are made. The local authority's duty arises in respect of the needs assessed according to the relevant statutory criteria and, so far as appropriate to do so, to ascertain what it is practicable for someone to pay (following the COSLA charging guidance). The deductions allowable for this exercise do not include all additional expenditure incurred as a consequence of disability, whether that expenditure is to meet assessed needs or to engage in desired (ie non-essential) activities or to acquire non-essential items.

[26] Furthermore, I find that the respondent's approach, including their Charging Policy and the COSLA guidance which it seeks to implement, is in accordance with its responsibilities as a local authority discharging its duties under section 87 (1A) of the 1968 Act as well as its equalities duties under the 2010 Act. In relation to the 2010 Act duties, in my view, the respondent's approach in this case, and the Charging Policy which it had followed, are consonant or in accordance with its duties under the 2010 Act. Not every person who is assessed as in need of social care will be disabled. In other words, when dealing with either a disabled or a non-disabled person who acquires social care services, the respondent begins by identifying the available income and then deducting from that the cost of meeting those needs (and I stress it is the assessed needs with which a local authority is concerned) which are not being met by the respondents. The accommodation of the disabilities of a person in receipt of social care services is achieved by identifying if there is additional expenditure in meeting those needs incurred by reason of the person's disability, ie the element of DRE. The significant point, in considering whether or not this approach complies with the duties under the 2010 Act, is that in neither case -that is, in undertaking a calculation under section 87(1A) for a disabled and a non-disabled person in receipt of social care- does the calculation permit or make allowance for discretionary spending.

[27] For these reasons, on the merits, I accept as well founded the respondent's submissions on these matters and reject the petitioner's challenge on the merits as ill-founded. Had I not sustained the respondent's preliminary plea, I would have sustained its plea to the merits.

*Vires of the policy*

[28] The petitioner's challenge to the respondent's Charging Policy as a breach of the equality duties in the 2010 Act was presented essentially as a linguistic challenge. The essence of the petitioner's argument, as I understood it, was that the policy was not framed in "positive" language – tracking the language in the 2010 Act- and so was in breach of that Act. It was not, it was argued, good enough for the Charging Policy to say that "consideration would be given". It is implicit from the foregoing that I would also have rejected the petitioner's challenge to the *vires* of the Charging Policy. The fundamental point is to consider how that Policy actually operates and whether, notwithstanding the terms in which it is expressed, it nonetheless complies with the 2010 Act duties. In my view, it does. As just noted, additional provision is made positively to take into account the additional expenditure incurred by a disabled person as a consequence of his or her disability in respect of his or her assessed needs (ie DRE). In my view, this is wholly compliant with the respondent's duties under the 2010 Act. While I reach that conclusion as a matter of interpretation of the statutory provisions applied to the Charging Policy under consideration, I am fortified in that view by the fact that the respondent's Charging Policy was based on, and intended to implement, the COSLA guidelines. There was no suggestion that those guidelines were non-compliant with the 2010 Act. Nor was it impermissible for the respondent to refer to these guidelines.

*Failure to decide*

[29] The petitioner's case based on a failure to decide was taken quite short. In advancing this branch of the petitioner's challenge, Mr Dailly referred to the latest exchanges between the parties, comprising the petitioner's claim (with vouching) of 11 June 2018, the respondent's rejection of that by letter of 14 August 2018 ("the Decision"), the petitioner's complaint (via Govan Law Centre ("the Centre") as her representative) of 4 September against the Decision and the Centre's chasing letter of 4 March 2019. He suggested that the respondent failed to provide the stage-two letter (ie addressing the petitioner's complaint of 4 September 2018 against the respondent's refusal of 14 August 2018), with the consequence that the petitioner was left in limbo. It was also suggested that the respondent's attitude that these were old complaints was misconceived. This was the first time that the petitioner had produced vouching for the various items of DRE items claimed. Declarator should be granted.

[30] The respondent's position was candidly to accept that the respondent had not responded meaningfully to the petitioner's complaint letter of 4 September 2018 against the Decision. However, the petitioner had not taken the court to the whole background, including the five letters referred to in the respondent's letter of 14 August 2018 or the observation therein that there had been communication between the parties on this issue since 2015. Contrary to the impression given by the petitioner's presentation of this issue, there was a very considerable history and each of the items had been claimed and considered previously. Ms Roxburgh took the court through some of these letters, including those of 7 April, 1 May and 28 May 2015, and the very full letter of 10 July 2017. In the letter of 10 July 2017, the respondent exercised its discretion to consider the petitioner's then complaint, notwithstanding it was outwith the applicable six month period. In that letter

the respondent demonstrably considered all of the petitioner's claims; it applied the relevant judgement; and it explained its Charging Policy and concluded that none of these constituted DRE.

[31] Against that background, and given that all of the items claimed in June 2018 had been previously claimed (see the list at the foot of the respondent's letter of 1 May 2015), the petitioner could have been in no doubt as to the respondent's full reasons for rejecting the claim even if the Decision did not itself explicitly or fully repeat these reasons; they had been incorporated by reference to the considerable correspondence which had passed between the parties since 2015. While, therefore, the respondent should have responded to the complaint letter (of 4 September), it was not said that the failure had any impact. It was not said that declarator was a necessary precursor to any other proceedings. There is no purpose served in the grant of a declarator, which concerned a stand alone issue that was not disputed between the parties.

[32] I accept the respondent's submissions on this issue.

[33] Mr Dailly's review of the background, as confined to the petitioner's letter preceding the Decision and the Decision itself, gives an incomplete picture. Having been taken through the very extensive background and the exchanges between the parties extending back to 2015 it is apparent (i) that the petitioner has previously claimed in respect of all of the categories of expenditure (albeit fresh information had been provided in the course of the hearing in support of bedding); (ii) that these had all been previously considered (I note parenthetically that the letter of 10 July 2017 was a model of a carefully considered and fully reasoned decision letter displaying clarity and courtesy of what clearly had by then become a thrashed dispute); and (iii) that what was 'new' was the vouching for the same items claimed. The respondent's prior rejection was not for a want of vouching, but because of the

narrower definition of DRE that they applied and which approach I have already held to be well-founded in law.

[34] Had this court had jurisdiction to consider the merits, I would have exercised my discretion and refused a declarator in respect of the respondent's admitted failure to issue a stage-2 letter. No purpose would be served by granting a declarator for what was, in the context of these proceedings, a relatively minor issue, of no lasting consequence and in respect of which the underlying failure had no prejudicial impact for the petitioner.

*Individual items claimed*

[35] The petitioner's position is periled on the court accepting her submission on the merits, ie what is the scope of DRE. Ms Roxburgh noted that there was an iterative process, beginning with the assessment of need in the unchallenged care plan and then consideration of whether the items complained of fell within the meaning of DRE, correctly construed. She then addressed each of the items claimed. In relation to holidays, for example, these were provided for in the care plan, including respite for the petitioner as Andrew's carer. Whether she uses respite days for holidays is a matter for her, but that did not mean additional holidays were "necessary" in the relevant sense as DRE. It is clear that the petitioner's claims for the items were rejected either because they represented discretionary spending and were therefore (on the respondent's approach to the characterisation question inherent in the merits of this petition) not DRE (eg claims for additional activities, holidays, the guardianship fee, ironing or bedding) or because the whole of the expenditure was claimed rather than the disability-related element of it (eg holidays). In relation to bedding, the information that there was a higher incidence of the kind of skin condition that necessitated more frequent bedding changes in persons with Downs Syndrome was new

material. There could not be a failure to take this into account, because this was new information not previously placed before the decision taker. I prefer the respondent's submissions. I am not persuaded that there was any irrationality or failure to have regard to a relevant consideration.

[36] In light of my determination of the issue on the merits (ie on the proper scope and meaning of what is DRE), I am bound to prefer the respondent's submissions on these.

### **Disposal**

[37] The respondent's preliminary plea will be upheld and this petition dismissed. On the unopposed motions of the parties at the end of the continued hearing, I awarded expenses in favour of the respondents but modified these to nil.