



Discrimination Law Association

Briefings 973-986

Discriminatory impact of a council's adult social care charging policy

SH v Norfolk County Council Case No: CO/1640/2020 [2020] EWHC 3436 (Admin); December 18, 2020

Implications for practitioners

SH v Norfolk is an important judgment for practitioners assisting clients to challenge the impact of charging policies for adult social care in other local authority areas. The court found that Norfolk's policy had a disproportionate impact on severely disabled people, by charging them a higher proportion of their income for their care than those without such severe disabilities. The judgment contains an interesting analysis of what amounts to 'other status' for a claim of discrimination under Article 14 European Convention on Human Rights (ECHR), as well as a robust critique by the judge of the aims put forward to justify the discrimination.

Facts

The claimant (SH) is a 24-year-old woman with Down Syndrome with associated physical disabilities and severe learning disabilities. She had never been able to work to earn money and had no prospect of doing so in the foreseeable future. Her income consisted of: Employment Support Allowance (ESA) at the support group rate with the enhanced disability premium; Personal Independence Payment (PIP) daily living component at the enhanced rate; and PIP mobility component at the higher rate. Her total income in July 2019 was £277.30, rising to £282.05 in April 2020.

Statutory regime

Councils can charge adults for care and support under s14 Care Act 2014. S14(7) provides that councils cannot levy charges which would cause SH's remaining income to fall below the minimum income guarantee (MIG).

The Care and Support (Charging and Assessment of Resources) Regulations 2014 (the 2014 Regulations) set the MIG and impose other constraints on councils' power to charge. The 2014 Regulations prohibit councils from taking certain income into account (e.g. earnings from employment or self-employment (regulation 14)),

but councils have the discretion whether to include other elements in calculating income (regulation 15(2)).

The Care and Support Statutory Guidance (the guidance) emphasises councils' discretion to charge and

requires them to consider whether it is appropriate to set a maximum percentage of income above the MIG.

Charging policy

Norfolk Council (the Council) introduced a new non-residential charging policy, under which SH was initially charged for care (including day services, respite care and a personal assistant) at a rate of £16.88 per week. This increased to £20.58 in April 2020 and was to become £50.53 when the next phase was introduced.

The key changes to Norfolk's policy were to: (a) reduce the MIG to the statutory minimum; and (b) exercise its discretion to include the daily living component of PIP at the enhanced rate.

SH argued that the charging policy:

1. discriminated against severely disabled people contrary to Article 14 read with Article 1 of Protocol 1 (A1P1) and/or Article 8 ECHR; and
2. indirectly discriminated against adults with Down Syndrome, contrary to ss19 and 29 Equality Act 2010 (EA).

High Court

It was common ground that the changes to the charging policy fell within the ambit of A1P1. The 'other status' relied on by SH was being 'severely disabled'. The judge considered that to be exactly the sort of personal characteristic which has always been recognised as protected from unjustified discrimination under Article 14. That 'other status' could be understood by reference to her entitlement to ESA at the support group rate with the enhanced disability premium, and to her entitlement to the PIP daily living component at the enhanced rate, by virtue of her 'severely limited ability to carry out daily living activities'.

There was a difference in treatment between, on the one hand, severely disabled service users (with needs which result in higher assessable benefits and no realistic prospect of accessing earnings from employment or self-employment) and, on the other hand, everyone else receiving council services covered by the charging policy. Their treatment was different because the

charging policy meant that a higher proportion of SH's earnings than theirs (and of other severely disabled people in the same position) was assessed as available to be charged, and the result was that she was charged proportionately more than they were.

The Council relied on the following aims to justify the effect of the charging policy on SH as not being manifestly without reasonable foundation, namely to:

1. apportion the Council's resources in a fair manner;
2. encourage independence;
3. have a sustainable charging regime;
4. follow the statutory scheme.

The court found that there was no evidence that the Council had considered the differential impact on SH's cohort or the alternative approach of setting a '*maximum percentage of disposable income*' over and above the MIG (as the guidance required them to consider). The outcome for SH was overlooked and not considered or consciously justified at all. None of the proposed mitigations structurally addressed the discriminatory impact.

No real effort was made in the proceedings to justify the discriminatory impact of the charging policy on severely disabled service users (as opposed to explaining the sums sought to be raised by the policy overall) by reference to the Council's stated aims. The impact directly contradicted the stated aim of encouraging independence because SH would have less money for

a personal assistant or other independent activity. A less intrusive measure, namely the alternative approach above, had not been considered and there could be other ways of achieving the same balance between cost and revenue.

Comment

While SH's challenge only targeted the policy in Norfolk, it has potential wider significance because, across the country, different local authorities have a range of charging regimes pursuant to the 2014 Regulations. Many may be the same or similar to Norfolk's. It will be necessary for local authorities to consider whether:

1. their regimes have a disproportionate impact on severely disabled people
2. they have considered the alternative approach of setting a maximum percentage of disposable income; and
3. whether the discriminatory impact of their policies can in fact be justified by stated aims.

It seems likely that further challenges are on the horizon.

Zoe Leventhal

Emma Foubister

Matrix