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*Judgment: approved by the Court for handing (subject to editorial corrections)** | *Delivered:* **16/11/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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British Medical Association's Application [2012] NIQB 90

IN THE MATTER OF AN APPLICATION BY THE BRITISH MEDICAL ASSOCIATION (NI) FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

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TREACY J

Introduction

[1] The applicant is the British Medical Association ("the BMA"), the professional organisation and trade union for doctors in the United Kingdom, and it challenges a decision of 5 October 2011 whereby the Department for Health, Social Services and Public Safety ("the Department") determined not to make any new clinical excellence awards ("CEAs") in the 2010-2011 awards round.

[2] The applicant claims that CEAs are in the nature of monetary 'prizes' awarded to consultants who have made an exceptional contribution in their field. It claims these awards are not 'pay' and that the respondent was wrong in law to treat them as pay and to subject them to a public sector pay freeze.

Factual Background

[3] The factual background to the application is described in the affidavit of Mr Nigel Herbert Gould, the Deputy Northern Ireland Secretary of the BMA, who sets out the following chronology of key events.

[4] The 2010-2011 CEA awards round commenced in April 2010 with an announcement of an awards round that would occur in May 2010. On 22 June 2010 the Chancellor of the Exchequer made a budget announcement introducing a 'pay

freeze' on pay for public sector workers earning more than £21,000 *per annum* ("the pay freeze").

[5] The closing date for the submission of nomination forms for 2010-2011 CEAs was 9 July 2010. Before that date 66 consultants submitted applications for higher awards.

[6] On 14 July_2010, the Northern Ireland Minister for Finance and Personnel issued guidance in relation to the effect of the pay freeze in Northern Ireland ("the DFP guidance"). In the meantime, the awards process was continuing with the return of citations – which were sought by the Department – to be concluded by 8 October 2010.

[7] The Department then made a decision not to issue any new CEAs in the 2010-2011 awards round which was then underway but not yet complete. It communicated this decision to the BMA on 26 October 2010 ("the first decision"). This decision came as a surprise to the BMA which, after corresponding in relation to the issue without success, sought leave to apply for judicial review of that decision ("the first application") contending, inter alia, (i) that it had a legitimate expectation to be consulted which had not been met, and (ii) that the Department had failed to observe its statutory equality obligations.

[8] The first application was dealt with by consent after the Departmental Solicitor wrote to the applicant's solicitors by a letter dated 8 February 2011 in which the Department committed itself (in the context of a resolution of the proceedings) to (i) take the impugned decision again *de novo*, the decision being taken by someone of suitable seniority who was untainted by the initial decision, (ii) engage in consultation with the applicant and others, (iii) carry out an Equality Impact Assessment, and (iv) backdate any CEAs awarded, in the event that they were awarded, to mitigate the delay in the decision-making. On foot of the commitments given in this correspondence (and clarified in further correspondence), the first application was dismissed by consent on 24 February 2011.

[9] The day after, on 25 February 2011, the Department invited the applicant to take part in a consultation exercise and it submitted a detailed consultation response. The consultation lasted 8 weeks and concluded on 22 April 2011. The BMA heard nothing further until the decision impugned in these proceedings was taken. As a result of the correspondence following that decision, and material seen in the course of these proceedings, it is now clear that the following process was undertaken between the closure of the consultation period and the decision being taken.

[10] The recommendation for the fresh decision was made by the Acting Senior Finance Director, who produced "a response and decision" on 29 June 2011. A submission was provided to the Minister on 19 September 2011, who then "endorsed this decision" on 21 September 2011.

[11] In the course of this process the Department conducted an equality screening exercise, on foot of which it decided not to conduct a full Equality Impact Assessment in relation to the position taken in its new decision. This screening exercise was finalised on 5 October 2011.

[12] The Department also communicated its 'fresh' decision on 5 October 2011. As with the first decision, this was again to the effect that no new CEAs would be made in the 2010 to 2011 awards' round.

Grounds of Challenge and Relief Sought

[13] The applicant's grounds of challenge are set out in its Order 53 statement and may be summarised as follows:

(i) That the Department failed to comply with its statutory equality obligations under s75 of the Northern Ireland Act 1998;

(ii) That the Department failed to take account of/act in accordance with various Guidance on s75 issued by the Equality Commission for Northern Ireland (ECNI), and with its own Departmental Equality Scheme;

(iii) That the Department failed to give adequate reasons for its stance in relation to s75;

(iv) That in concluding there was no evidence of potentially unlawful equality impacts on protected groups, the Department's decision was *Wednesbury* unreasonable;

(v) That the Department breached the applicant's legitimate expectation, generated by its letter of 8 February 2011, that a full Equality Impact Assessment (EQIA) would be conducted into the CEA issue;

(vi) The Department misdirected itself as to the nature of CEAs (wrongly considering them to constitute 'pay') and/or as to the applicability of the Civil Service pay freeze to CEAs.

(vii) That, for a range of reasons, the Department's purported consultation exercise in this case was inadequate and unlawful.

[14] On 3 May 2012 leave was granted to the applicant to amend its Order 53 statement to include the further ground that the Department failed to take a relevant consideration into account, namely the content of the latest Doctors' and Dentists' Remuneration Body's Four Nations Review into Clinical Excellence Awards ("the DDRB Review"). The applicant's amended grounds now allege that this failure was

Wednesbury unreasonable and a breach of its legitimate expectation that regard would be had to the contents of this Review.

[15] On foot of the above grounds the applicant seeks an order quashing the impugned decision of 5 October 2011, along with associated declaratory relief, and an order requiring the Department to proceed with the 2010-11 awards round.

Legislative Background

[16] The applicant asserts that in reaching its decision not to offer CEAs for the year 2010-2011 the Department failed to comply with its s75 equality obligations for a range of reasons. S75 states:

> "A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without; and
>
> (d) between persons with dependants and persons without."

[17] The Guide to Statutory Duties published by the ECNI states that the purpose of s75 is to 'mainstream' equality issues and secure the "integration of equal opportunities principals, strategies and practices into the everyday work of Government…". One of the principal ways in which this 'mainstreaming' of equality of opportunity is to be achieved under the Act is by the creation of Equality Schemes by public authorities. These schemes are provided for in Schedule 9 to the Act which states:

> "A scheme shall show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant function". [Schedule 9, (4)(1)]

[18] Equality schemes are submitted to the ECNI for consideration and it has powers under the Schedule to seek revisions of any equality scheme, to approve the scheme or to refer it to the Secretary of State for further action. In addition the ECNI has statutory authority to issue guidance to public authorities on the discharge of their s75 duties, and to receive and investigate complaints about non-compliance

with an approved Equality Scheme from persons directly affected by such alleged non-compliance.

The Legal Arguments

[19] The applicant asserts that one of the functions of the introduction of CEAs was to facilitate the mainstreaming of equality of opportunity. It states that one of the precursor schemes to CEAs, the Distinction Awards Scheme, was reviewed in Northern Ireland in 2001 focussing primarily on "the aim of ensuring equality of opportunity for all consultants" because it was recognised that that scheme did not favour certain groups, including female consultants. Another precursor scheme, the Discretionary Points Scheme, was also said to face "many of the same problems", including "concerns about issues of equality". One of the purposes of the new CEA scheme therefore was to seek to ensure equality of opportunity among different groups of medical consultants operating in N. Ireland. The applicant argued that if the introduction of the scheme was designed to improve equality of opportunity for protected groups, it follows that the suspension of the scheme must have an adverse effect on equality of opportunity, which should be carefully examined.

[20] The applicant states that its evidence in its consultation response identified a range of potential disproportionate effects on certain protected categories of consultants and of patients. It says on this basis there were good grounds for concluding that equality issues were a very live concern and that the Department ought to have had "due regard" to these issues and that it failed to do so.

[21] In reply the respondent points to the terms of s75 which imposes a duty on public authorities to 'have due regard' to the need to promote equality of opportunity between protected groups. The respondent asserts that this legal duty has the nature of a 'legislative target' which is not intended to be enforced by a court in judicial review proceedings. Instead Parliament has provided a very specific enforcement mechanism in Schedule 9 of the 1998 Act. S75 itself states:

> "Schedule 9 (which makes provision for the enforcement of the duties under this section) shall apply' [s75(4)].
>
> For these reasons the respondent suggests the courts will only intervene in s75 cases in very limited circumstances. In the respondent's submission the 'Court will only intervene where there has ... been a complete failure to have regard to the duty.'"

[22] The applicant accepted in its skeleton argument that there are cases where the appropriate redress for any failure to comply with s75 duties is by way of complaint to the ECNI. However, it argued that "there are cases where the Court retains discretion to intervene and it can and will do so where the public authority's

purported discharge of its equality obligations is infected by *Wednesbury*unreasonableness': see Re JR1's Application [2011] NIQB 5 at paras31-35.

[23] The applicant went on to assert four reasons why the impugned decision was so infected. In summary these were:

- First, the Department had insufficient information before it on which to properly found a conclusion that there would be no adverse impact.
- Second, what evidence the Department did have pointed towards the conduct of a full EQIA. The Department's conclusion that there was "no available evidence to support the view that there would be an adverse impact" ignores the evidence to this effect.
- Third, the analysis of the consultation responses – even with all of its failings – was not taken into account at the time of the decision – an allegation which is denied by the respondent in its skeleton argument.
- Fourth, the outcome of the screening exercise was not consulted upon and stakeholders (such as the applicant) had no opportunity to engage with the proposed conclusion not to proceed to a full EQIA.

The applicant concludes: 'The result of all of this is that the full process of information gathering, consultation and decision-making required in a full EQIA was simply avoided by the Department', and the applicant invites the court to intervene.

EQIA: Legitimate Expectation

[24] In addition, the applicant alleges that the Department has breached the applicant's legitimate expectation that it would carry out a full Equality Impact Assessment, generated by the clear representation to that effect in the February 2011 letter:

> "The Department will voluntarily carry out an Equality Impact Assessment and it will also take the outcome of that into consideration in the appropriate manner".

[25] The applicant claims this letter generated an enforceable legitimate expectation in public law and the failure of the Department to carry out what it had promised to do is a breach of that expectation.

[26] The department did not take account of the outcome of the EIS at the time of its decision on 29th June 2011 and the ' failure to consider the outcome of this process (even assuming it amounted to an EQIA) is another..... breach of the applicant's legitimate expectations in the case.

[27] The applicant also complains about the Department's decision to treat CEAs as pay and to subject them to the public sector pay freeze announced by the Chancellor of the Exchequer in June 2010. It contends that a CEA is a pensionable monetary award which it rewards exceptional clinical excellence, and therefore not 'pay' in the usual sense of that word and therefore the Department was wrong in law to subject these awards to a 'pay' freeze.

[28] Finally the applicant complains about the quality of the consultation process conducted by the Department, alleging that it was mere 'window dressing' intended to give the appearance of compliance with the Department's equality duties under s75. It also complains about the failure to have regard to the DDRB Review which became available in July 2011.

[29] In response the Department states that it did commence an EQIA by conducting an initial screening. This screening indicated that a full EQIA was not required in the present case and it therefore terminated the process at that point. It claims that this did fulfil the promise made in its letter and that this exercise ought to have satisfied the applicant's legitimate expectations arising from the letter of 5th October.

[30] In its skeleton argument the respondent denies that the screening exercise was conducted after the decision was taken and asserts that this exercise was regarded as a 'living or evolving document' that was continually updated, which was merely 'signed off' on the 5th October when the whole review exercise was considered to be complete. It states that the consultation responses were taken into account by the decision maker at the time the decision was made i.e. on 29th June.

[31] In relation to the question of the status of CEAs – i.e. whether or not they constitute 'pay' - the Department sets out a range of features of CEAs including the fact that they are recurrent pensionable awards which are subject to normal income tax and to the National Insurance contributions that apply to pay for work carried out by consultants. For these reasons the Department regarded them as pay and considered them to be subject to the general pay freeze that had been put in place for public service employees earning more than a specified sum. On the issue of its failure to have regard to the DDRB Review recommendations the Department says that this was a high level review intended to inform *future* policy in relation to the whole structure of the awards system and that it has no bearing on the specific issues involved in the present case. Moreover the document did not become available until July 2011 and the impugned decision was taken on 29th June and only endorsed later, after the review has issued. In other words the Department says this review document was not available at the time of the decision, had no bearing on it and was therefore not a relevant consideration.

Discussion

[32] The applicant in this case has raised a series of complaints related to the way the respondent set about discharging its s75 duty to evaluate the potential equality impacts of the deferral of CEA awards for a period of time. These complaints relate principally to issues about how the respondent gathered information for its evaluation, how and when it considered the information, the opportunities for consultation offered during the process and the weight it attributed to the information received. The nature of the complaints raised is procedural in all cases. They are about how the respondent set about its task. There is and could be no complaint that the respondent failed completely to recognise that it had a s75 duty or failed to take any steps to discharge that duty. The core of the applicant's complaints relate to the quality of the efforts made by the Department to discharge these duties.

[33] This case is therefore one which calls for an investigation of the procedural fairness of the process that was applied. Such cases fall squarely within the remit of the ECNI using the clear and well developed statutory mechanism established under Schedule 9 to the Act for precisely this purpose. This allocation of enforcement responsibility was deliberately inserted into the body of the legislation. It is clearly the intention of Parliament that this class of complaint should be dealt with by the specialised mechanism it had specifically designed for that purpose. There is no basis upon which this court could or should take any step to circumvent the clear legislative intent of the Act. Moreover to do so would fly in the face of a clear and established line of authority exemplified by the case of Peter Neill's Application [2006] NICA 5 in which Kerr LCJ stated:

> "At the kernel of this is the avowed failure of the NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Sch 9 is designed to deal with.....It would be anomalous if a scrutinising process could be undertaken parallel to that for which the [ECNI] has the express statutory remit. We have concluded that this was not the intention of Parliament...."

[34] In the view of this court the same logic applies precisely to many of the complaints made by the applicant in the present case and for this reason the claims summarised at para 13(i), (ii) and (iii) above are dismissed. Similarly the claim summarised at para 13(iv) requires an investigation of the quality of the evidence gathered by the Department and again this function lies within the remit of the ECNI. Accordingly this claim is also dismissed. Also the complaint in relation to the quality of the consultation summarised at para 13(vii) above shares the same procedural nature as that identified above. It too fails on the basis that it is a matter within the specific remit of the ECNI under Schedule 9.

[35] The applicant also claims that this case comes within the remit of the judicial review court because of a legitimate expectation said to derive from a specific chain

of correspondence which caused it to believe that a full EQIA would be conducted in the case.

[36] There is no doubt that the respondent did give a clear and unconditional undertaking that it would conduct an EQIA in this case. The applicant argues that this was not done and that was in breach of its legitimate expectation. The respondent says it did set about conducting the EQIA as it had promised it would. It took the first step in the process – namely it conducted a preliminary screening exercise. It maintains that this screening exercise was step 1 in the promised EQIA. On foot of that screening exercise the respondent decided that there was no need to proceed any further with the process. The initial screening conducted at stage 1 was enough to satisfy it that no step 2 was called for in the particular circumstances of the case.

[37] The applicant asserts that screening exercises and full EQIAs are fundamentally different beasts and that completing the former is no satisfaction of a promise to conduct the latter. The respondent's evidence is that it considered the screening exercise to be an integral part of the EQIA. Once again there is an issue here which might have benefitted from investigation by the ECNI. However, it has been dressed in the language of judicial review and in this court I must decide it on the basis of the evidence presented to me.

[38] Having reviewed the respondent's evidence I see nothing irrational or unsustainable about the approach it took to the conduct of the EQIA. The Department promised to conduct an EQIA and it has a margin of discretion as to how it will set about that task. The Department chose to begin the EQIA with a screening exercise. This is a legitimate approach and, the evidence suggests, one which is widely used in such exercises. The applicant complains that a 'screening' is a term of art and that an 'EQIA' is another distinct term of art which implies a different procedure. They say that when the respondent undertook to conduct an EQIA it *necessarily* involved going beyond the screening stage. In my view this argument might hold good where two distinct routes to an outcome exist and one party has promised to use one route and therefore necessarily *not* to use the other. This was not the situation in the present case. In this case one route could legitimately and appropriately, perhaps even necessarily, encompass the other for a part of the journey. It was implicit in the respondent's promise that a new screening process would be undertaken because this is a common starting point used at the outset of any new EQIA. The two approaches open to the respondent were not mutually exclusive. On the contrary the promised option reasonably and legitimately included an implied undertaking that an initial screening exercise would be done. It was done and it produced a result which screening exercises are designed to produce in some situations. It eliminated the need to expend further effort and expense in pursuing the remaining steps of the process in the case in hand. This does not mean it decided that no EQIA was conducted contrary to the respondent's promise to conduct one. It meant that the EQIA it had promised was

over. It was finished because the first step in the process had concluded in an internally logical and appropriate way that nothing further was necessary.

[39] Evidently the applicant is unhappy with the outcome of that EQIA process. It says the outcome frustrates its legitimate expectation. It may have expected steps beyond screening but that ignores the respondent's evidence that most EQIA's begin with a screening and that such an exercise performs the very important policy objective of sifting out cases where no further action is merited. The applicant could not legitimately expect the respondent to expend time and resources on a formal EQIA when the screening exercise informed the respondent that this was not required or merited. How could a party legitimately expect a respondent to waste time, expertise and money on an exercise which was not necessary? The answer is it could not. To insist on such a course would be to insist on a meaningless waste of public money which the law cannot endorse. For this reason I find that the complaints based on the applicant's legitimate expectations are not well founded and these are also dismissed.

[40] In relation to the claims based on the status of the CEAs and the application of the pay freeze to them I find that CEA's share enough of the characteristics of "payment" for it to be reasonable for the respondent to treat them as such. The characterisation of these awards is a matter within the discretion of the decision maker and no public law basis has been established to impugn the respondent's conclusions on this issue.

[41] Finally in its amended Order 53 statement the applicant complains that the respondent failed to take into account the contents of the DDRB review. I accept the respondent's argument that this was a high level review intended to inform future policy in relation to the whole structure of the awards system which had little or no bearing on the specific issues raised in this case. In any event, as the respondent pointed out, the review document was not available at the time of the decision and had no bearing upon it. I therefore also reject this ground of challenge on the basis that the DDRB was not a relevant consideration in the context of the present dispute.

[42] For all the above reasons I dismiss the judicial review.