Neutral Citation No. [2013] NIQB 86 | *Ref:* **TRE8945**

Judgment: approved by the Court for handing down | *Delivered:* **05/07/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Re Armagh City & District Council's Application [2013] NIQB 86

IN THE MATTER OF AN APPLICATION BY ARMAGH CITY & DISTRICT COUNCIL FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY THE COMMISSIONER FOR COMPLAINTS

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TREACY J

Introduction

[1] The applicant, Armagh City & District Council, seeks judicial review in respect of a Report issued by the respondent, the Northern Ireland Commissioner for Complaints dated 11 July 2012.

[2] A preliminary issue in respect of jurisdiction was identified and this was addressed in advance of considering the applicant's substantive complaints about the respondent's Report of July 2012.

Background

[3] A group of General Practitioners carrying on a medical practice known as the 'Willowbank Surgery', of whom Dr Fearon is one, complained in May 2007 to the respondent about actions of the applicant arising from the proposed sale of lands owned by the applicant to the doctors for the purpose of constructing a replacement surgery.

Order 53 Statement

[4] By ground 3(g) of the applicant's Order 53 Statement a preliminary issue was raised in respect of jurisdiction. Ground 3(g) states:

> "In relation to the decision as to jurisdiction: Article 10 of the Commissioner for Complaints (Northern Ireland) Order 1996 ("the 1996 Order") restricts certain bodies and entities from making a complaint to the Commissioner. Article 10(1)(d)(ii) includes a body "whose revenues consist wholly or mainly of moneys appropriated by Measure or provided by the Parliament of the United Kingdom". A body may be incorporated or incorporated. The Complainant is such a body, comprising a partnership of General Practitioners, and its revenues consist wholly or mainly of moneys which are provided in the way identified in the article. In the circumstances the Commissioner's decision in relation to jurisdiction was wrong in law and *ultra vires* the powers of the Commissioner".

[5] The applicant contends that the respondent was wrong to accept for determination the complaint made by Dr Fearon on behalf of the Willowbank GP Surgery in Keady ["the complainant"] in and around May 2007 submitting that the complainant was a body which was barred from making any complaint to the respondent by virtue of Art10(1)(d)(ii) of the **Commissioner for Complaints (NI) Order 1996** ("the 1996 Order") which provides:

> "10.—(1) A complaint under this Order may be made by any person other than—
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) any other body—
>
> (i)...
>
> (ii) whose revenues consist wholly or mainly of moneys appropriated by Measure or provided by the Parliament of the United Kingdom;
>
> (e)..."

The applicant submits that the complainants were such a body and that therefore the respondent should not have entertained their complaint. The respondent disagreed and maintained that the complainant was entitled to make their complaint and were not prevented from doing so by Art10(1)(d)(ii) of the 1996 Order.

Submissions

[6] The applicant submitted that the complainant fell within the statutory phrase, *"any other body"* under Art10(1)(d) of the 1996 Order. The applicant asserted that the complainant was a GP practice, was a partnership and was thereby an unincorporated body. The applicant noted that Dr Fearon made his complaint to the respondent on behalf of Willowbank Surgery and that therefore this GP partnership could be said to fall within Art10(1)(d) as a "body" to which that provision can apply. The applicant denied that a GP can be considered to be an independent contractor, because, if they were then they would not be eligible to be members of the Government's superannuation pension scheme. The applicant identified what they referred to as the *"crux"* of the matter as relating to that part of Art10(1)(d)(ii) which refers to the source of a bodies revenue. In short they submitted that Art10 is aimed at *"ensuring that publicly funded bodies are not permitted to complain to the Respondent in respect of each other's activities."* The applicant made the point that Art10 does not refer to "public bodies" and no distinction made between the way in which funding may be received from Parliament. The applicant's case was based on the submission that it is the **source** of revenue which is at the core of the Art10(1)(d)(ii) restriction. The applicant relied on a substantial body of evidence that a large proportion of GP's income comes from public monies whose ultimate source was Parliament. The applicant suggested that the respondent has misinterpreted Art10(1)(d)(ii) by mistakenly construing this provision as applying in reality to what have been termed "public bodies."

[7] The respondent acknowledges that like many other self-employed persons acting under a contract for services with a public body, GPs undoubtedly do receive public money and, in some way, that money does come *"from Parliament"*. However it says there is a fundamental distinction to be made. Whilst all public money comes from Parliament it can be received in myriad ways and through various channels. In particular they point out that it can be received by way of grant or, by contrast, through contract – as in the case of GPs. Whilst the applicant contends that this distinction is irrelevant the respondent submits that it is highly relevant.

Relevant Statutory Provision

[8] Article 10 of the 1996 Order:

> *"Provisions relating to complaints*
>
> 10.—(1) A complaint under this Order may be made by any person other than—
>
> (a) a department;

(b) a district council or other body constituted for the purposes of local government;

(c) a body constituted for the purposes of—

(i) the public service; or

(ii) carrying on under national or public ownership any industry or undertaking or part thereof;

(d) any other body—

(i) whose members are appointed by Her Majesty, a Minister of the Crown, a department of the Government of the United Kingdom, the head of a department or a department; or

(ii) whose revenues consist wholly or mainly of moneys appropriated by Measure (first limb) *or* provided by the Parliament of the United Kingdom (second limb);

(e) a member, at the time of the action complained of, of the body against which the complaint is made.

...

(2) Except as provided by paragraph (3), a complaint shall not be entertained under this Order unless made by the person aggrieved himself.

...

(9) Any question whether a complaint is duly made under this Order shall be determined by the Commissioner."

The Legal Status of General Medical Practitioners

[9] General Medical Practitioners ("GPs") are independent practitioners that have contracts of service with the Health and Social Care Board ["HSCB"]. They are not employees of the HSCB, they are self-employed and subject to "Schedule D" tax status. In April 2004 a new contract was introduced with the Health and Personal Social Services (General Medical Services Contracts) Regulations (NI) 2004 ("the GMS Regulations").

[10] The HSCB has a duty to provide or secure the provision of primary medical services and in order to achieve this it is empowered by the Health and Personal Social Services (NI) Order 1972 and the regulations made thereunder to enter into a general medical services contract with specific categories of person. The contract is a

contract for the provision of services i.e. the practice provides services under contract to the public body. The contractor is an independent provider of services and is not an employee, partner or agent of the HSCB. Despite their inclusion in arrangements such as the health service pension scheme HMRC has not challenged their self-employed status within the national tax system. GPs are funded by a contract for the provision of services, on a similar basis to many contracts between public bodies (including Departments and ALBs) and independent sector suppliers (in the private voluntary and other sectors), as distinct from grant aided status.

[11] Each practice draws down agreed funding at regular intervals from the HSCB based on an agreed formula, which is linked to the overall number of patients on each practice list, and in return the practice delivers services to that patient list. Based on the provisions within the GMS Regulations funding can be withheld by the HSCB if services are not delivered at all or to the required standard, see para105 to Schedule 5 of the 2004 Regulations.

[12] Dr Patterson gave oral evidence before the Commissioner. Dr Patterson is a retired GP who was chair of the Northern Ireland GP Committee from 1996 to 2003 and was the Northern Ireland negotiator for the new GP contract. Dr Patterson confirms that GP practices now contract with the HSCB to provide services and also confirms that GPs were deemed to be independent contractors by a Royal Commission in 1979 and are taxed on that basis as self-employed persons. Dr Patterson's evidence highlighted the autonomous nature of GP practice subject to the requirements to provide the agreed services under contract. In short it is up to each individual practice to determine how services are delivered.

Discussion

[13] The fact that it is mainly public money which goes to GPs whose ultimate source may be traced to Parliament is far too simplistic a basis upon which to claim a jurisdictional ouster under Art10(1)(d)(ii). It is clear that, as with other self-employed persons acting under a contract for services with a public body, GPs do receive money whose ultimate source may loosely be said to come "from Parliament". But I agree with the respondent that there is a fundamental distinction to be made. Public money emanating from Parliament can be received in a number of ways. It can be received directly by way of grant or, by contrast, through contract as in the case of GPs.

[14] The legislative purpose of Art10(1)(d)(ii) is clear namely to ensure that disputes between public bodies are not resolved through the office of the respondent Commissioner. The Notes on Clauses for the Commissioner for Complaints Bill which relate to the Commissioner for Complaints (NI) Act 1969 ("the 1969 Act") were relied upon by the respondent as an interpretative aid as to the 1996 Order which contains similar provisions to the 1969 Act [and which replaced the 1969 Act]. The 1969 Bill and subsequent Act contained a provision at section 6(1)(b) which stipulated that a complaint could be made under the 1969 Act by any aggrieved

person *"not being any other authority or body ...whose revenues consist wholly or mainly of moneys provided by Parliament [the NI Parliament] or by the Parliament of the United Kingdom."*

[14] The Notes describe the purpose of the relevant "exclusionary" provisions as being:

> "...to avoid the absurdity of one public body invoking the Commissioner to pursue a complaint of injustice which it attributes to another public body. This would be a far cry from the underlying principle of the Bill which is to protect the private citizens in his dealings with public bodies."

[15] This legislative objective is met, in part, by the provisions of Art10(1)(d)(ii) which provides that any other body whose revenues consist wholly or mainly of *monies appropriated by Measure* [first limb] or *provided by the Parliament of the United Kingdom* [second limb] cannot make a complaint to the respondent.

[16] "*Monies appropriated by Measure*" refers to moneys provided by statutory measure to the body in question from the NI Consolidated Fund (*"by Measure"* should now read *"by Act of the NI Assembly"* pursuant to para3(3) of Schedule 12 to the NI Act 1998).

[17] The authority for the provision of funds from the NI Consolidated Fund to the Department of Health Social Services and Public Safety ("DOH") is contained in the various Budget Acts of the Assembly. The authority for the NI Consolidated Fund to provide funds to DOH for 2011/12 and 2012/13 is the Budget Act (NI) 2012. These Acts also describe the services which the Department may provide out of the funds allocated to it under the Acts. The Acts also provide the authority for the Department to make allocations to the HSCB for the provision of "family and community health services", which include general practitioner services."

[18] Under the 1972 Order the status of any GP or group of GPs is that of "private contractor" with the Department i.e. the HSCB.

[19] Money from Parliament is allocated to the NI Consolidated Fund administered by DFP. Through Budget Acts of the NI Assembly a portion of that money is provided to the DOH. The same legislation also authorises the DOH to further allocate a portion of their funding to the HSCB for health services to be provided to the community in Northern Ireland, including GP services. The HSCB then contracts with GPs under the 1972 Order and the 2004 Regulations for the provision of those services in return for payment from the funds that have been allocated to the HSCB from the DOH.

[20] GPs clearly do not *"appropriate"* monies by Measure or Act of the NI Assembly. It is the DOH who appropriates monies by Measure i.e. through the Budget Acts of the NI Assembly. The Department are entitled to appropriate those funds under the relevant Budget Acts. They take exclusive possession of the funds under legislative authority in order that they may be set apart for a particular purpose, i.e., the provision of health and related services in Northern Ireland.

[21] The second limb of Art10(1)(d)(ii) refers to monies *"provided by the Parliament of the United Kingdom"*. Funds that GPs earn under their contracts come ultimately via the Budget Acts with the money filtering down from the NI Consolidated Fund to the Department then to the HSCB and, finally, to GPs in return for the provision of health services according to the terms of their contract with the HSCB. As the respondent correctly pointed out for the second limb to have any meaning, given the first limb, it must mean that such monies are provided directly to the body in question by the Parliament of the United Kingdom. I accept the respondent's submission that the first limb applies to bodies which receive a devolved and delegated budget to disburse at their discretion. This can have no application to GPs who receive contracted funding as consideration for the supply of primary care medical services. As Mr McGleenan QC submitted to interpret the second limb otherwise would render it superfluous because all funds come from the UK Parliament including those under the Budget Acts (i.e. by the first limb). As such the second limb must refer to monies that come directly from the UK Parliament. Furthermore the word *"provided"*, as the respondent contended, must be read in the context of the entitlement that was apparent from the first limb. No GP practice is entitled to monies from the Parliament of the United Kingdom as of right or by way of legislative authority.

[22] Contrary to the applicant's submission I consider that the respondent is correct that it is the means by which monies are received, not the source of the revenue, which must be the determinative factor. Thus Art10(1)(d)(ii) applies to any body that has a legal entitlement to public monies by legislation or can receive such monies directly from Parliament.

[23] If the applicant's construction of the provision is correct it would have a number of anomalous consequences. It would, as the respondent contended, leave a range of health professionals who deliver services to the public through partnerships which contract with the HSCB such as doctors, dentists and pharmacists without recourse to the respondent should they be subjected to maladministration by a public body. In the absence of such a safeguard those health professionals would be required to seek a remedy either by civil action or judicial review even when a complaint would be more appropriate.

[24] The applicant's interpretation would also produce a rather bizarre consequence. The respondent referred to the scenario whereby one group of doctors contracts with HSCB to provide medical services and another group of doctors sets up a private clinic. The first group earns public money through their contract. The

second group earns money through their patient's private means. If both groups experience maladministration at the hands of the same public body only the private clinic will be able to pursue a complaint. The applicant's approach would deny access to any independent contractor whose revenue was largely derived from public funds. Taken to its logical conclusion the respondent says it might preclude lawyers whose sole or principle source of income was from the legal aid fund and those who lived on social security benefits from making a complaint to the respondent.

[25] The respondent was surely right to submit that if a body can earn public money under contract with a public body then there remains a clear distinction between the two parties to that contract, the GP practice, made up of individual GPs in partnership, and the public body as part of the state. On the other hand if a body is entitled to public funds as of right through legislation then the line between that body and the funding source is much less clear. In those circumstances the rationale underpinning Art10(1) is given effect – public bodies should not be able to complain about one another through the respondent's office.

Conclusion

[26] In summary, I reject the applicant's contention that it is the source of a body's revenue which determines whether it is excluded from making a complaint under Art10(1)(d)(ii). Rather it is the means by which it is received which will be the determining factor. Public monies received by GP practices under a contract to provide services do not fall within the exclusionary provision of Art10(1)(d)(ii). Accordingly, I hold that the respondent had jurisdiction under the 1996 Order to accept and determine the complainant's complaint.