public matters newsletter

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public sector lawyers

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the end of industrial and provident societies?

With effect from 1 August this year, the Industrial and Provident Societies Act 1965 and related IPS legislation were repealed and replaced by the Co-operative and Community Benefit Societies Act 2014 (CCBS). With effect from this date all new societies registered under CCBS will take one of two legal forms – a co-operative society or a community benefit society. It will no longer be possible to register as an industrial and provident society. Existing IPS will not be categorised in the same way and will instead be referred to as 'registered societies' but will have to decide which condition for registration they meet (being established either as a co-operative or for the benefit of a community) and then stick to that. The FCA's decisions regarding the activities of an existing society will depend upon which condition that society believes it satisfies: for example, a rule change allowing the payment of dividends would not be permitted if an existing society was established for community benefit but may be permissible for a bona fide co-operative.

Applications for registration will continue to be made to the Financial Conduct Authority (FCA) and the legal form taken by new societies registered under CCBS will depend upon the purpose for which it is being established and its constitutional rules. A society will only be a co-operative society if it is a 'bona fide' co-operative and this will be decided by reference to the International Statement on the Co-operative Identity which sets out the co-operative principles. A society which does not meet all of these principles but is being or is intended to be conducted for the benefit of a community will become a 'community benefit society'.

The rules governing existing IPS have not otherwise changed. The FCA has issued guidance to existing IPS confirming that there is no requirement for them to update their Rules to make reference to the new legislation but they should do this when making any other changes in future. However, the FCA has suggested that existing societies should consider adding to their letterhead and websites '[name of society] is a registered society under the Co-operative and Community Benefit Societies Act 2014'.

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Information and resources

The Public Services (Social Value) Act 2012 (the 'Act') came into force on 31 January last year. It is designed primarily to help to ensure that those people who are responsible for the procurement of public services consider, in the pre-procurement stage, how their procurement activity can provide a wider social, economic and/or environmental benefit.

As originally drafted, the bill which led to the Act was much wider in application. However, as enacted, the Act only applies to the procurement of services contracts. Essentially, the Act requires contracting authorities to consider, before commencing the formal procurement process for the services contract, the following:

(a) How what is proposed to be procured might improve the economic, social and environmental wellbeing of the relevant area; and

(b) How in conducting the process of procurement it might act with a view to securing that improvement.

In considering (b), contracting authorities must consider only matters that are relevant to what is being procured and the extent to which it is proportionate to take those matters into account in the circumstances. They must also consider whether to undertake any consultation when fulfilling their duty under the Act. Contracting authorities must comply with the duty except where urgency makes it impracticable to do so, although, as with the public procurement regime, the urgency must not be attributable to undue delay brought about the contracting authority. Notwithstanding the obligations in the Act, failure to comply with the duty under the Social Value Act does not affect the validity of anything done in order to comply with the Public Contract Regulations 2006.

The Act is clearly a very laudable piece of legislation and there are a number of examples which have shown that public authorities have considered its requirements carefully and designed their procurements in a more innovative way. However, it is apparent that in practice its ability to materially change the way in which public sector procurement is formulated has been limited. One could speculate as to why this is: it could be as a result of the limited sanctions contained within the Act, the natural behaviours of procurers, the financial difficulties in which public bodies find themselves or any combination of those.

In any event, the Government is extremely keen to see the Social Value Act deliver on its potential; and indeed in its report the *Public Services Social Value Act 2012: one year on* stresses that the Act is part of a

suite of initiatives which help public bodies to act in a more socially recognising way when pulling together their procurement strategies.

In any event, on 19 August the Cabinet Office published further information and guidance on the Act and indeed how commissioners can be supported to achieve the aims and objectives set out in the Act. The website can be found at:
https://www.gov.uk/government/publications/social-value-act-information-and-resources.

This is a relatively short web page but has a number of links to some very useful information, including the one-year report, which outlines how commissioners have responded to the Act during its first year and looks at the Government's plans to advance social value in the future. The webpage also provides links to what support is available to commissioners, including access to the commissioning academy, which is a development programme for senior commissioners from all parts of the public sector. It gives access to guidance on the Act and a range of independent guides and toolkits. It also provides some support for providers who feel that the obligations under the Act are not being complied with, including providing information in relation to the mystery shopper service and the commercial master-class support service programme, which is open to voluntary sector staff. Finally, it provides a number of excellent case studies on how the Act has been used by a number of local authorities in delivering genuine social value change in their procurement exercises.

This is a useful consolidation of information for public bodies who wish to consider how they may structure their procurements in a more socially responsive and responsible way. Inevitably, it will be for those public bodies to develop their procurement strategies to meet their own social agendas and in compliance with the wider public procurement regime. However, this is a good resource which should be utilised by public bodies moving into the future.

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Election advantage as an irrelevant consideration or improper purpose

Introduction

Boris Johnson was and is the Mayor of London. In April 2012 he was standing for re-election to that office when an organisation ('C'), whose purpose was to support gay people 'who voluntarily seek a change in sexual preference and expression', applied to place an anti-gay advert on London buses operated by Transport for London ('TfL').

C's proposed advert was in response to one by Stonewall, an organisation working for equality for gay people.

After obtaining the views of the Mayor, TfL decided not to display C's advert. C challenged that decision in Judicial Review proceedings but was largely unsuccessful before the Court of Appeal: R (on the application of Core Issues Trust) v Transport for London [2014] EWCA Civ 34.

The Court of Appeal held that TfL's decision not to display C's advert on its buses had not breached Article 10 ECHR (as alleged by C) as the advert was likely, if displayed, to cause offence to large numbers of the public. However the court added the Mayor to the proceedings as a defendant and remitted the case to the Administrative Court to decide whether the Mayor had made the impugned decision and, if so, whether he had taken into account the improper purpose of furthering his campaign for re-election (as further alleged by C).

The law

In the Administrative Court, the law on taking into account electoral advantage as an irrelevant consideration or improper purpose was summarised in the judgment of Mrs Justice Lang: R (on the application of Core Issues Trust) v Transport for London and the Mayor of London [2014] EWHC 2628(Admin). Lang J referred with approval to the speech of Lord Bingham in Porter v Magill [2002] 2 AC 357, where he analysed the relevant legal principles in the following terms:

"….powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise". A very clear statement of this principle is to be found in Wade & Forsyth, Administrative Law, 8th ed.(2000),pp 356-357. The corresponding passage in an earlier edition of that work was expressly approved by Lord Bridge of Harwich in R v Tower Hamlets London Borough Council, Ex p. Chetnik Developments Ltd [1988] AC 858,872:

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

The principle is routinely applied, as by Neill LJ in Credit Suisse v Allerdale Borough Council [1997] QB 306,333 who described it as *"a general principle of public law"*.

In Porter v Magill the House of Lords held that powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. But in doing so Lord Bingham explained that:

"Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend them and their party (when as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers are conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise."

Support for the approach of the House of Lords in Porter v Magill is to be found in R v Board of Education [1910] 2 KB 165 at 181 where Farwell LJ said *"if the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous and that no political consequence can justify the Board in allowing their judgement and discretion to be influenced thereby"*. This passage was accepted as correct by Lord Upjohn in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 at 1058, 1061. Support for the approach of the House of Lords in Porter v Magill is also to be found in the case of R v Port Talbot Borough Council and Others Ex p Jones [1988] 2 ALL ER 207 at 214 where council accommodation had been allocated to an applicant in order that she should be the better able to fight an election. Nolan J held that decision to be based on irrelevant considerations.

If an authority takes into account an irrelevant consideration, the position is that stated by Lord Esher MR in the Court of Appeal in R v Vestry of St Pancras (1890) 24 QBD 371 at pages 375-6 *"If people who have to*

exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion".

It is sufficient to establish illegality that an irrelevant consideration has been taken into account and that, if the irrelevant consideration had not been taken into account, there is a real possibility that the decision may have been different. That approach was approved by the Court of Appeal in GE Simplex Holdings v Secretary of State for the Environment [1988] 3 PLR 25 at pages 40-41 and in R v Lewisham LBC ex parte Shell UK [1988] 1 ALL ER 938.

There is no principle that merely because some consideration or purpose may be described as 'political' it is a matter to which an authority is entitled to have regard or to pursue. As Lord Upjohn said in Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997, at page 1058:

> *"[The Minister] may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which… are pre-eminently extraneous"*

The public purposes for which statutory powers are conferred on public authorities do not include the promotion of the private interests of particular political parties or their members. Functions are not vested in a local authority, or indeed in any minister or other public body, to be used for the advantage of any particular political party or members of it.

It does not follow from the conclusion that a local authority may not promote the political or electoral interests of a particular political party or its members that there is no proper role for political parties or politics or for the views of the electorate in local government. There will inevitably be a range of views which may reasonably be held as to how the functions vested in a local authority should be discharged in the public interest. Those who share a common view as to how the public interest may best be served are entitled to organise themselves to seek to implement their view. For example they may seek to persuade the electorate that they should be elected to enable them to pursue policies which will reflect their view of the public interest. When elected, in making decisions as members of a local authority, they are entitled, subject to the terms of the enactment conferring the function to be discharged, to give weight to that view and to the fact that it commanded support from the electorate.

The verdict

So what happened to Boris? Mrs Justice Lang decided that he was not motivated by the improper purpose of advancing his mayoral election campaign and was entitled to hold and give effect to his view that C's proposed advertisement was 'offensive and unacceptable': success for Boris in the court and at the hustings. But the underlying legal principles affirmed in Porter v Magill remain intact.

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The issue of subsistence payments to NRPF families

In the recent case of PO v London Borough of Newham [2014] EWHC 2561 (Admin), the policy of Newham London Borough Council as to the subsistence payments made to families with no recourse to public funds ('NRPF') was subject to successful challenge by way of judicial review. That policy provided for some payments to be made at child benefit levels and contained other provisions as to payments for the adults of the family and for additional children (for whom payments were made at a rate significantly lower than the equivalent child benefit rates). The Newham policy was held to be unlawful.

The judgment is of significance as many local authorities use child benefit rates as the basis for subsistence payments for NRPF families, in addition to other payments such as travel allowances to enable children to get to school (as were paid to the claimants in the PO case) and the meeting of all outgoings relating to the accommodation provided.

It is important to note that, whilst the judge was generally critical of the Newham NRPF policy, the judgment is not necessarily the victory for claimants that may have been feared. As considered further below, in a number of respects the claimants were unsuccessful and, in particular, there were specific features of the Newham policy that drove the decision to find that policy unlawful. Further, the judge did not find that either asylum support rates or mainstream benefit rates were the appropriate measure for subsistence payments and, whilst the need for some support for the adults of the family was held to be appropriate this was expressly limited to the minimum necessary to avoid a breach of rights under the European Convention on Human Rights ('Convention'). These issues are explored further below.

The judgment contains a very helpful summary of the relevant legal and benefit provisions. The judge, John Howell QC, is a pre-eminent public law practitioner and the judgment is clear and well-reasoned. Newham's NRPF policy was criticised by the Judge on a number of grounds:

First, and perhaps most significantly to other local authorities, the judge held that the use of child benefit rates as the basis for determination of subsistence payments was unlawful. Child benefit rates were not calculated as a means by which the subsistence needs of destitute children could be *met "it is not a benefit designed to meet the needs which a child has for support in financial terms"*. Child benefit was not means tested and as such was not calculated with reference to whether there was any other income available to the family to meet the children's needs. Further, the judge considered the rates paid to asylum seeking families to meet their 'essential living needs' and concluded that the difference between those rates and child benefit rates was so significant that no reasonable authority could have based its assessment of what

was appropriate to meet the subsistence needs of a destitute child on the amounts payable in respect of child benefit.

Second, the policy was held to be deficient in its application of child benefit rates. Additional payments made in respect of the adults of the family meant that those families received less than if each person were paid at child benefit rates, certain subsequent children of the family received less than half the child benefit rate, and families with two parents received less than lone parent families. The judge held that there was no rational way by which the payment of £15 per adult could be derived from child benefit rates. In those respects the policy was held to be irrational.

Third, Newham were criticised for not publicising the policy (the claimants were only provided with a copy during the disclosure that occurred during the course of the litigation). It is an established principle of public law that where decisions are to be made in accordance with a policy those affected are entitled to have sight of that policy.

The claimants argued that Newham's NRPF policy was unlawful in that it did not in reality allow for a case by case assessment of families, such as was required by Section 17 of the Children Act 1989 ('Section 17'), and that, whilst the policy stated that exceptional circumstances could lead to additional payments such payments were in fact not made. This argument was not accepted by the judge. He accepted the council's argument that it was entitled to introduce standard rates provided that those rates were rationally determined, that the policy introducing those rates was published and that the policy allowed for additional payments in exceptional circumstances.

The council argued that the availability within the policy for an internal review of the amounts paid, a review triggered by a written request from the family concerned, was sufficient to 'save' the policy in legal terms. This was not accepted by the judge who found that:

a) it was unfair to rely upon a right to seek an internal review that was contained in a policy that was not publicised or communicated to the families concerned, and

b) that the internal review in effect related only to the issue of whether there were exceptional circumstances that could justify the making of additional payments and would not go to the suitability or otherwise of the standard rates.

Perhaps unsurprisingly, the judge declined to indicate what standard rates would in fact be appropriate to be paid to NRPF families. He instead emphasised that it was local authorities that were responsible for deciding what level of services were appropriate to meet the needs of destitute children in accordance with Section 17. The judge expressly declined to grant the claimants' application that payments to them be

backdated and paid at mainstream benefit levels, noting that benefit levels took into account a family's needs to pay utility and other bills that were ordinarily paid by a local authority supporting a NRPF family and that to pay at those levels could give rise to a standard of living above that which was necessary to avoid a breach of Convention rights.

Further, the judge also expressly rejected the claimants' submission that rates paid to asylum seeking families were unreasonably low, notwithstanding the recent successful challenge to the Secretary of State's decision not to increase those rates[1]. The judge recognised that there may be some difference between 'essential living needs' (the asylum seeker criteria) and a family's 'subsistence needs' (the Section 17 criteria) although neither he nor counsel for the council were able to articulate what those differences were or how they could arise.

As a result of PO, local authorities would be well advised to urgently review their policies as to subsistence payments for NRPF families to ensure that they meet the criteria set out in the judgment, and to publish any policy that is adopted.

Local authorities should also be aware that if they continue to pay subsistence at child benefit rates, such decisions may be vulnerable to successful challenge unless the authority can clearly justify those decisions with reference to the needs of the particular family concerned.

The principal effect of the judgment in PO is that decisions based solely on child benefit rates will not be readily defensible and some other (rational) basis for payment will need to be determined, although that need not necessarily be mainstream benefit rates. Regard should perhaps be had to the rates paid to asylum seekers which, whilst greater than child benefit rates, were held in PO not to be so low as to be unreasonable.

[1] R (Refugee Action) v Secretary of State for the Home Department [2014] EWHC 1033 (Admin)

In PO, neither party sought permission to appeal against the judgment at the hearing. Given the particular criticisms made of Newham's approach, and their counsel's inability to explain the basis for much of that approach, it is considered unlikely that Newham will appeal. Although it is possible that the claimants will seek permission to appeal those parts of the judgment in which they were unsuccessful, it is considered unlikely; further, it is noted that the claimants are represented by a legal charity who may take a conservative view as to the costs involved in any appeal.

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failure to risk assess is not the full picture

Risk assessment is a familiar concept to personal injury lawyers, although perhaps more familiar in theory than the practice, and it would seem to crop up less frequently as a significant element in stress at work claims.

Bailey v Devon Partnership Trust (2014) QBD Exeter (HHJ Cotter QC) (Bailey) is a case that deals with this issue and reminds us that a failure to risk assess need not necessarily be fatal to the defence of a claim.

The claimant in Bailey was a psychiatrist who complained of over-work, a lack of administrative and management support, too much organisational change and an inability to obtain assistance with various reports that she had to write to health agencies. There were two distinct periods covered by the claim.

In the first instance, the claimant had six months off when she was admitted to hospital with a heart condition. It was alleged the pressures of the job led to a severe depressive disorder and that the heart condition had been brought on by stress. The second period commenced when the claimant returned to work under a plan approved by her treating psychiatrist; she subsequently complained that her employer failed to abide fully by the return to work plan, specifically that she was unable to take as much holiday as she had wanted and that she had to supervise a trainee doctor which she found to be an imposition to her work-load.

The employer's legal team defended the case on the basis of a lack of foreseeability of psychiatric harm arising for the first breakdown. In respect of the second period, the defendant was of course on notice of the claimant's vulnerability, but there was still a lack of foreseeability of the particular psychiatric harm arising in the particular circumstances. The claim was also defended on causation.

The claimant alleged that her line manager should have completed a risk assessment which was a document annexed to the employer's stress reduction policy. She argued that this could have led to indications of impending harm to her health arising from stress at work being obvious to the employer.

The judge found that there was a breach of duty in not completing the risk assessment however, even if the risk assessment had been completed and carefully scrutinised, the heart condition which led to an acute event necessitating a stay in hospital would not have been avoided. Further, and most importantly for occupational stress claims, the judge also found that a risk of imminent breakdown would not have been identified.

The claimant's reticence about giving details or full information about her health was to her detriment in this claim. She had been prescribed medication and was seeing a psychotherapist but had failed to tell her

employer about this. The judge found that the claimant would not have answered any assessment questions in such a way as to give rise to a foreseeable risk of psychiatric injury, so therefore her breakdown would not, and could not, have been prevented. Consequently, there was no specific breach of duty leading to the direct causation of stress.

The Bailey case highlights the important role that risk assessments play in the employment context but it also shows how important it is to also recognise their limitations.

The importance of assessments was stated by the Court of Appeal in Allison v London Underground (2008) although in that case Smith LJ recognised that failure to carry out an assessment will never be the direct cause of an injury.

The case is also helpful to those employers who are undergoing significant changes, or are under-funded as the court accepted that resource issues and the change of management were outside of the control of the defendant as they were imposed nationally.

Comment

Bailey is another example of a case where the failure to risk assess has not been fatal to the defence of the claim. This will come as welcome relief to those employers who may not have completed assessments or followed their own stress policies to the letter. As long as the failure to do this does not lead to a claimant's breakdown, a case may be won purely on causation. The judge went on to say that even if an assessment had led to some immediate reduction or alteration to the claimant's workload, it would not have prevented the breakdown.

Hatton v Sutherland (2002), however, remains the key case to consider in occupational stress claims. The 'threshold' question of whether psychiatric injury was foreseeable is the key question to ask. Foreseeability of workplace stress is not sufficient. This threshold question is not overridden by the need to consider the threshold question in each case.

Browne Jacobson acted for the defendants Devon Partnership Trust. Counsel for the defendant was Andrew Warnock QC and Jack Harding of 1 Chancery Lane.

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no costs recoverable

Small claims in the Court of Appeal

As you may be aware, in litigation the general costs rules, with regard to which party should pay for various legal costs, do not apply to low value claims. Indeed, the Civil Procedure Rules are very clear in stating that in relation to cases that have been allocated to the small claims track the court may not make a costs order, save for in certain limited circumstances.

The specific rule in question is CPR 27.14 (2) which states:

> "The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses including those relating to an appeal, except…"

However, it was widely considered that costs incurred in connection with an appeal to the Court of Appeal would be recoverable, even when the appeal relates to a small claims matter. This was based on the current guidance contained within the Supreme Court Practice (the 'White Book') which states that *"second appeals against small claims decisions in the Court of Appeal are subject to full costs shifting"*.

There is an element of common sense to the above approach – while generally costs should not be added to low value claims, any appeal to the Court of Appeal is likely to require significantly more time (and subsequently costs) to prepare for, than a hearing before a district judge in a first instance hearing.

The above assumption was tested in the costs decision in the Court of Appeal case of Akhtar v Boland [2014] EWCA Civ 943. Unfortunately, the Court of Appeal ultimately decided that the 'no costs' rule for small claims cases applies to the costs of any appeal to the Court of Appeal.

It found that CPR 27.14 (2) was very clear and specifically precluded any costs order being made in any appeal (including to the Court of Appeal) for small claims track matters. The court also found that the note in the White Book was incorrect and reluctantly concluded that it was precluded from making a costs award in connection with the appeal.

As public authorities begin to face more and more claims with litigants in person on the other side, this is an unhelpful case as it removes another disincentive to discourage determined litigants in person from lodging appeals following an unsuccessful small claims hearing.

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MOJ gets tough on fraudulent claimants

The Ministry of Justice (MOJ) is continuing in its crack-down on potential fraud after proposing to bring in a mandatory system forcing claimant lawyers to check the claims history of potential clients before starting cases. View the 'Whiplash reform programme: Consultation on independence in medical reporting and expert accreditation' here.

The aim is to prevent a whiplash claim from being started under the pre-action protocol unless a search of any claims history has taken place.

In addition there is to be a new 'IT interface' set up to enable claimant representatives to obtain data on the number of whiplash claims made by potential clients within the previous five years. It is also proposed that there be a new independent IT hub, MedCo, which will allocate medical experts to claims.

Lord Faulks, the Justice Minister, has commented that the reforms will create an improved and robust system for medical evidence to drive fraud out of the market. To allege fraud, defendants must plead this clearly so perhaps it would be a good idea to list all previous claims known to the defendant insurer in its letter of response? This would highlight potential fraud and put the claimant's solicitors on notice it is being investigated.

It could also be a good idea to set up a database of claims which insurers have declined as surely this would give helpful information to defendant lawyers and insurers, particularly if the database contained details of why the claim was declined.

If it is successful, we could see this rolled out to claims that do not just relate to whiplash. We all too often see cases presented where there are claims for care, mileage, aids and equipment etc that cannot be justified. When the case is settled, these heads of claim fall away. This all forms part of a crackdown by this Government on fraudulent claimants but does it go far enough? Perhaps the idea promulgated by the insurance industry that if there is part of a claim which is fraudulent then the whole claim should be forfeited as a penalty.

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Healthcare at Home Ltd v The Common Services Agency

When a public authority invites tenders for a public procurement exercise, it is important that the criteria it uses for assessment of the tenders it receives are clear and transparent. The recent Supreme Court judgment in the case of Healthcare at Home Ltd v The Common Services Agency [2014] UKSC 49 (the 'HAH Case') considers the law in relation to certain aspects of the public procurement process; in particular the test that is applied when assessing whether award criteria are sufficiently transparent.

It should be noted that the HAH case discusses the application of the Scottish procurement regime, which means that the regulation under which HAH's claim was brought does not apply in England and Wales. However, the overarching directive implemented by the Scottish regulation (Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts ('2004 Directive')) forms the foundation of each EU member state's procurement regime. The principles of interpretation used by the court in the HAH case are therefore based on the underlying fundamental principles of EU procurement law and can be applied equally across the EU member states. The HAH case provides a useful restatement of the legal position for public authorities in England and Wales, as well as those in Scotland.

Although this decision is favourable to public authorities, it nevertheless highlights the importance of sending out a robust invitation to tender at the outset of the process to minimise the risk of a challenge from an unsuccessful tenderer.

The reasonably well informed and normally diligent tenderer test (RWIND)

As a reminder of the background, the 2004 Directive regulates the award of contacts by public authorities within the EU. The Directive is intended to ensure that the award of public contracts is subject to the fundamental EU principles of free movement of goods, freedom of establishment and the freedom to provide services, and the other principles stemming from those (equal treatment, non-discrimination, mutual recognition, proportionality and transparency) which are all equally relevant in a procurement exercise. The RWIND tenderer test was developed in EU case law in order to articulate the standard of transparency required in public procurement exercises. The recital to the 2004 Directive provides that *"contracts should be awarded on the basis of objective criteria which ensure compliance with principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition…"*

In the case of SIAC Construction Ltd v Mayo County Council (C-19/00) it was said that *"the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified…this*

means that award criteria must be formulated…in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way."

The key point to note from the EU case law is that the test is objective. The question is not whether it could be shown that all actual or potential tenderers had in fact interpreted award criteria in the same way, but whether, when the criteria were interpreted by the court, it could be said that the criteria were sufficiently clear for uniform interpretation by all RWIND tenderers. The opinion of the Advocate General in Lammerzahl GmbH v Freie Hansestadt Bremen (C 241/06) explains that the reason for having an objective standard against which to measure award criteria is to give legal certainty. Use of a subjective standard which depended on evidence of the ability of particular tenderers to interpret award criteria in a uniform manner would undermine that certainty.

Providing reasons to unsuccessful tenderers

Article 41 of the 2004 Directive places a duty on public authorities to inform (on request) unsuccessful candidates of the reason their tender was rejected. In the case of Strabag Benelux NV v Council of the European Union (T-183/00) the court stated that (in relation to a provision analogous to the 2004 Directive) the requirement was for the public authority to inform unsuccessful tenderers of the name of the successful tenderer, and their relative characteristics and advantages. They went on to say that *"the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion, so as, on the one hand to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights, and on the other, to enable the court to exercise its supervisory jurisdiction."* All that is required of public authorities is therefore to provide the name of the successful tenderer, and a clear statement of the reasons which lead to the decision, ensuring that the reasons include those related to the successful tenderer as well as to the unsuccessful.

Background to the HAH case

The HAH case concerns a public procurement process which took place in 2010. The Common Services Agency (CSA) ran a procurement exercise for a single supplier framework agreement for services relating to the supply and delivery of the cancer drug Herceptin. Healthcare at Home Ltd (Healthcare) was the supplier of the services under the contract which was due to be replaced by the framework agreement, and put forward a tender for the framework agreement.

Following the procurement exercise, Healthcare was informed that its tender had been unsuccessful. It challenged the decision of the CSA on the basis that the CSA had breached its duties under the Public Contracts (Scotland) Regulations 2006, complaining that CSA had used criteria in its invitation to tender which were insufficiently clear, and that the reasons given for rejection of its tender were unclear and lacked sufficient detail.

At first instance, the court applied an objective test in relation to the award criteria and found that in light of the evidence as to the relevant context, the criteria met the required standard of clarity. In relation to the reasons given for rejection of Healthcare's tender, the court held that the reasons given were adequate; Healthcare could have been left in no real doubt as to why it had been unsuccessful, and the relevant characteristics and advantages of the successful tenderer were clear.

The Inner House

Healthcare appealed the decision to the Inner House of the Court of Session but was again unsuccessful. It was argued for Healthcare that the court should take into account evidence of what a RWIND tenderer would have understood the criteria in question to be, the relevant evidence being what Healthcare's witnesses had in fact understood the relevant criteria to mean. The court considered this to be 'misguided'. The appropriate interpretation of the RWIND test was whether the invitation to tender was formulated 'in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them the same way'. It was not the case that criteria will be deemed unclear where a tenderer, who might normally be expected to be reasonably well informed and diligent, construes them in an idiosyncratic way. The standard to be applied is that of the hypothetical RWIND tenderer.

The Supreme Court

On appeal to the Supreme Court, Healthcare argued that the conclusions reached by the lower courts on the issue of the RWIND tenderer test and of the adequacy of the reasons given were incorrect.

In relation to the RWIND tenderer test, it was again argued for Healthcare that the test is not what the hypothetical RWIND tenderer would have done or thought, but involved consideration of what an actual tenderer did or thought, based on witness evidence.

The Supreme Court agreed with the Inner Court that *"evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant."* The court may require evidence of how particular terms or documents would be understood by the RWIND tenderer, particularly where industry specific terms or documentation is used, but the question of whether or not the terms are sufficiently clear must be determined by the application of a legal test rather than on the basis of factual evidence. The issue is whether the meaning of the invitation to tender would be clear to any RWIND tenderer, and not what the invitation to tender actually meant.

In terms of the reasons given for Healthcare's lack of success in the tender, the court considered that the lower courts had applied the approach set out by the European Court of Justice in the Strabag Benelux case, and that this was the correct approach. In the absence of any error of law, the Supreme Court declined to review their findings.

Key points to note

The Supreme Court held that in order for award criteria to be consistent with the principle of transparency, *"all the conditions and detailed rules of the award criteria must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that first, all reasonably informed tenderers exercising ordinary care can understand their exact criteria and interpret them in the same way, and secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract."* It is therefore necessary for public authorities going out to tender to ensure that they include sufficient detail in their award criteria to allow potential tenderers to understand exactly what information they are required to provide and how their tenders will be assessed.

Authorities also need to ensure that they do not simply reuse documents from previous procurement exercises without review. Not only must the documents be specifically tailored to the particular procurement, it is important that the documents provided to potential tenderers set out exactly the evaluation approach that will be used in relation to the particular exercise. Failing to properly disclose evaluation criteria can lead to costly and time consuming challenges from unsuccessful tenderers.

Finally, it is helpful that the Supreme Court followed recent tradition in this instance and declined to go behind the decisions of the lower courts on the adequacy of the reasons given by the authority for its decision. Provided the reasons given allow the unsuccessful tenderer no real doubt as to why the successful candidate was chosen instead of them, then the quality of reasons given should not be relevant. Authorities can take comfort from this but should ensure that they provide every unsuccessful tenderer with the name of the successful tenderer, as well as a clear statement of the reasons which lead to the decision, including the authority's evaluation of the relevant advantages and skills of the successful tenderer, and assessment of the relative qualities of the unsuccessful tenderer.

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stop press!

New procurement regulations delayed until 2015!

It's the one we've all been waiting for! In an announcement made on 21 September, the Cabinet Office has confirmed that implementation of the new public procurement regulations in England and Wales will be delayed until 2015.

The regulations will implement the EU Public Sector Directive which came into force in April 2014. It was previously thought that the regulations would be fast tracked for implementation in late 2014, but the UK Government has two years from the date of publication in the OJEU to implement the Directive into national law.

The current proposal from Government is to implement the majority of the new Directive mid-2015 but leave certain parts relating to clinical healthcare services until the last day possible: 18 April 2016. Consultation is only until 17 October 2014 and, considering this strange circumstance, plus the insertion of the Lord Young reforms, our advice is to get your thinking hat on soon if you want to contribute.

talk to us...

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