Neutral Citation Number: [2024] EWHC 699 (Admin)

Case No: AC-2023-MAN-000418

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Wednesday, 27th March 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of MICHAEL SHERRATT, by his mother and litigation friend STEPHANIE SHERRATT)	**Claimant**
- and -	
BOLTON COUNCIL	**Defendant**

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Benjamin Tankel (instructed by Irwin Mitchell) for the **Claimant**
Sian Davies (instructed by Bolton Council) for the **Defendant**

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Determination on the Papers
Written submissions: 18.3.24, 19.3.24, 21.3.24
Circulated: 25.3.24
Hand-down: 27.3.24

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Introduction

1. The substantive hearing of this judicial review claim was due to take place on 19 March 2024. On 15 March 2024 the parties agreed a Consent Order, with Agreed Recitals (which the Defendant is recorded as accepting), accompanied by a joint statement of Agreed Reasons. The Order involves, by consent, the Claimant having permission to withdraw the claim for judicial review, and the Court determining the contested issue of costs. I made the Order on 25 March 2024. There is a right of access to Orders from the records of the court, but I am satisfied that – rather than an Order embodying detailed reasons – delivering this brief judgment best promotes open justice. In it, I will set out the Agreed Reasons (§§2-12 below) and Agreed Recitals (§§13-17 below) before giving my costs determination (§§18-28 below).

Agreed Reasons

2. The Claimant has been assessed by the Defendant as having needs for care and support, and as requiring a care package in the sum of £321.07 per week, part of which is paid by way of direct payment. He receives a gross weekly income of approximately £191.30 per week, made up entirely of state benefits including disability-related benefits. On 10 March 2022, the Defendant assessed him as being required to make a contribution of £39.92 per week to the cost of his care.

3. Because the Defendant has taken the Claimant's disability benefits into account in assessing his weekly income, it is required to disregard any disability-related expenses ("DRE"): see §4 of Schedule 1 to the Care and Support (Charging and Assessment of Resources) Regulations 2014 (the "2014 Regulations").

4. The Claimant's mother contends that the following items are DRE and should therefore have been excluded from financial assessment: (a) Gym membership; (b) personal assistant ("PA") petrol; (c) PA parking; (d) the cost of specific food items; (e) PA lunches.

5. By letter dated 16 March 2023, the Defendant found that these items were not DRE on the basis that:

> ***We have reviewed the figures you submitted and asked for guidance from the Social Work Team as to whether any of the expenses you detailed to us were relatable to your care plan and should, therefore, be added to the current financial assessment. Unfortunately, the guidance we have received is that none of the expenses submitted could be attributed to the plan and, on this basis, we are unable to alter our assessment of charge.***

6. By letter dated 6 July 2023, the Defendant again found that "PA parking, petrol expenses and lunch expenses" were not DRE, on the grounds that:

> ***It was noted, and is still relevant, that there were no specific medical, clinical or therapeutic recommendations related to the Care Act Needs Assessment that would necessitate this specific approach or provision or, that the need cannot be provided for in another way i.e. a blue badge for parking expenses. The authority would contend that the costs of travel, or petrol expenses, are already being allowed for in the mobility element of Michael's personal independence payment ("PIP") which is not taken in to account in the assessment. Please note, that the personal allowance already included in the financial assessment, as standard, allows flexibility***

> ***to cover general day to day living costs which includes cost of travel. The expense being requested for lunch for the PA has also been refused on the basis that Michael is not responsible for providing lunch for an individual in his employment.***

7. The Claimant exhausted the Defendant's internal complaints and appeals processes for challenging these decisions. The Defendant was and is of the view that the Claimant's next step ought to have been a complaint to the Local Government Ombudsman ("LGSCO"). The Claimant is of the view that the only available remedy was via judicial review; alternatively, that an application for judicial review was an appropriate remedy having regard to all the circumstances of the case.

8. On 3 October 2023, the Claimant issued an application for permission for judicial review, on the following five grounds. (1) In breach of the Care and Support Statutory Guidance and the Defendant's "Charging Policy: Adults Non-Residential Care", the Defendant relied solely upon the Claimant's care plan when determining whether any of the Claimant's claimed items of expenditure were DRE. (2) Even on the Defendant's approach of relying solely upon the care plan, the Defendant had unlawfully interpreted that plan as not supporting the claimed DRE. (c) The Defendant had erred in law in treating the fact that transport costs were included in the mobility element of the Claimant's PIP as of itself a reason that transport costs could not be DRE. (d) In its letter dated 6 July 2023, the Defendant had failed to address the issues of branded food or gym membership. (e) The Defendant had provided inadequate reasons for aspects of its decision.

9. The Claimant sought the following by way of relief: "The Claimant seeks orders: (a) Quashing the Defendant's financial assessment; (b) Remitting the question of DRE back to the Defendant; (c) Declaring that the Defendant acted unlawfully by: (i) Relying exclusively upon the support plan; (ii) Finding that transport expenses, the cost of branded food, the cost of PA lunches, and gym membership, were not supported by the support plan, when they were; (iii) Taking into account the irrelevant consideration of transport costs being "allowed for" within the mobility element of PIP. (iv) Mandating that, to the extent that any of the costs the Claimant has been required to pay are determined to be DRE, the Defendant do reimburse these in full to the Claimant, together with interest at a rate of 8%; and (d) For the costs of these proceedings."

10. The Claimant contends that the claim was properly and timeously served by email timed at 21.08 at 3 November 2023. The Defendant contends that the email went into its junk email folder. The Defendant did not advance any defence to the claim. This was because of personal circumstances on the part of the instructed solicitor, which were communicated to the court. As observed above, the Defendant also contends that it did not receive the sealed claim form until 5 December 2023. Permission was granted by Deputy High Court Judge Karen Ridge on 31 January 2024.

11. The Defendant accepts that its letter dated 16 March 2023 and thus financial assessment based upon it provided that DRE required to be "relatable" or "attributable" to the Claimant's care plan. Further, its letter dated 6 July 2023 provided that DRE required to be "related" to the care plan in a way that would "necessitate" this specific approach or provision; to not be provided for in another way; that travel costs were already "allowed for" in the mobility element of the Claimant's PIP and so could not be DRE; and that PA lunches could not be DRE because the Claimant was not "responsible" for providing lunch for an individual in his employment. Meanwhile, §§40 and 41 of

Annex C to the Care and Support Statutory Guidance provide for "any reasonable additional costs directly related to a person's disability [to] be included", including (non-exhaustively) the "costs of any specialist items needed to meet the person's disability needs", that the care plan "may be a good starting point", that "flexibility is needed", and that disability related expenditure should not be "limited to what is necessary for care and support". Further, paragraph 7.5 of the Defendant's "Charging Policy: Adults Non-Residential Care" provides that: "Disability Related Expenditure will be assessed according to individual need. Any reasonable expenditure will be allowed but receipts may be required for certain items." The Defendant further accepts that, on the facts of the Claimant's case, transport expenses, parking expenses, the cost of branded food, the cost of PA lunches, and gym membership, are potentially capable of being DRE.

12. In light of the points in §11 above, the Defendant has agreed to withdraw and reconsider its financial assessment, to reimburse any sums that ought to have been excluded together with an appropriate rate of interest, and to review its policies to ensure compatibility with the Care and Support Guidance. Whether or not any of the items claimed as DRE should be excluded from financial assessment will be for the Finance Income and Assessment Team to determine upon reconsideration, subject as appropriate to use of the local authority statutory complaints process, the LGSCO, and/or application for judicial review. Whether or not the Defendant's policies require any amendment will be for the Defendant to decide, subject to application for judicial review in an appropriate case. The parties have not reached an agreement as to either the principle or quantum of costs and seek the opportunity for that to be determined by way of brief written submissions.

Agreed Recitals

13. The Defendant's letter dated 16 March 2023 and thus financial assessment based upon it provided that DRE required to be "relatable or "attributable" to the Claimant's care plan.

14. The Defendant's letter dated 6 July 2023 provided that DRE required to be "related" to the care plan in a way that would "necessitate" this specific approach or provision; to not be provided for in another way; that travel costs were already "allowed for" in the mobility element of the Claimant's PIP and so could not be DRE; and that PA lunches could not be DRE because the Claimant was not "responsible" for providing lunch for an individual in his employment.

15. Whereas: (a) §§40 and 41 of Annex C to the Care and Support Statutory Guidance provide for "any reasonable additional costs directly related to a person's disability [to] be included", including (non-exhaustively) the "costs of any specialist items needed to meet the person's disability needs", that the care plan "may be a starting point", that "flexibility is needed", and that disability related expenditure should not be "limited to what is necessary for care and support"; and (b) §7.5 of the Defendant's "Charging Policy: Adults Non- Residential Care" provides that: "Disability Related Expenditure will be assessed according to individual need. Any reasonable expenditure will be allowed but receipts may be required for certain items."

16. On the facts of the Claimant's case, transport expenses, parking expenses, the cost of branded food, the cost of PA lunches, and gym membership, are potentially capable of

being DRE. The fact that transport expenses are included within the mobility element of the PIP is not of itself grounds for excluding them from DRE.

17. In light of the points at §§13-16 above, the Defendant will withdraw the challenged financial assessments and carry out a fresh financial assessment, by 5 April 2024. To the extent that the Defendant determines any of the costs the Claimant has historically been required to pay to the Defendant to be DRE, it will reimburse these in full to the Claimant, together with interest at a rate equivalent to the rate of interest paid on the personal bank account into which direct payments are paid. The Defendant will review its relevant policies to ensure their compatibility with the Care and Support Statutory Guidance.

Costs Determination

18. Having set out the Agreed Reasons and the Agreed Recitals, I turn to address the contested costs issue. The Claimant seeks an order for the whole of his costs, on the standard basis at inter partes rates, to be the subject of detailed assessment if not agreed. The Defendant submits that the appropriate order in the circumstances is that there should be no order as to costs, as a departure from the general principle that costs follow the event. I am satisfied that it is the Claimant's representatives who have identified the correct costs order in the circumstances of the present case. Here are my reasons:

19. I can start with the "outcome" that has been achieved, together with how that has been achieved. The outcome is this: the Defendant will withdraw the challenged financial assessments; it will carry out a fresh financial assessment; it will determine whether the claimed items, recognising that they are potentially capable of being DRE, are DRE; and it will make any resultant payments and reimbursements together with interest (§§12 and 17 above). That outcome has been achieved by agreement reached in the context of the judicial review proceedings, recorded in a Court Order. It has been achieved immediately prior to the substantive hearing of those judicial review proceedings. Importantly, it is – in substance – the relief which was pleaded in the judicial review claim (§9 above).

20. Next, I turn to the analytical route by which that outcome has arisen. The decision letters of 16 March 2023 and 6 July 2023 rejected the claimed items as DRE on the basis that they were not relatable, attributable, or related so as to be necessitated, to the Claimant's care plan (§§5-6 and 11 above). But a broader approach was described in the statutory guidance and the Defendant's own policy (§§11 and 15 above). The July 2023 decision letter excluded travel costs on the basis of their having been allowed for in PIP (§§6 and 11 above) but that is not grounds for exclusion (§16 above). This is the reasoned basis on which the challenged financial assessments have now been withdrawn and the decision is to be retaken afresh. Importantly, that analytical route is – in substance – squarely reflective of the pleaded judicial review claim (§8 above).

21. To these powerful points, I can add a further dimension of the case. In the run up to the hearing, I made an order (29.2.24) setting the final deadlines for the skeleton arguments. The Claimant's skeleton argument was duly filed, in accordance with those directions, on 5 March 2024. The Defendant had filed no summary grounds or detailed grounds of resistance. Its skeleton argument was due on 12 March 2024, but it did not arrive. On the afternoon of 13 March 2024 I was told by email that the parties were

seeking to negotiate an agreed settlement. In the event, I had the advantage of a substantial degree of reading into the case. I made no decisions or findings. But I derived a real familiarity with the documents in the case, the law, and what the Claimant's team were submitting. I awaited the Defendant's answer to the claim. Given what has ensued, and what is agreed, I am able to say this. I am able to see a clear symmetry between what the Defendant came to agree in the Reasons and Recitals, and what would have been embodied in a judgment on the legal merits, written by me. On the face of it, the Defendant had breached its basic public law duty to ask the legally correct question. The decision needed to be retaken lawfully. The statutory scheme makes provision for the specified needs identified by a needs assessment, within a care plan. The scheme makes provision for the duty to disregard DRE incurred by the adult when taking into account disability benefits received (such as PIP), in assessing income as part of the means test (Sch 1 §4 to the 2014 Regulations). Nowhere does the statutory scheme provide – as it could so easily have done – that DRE means expenditure on a specified need identified within the statutory needs assessment. The concept of DRE expressly involves a relationship between the expenditure and the disability and Sch 1 §4 gives an inclusive description. The whole point of the statutory disregard of DRE is to recognise that there can be amounts within a disability benefit which are not counted as income, for the purposes of assessing affordability, in deciding the level of contribution towards a local authority's care costs. The statutory guidance states, in terms, that flexibility is needed and that what is DRE should not be limited to what is necessary for care and support. It also speaks of necessary DRE, to meet needs which are not being met by the local authority. Nothing in the Defendant's guidance does or could detract from these points; and in fact the guidance is consonant with them, in emphasising individual need and reasonable expenditure. These were all impressions gained from my pre-reading. They fit with what, ultimately, has now been agreed. They would be reasons why the question identified by the Defendant was unduly restrictive; which was a material public law error. I have a high level of confidence that this claim, to which no defence has ever been entered, would have succeeded on its legal merits.

22. Next, there are the Defendant's answers to all this. Ms Davies says there should be "no order as to costs". That is because there was, throughout, the suitable alternative remedy of a complaint to the LGSCO, which remains the Defendant's position (§7 above). That would be a basis for dismissing the claim for judicial review, with the Defendant obtaining its costs. Linked to that is the failure of the Claimant's representatives to write a further letter before claim, after 6 July 2023, instead of commencing judicial review proceedings on 3 October 2023. Moreover, the claim should not have been sent using an "automated email system" which the Defendant's system did not recognise, which is why it went to junk email folder (§10 above). Viewed overall, the Claimant's representatives failed to follow "the letter and spirit of the pre-action protocol" and, failed to engage with "ADR to the full extent available". These are the considerations which justify departing from the general principle that costs follow the event.

23. I have not been persuaded by these submissions. The Defendant had ample opportunity to raise the question of 'alternative remedy'. That is a classic issue which can be ventilated at the permission stage (see Administrative Court Judicial Review Guide 2023 at §§6.3.3, 9.1.6). The permission stage allows the opportunity for informed consideration of the right course of action for a claimant to pursue, so that costs can

then be avoided. I cannot accept that if the Claimant's representatives had writing a further letter before claim rather than filing a judicial review claim, there would have been any greater proactivity on the part of the Defendant. It is true that alternative remedy might have been raised at the substantive hearing, alongside the legal merits. In the event, there had been no detailed grounds of defence. The point could have been raised in a – late – skeleton argument. I have a high degree of confidence that I would have rejected it. The costs would have been incurred. The strength of the legal merits of the claim would have been considered. It would have been unjust to allow an unlawful decision to stand, in the circumstances of this case.

24. This was the sequence of key events.

i) Following the Defendant's decision letter of 16 March 2023, the Claimant's solicitors wrote a letter before claim on 11 May 2023. It explained in admirably clear terms the error of approach contained within the March 2023 decision letter. The matter was treated as a complaint and escalated. The Defendant's legal services department ("LSD") sent an email (31.5.23) emphasising that judicial review was a mechanism of last resort, that the formal complaints procedure had not been exhausted, and reserving the right to respond to the substance of the letter before claim if the Claimant remained dissatisfied with the outcome of the escalated complaint. The outcome of the complaint was the July 2023 decision letter. In substance, it repeated the error of approach in the March 2023 decision letter, which had been identified in the May 2023 letter before claim. The July letter stated that if the claimant remained dissatisfied with the response "you are able to ask" LGSCO to review the complaint.

ii) The judicial review claim was prepared and the papers were lodged with the Administrative Court in Manchester ("ACM") on 3 October 2023. The grounds drew attention to recourse to LGSCO and explained why judicial review was said to be appropriate. At 12:53 the previous day (2 October 2023), the Claimants solicitors had emailed the LSD attaching a copy of the bundle which was to be filed at court. Having seen the bundle, the LSD Lawyer emailed (12.10.23) stating that the Defendant would accept service of the issued claim by email, asking for the legal aid certificate, and saying: "we will respond accordingly in due course" and "we will comment … on the merits of your claim in due course".

iii) There was then a delay at ACM who issued the claim on 3 November 2023. At 21:05 on 3 November 2023, the Claimant's representatives emailed the LSD Lawyer, attaching the sealed claim form and bundle. I do not accept, on the evidence, that an automated email system was used. Certainly, that email was missed because the LSD Lawyer emailed (16.11.23) chasing the sealed claim. There was a prompt reply (17.11.23) and chasers from the Claimant's side (20.11.23 and 28.11.23). The deadline for the Defendant's acknowledgement of service ("AOS") was 5 December 2023 and the Claimant's representatives sensibly emailed the LSD Lawyer that day, drawing attention to the deadline and asking when the AOS could be expected. On 5 December 2023 at 17:41 the LSD Lawyer emailed to explain that there had been a period of absence from work, that there had been issues with the email serving the claim (3.11.23). That email (5.12.23) raised the suggestion of the Claimant pursuing the matter with LGSCO, the absence of any further letter before claim, and suggested a stay while the

matter was pursued with LGSCO. The email said that instructions were being taken, and that it was hoped to confirm the position "in the next days".

iv) On the same day (5.12.23), the Claimant's solicitors sent an email pointing out the absence of "out of office" replies to previous emails; the fact that the Defendant knew that a judicial review claim was awaited; the fact that no alternative arrangements had evidently been put in place during any period of absence; that the deadline for the AOS had expired; and that the reason why the LGSCO was not considered appropriate by the Claimant's representatives had been set out in detail in the grounds for judicial review, sent a month earlier. Reference was made to the implications for the Claimant and the family of the ongoing delay in having matters addressed and resolved. A week later (12.12.23) the Claimant's representatives followed up, pointing out that there had been no response, as indicated "in the next few days", and that the Defendant would need to submit an application to extend time for the AOS giving full reasons including a proper chronology. There was no reply.

v) On 15 December 2023 the Claimant's representatives emailed the Court, rightly copying in the LSD (see CPR 39.8), and asking whether the papers were now being passed to the judge to consider permission for judicial review. Later that day (15.12.23) the LSD Lawyer emailed the Court, themselves rightly copying in the Claimant's representatives, making points about the way in which the claim had been served, the absence of a further letter before claim and, on the non-pursuit of complaint to LGSCO. That email said: "we reserve the right to refer to these multiple issues on the question of costs". It told the Court that the Defendant intended to file an application for an extension of time for delivery of its AOS. But no application to extend time for an AOS was forthcoming. No AOS was filed. There was even a chaser email from the Claimant's representatives (21.12.23).

vi) And so the papers came to be considered by DHCJ Ridge, who granted permission for judicial review (23.1.24). A response from the LSD Lawyer that day (23.1.24) explained that there had been a period of leave of absence. An email was subsequently sent by the Claimant's representatives to the LSD on (14.2.24), urging the Defendant to concede the claim. Nothing was filed with the Court by the Defendant. The Order of DHCJ Ridge granting permission for judicial review made specific reference to the email communication from the LSD Lawyer indicating that there was to be an application to extend time for filing an AOS, but that no AOS had in fact been filed. In her observations, the Judge referred to the need for timely notification from the Defendant, if the claim was not resisted, to avoid unnecessary hearings and further costs. The Judge considered the claim reasonably arguable on the basis of the facts and grounds which had been submitted. Plainly, she was satisfied with the way in which the grounds of claim had addressed the question of alternative remedy.

25. I am of course conscious of what the Court has been told about absences, and about the non-receipt of the sealed claim (§10 above). But, making all due allowance, it is also clear that there was ample notification and an ample opportunity, there was a lack of responsiveness, and there was a pattern of saying that things would happen which then did not. The error of approach could have been recognised at any time, and all the costs

were in that way avoidable. Above all, there is no basis on which the Defendant can properly criticise the Claimant or his representatives.

Detailed Assessment

26. The Claimant accepts – and this is a legal aid case (Judicial Review Guide §25.3.4.4) – that the Defendant is entitled to the protection of an assessment of the costs. That is a mechanism in which proportionality can be examined. The Claimant's representatives had served a costs schedule (in the sum of £63,526), which was filed updated (25.3.24, in the sum of £67,217.20). The reason why the Defendant's costs submissions were said to have missed the agreed deadline was that the Defendant was "in the process of preparing" its costs submissions but had been served with the costs schedule and might "wish to make observations" about that schedule. In the event, what was said by Ms Davies in the written submissions is that the total "appears disproportionate" to the "content and complexity of the issues in the claim". She pointed to the Defendant's own costs of £6,000. But she rightly recognises that that is not a proper comparison since the Defendant had never substantively addressed the claim. There were no summary grounds, no detailed grounds and no skeleton argument. Ironically, the only document of substance filed with the Court by the Defendant, which will have incurred costs of Counsel, is the costs submissions themselves. Be all of that as it may, as everyone accepts, the question of proportionality will be a matter for any detailed assessment, absent agreement.

Interim Costs Payment

27. That leaves the question of an interim payment. The Claimant's submissions had made very clear that an interim payment was being sought at a level of £38,115.96, being 60% of the (£63,526) costs claimed, reflecting the lower end of the range of the amount likely to be recovered, which payment was appropriate in the absence of good reason (CPR 44.2(8)). There was no response in the Defendant's costs submissions to this specific aspect. The Council took its stand on its arguments that there should be no order as to costs, and its general observation about what it says is an apparent lack of proportionality. It has not been argued by Ms Davies that it would be wrong in principle to order an interim payment. No submission was made by Ms Davies about the level of the interim payment which would be appropriate, if costs did follow the event. I have reminded myself of R (LC) v SSHD [2023] EWHC 319 (Admin) at §§6-7. No point was taken about the absence of a professionally drawn bill of costs. I obtained specific clarification from the Claimant's solicitors that the costs schedule was being put forward, not as a professionally drawn bill of costs (as described in LC), but as a working document. I am satisfied that an interim payment is appropriate, that 60% is the correct level, but also that there should be the safeguard and discipline of a professionally drawn bill of costs. I will therefore make the same Order as in LC at §2(7).

28. As to costs, my Order is as follows: (i) The Defendant shall pay the Claimant's reasonable costs of the claim on the standard basis, to be assessed if not agreed. (ii) There shall be a detailed assessment (if required) of the Claimant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013. (iii) Pursuant to CPR r 44.2(8), the Defendant shall make a payment on account of those costs, within 14 days of being served with a professionally drawn schedule of costs, in the sum of 60% of the schedule.

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