

Croydon counts the cost of inadequate consulting

*Croydon Council thought they had adequately consulted the parents and the existing home before making the decision to move a young man. But, says **Belinda Schwehr**, the law is clear: the process has to be done correctly for the re-assessment decision to be lawful.*

A decision was made earlier this year which proves that knowing something about the legal rights of service users can be very useful to their families, and also to providers faced with cost brokers, threatening the removal of a council-funded client, unless the contractual fee is reduced.

SW was a young adult with autism, severe delay in language development, difficult behaviour, and severe learning disabilities. Since 2005 Croydon Council had paid for his accommodation in Hesley Village, a large residential care home. SW was apparently happy there and his parents were keen that he should remain there at least in the short term.

Croydon conducted a re-assessment in mid 2010, and concluded that the home was not a suitable place for SW. The parents were not consulted about the assessment until a later best interests meeting, and it was not shown to Hesley's management until after the decision had been taken to move the young man. The decision was taken that the placement should be terminated and that he should be moved to other accommodation involving supported living.

Overly restricted

The two primary concerns were that the home was not encouraging SW towards independence but was instead overly restricted and isolated; and also that its cost, £4,800 a week, was more than twice what the local authority would usually expect to pay for someone with needs assessed at the level of SW's.

SW's mother, acting as his litigation friend, alleged that there was no adequate consultation with the parents and with Hesley Village's management which would satisfy the legal requirements.

The council contended that the parents were adequately consulted and that the failure to consult Hesley was a relatively minor deficiency which should not affect the validity of the decision taken. The council decided to invite the parents and provider to a best interests meeting. The provider was not available, through no fault of its own, but the council did not grasp this. Just before the meeting, at the venue, SW's parents were provided with the re-assessment. The meeting explored the council's concerns about

the amount of stimulation provided and the cost. The parents disagreed with the content of the re-assessment. The mother asked why they had only just been given it and said they needed time to digest it.

The advantages of isolation were pressed by the parents and they expressed concern at the idea of SW living in the community.

Croydon said that they could not keep paying £2,000 a week more than they needed to, saying it was scandalous how poor the service was for the money, to which the parents riposted that their son was happy there. The meeting turned to where else SW might move, but no details were provided. Soon after this, the council wrote to Hesley, enclosing the reassessment and saying that the outcome had been determined, giving the three months notice which the contract required. He was to be transferred to supported living accommodation and their assistance was sought in that venture. The parents raised their concerns about the process by separate letter.

Hesley Village responded too, by telephone and in writing, to the council, regarding the concerns in the re-assessment.

The decision

The judge took the following view, having heard both sides' contentions:

- "The council clearly had a firm but provisional view as to the unsuitability of Hesley Village as a continued placement. There is nothing in the assessment, the invitation to the meeting, or what is said at the start of the meeting, that shows that this meeting was not prepared to consider what the parents might say about the suitability of Hesley Village, their wishes that the claimant remain there, and the reasons for that view. They did listen to those views and the minutes do not suggest that they were simply told that what they were talking about was irrelevant because the decision had been made. There was a discussion at some length about what were the problems with Hesley Village, to which the parents responded.
- However, *the consultation was inadequate and breached the various requirements* – there was nothing, even in the letter before the meeting, to alert the parents to quite how far down the road the council's thinking had got in relation to the lack of suitability and the cost of maintaining the placement. *They had not been involved in the earlier assessments of their son's needs. The parents did not have sufficient time at that meeting to consider and formulate responses to the proposal that the placement should be ended.* There plainly was material that the parents wished to deploy. They deployed it in their formal letter but, the decision having been taken, that issue would have been regarded as closed by Croydon Council.

- The council, for want of ensuring that it had the views of Hesley Village before terminating the contract, made it more difficult for it to re-open its mind to consider what the parents, and later Hesley Village, had to say. Of course Hesley village could be regarded as, to a degree, an interested party in relation to this placement, but the provisions of section 4 of the Mental Capacity Act, and of the guidance under it, make it clear that their views would be valuable.
- So I quash the decision that was taken”.

Challenge

This claim was not a challenge suggesting that it would forever be irrational to move the man from Hesley Village, or that other factors, and in particular the high cost of maintaining the placement which the council gave great weight to, were either irrelevant factors or ones which would not entitle Croydon, if properly re-consulting on the decision, to come to the same conclusion.

The law is that the council *is* entitled to terminate a placement because of the greater cost, although whether it does so will be a matter for it to consider in the light of what is said about needs and costs and how these can be met elsewhere. It is also entitled to terminate because of the view it takes of the nature of the place in relation to what it assesses are SW's needs, but one of the purposes of a consultation process is to enable other views than those which it forms on a firm provisional basis to influence it. But the law is clear: *the process has to be done correctly for the reassessment decision to be lawful.*

The obligation to consult in relation to accommodation comes from the **National Assistance Act 1948 (Choice of Accommodation) Directions 1992**, and the guidance which has been issued about them. There are further directions in relation to community care in the Community Care **Assessment Directions 2004**.

These require carers, which for these purposes include the parents, to be involved as much as possible in the decisions made for the person catered for. Finally, as the judgment sets out, there is the **Mental Capacity Act and Code**. Providers caring for people lacking capacity, need to be aware of these legal principles, to wave the flag about the clients' families' rights, as well as their own, to be consulted before a move is made.

The lesson for councils

For councils, the lesson is this: a best interests meeting cannot simply be tacked on the end of a purported reassessment: the re-assessment has to be done in accordance with best interests principles and process.

The case shows that the fact that a provider has a commercial interest and is bound up in private law through contract with the commissioning authority is not a good reason for not involving it in proper consultation; and indeed, any new sensible alternative provider will ask to be given a copy of an assessment that is up to date and deals with the trauma of moving, in order to determine what price it requires adequately to meet the needs of the service user.

Interestingly, the case does not mention the quandary of how a council would secure valid tenure for a person lacking capacity to understand a tenancy, when the obvious candidates for deputyship, the parents, may well be expected to be unwilling to take on the role, unless they approve not only of any unregistered accommodation ultimately found but are also satisfied about the level of housing benefit and adequacy of the funding for the home and day care package to be provided...!

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