

WHY LEICESTER COULD LITIGATE AND MANCHESTER COULDN'T - SOME BASIC LESSONS IN PUBLIC LAW

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INTRODUCTION

I was the solicitor representing service-users of Voluntary Action Leicester (VAL) and five other voluntary sector organisations in the claim for judicial review against Leicester City Council. I have also advised voluntary sector activists in Manchester on a potential challenge to the City Council there over the recent tendering process for infrastructure services. I am here to explain how we successfully managed to challenge the Council's actions in Leicester, but why I advised against it in Manchester's case.

I will start by explaining the basics of public law and how it works in reality, before outlining what happened in Leicester in 2004 and Manchester this year to illustrate how public law does – and doesn't - work. I will then sum up by looking at outcomes in various cases, and giving some general pointers on what to look out for when dealing with public bodies who may be behaving unlawfully.

THE PUBLIC LAW "DREAM"

Public bodies have various public law duties that should govern how they behave. These include – in certain circumstances – a duty to consult; that they must give consultees sufficient information and time to comment on their proposals. Consultation must take place when proposals are at a formative stage, and the results of consultation must be taken into account when the public body makes its decision.¹

Public bodies must act fairly; they should give reasons for their decisions; they must listen to both sides before making a decision; there should be transparency and openness in their decision-making; they must not be biased (or appear biased). When making a decision, a public body must take into account all relevant information, and should not base its decision on irrelevant information.

Public bodies should not fetter their discretion, by pre-determining issues or having a policy that is too rigid: this could be found to be unlawful.² If they do not follow the set procedure for making a decision, this could also make a decision unfair and susceptible to challenge.

¹ The classic consultation example is from a case called *Coughlan*, about the closure of a residential home; the court found that the local authority hadn't consulted properly and set out these guidelines.

² For example, if a public body had embarked on a review of the voluntary sector asking all groups to compete for funding (or a wide public consultation), but had already decided they would only fund, say, groups working with children, this could be considered unfair and unlawful.

A public body must not act beyond its powers; it can only take action that it is allowed by law to take. They also cannot let someone else take a decision on their behalf unless they are permitted by law to do so. Nor should a public body act irrationally; they must make reasonable decisions.

These public law duties run alongside any private law commitments, such as those set out in contracts. Just because a contract governs a relationship between a public body and a voluntary organisation, does not mean the public body can ignore their public law duties. This is a common misconception on the part of public bodies; they often fail to realise that they owe any public law duties at all, let alone that there is a duty to consult affected parties³.

The way to enforce these duties is mainly through a court process called judicial review. This enables the court to look at how a public body has behaved, and decide whether they have acted lawfully and fairly. If they have not, the court will then decide whether to order the public body to take their decision again, in a fair and lawful way, but this is not a foregone conclusion. Judicial review can also stop the clock running on any imminent action by a public body whilst you challenge their decision. You can apply for what's called "interim relief" in the form of an injunction that the public body must maintain the status quo until the proceedings are concluded.⁴

Public law wrongs can also be challenged by making a complaint to the public body concerned, and if this is unsuccessful, by complaining to the appropriate ombudsman, such as the Local Government Ombudsman. The LGO will consider whether there has been maladministration causing injustice. Maladministration includes issues such as delay, neglect, bias and giving incorrect advice. The LGO issues a report and recommends what the public body should do to put matters right, including a review of policy or financial compensation. Whilst ombudsman schemes are free, and you do not need a lawyer, they are very slow and cannot enforce their recommendations. They will also not deal with points of law.

The Compact may also be the basis for a public law challenge as there is an overlap between the Compact codes and public law principles. A public body who has signed up to the Compact has even more reason to meet these duties, and breaches may be evidence of public law wrongs. However, the Compact in itself is difficult to enforce as many public bodies do not take it seriously and there are no sanctions for not complying with it. My understanding of Compact Plus is that the Compact Champions will only succeed if they have some weight behind them and some teeth. If their role is similar to that of the Ombudsman, this may be insufficient to ensure public bodies do act lawfully and observe the Compact codes.

³ In the Leicester case the Council claimed that: "the Council's grant funding is entirely a matter of contract between itself and VAL". This is incorrect in law and they dropped this argument once proceedings started.

⁴ In terms of voluntary sector organisations this can be crucial; if funding is about to stop and the group will close in the meantime, there is a risk that the proceedings will become academic if you do not get an injunction to force the public body to keep on paying you.

THE PUBLIC LAW “REALITY”

Despite all the compelling public law duties outlined above, unfortunately, there are numerous caveats as to how effective enforcing public law is in reality, particularly if your only realistic option is judicial review proceedings.

The first is that the court’s role is supervisory only. It will simply look at how the decision was taken and *possibly* make the public body take the decision again. The court does not change the decision or make a fresh decision itself. This means you could win your court case, and the public body be ordered to take the decision again, but they just reach the same conclusion in a lawful and fair way.

Secondly, any “remedy” (i.e. the court order you hope to get) is discretionary. This means that even if the court thinks the public body has acted unfairly, the court has a discretion as to whether to intervene or not. The judge in the Leicester case repeatedly referred to case law that established that even when a decision has been proved to be unfair, there is no guarantee of the court’s intervention⁵.

Thirdly, you have to act very quickly indeed. You must start proceedings at court very promptly from the date your grounds for judicial review arose, (often the decision by a local authority to stop funding an organisation). This means you have virtually no time to achieve what you need to in this period, or you may already be too late. We see a lot of cases where things have reached a head between the council and the voluntary organisation, but the decision that could actually have been challenged was made many months earlier.

Fourthly, it is very difficult (if not impossible) to bring a case based on a series of small errors or unfair acts by the council. You cannot mount a challenge based on what you suspect the public body has done, or what you think its hidden agenda is. You have to be able to rely on substantial acts with concrete evidence. A personality dispute or nuances over how something has been done or interpreted is not enough.

Judicial review is also phenomenally expensive. A group would need to allow £10,000 to £20,000 for their own costs, and if they lost, they would also have to pay the defendant’s costs as well – probably a further £10,000 to £20,000, depending on the complexity of the case. Legal aid is available for individuals who are financially eligible, but only if no-one else can fund the action, and only if the case is one that the Legal Services Commission wants to back. Litigants must have sufficient interest, for example service-users of a project, but they risk being accused of being mere “front men” by the defendant if the public body takes the view that it is really the group instructing the lawyers and not the service-users.

Lastly, it is very important to appreciate that any local authority has a very wide discretion as to what it funds and how. There is no duty to fund the voluntary sector as such, and as long as a decision is taken lawfully (following a fair process), they

⁵ The court will often refuse to intervene in the interests of good administration, or because the dispute has become academic because of the passage of time or a change in circumstances.

could in theory cease funding all projects altogether. Our recent experience suggests that many public bodies see the voluntary sector as an easy or obvious target to save on budgets and to a certain extent they are right.

LEICESTER⁶

In the Leicester case the Council made a series of specific errors in public law terms. In 2003, the Council decided they only wanted to fund what they referred to as “core services”. They reviewed the work of the voluntary sector and wrote to all the relevant groups saying they did not provide core services and that their funding would stop at the end of the financial year when their current grants ran out. The groups had 28 days to comment, and then the Council made decisions, cutting the majority of funding. However, the Council had not told the groups what “core services” meant, nor why they specifically were considered not to be providing these services. The Council compounded their error by failing to explain why groups who had been providing “strategic or statutory services” during the last review (only two years earlier) were now facing closure.

The judge found in favour of the groups’ service-users. In his view, once the consultation process (i.e. the groups being asked to make representations) had started it had to be fair. It was unfair in this instance because the Council did not explain what “core” meant. This was a criterion for deciding ongoing funding which had never effectively been put to the groups. The judge relied on earlier legal cases that said consultation must take place when a decision is still at a formative stage; those consulted must have sufficient information to give the proposals intelligent consideration and a reasoned response; the results of consultation must also be taken into account by the public body.

As a result, the judge thought the groups had been treated so unfairly that the Council should be forced to make their decisions about funding again, using a new and fair process. This included explaining the criteria “clearly and comprehensively”.

However, despite this now seeming a straightforward case, at the very start our barrister was very concerned about our prospects of success and was initially doubtful as to whether we would win. This illustrates how difficult it is to predict whether you will be successful in a judicial review claim. The judge repeatedly made the point that even if he found unfairness, he wouldn’t necessarily quash the Council’s decisions. A major factor was that the groups were likely to fold without the funding from the Council. They had all received substantial funding for many years and therefore they had a “legitimate expectation” that they would be fairly and properly consulted about the withdrawal of funding.

⁶ Both Leicester and Manchester were complicated situations with long histories. The points made here are just an outline of the facts from the point of view of the legal issues, rather than the full factual background.

Once the judge decided the process had been unfair, he ordered the City Council to undertake a new process and to do so fairly. The terms of that process were left to the Council and the groups to sort out. I will discuss the outcome below.

MANCHESTER

VAM – part of the Greenfish Partnership - were not so lucky. The Council did make a series of errors and ostensibly unfair decisions, but nothing that was substantial or significant enough to be the basis of a legal challenge. There was a voluntary sector review, including a review of how infrastructure services were to be provided. The Council obtained a report from independent consultants. This was largely favourable and positive about current arrangements, and made some recommendations. The Council then decided to put the contract for CVS support services out to tender. This was on the basis that EC law obliged them to do so because of the value of the contract.

Once the tendering process was entered into, there were considerable delays on the part of the Council. Thus when they announced their decision on 1st April, VAM's contract had already expired, and they were only offered 6 months of "transitional funding" with considerable strings attached.

Here the Council had not behaved well, but they had not gone so far over the line that they could be challenged. The tender process in itself was generally fair: they had set criteria which all applicants were aware of; they had a weighted scoring system, details of which were disclosed; their timetable slipped, but they could argue this was unavoidable and made no difference in the long run. The Council were obliged to operate a fair competitive tendering process once it was under way and therefore any earlier assurances by Council officers (for example that it was a paper exercise and Greenfish would win) were meaningless.

VAM were understandably concerned both about the fairness of the process and the decision itself. However, it is far easier to challenge a process than an actual decision. Failings in a process (e.g. not explaining a criterion properly) are relatively easy to identify and to base a challenge on. However, judgment calls by Council officers have to be irrational (i.e. no other reasonable officer could have reached that conclusion) before they can be the basis of a challenge.

VAM were therefore faced with what seemed a dubious decision: an outside organization with no local connections or track record for providing this sort of service was to be awarded the contract over the well-established and well-respected current consortium. However, with disclosure of criteria, an open tendering process and two-stage scoring, there was no firm basis on which to argue the Council had behaved unlawfully. Whilst VAM and others had genuine concerns over the lack of consultation on the decision to have a non-Manchester-based outfit providing the services, the sector had been fully aware since the tender process started that this was a possibility. Any concerns – in fact any public law challenge – should have

been raised at that stage, when the decision to adopt a tender process was made, not at the end of the process itself.

The courts unfortunately take a relatively pragmatic and businesslike approach to many public law disputes. This was a commercial exercise for the Council who were legitimately trying to obtain the best services at the best value for Manchester residents. The court would be unlikely to intervene on the basis of concerns about future lack of accountability on the part of the Scarman Trust or any deliberate attempt by the Council to oust VAM and its partners from the sector locally.

Unfortunately, the court would also be relatively unconcerned about the impact on the sector generally. The fact that it could be difficult for VAM to continue without Council funding does not make the decision unlawful. Nor is it relevant that the services provided by Scarman will be very different to what was funded previously. This had been apparent since the tendering process started, and the documents confirming this had been in the public domain for several months. The City Council has a wide discretion in terms of what it chooses to fund, and this in itself could not be the basis of a legal challenge.

OUTCOMES

Leicester were lucky in that there was also a change in the political administration which meant that when the fresh consultation process took place, the minority ruling Labour group was inclined to continue funding the services. The groups were also able to negotiate a two-stage process, with clear criteria being disclosed at the outset, and the groups able to comment on the Council's initial view before a final decision was made.

Another project we successfully represented has not been so lucky, although we won the court case itself, illustrating that it can be a hollow victory to succeed in the litigation, but still lose in the long run. They in fact scored worse under the new review process than they had the first time round. However, they were able to take advantage of the new two-stage process, in that the initial view of the local authority was provided to them with considerable detail, enabling them to comment on the misunderstandings and misrepresentations that the funder was putting forward. It also revealed that the public body had expected a level of detail which they had not requested in the first stage of the review. We are awaiting the final decision on that new review process, and the group has been funded for an extra six months in the meantime.

Broader outcomes are hopefully that public bodies will act more fairly in future. I think it is unlikely that Leicester City Council will get caught out in the same way again. They are now holding a conference with a view to developing a Compact in Leicester.

Cardiff Local Health Board defended a case all the way to the Court of Appeal because they thought it would "*set a significant precedent if any organisation from which*

the LHB commissioned services was able to challenge its decision-making process". In fact the organisation has set such a precedent. The LHB must now fund the project until 2008, which will cost over £150,000, plus they must pay all the legal costs of the service-users who brought the claim. The voluntary sector review had been intended as part of a cost-saving exercise when in fact it has probably cost them about £250,000 in legal fees and funding to the groups involved. As with Leicester, I think it is unlikely this public body will act in this way in the future.

LOOK & LEARN

There are a number of important lessons to take home about public law in the voluntary sector: some obvious and practical ones, others more about the legal aspects of the situations we have dealt with.

Practical pointers

- Keep copies of all documents
- Make notes at meetings
- Confirm and clarify decisions by following up meetings with letters
- Don't use inflammatory language; stick to the facts
- Ask difficult questions, even if you think you might not like the answer
- Engage in the process; set up a dialogue; don't put your head in the sand
- Hope for the best, but prepare for the worst
- Get specialist legal advice quickly

Public law pointers

- Has the public body disclosed all the relevant info to you?
- Has the public body consulted properly?
- Have you been given enough time and info to comment properly?
- Do you know what the criteria are for a funding decision?
- Is the public body breaking promises they made before?
- Remember the public body has a wide discretion as to what they fund and how.

CONCLUSION

As you may know, the Public Law Project and NACVS have made a joint bid for funding to the Lottery to establish a training and advice project to help voluntary organisations challenge decisions made by public bodies. In the meantime, we have limited resources to provide some legal advice on the public law issues arising from funding and tendering decisions. Feel free to contact us if you would like our help. We can be contacted by email (l.whitfield@publiclawproject.org.uk) or telephone (020 7697 2192).

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