Neutral Citation No: [2021] NIQB 5	*Ref:* **COL11398**
	ICOS No: **20/045035**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **15/01/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

RE AF's APPLICATION FOR JUDICIAL REVIEW

Mr Seamus Lannon BL (instructed by McEvoy Sheridan Solicitors) for the Applicant
Mr Philip Henry BL (instructed by Director of Legal Services) for the Proposed Respondent

---

COLTON J

Introduction

[1] This application concerns a child with a disability. I will refer to him as HF in the course of this ruling. The applicant, his mother, shall be referred to as AF.

[2] Nothing should be reported in relation to this matter which would lead to the identification of the applicant or her son.

Background

[3] The applicant resides with his mother and father. He has complex needs which include, but are not limited to the following:

(a) Autism Spectrum Disorder.

(b) Global development delay.

(c) Delayed self-help skills.

(d) Speech and language difficulties.

[4] He normally attends a special care school. Because of the Covid emergency the school was closed in mid-March 2020 and remained closed for much of the

period in dispute in this case. It re-opened on 20 August 2020. As a consequence the applicant had to provide care that would otherwise have been provided by the school. Given the inevitable problems associated with isolation and a failure to have the routine and stimulation of school those needs were enhanced.

[5] The applicant is on benefits. She suffers from anxiety and depression. Her husband suffers from incurable/terminal cancer and the applicant has to contribute to his care in addition to that of her son.

The Dispute

[6] The dispute centres on the rates the proposed respondent pays to the applicant for direct provision of care to her son. The proposed respondents are paying a rate of £12.91 per hour for H's care needs. The applicant seeks £21.00 per hour which will become clear from what follows.

[7] Prior to the closure of his school he was assessed by the Trust as requiring:

(a) 8 hours respite care per month during school term.

(b) 22.5 hours per week care during school holidays.

[8] The assessment was based on what is referred to as care support which is at the "base end" of the care hierarchy. The applicant's son is not assessed as requiring care needs such as enteral/tube feeding, management of epilepsy, management of medication or oxygen management which might require more complex care needs such as the involvement of a nurse, occupational therapist or physiotherapist.

[9] As a consequence of his school closing HF's needs were reassessed. Some of the history can be seen in email correspondence between the applicant and the Trust.

[10] In summary on 12 March 2020 the number of hours assessed increased to 22.5 hours per week. This was in accordance with the existing assessment of the requirements for care during school holidays. This was subsequently extended to cover the first two weeks in April. In the interim there was an increase in the hours for term time from 8 hours to 12 hours. At this stage it was anticipated that there might be an early return to school.

[11] On 9 April 2020 the applicant emailed her social worker to express her dissatisfaction with the existing arrangements. There were a series of emails on this date leading her to sum up her position by saying that she wanted £525, which she calculated by taking 25 hours per week (5 hours per day for 5 days per week) and multiplying it by the rate of £21 per hour which was the rate being charged by her preferred carer, Mr R McC. He was providing care on a private basis for a number of people in the area and was familiar with AF as he worked at the school.

[12] The email was as follows:

> "*Catherine (Social Worker)*
>
> *To sum up, I would ask that you confirm, that you will pay the sum of £525 per week in respect of HF's respite which, which is calculated at the rate of 21 per hour for 5 hours per day, 5 days per week.*
>
> *If you do not confirm this by 5pm today, I will take steps to make an application to the High Court under Inherent Jurisdictions. And in relation to that I will be instructing my solicitors to act accordingly.*
>
> *Kind regards*"

[13] According to the respondents the complaint resulted in the matter being "elevated" within the Trust. I pause here to say that I do not consider that this was anything other than entirely appropriate. Thereafter it is clear that the social worker in charge of the case had discussions with AF and explored additional and alternative supports for HF. Speech and language therapy input and Trust child care was offered. The applicant felt this would not be appropriate as RMcC knew HF and was best suited to care for him. There was also discussion of possible additional education supports, to which the applicant was agreeable. The social worker recommended that the applicant should explore other care providers because if her chosen provider became ill or had to isolate as a result of exposure to someone who was ill there would be no carer for HF.

[14] In the course of the ongoing discussions a principal senior social worker in the Trust approved an increase to 35 hours per week during lockdown and school closures which was an increase of 12.5 hours on the 22.5 hours assessed previously. However, the applicant remained dissatisfied and on 15 April she emailed the relevant social workers in which she said:

> "*Firstly, thank you for agreeing to 35 hours per week which is helpful, however this does not cover our worker's hourly rate of £21 per hour. …*"

[15] On 17 April 2020 the social worker spoke to her sector manager setting out the background and as a result obtained authorisation to provide an additional 12 hours per week during term time. This resulted in a total of 47 hours care per week when HF was not at school.

[16] When informed of this decision the proposed respondents say that the applicant was pleased and advised she would not be taking the matter to court. It

will be noted that this ultimately resulted in a payment of £606.77 per week as opposed to the £525 sought in the email of 9 April.

[17] However, on 2 June 2020 the applicant's solicitor wrote to the proposed respondent in which she said:

> *"Mrs F instructs us that she had only access care from a carer who charges a sum of £21 per hour.*
>
> *In the circumstances, we would be obliged if you would confirm the Trust will increase the hourly rate of £12.19 to £21 so that Mrs F can assess the necessary care for her son H. The figure of £12.19 was subsequently increased £12.91 and backdated to 1 April 2020."*

[18] The Trust has maintained its position and this has resulted in the current application.

[19] There is no dispute that HF is assessed as being entitled to 47 hours care during the current pandemic, whilst not at school. He is now to receive 16 hours care per week whilst at school. However, the applicant is adamant that she should receive the £21 per hour because that is the rate charged by her chosen carer Mr McC whom she says is the only carer that she can source.

The Statutory Framework

[20] It is necessary to consider the key statutory provisions. Article 18C(4)(a) of the Children (Northern Ireland) Order 1995, as amended (hereinafter referred to as the "1995 Order") is the central provision in these proceedings.

[21] Article 18C provides for such payments:

> "***Direct Payments***
>
> *18C.—(1) The Department may by regulations make provision for and in connection with requiring or authorising an authority in the case of a person of a prescribed description who falls within paragraph (2) to make, with that person's consent, such payments to him as the authority may determine in accordance with the regulations in respect of his securing the provision of the service mentioned in that paragraph.*
>
> *(2) A person falls within this paragraph if he is—*
>
> *(a) a person with parental responsibility for a disabled child;*

(b) a disabled person with parental responsibility for a child; or

(c) a disabled child aged 16 or 17,

and the authority has decided for the purposes of Article 18 that the child's needs (or, if he is such a disabled child, his needs) call for the provision by it of a service under that Article.

(3) ***Regulations under this Article may, in particular, make provision –***

(a) … ;

(b) ***for any payments required or authorised by the regulations to be made to a person by the authority ("direct payments") to be made to that person ("the payee") as gross payments or alternatively as net payments****."*

[22] I should interject at this stage to say that in this case we are dealing with gross payments. The applicant's means are such that no issue in relation to net payment arises.

[23] I return to the provisions.

"(4) For the purposes of paragraph (3)(b) "gross payments" means payments –

(a) *which are made at <u>such rate</u> as the authority estimates to be equivalent to the reasonable cost of securing the provision of the service concerned; …"*

[24] What then is the rate which the Trust estimates to be equivalent to the reasonable cost of securing the provision of the care which has been agreed for H? The statutory rate is set by the Trust following annual revision by the Board which is determined by the "Market Rate."

[25] At the date the proceedings were issued the rate was £12.19 but this increased to £12.91 because of an update from the Board which was communicated to the Trust in a letter dated 19 June 2020 which said:

"At its meeting on Tuesday 6 June 2020, the HSCB Senior Management Team approved a paper advising that the recommended regional minimum rate for SDS would increase from £12.19/per hour to £12.91/per hour from 1 April 2020."

[26] It is the Trust's case that £12.91 is the equivalent carer's rate for this work throughout Northern Ireland and that it represents market value.

[27] In this regard they actually point out that R McC has been advertising for carers for rates starting at £10.85 per hour.

[28] It is important to understand that under the scheme the applicant consents to opting in to a direct payment scheme. For understandable reasons such a scheme can be preferable for carers. It provides maximum flexibility, more control for the carer and in some situations the option to supplement payments if a particular carer is preferred. This is confirmed by the fact that a person who opts into a direct payment scheme signs a "**Direct Payment Scheme Agreement Form**" which states at paragraph 2:

> *"The amount of money you receive will be based on your need for assistance as detailed in your assessment and in keeping with the Trust's criteria for support at home (see attached). The rate paid will be set out and reviewed annually by the Trust."*

[29] Therefore, if an applicant carer does not wish to avail of the scheme there is no obligation to do so. It will then fall on the Trust to provide the necessary alternative arrangements for an assessed person's care.

[30] There is no doubt that the restrictions imposed by the Covid-19 pandemic have caused great difficulties for many people in all walks of life.

[31] This is particularly so for those such as the applicant who care for disabled children in very difficult circumstances. I have no doubt that the applicant is right when she says that this has caused her and her family significant stress. It is clear that she is doing the best for her son and I can well understand her desire to employ Mr McC as his respite carer – although an over reliance on one carer could be problematic if for any reason that carer should become unavailable.

[32] In my view it is also clear that the social workers who work with the applicant are sympathetic to her situation and have actively responded to her representations as evidenced by the very significant increase in hours of care provided to her.

Consideration

[33] The case boils down to whether the Trust has acted unlawfully in its decision to pay a rate of £12.91 per hour in respect of the agreed hours of care for the applicant.

[34] In considering this matter I bear in mind that this is a leave application. The applicant need only establish an arguable case which has been described as a modest threshold.

[35] It is however a public law challenge and the onus remains on the applicant to establish such an arguable case.

[36] The Order 53 Statement in this case is drafted in diffuse terms but I propose to focus on any issues of illegality, irrationality or procedural irregularity.

[37] Obviously the payment rate is within the statutory scheme and the relevant regulations.

[38] The decision to pay the rate of £12.91 per hour could in no way be considered irrational. There is a clear and logical basis for it. It is a rate assessed on an annual basis by the Board which is a body with appropriate expertise.

[39] Equivalent carers work for this rate throughout Northern Ireland. These rates are regularly referred to in civil courts when assessing care rates in assessment of damages. It has been fairly described as the market rate and certainly there is no empirical evidence to the contrary.

[40] In this context it must also be remembered that the only rate that has been suggested by the applicant is £21.00 per hour – almost twice the market rate. There is no evidential basis for any other rate between the figures before the court that might be agreed as suitable.

[41] One issue that does give me pause relates to the point raised by Mr Lannon at the outset of his submissions. He draws my attention to the fact that the rate is described by the Board as "the recommended regional <u>minimum</u> rate." (My underlining)

[42] This rate, which the Trust pays throughout Northern Ireland, has been repeatedly referred to by Mr Henry and the Trust as "the standard rate."

[43] Mr Lannon submits that in fact and in practice the Trust has unlawfully fettered its discretion by failing to consider a higher rate which it would be entitled to do as the rate is described as a minimum one.

[44] He argues that the failure to consider a higher rate and in effect to slavishly follow the minimum rate is an unlawful fettering of its discretion.

[45] In so doing he says that there are arguable grounds for saying that the Trust has acted unlawfully.

[46] Alluring as this argument might appear I consider that it is unmeritorious in the context of this case.

[47] I note the assertion on behalf of the Trust at paragraph 56 of the position paper which was directed by McAlinden J by way of response to the application to the effect that "having taken the above letter into account, the Trust would consider an increase in the standard rate if the particular circumstances of a case required it, but the Trust's assessment of the current applicant's case is that there is no justification for departing from the standard rate."

[48] The letter to which the paragraph refers is one from the Chief Social Worker at the Department of Health on 4 August 2020 which encouraged Social Care Trusts to apply flexibility in their support of direct payment recipients having regard to the challenges arising from the Covid-19 pandemic. The examples of flexibility did not include increasing the standard rate of payment.

[49] That this response was made in the absence of the specific pleading of the point above is in my view significant. The assertion that the Trust would consider an increase in the standard rate if the particular circumstances of the case required it is plausible but more importantly is the, in my view, entirely reasonable suggestion that there is no justification for departing from the standard rate in this case. There is simply no evidential basis for saying that a higher rate would provide the care for AF other than the figure of £21.00 being put forward by the applicant. That is the only alternative option before the court.

[50] I consider it is inconceivable that the Trust, as a public body, could agree to pay the rate of £21.00 which is, as I have said, almost double what the Board has determined to be the market rate or the minimum payment appropriate let alone any suggestion that a refusal to do so would be unlawful.

[51] It is clear from the history of this case that the social workers who have liaised with the applicant have demonstrated flexibility in their approach since March 2020.

[52] I repeat the applicant opts into this scheme. The scheme envisages provision of care, not the provision of care by a particular carer at the rate charged by that carer. If the applicant is unhappy with the level of payment under the scheme she can withdraw and the onus will then fall on the Trust to provide the necessary level of care as assessed at any particular time.

[53] The court cannot grant leave on a speculative theoretical basis that there may have been a fettering of discretion in the face of an assertion to the contrary and the complete absence of any evidence as to proposed alternate rates other than the £21.00 being charged by Mr McC, who it is noted is advertising for carers at a rate of £10.85 per hour.

[54] I cannot see that there is any arguable case in this application.

[55] It is of course important that the applicant and the Trust continue to liaise as circumstances develop and change. They should be willing to be flexible within the legal parameters to ensure the best care for HF.

[56] For the reasons set out leave is refused.