

January 2011

In this Issue

Pages 1– 3

Judicial Review and Church of England
Mark Hill QC

Pages 3-5

The Judicial Review of Compromise Agreements
Spencer Keen

Pages 5-7

Who is 'looking after' the children?
Leslie Samuels

JUDICIAL REVIEW AND THE CHURCH OF ENGLAND

Religious organisations generally are not amenable to judicial review. As a matter of law, they are private members clubs. See generally *R v Chief Rabbi, ex parte Wachmann* [1992] 1 WLR 1036, and *R v Provincial Court of the Church in Wales, ex parte Williams* (1998) 5 Ecc LJ 217, Latham J. Accordingly, disputes are governed by the law as it applies to unincorporated associations and by principles of quasi-contract and the law of trusts. Examples of this include *Dean Burne* [2009] EWHC 1250 (Ch) (Russian Orthodox) and *Varsani v Jesani* [2002] 1999 Ch 219 (Hindu schism).

However, the established nature of the Church of England renders

its component institutions more readily amenable to judicial review.

In the seminal decision of the House of Lords in *Parochial Church Council of Aston Cantlow v Wallbank* [2004] 1 AC 546, Lord Hope of Craighead recognised that '*the relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government*' (para 61). However, the fact that organs of the Church of England (in that case a parochial church council) are not 'public authorities' for the purposes of the Human Rights Act 1998, is not determinative of whether



PUMP COURT
CHAMBERS

CIVIL
TEAM

Newsletter

JUDICIAL REVIEW AND THE CHURCH OF ENGLAND CONTINUED

they are susceptible to public law remedies by way of judicial review in the Administrative Court.

Challenges to the legislation permitting the ordination of women as priests led to a plethora of judicial review challenges: see, for example, *R v Archbishops of Canterbury and York, ex parte Williamson* (The Times, 9 March 1994) and a similar volume litigation can be expected if General Synod submits a Measure to the Ecclesiastical Committee of Parliament making provision for women to be consecrated bishops. Likewise, were individuals or groups to accept Pope Benedict XVI's invitation to join an Anglican Ordinariate under the terms recently outlined in *Anglicanorum Coetibus*, certain issues of a public law nature might arise remediable, at the behest of those affected, by means of judicial review.

Some years ago, I wrote a short piece on 'Judicial Review of Ecclesiastical Courts' published in Doe, Hill and Ombres, *English Canon Law* (University of Wales Press, 1998). Since then, diocesan chancellors have taken out a policy of insurance to cover the potential costs of defending a challenge to one of their decisions in the Administrative Court. Challenges, though rare, are not unknown. A case was brought in *R v Chancellor of St Edmundsbury and Ipswich, ex parte White [1948] 1 KB 195*, and more recently in *R v Chancellor of Chichester, ex parte News Group Newspapers [1992] COD 48*, where objection was taken by the press to certain of the proceedings of a notorious clergy discipline case being heard in camera; and *R v Exeter Consistory Court, ex parte*

Cornish (1998) 5 Ecc LJ 212 which arose from the determination of a faculty petition and reached the Court of Appeal.

Some while ago Brooke J in *R v Bishop of Southwark, ex parte the PCC and Churchwardens of St Luke, Kingston*, 13 November 1995, sounded a note of warning to diocesan bishops minded routinely to suspend presentation to benefices in the absence of a case-specific pastoral scheme being genuinely under consideration. Thankfully for the parish (but regrettably for the jurist) this matter was compromised before the full hearing took place, thus the judge's remarks at the leave stage do not carry any great weight of precedent. However, contrary to certain rumours, rights of patronage will survive the introduction of common tenure under the Ecclesiastical Offices (Terms of Service) Measure 2009. Patrons will need to be astute to safeguard their historic rights.

The provisions of the Clergy Discipline Measure 2003 have given rise to challenges to decisions of the President of Tribunals and the likelihood is that these will increase in the future, as complainants feel empowered to seek redress against wayward clerics. Likewise, bishops remain vulnerable to challenge to the extent that they may act *ultra vires*. Note for example, *R v Bishop of Stafford ex parte Owen [2000] 6 Ecc LJ 83*, where a challenge was made to a decision not to renew a team rector's licence and *R(Gibbs) v Bishop of Manchester [2007] EWHC 480*, where the method of termination of a licence for a church army captain was scrutinised by Munby J. In neither of these

Newsletter

JUDICIAL REVIEW AND THE CHURCH OF ENGLAND CONTINUED

cases was the complaint upheld, but the judgments emphasise the need for transparency in consultative exercises and clarity of both thought and expression in decisions which affect the rights and livelihood of others.

In St Luke's gospel, ch 11, v 26, Jesus says: 'Woe unto you also, ye lawyers, for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers'. However, the established Church of England is not above the burden of judicial review of administrative action which has increased exponentially in the last half century. The need to act lawfully, fairly and openly is not merely a sound Christian principle, but one which is increasingly

enforceable through the secular courts.

Mark Hill QC heads the Civil Team at Pump Court Chambers. He is regularly instructed in judicial review proceedings and has a particular expertise in the law of religious organisations. He is Chancellor of the Dioceses of Chichester and Europe and editor of the Ecclesiastical Law Journal. His publications include Ecclesiastical Law (now in its third edition), Religious Liberty and Human Rights and various articles in leading periodicals including Public Law. His latest work, Religion Law, co-authored with Professor Norman Doe and Dr Russell Sandberg was published in 2010.

THE JUDICIAL REVIEW OF COMPROMISE AGREEMENTS

In ***Rose Gibb v Tunbridge Wells NHS Trust* [2010] EWCA Civ 678** the Court of Appeal considered, amongst other things, the question of whether a compromise agreement between the Trust and an outgoing Chief Executive was ultra vires because it was irrationally generous.

The Facts

Ms Gibb was the Chief Executive of the Trust. She was paid £150,000 per year and had a significant pension entitlement. In 2006 there was an outbreak of the superbug *C.Difficile* in the hospitals managed by the Trust and a number of people died. In mid to late 2007 the Healthcare Commission investigated the outbreaks and produced a draft report which was highly critical of the leadership of the

Trust. The Trust, in anticipation of receiving a final report that advised a change in leadership, offered Ms Gibb a compromise agreement in the sum of £250,000.

Before the payment was made to Ms Gibb the Director-General of NHS finance instructed the Trust to only pay Ms Gibb £75,427.00 (representing the payment in lieu of notice) and to withhold the balance. Ms Gibb sued.

Had Ms Gibb been summarily dismissed without any compensation she would only have had two claims against the Trust. The first would have been a wrongful dismissal claim for payment in lieu of notice (£75,427.00) and the second an unfair dismissal claim (for the statutory maximum of £60,600). By agreeing to pay Ms Gibb

Newsletter

THE JUDICIAL REVIEW OF COMPROMISE AGREEMENTS CONTINUED

£250,000, the Trust was therefore giving Ms Gibb £100,000 more than she would have received had both potential claims been entirely successful. The Trust defended Ms Gibb's action to enforce the Compromise Agreement on the basis that the agreement was irrationally generous and therefore ultra vires. The Trust's defence was upheld in the High Court but Ms Gibb appealed successfully to the Court of Appeal.

The Decision

It was not disputed that a public body entering into a contractual obligation with an employee or ex-employee is constrained by the general duty in public law not to enter into an undertaking which is irrationally generous in the sense that no reasonable decision maker would have committed to it.

The High Court had held that the agreement was ultra vires because:

- i. the Trust had undertaken no proper financial analysis of the additional legal and management costs;
- ii. the Trust had mistakenly assumed that the Claimant would achieve a maximum award of compensation for unfair dismissal;
- iii. the Trust's consideration of the Claimant's years of good service and loss of office did not evidence a proper consideration of the need (a) not to be seen to reward failure and (b) to regard payments over and above statutory and contractual liabilities as exceptional.

Lord Justice Laws, in the Court of Appeal,

rejected each of these criticisms and noted that where a public authority was seeking to rely on its own irrationality the courts should not allow it to escape too easily from its commercial commitments.

His Lordship held that the High Court had incorrectly substituted its own opinion as to what financial prudence required and that the Trust had legitimately considered a range of opinions on the cost of not entering into the compromise agreement. Lord Justice Laws also disagreed that the Trust had simply assumed that there would be an unfair dismissal with a maximum award and held that it was clear that the Trust would have considered fighting the case if necessary.

Importantly, Lord Justice Laws found that, when offering a compromise agreement, the Trust could legitimately have regard to other intangible factors such as Ms Gibb's many years of good service, the time that it might take her to find other employment, and matters such as the desirability of a clean break and confidentiality.

The Court of Appeal concluded that the decision to pay Ms Gibbs over and above the maximum that she would be able to receive had she pursued a legal claim was not irrational. The payment was made because of the intangible factors referred to above and in order to avoid a costly dispute – these were rational considerations. Furthermore the size of the payment which was made in response to these concerns was **not** so outlandish as to merit interference. Lord Justice Sedley stated that “*on the scale of severance payments not*

Newsletter

THE JUDICIAL REVIEW OF COMPROMISE AGREEMENTS CONTINUED

only in the private sector, £240,000 was not on its face outlandish compensation for the arbitrary termination of a career which it was unlikely Ms Gibb would be able to resume or resurrect."

A person earning the average wage might be surprised by the notion that an ex gratia payment of £100,000 to a public servant was not outlandish. The fact that the Court of Appeal did not consider the payment to be outlandish perhaps reflects the difficulty of proving Wednesbury unreasonableness when the unreasonableness relied upon is one's own. Alternatively, the more cynical may say that it is a reflection of what a Lord Justice of Appeal considers to be a significant sum of money.

Many commentators have reported that this case demonstrates that Courts will not interfere with compromise agreements made

between employees and public bodies. This is not the case. Although difficult, irrationally generous compromise agreements can be challenged even if the public body has to rely on its own irrationality. However, the assessment of reasonableness would not depend solely on tangible financial factors and so public authorities have a very broad discretion to set the amount of the settlement.

Spencer Keen is a member of the Judicial Review Practice Group at Pump Court Chambers. He has particular expertise in discrimination law and disciplinary proceedings. His publications include a book on Disability Discrimination published by Oxford University Press in 2009.

WHO IS 'LOOKING AFTER' THE CHILDREN?

Conventionally, we think of children who are in the care of a local authority (or 'looked after') as living in a foster placement or at a children's residential home. We may also consider the only route to a child coming into the care system to be through public law care proceedings.

Yet s.20 of the Children Act 1989 provides a route by which children may gain 'looked after' status, without the need for court proceedings. Sometimes such children may be placed with relatives or friends. Indeed, local

authorities have a statutory obligation to consider such a placement. Deciding whether a child living with relatives or friends is, in fact, being 'looked after' by the local authority will have important consequences.

It will be important for two main reasons. First, if the child is 'looked after', the relative or friend may be entitled to a foster carer's allowance to meet the cost of caring for the child, i.e. he or she may be entitled to be paid at the same rate as a designated local authority

Newsletter

WHO IS 'LOOKING AFTER' THE CHILDREN?

CONTINUED

foster carer. It is frequently said by local authorities that no-one can be paid a foster carer's allowance unless properly assessed and authorised to provide that service. That is a misunderstanding of the current legal position.

Secondly, an older child will, if 'looked after' for more than 13 weeks, be entitled from age 16 to 'leaving care' services which will include the appointment of a personal advisor, the creation of a specific 'pathway' assessment and plan and possible financial assistance, particularly with education and training. These are important and worthwhile benefits which flow from the child having been 'looked after'.

In ***Southwark LBC v D [2007] 1 FLR 2181*** a child made allegations at school of violence by her father. The local authority made arrangements for the child to stay with a woman who had formerly been her father's partner. The LA argued they had merely facilitated a private fostering arrangement but the child argued that she was 'looked after' by the local authority under s.20 Children Act 1989.

The Court of Appeal confirmed that there are two routes by which a local authority may place a child to which it owes duties under s.20 of the Children Act 1989 in a family placement. Either the local authority could make such a placement itself under s.23(2) or it can make arrangements for the child to live with a relative, friend or other person connected with him pursuant to s.23(6). Under the former placement the child would be 'looked after' but under the later it would

not. The test for deciding between these alternative placements was not a matter of designation by the local authority but one for the Court taking into account the circumstances under which the placement had been made.

If the local authority takes a major role in making those arrangements, and does not explain clearly to the carer the nature of the proposed arrangements and the financial consequences, the court is likely to conclude it was exercising its powers under s.20 of the Act and, therefore, that the child was 'looked after' by the local authority.

More recent cases have emphasised the importance of the local authority explaining to the adult with whom the child is to be placed the different placement options and explaining, if the local authority wishes to pursue a s.23(6) placement, that the adult and not the local authority will have financial responsibility for the child.

In ***Collins v Knowsley Metropolitan Borough Council [2009] 1 FLR 493*** Michael Supperstone QC held that where the local authority did not explain to the carer the basis upon which the child was living with her, or the financial consequences, the placement had been made under s.20 and the child was, therefore, 'looked after'.

In ***SA v A Local Authority [2010] EWHC 848 (Admin)*** the child had been placed with her grandmother. Black J held that there was a pattern of social services' involvement which was not consistent with a private family arrangement. The local authority had taken a

Newsletter

WHO IS 'LOOKING AFTER' THE CHILDREN?

CONTINUED

had monitored and regulated matters in a way that was consistent with the protection of a looked-after child. She found it was notable that it had not set out the ambit of any financial help that might be available and nobody had told the grandmother that she would, essentially, be on her own in financing the child's stay with her. It was up to the local authority to ensure that the parties understood what they were agreeing to.

The making of a private law order securing the placement of child with the carer, for example a residence order, will bring to an end any 'looked after' status and, therefore, any entitlement to a foster carer's allowance (per Black J. in **GC v LD** [2010] 1 FLR 583). However, in such circumstances the carer should look to secure from the local authority an appropriate compensatory payment, such a residence order

allowance pursuant to paragraph 15 of Schedule I of the Children Act 1989. A helpful summary of a local authority's obligations in respect of such an allowance are set out in the judgment of Charles J in **R (on the Application of M) v Birmingham City Council** [2009] 1 FLR 1068.

Leslie Samuels is Head of the Judicial Review Practice Group at Pump Court Chambers. He has appeared in a number of cases concerning provision for children and vulnerable adults including the cases of **R (L) v Nottinghamshire County Council** [2007] EWHC 2364 (Admin) and **R (EW and BW) v Nottinghamshire County Council** [2009] EWHC 915 (Admin) [2009] 2 FLR 974.

The information and any commentary on the law contained in these articles is provided free of charge for information purposes only. Every reasonable effort is made to make the information and commentary accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by the author or the publisher or Pump Court Chambers. The information and commentary does not, and is not intended to, amount to legal advice to any person on a specific case or matter. If you are not a solicitor, you are strongly advised to obtain specific, personal advice from a lawyer about your case or matter and not to rely on the information or comments on this site. If you are a solicitor, you should seek advice from Counsel on a formal basis.

3 Pump Court

Temple, London EC4Y 7AJ
Tel 020 7353 0711
Fax 0845 259 3241
DX 362 London

31 Southgate Street
Winchester SO23 9EB
Tel 01962 868161
Fax 0845 259 3240
DX 2514 Winchester

clerks@3pumpcourt.com
www.3pumpcourt.com

5 Temple Chambers

Temple St. Swindon SN1 1SQ
Tel 01793 539899
Fax 0845 259 3242
DX 38639 Swindon 2