**OUTER HOUSE, COURT OF SESSION**

**[2022] CSOH 68**

**P1015/21**

OPINION OF LADY CARMICHAEL

In Petition of

AB

Petitioner

for

Judicial Review

**Petitioner: Brodie KC, M Crawford; Urquharts**
**Respondent: R Macpherson; Clyde & Co**

20 September 2022

**Introduction**

[1] CD has Alzheimer's disease. She formerly attended the Teviot Day Service in Hawick ("the service"). That was a day care service for adults operated by Scottish Borders Council ("the council"). It provided medium to high level care for between 12 and 14 people. On 4 June 2019 an executive committee of the council made a decision accepting the following recommendation:

> "It is recommended that the Executive Committee
>
> (a) notes the expansion of Local Area Co-ordination to all areas of Scottish Borders; and
> (b) agrees to the decommissioning of individual Day Services when suitable alternatives that meet assessed needs are identified following the introduction of the new model of Local Area Co-ordination for older adults."

[2] The service stopped operating in March 2020 because of the pandemic. It has never re-opened. CD now lives in a care home. There have been no new referrals to the service. The council say that no referrals could be made because of the pandemic, and that, in any event, it is reasonable that no referrals should be made to a service that is the process of being decommissioned.

[3] AB is CD's son and guardian. He argues that the decision of 4 June 2019 was a decision in form and substance to close the service. He brought a petition for judicial review in the latter part of 2021. On 8 February 2022 the Lord Ordinary extended the time limit in terms of section 27A of the Court of Session Act 1988 and granted permission to proceed.

[4] AB argues that the decision to close the service was unlawful because the council did not carry out an equality impact assessment. He says also that the council did not fulfil their duties to consult the users of the service, and that the users had a legitimate expectation that they would be consulted. The council submits that although the decision was indeed one to close the service, the actual closure was conditional upon suitable alternatives being available to the users of the service.

[5] The council also submits that it is relevant to look at what happened before 4 June 2019. In particular it says that a meeting that took place on 14 March 2019 was in substance consultation, and that the council took into account what happened at the meeting. It also invites consideration of some events after 4 June 2019.

**The facts**

[6] There is no dispute about the chronology. The following account draws in particular on the content of AB's affidavit, and that of Mr Michael Curran.

[7] CD attended the service 3 days a week. The council provided a minibus which took her to and from the service. CD had a good relationship with the staff.

[8] On 12 March 2019 SB Cares, a care organisation run by the council, sent a letter to those who attended the service. It gave notice of a meeting on 14 March 2019, which Michael Curran, a programme manager, would attend. It read:

> "Michael will describe the vision for Transformation of Older Adults Day Services within SB Cares. All service users and their family/carers are invited to come to this meeting which will provide opportunity to ask questions afterwards."

AB did not understand this to be an indication that the service might be closing. He did not attend it.

[9] Michael Curran's account of the meeting is this:

> "The March meetings were intended to be conversational, however, there was significant kickback at the meeting and, for that reason, when the matter was placed before the Executive in June the approach was moderated and that it was agreed that no Centre would close until each individual client's needs were fully assessed and they were able to be given an appropriate alternative provision which would fully meet those needs. The plan included adaptations to timescales and the local area co-ordination activity as a result of initial concerns arising from the consultation. This is seen in the Executive Report."

[10] On 24 April 2019 AB received a letter from Stuart Easingwood, Chief Social Worker and Public Protection Officer. It stated:

> "As you may be aware, the Council is embarking on the transformation of our older adults' day service provision across the Scottish Borders. This is in response to an increase in the number of people choosing to engage with a range of community based options such as lunch clubs, classes, social centres and other activities, and a corresponding decrease in those opting to attend day centres.
>
> We would like to reassure you, however, that we are at an early stage in the engagement process. We will be making arrangements in due course to meet individually with each day service user like yourself to explain more about the review and what the potential options might be going forward."

AB got in touch with a Ms Brown, whose mother also attended the service. On 14 May 2019 she received an email from Mr Curran stating that he had been requested to take an update

to the council on 4 June 2019. He noted that he would update families following that meeting. AB received a further letter from Mr Curran on 28 May 2019 announcing that there would be a meeting at the service on 12 June 2019 to explain more about the changes and what future services might look like.

[11] On 3 June 2019 AB learned from a news release of the terms of the recommendation to be put before the executive committee on the following day. He emailed a number of councillors expressing his concerns, which included one that there was no suitable alternative for CD in Hawick.

[12] Paragraph 7.3 of the report put before the executive committee for the meeting of 4 June 2019 read:

> "An Equalities Impact Assessment has been carried out on this proposal and it is anticipated that there are no adverse equality implications."

Paragraph 8 of the report, which is headed "Consultation", read:

> "8.1 The Chief Executive, the Chief Financial Officer, the Monitoring Officer, the Chief Legal Officer, the Chief Officer Audit and Risk, the Service Director HR Communications and the Clerk to the Council have been consulted and comments received have been incorporated into the final report.
>
> 8.2 Others consulted were –
>
> - Corporate Equalities and Diversity Officer
> - Chief Finance Officer, Integrated Joint Board, Scottish Borders Health and Social Care Partnership
> - General Manager - Primary & Community Services. Scottish Borders Health and Social Care Partnership
> - General Manager Mental Health and Learning Disability Services, Scottish Borders Health and Social Care Partnership"

[13] On 4 June the executive committee made the decision already referred to.

[14] On 6 June AB received a letter from John Lamont MP enclosing an email from the leader of the council. It included the following:

> "the re-imagining of day services in the Scottish Borders has been an ongoing project for the last five years …
>
> No day centre will be closed until every client is happy with the package that is in place for them. That commitment is absolute and is confirmed in the paper for the Executive. If day centres were the best option and gave the best outcomes, then we would be continuing with day centres …
>
> It is always difficult for families when their relative's care package changes. However, it is important to emphasise that no day care centre will close until every client has a package in place that they are happy with."

[15] AB subsequently received various assurances in similar terms. It is not necessary to narrate the terms or dates of those.

[16] There were two service users for whom the council was unable to agree alternative packages of care before the centre closed. One of them was CD.

***The Equality Impact Assessment***

[17] Although the council produced a number of assessments, only one clearly relates to the period before 4 June 2019 (7/1 of process). It is said to date from 2018/2019, but is undated.

[18] A further assessment (7/2 of process) is also undated. It contains a link to a Word document on its second page, described as "Initial Equality impact assessment carried out on initial project proposals in 2018/19". It goes on to say:

> "additional work carried out in February 2019 inserted below
>
> (get this off Iain D)
>
> Translated and additional work carried out to come in line with new EIA policy August 2019"

The document includes references to meetings in March 2019. It is impossible to tell when any particular words were included in this document. Counsel did not submit that the document produced as 7/2 was completed before 4 June 2019, and recognised that it might be as late as August 2019.

[19] Counsel submitted that because the petition was raised late, it had been harder to gather information. He recognised, however, that even where there have been various iterations of a document over a time, involving amendments, it is easy to preserve the versions in circulation at particular dates. He recognised that the ability to identify documents as they stood at particular dates might be important, and that it would not be unreasonable to expect a local authority to keep its records with that in mind. I should have expected a local authority to be able to identify and to produce an equality impact assessment where such an assessment had been referred to in a report put before an executive committee, and to be able to say with some certainty that it was the version mentioned in the report.

[20] The title of the proposal to which 7/1 ("the EIA") relates is "Review of Day Services" (Older People and Learning Disability). The description of the proposal reads:

> "The Re-imagining Day Services Review project is ongoing, a key pillar of the Integration Joint Board Integrated Transformation Programme. Following implementation of its recommendations, some existing day centre provision will be decommissioned. This may impact on the current SB Cares General Fund Contribution level and on the current level of service required from SB Cares. This will not have a detrimental impact on Health & Social Care staffing although there may be potential impact for SB cares staff. The Council's HR Policies and Procedures will be utilised to manage and mitigate any staffing changes/reductions."

The assessment identifies possible negative impacts in relation to the protected characteristics of age and disability. The explanations given in relation to those characteristics were, respectively:

> "Potential to reduce Adult Day Services, Social Centres & Community Health Teams. Alternatives will be developed and provided for individuals with the aim of providing more interaction in the community."
>
> "Potential to reduce Learning Disability Day Services/Physical Disability Services. Alternatives will be provided with the aim of providing more interaction in the community."

The author of the report indicated that he was "fairly certain" of the answers he had given. "Fairly certain" is defined in the form as meaning:

> "Fairly Certain - but don't have concrete evidence to support my answers so would recommend further assessment be conducted if the proposal is accepted."

[21] The EIA does not appear to have been produced as an appendix or supporting paper with the report put to the committee. The EIA, as already noted, does identify possible negative impacts in relation to the protected characteristics of age and disability. It is not clear on what basis the author of the report represented that it was anticipated that there would be no adverse equality implications.

[22] Although counsel did not submit that the assessment produced as 7/2 pre-dated the decision, or that it was the assessment referred to in the report put to the committee, for completeness I record that it also identifies possible negative impacts in relation to those protected characteristics.

**The Law**

[23] There was no material dispute as to the law that I should apply.

***The public sector equality duty***

[24] Section 149 of the Equality Act 2010 imposes the public sector equality duty. A public authority must in the exercise of its functions have due regard to the need to

eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between persons who share a relevant protected characteristic and persons who do not share it: section 149(1).

[25] Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low: section 149(3). The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include steps to take account of disabled persons' disabilities: section 149(4).

[26] Regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 provides:

> "5(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.
>
> (2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).
>
> (3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact."

[27] What is necessary to fulfil the duty imposed by section 149 of the 2010 Act is explained and summarised in *R (Bracking)* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. The summary of the law in *Bracking* has been endorsed and applied recently in this jurisdiction, by Lord Boyd of Duncansby in *McHattie* v *South Ayrshire Council* 2020 SLT 399 at paragraphs 24 to 26:

"[24] … (i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;

(ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

(iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(iv) The duty is non-delegable; and

(v) Is a continuing one.

(vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

[25] For present purposes there are I consider three important aspects to that summary. The first is that the duty has to be fulfilled before a policy that might affect a particular class of protected persons is adopted. It is an essential preliminary to lawful decision making: see also *Monaghan on Equality Law* (2nd edition), at 16.66.

> The second point is that the duty must be exercised in substance with rigour and an open mind. It is not a question of ticking boxes.
>
> [26] The third aspect is the continuing nature of the duty. That means that as policy evolves due regard has to be made to the duty under section 149 of the 2010 Act. The duty does not end with the completion, for example, of an EIA. As the policy is developed and executed the public authority must continue to have regard to the duty."

***Consultation***

[28] At common law a legitimate expectation to be consulted may arise from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation: *R (Moseley)* v *Haringey LBC* [2014] 1 WLR 3947, paragraph 35. Procedural fairness is a rationale for consultation, and the common law regarding procedural fairness, bearing in mind the purpose of consultation, informs how the consultation is to be carried out: *Moseley*, paragraphs 23 and 24. The requirement that a consultation be fair is liable to result in better decisions, by ensuring that the decision maker receives all relevant information and that it is properly tested. It will avoid the sense of injustice which the person who is the subject of the decision will otherwise feel: *Moseley*, paragraph 24, citing *R (Osborn)* v *Parole Board* [2014] AC 1115.

[29] Consultation is a process within which a decision maker at a formative stage in the process invites representations on one or more possible courses of action. The decision maker's obligation is to let those who have potential interest in the subject matter know in clear terms what the proposal is. The decision maker must give sufficient reasons for any proposal to permit intelligent consideration and response. Adequate time must be given for consideration and response. The product of consultation must be conscientiously taken into account in finalising the proposal: *Moseley*, paragraph 25, and authorities cited there; see

also *R (LH)* v *Shropshire Council* [2014] PTSR 1052 at paragraphs 21 to 26; *R* v *Devon County Council ex p Baker* [1995] 1 All ER 73.

**Decision**

***The public sector equality duty***

[30] The council did carry out an EIA. It is notable, however, that the EIA did not relate specifically to the service with which this petition is concerned. It related to a proposal that "some existing day centre provision" would be decommissioned. It contained a recommendation for further assessment if the proposal - namely what is apparently a fairly high level proposal to decommission some day centre provision - were to be accepted.

[31] There was no assessment before 4 June 2019 of the impact of bringing to an end the service provided at the Teviot Day Centre. The EIA produced contains no relevant evidence relating to persons who share the characteristic either of disability or age who used that service. It contains very brief summaries of the bases on which there might be negative impacts on persons sharing those characteristics, and records an aspirational assertion that "alternatives [would] be developed and provided for individuals with the aim of providing more interaction in the community." It does not contain any detail as to the needs of individuals using the service, or any evidence-based assessment that there would be suitable alternatives for the individuals in question.

[32] The EIA contains no evidence from users of the service. For the reasons given later in this opinion, I am satisfied that the council did not fulfil its duty to consult with the users of the service. As Lord Boyd of Duncansby observed in *McHattie* at paragraph 35, it is difficult to see how an EIA can be concluded properly without consulting the users of the service. There is nothing of any substance in the EIA which might assist the council to

have due regard to the need to advance equality of opportunity, to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic, or to take steps to meet the needs of persons who share a relevant protected characteristic. The EIA itself is in the most general terms, and is the sort of "box-ticking" exercise deprecated in the authorities to which I have already referred.

[33] The council took its decision in a situation where there was not an EIA which satisfied the requirements of the 2012 regulations. It was not provided with information such as to permit it to exercise its duties under section 149 of the 2010 Act with rigour. The reference to an equalities impact assessment, such as it is, in the report to the executive committee, is difficult to reconcile with the terms of the EIA.

[34] The council's contention came to be that it was aware of, and had regard to, the needs of individuals by reference to the protected characteristics of age and disability. The solution the council chose was the provision of alternative services for individuals, and the decision was that the service would not close until a suitable alternative had been found for every user. The council had taken into account what Mr Curran described as "kickback" from the meeting on 14 March 2019. It had therefore had, in substance, due regard to its duties under section 149.

[35] I reject that contention. Evidence about the needs of existing users is plainly important in relation to meeting the needs of those users. It is, however, important not only in relation to existing users. Evidence of that sort is also capable of informing a local authority about the needs of potential service users who share the protected characteristics of the existing service users. The duty of the local authority is not confined to considering the impact of a new policy on existing service users. The local authority must have due regard to the needs identified in section 149, which relate to persons with protected

characteristics more generally. It must consider the steps to meet the needs of disabled persons by taking account of the disabilities of disabled persons.

[36] In providing a solution focused on existing service users for whom no alternative service could be identified, the council failed to have due regard to the needs of disabled persons more generally, and in particular persons with disabilities similar to those of CD. There is no indication that the council considered with rigour the possibility that the service might remain open, or that keeping it open might be necessary to meet the needs of persons with disabilities similar to those of CD. I bear in mind that no alternative provision was in fact found for her. It might be that the council would have determined to decommission the service, even absent any alternative provision for persons who had disabilities similar to those of CD, even if it had had due regard to the needs of persons with such disabilities. I am satisfied that it did not have due regard to those matters, and that its decision is unlawful.

***Consultation***

[37] So far as consultation is concerned, the council did not submit that users of the service had no legitimate expectation that they would be consulted. The council was correct to take that approach. The interests of the users of the service, including CD, were of such a nature as to give rise to such an expectation. Rather, the council's submission was that the meeting on 14 March satisfied the requirements of consultation, and that it responded to the consultation by moderating the proposal in the way already described.

[38] The meeting was held at short notice. The notice of the meeting did not let those with an interest know, in clear terms, that the proposal was to close the service. A statement

that at a meeting an individual will "describe the vision for transformation" is not clear notice of a proposal to close a service.

[39] The meeting was not held at a point when the proposals were still at a formative stage. The language used by Mr Curran ("the approach was moderated") indicates that there was a clear plan to decommission. It was moderated only to the extent of delaying closure until the individual needs of service users had been met. His evidence indicates that at the time of the meeting of 14 March, the mind of the council was not open to the possibility that the service would not be decommissioned.

[40] The meeting of 14 March therefore lacked a number of the essential features of consultation which I have described in paragraph 29, and is unlawful.

***Remedy***

[41] I have concluded for the reasons given above that the decision taken on 4 June 2019 was unlawful by reason of a failure to have due regard to the needs specified in section 149 of the 2010 Act, and at common law by reason of failure to consult. The council submitted that I should restrict any remedy to one of declarator. I should take into account the delay in raising the petition, notwithstanding the interlocutor granting permission. Matters had moved on since June 2019. The pandemic had intervened. The service had closed and never reopened. CD now lived in a care home, and would not be likely to need the service. It would be disproportionate to require a fresh assessment or consultation process.

[42] The principles relevant to whether or not to reduce the decision are those set out by Lord Boyd of Duncansby at paragraphs 51 and 52 in *McHattie*. These proceedings do not relate only to the individual interest of CD as a user of the service. They bring to light unlawful decision-making, and in particular a failure to have due regard to the public sector

equality duty before determining that the service should be decommissioned. Although the pandemic is a confounding factor, it is clear that there would normally be no new referrals to a service that was in the course of being decommissioned. I accept that a fresh decision-making process will inevitably be one taken in the context of circumstances that differ from those which obtained in June 2019. I am not, however, prepared to speculate as to what the outcome of it would be or to find that it is inevitable that the same decision would be taken.

[43] I therefore reduce the decision of 4 June 2019 so far as relating to the Teviot Day Service. I am conscious that the decision affected other services, and that the focus of these proceedings has been only on the lawfulness of the decision relating to the Teviot Day Service. I also grant declarator that the decision so far as relating to the Teviot Day Service was unlawful in respect that the council failed to perform its statutory duty under section 149 of the Equality Act 2010, and in respect that it frustrated the legitimate expectation of the petitioner to consultation.