

From: Swil, Jonathan
Sent: 03 April 2014 12:10
To: Band, Christa
Subject: FW: Legitimate expectation

I spoke to Chris Aujurd about this.

I told him we had raised the possibility of JR in the note and that we thought it would be a question worth pursuing with a QC, partly because you and I do not have day to day expertise. He said they had instructed Beachcroft – JR specialists – on a range of JR issues before, although he didn't say whether that was on the current issue about taken with respect to the Scheme and I got the feeling they haven't been asked specifically.

Chris says he thinks there are two types of decision relevant here: 1) a decision to change or scrap the scheme and expectations that would not happen in applicants and 2) a decision to make ex gratia payments instead of assessing cases against legal merit and expectations this might have raised for the wider SPMR group. I agreed although said 2) is really related to 1) – both are about making substantial changes to the scheme that don't satisfy expectations of a class of SPMRs.

He said he will work JR into the slides by saying it is a point worth keeping in mind and ensuring that changes to the scheme do not give rise to JR claims. I said that's fine but the real purpose of my call was to suggest a QC's advice. Having said it about three times and ending the call without him showing any inclination either way to instruct someone, I don't think they are keen, at least at this stage, to do it. This might be because of costs but I suspect to do with Chris' view, which he mentioned, that this wouldn't be amenable to JR. He thinks it is closer to the commercial end of the spectrum and seemed fairly confident about that; perhaps because he has the benefit of Beachcroft's advice more generally in this context. He might be right although I did say it a grey area and there are some factors which point the other way.

I'm not sure, therefore, there is much more we can do at this point now that we have made our view known except see what comes next. Perhaps the Board or CEO will latch on to JR risk when they see mention of it in the slides and ask questions which lead to it being pursued further at which point a QC may come into play. It's difficult to see how the JR risk can be managed, if they're genuine about it, if definitive advice from someone who is expert in it is not obtained.

Jonathan

From: Swil, Jonathan
Sent: 25 March 2014 21:28
To: Band, Christa
Subject: Legitimate expectation

Christa

Amenability to JR

Legitimate expectation is one of the grounds of judicial review, along with (or as part of) procedural fairness, illegality, reasonableness etc. The preliminary question is whether the decision in question is amenable to review and as discussed there is always going to be some doubt about that in respect of decisions of an entity such as the Post Office. When not dealing with a decision of a clear public authority i.e. where the *source* of the power to make the decision does not derive from statute or the prerogative, it seems the question will turn on whether the relevant entity is performing a public function.

There are probably arguments both ways about whether decisions about the Scheme are part of the performance of a public function – on the one hand, the proper functioning of the PO/SPMR relationship is of public importance, this is a matter about which Parliament and the Minister has become interested, and generally, the PO is a body which provides a service which if it wasn't privatised, the government would be forced to step in to provide. On the other hand the cases say the fact decisions regarding the Scheme may affect a large number of people or have a serious impact on them (if it will) is not determinative, the SPMRs have not been compelled to enter the Scheme to seek or

obtain redress (they have other options) and while the Post Office might have a statutory underpinning (in the sense it was established with the authority of government) and therefore might be amenable for that reason generally, the Scheme itself doesn't have such underpinning. But assuming for the purposes of argument decisions with regard to the Scheme that the Board has made and might make in due course are subject to JR, the following might be relevant with regards to legitimate expectation.

Legitimate expectation

There are said to be two forms of legitimate expectation (LE): procedural and substantive. Procedural LE is really an incident of the procedural fairness rule and therefore the existence of a procedural LE only entitles the claimant to a fair hearing i.e. to be consulted, heard or given reasons etc. Once the hearing has been provided, there is no further duty to provide the substance of the expectation. Substantive LE entitles the claimant to the fulfilment of the LE, although this seems to be less developed than procedural LE, is fairly limited and the text I looked at is somewhat scant on the criteria for this (I think I would need more time to delve into this aspect if we are to continue with this issue in due course).

There are three kinds of procedural LE

- 1 where the expectation is based upon an assurance that a past benefit will continue. The benefit may not be denied without a hearing.
- 2 where the expectation is based on the assurance of a hearing itself. The hearing cannot be denied.
- 3 where a public authority (although I don't think this would necessarily exclude PO, if we are assuming a public function etc. here) has, without promise, established a policy distinctly and substantially affecting a person or group who in circumstances was entitled to rely on its continuance and did so. The authority will be obliged to consult. This does not arise often because if there has been no assurance either of consultation (i.e. point 2) or the continuation of the policy (i.e. point 1/ substantive LE), then there will be little left in the case save a decision by the authority to change its policy. The assurance needed in this case would need to be "pressing and focussed" (it's not clear to me why how "assurance" fits in here, unless it is intended to be significantly less than an "assurance" on the other cases).

LE can arise from an express promise or from the existence of a regular practice which the claimant can reasonably expect to continue i.e. the representation which induces the LE can be express or implied. The form of promise is not important and it can arise from a considered assurance, undertaking or promise of benefit or course of action which the authority will follow e.g. it can be made by a junior Minister in Parliament. It can relate to a future benefit, not just a continuing situation. An express promise need not be made to the claimant in particular, a general policy which affects a class is sufficient. It is necessary however that the claimant is a member of the class of persons who are subject to the representation while the representation is operative.

To be "legitimate" an expectation (amongst other less relevant things) 1) must be clear, unambiguous and devoid of qualification 2) must be induced by the decision-maker. A representation by a different person or authority will not do 3) must be relied upon by a person who belongs to the class to whom it may reasonably be expected to apply 4) probably does not need to be based on an assurance or practice actually known by the claimant 5) need not have caused detrimental reliance.

The disappointment of a LE is not always unlawful. It will always depend on the weighing up of the need for legal certainty/fairness to the claimant against the authority's pursuit of public interest and need from time to time to be flexible and change its policy.

The following factors may be relevant in deciding how the court will approach the balance: 1) more weight is likely to be given to the LE where it involves deprivation of an existing benefit than one promised for the future 2) more weight is likely to be given to a LE where the representation is given to an individual or class, especially where it has the "character of a contract", than the world at large 3) the extent of the reassurance e.g. an express oral or written representation will carry more weight than an implied course of conduct 4) an authority will be expected to yield less to a LE where it is duty bound to make policies which lie on the "macro-political field" i.e. it is entitled to give priority a decision which affects the public at large 5) while not determinative, detrimental reliance is relevant to the balancing exercise 6) where it is within the capacity of the authority to mitigate the impact of the disappointed expectation e.g. by paying compensation (although such mitigation need not be compensation).

So, assuming decisions about the Scheme are amenable to review it seems to me that

- we would be concerned with substantive LE; the JFSA representing SPMRs would be (or easily could be) consulted before making changes to the Scheme or we could seek reps from SPMRs directly.

- we are dealing with an express assurance i.e. in the form of the scheme document given to SPMRs and public statements etc., not an on-going, implied continuing practice.

- it doesn't seem that any clear unambiguous assurance was given, to the extent that a SPMR could not legitimately expect any particular outcome such as getting mediation or compensation at the end. Perhaps the assurance only extends to an entitlement for their cases to be considered (and perhaps considered fairly) in "a" scheme of the kind or simply that their concerns would be addressed fairly whether in a scheme or not. This might mean changes could be made so long as that criterion continues to be met.

- any LE is limited to SPMRs who made the cut off date for this Scheme. i.e. the PO has made clear the scope of the class to which any LE as to how complaints about Horizon would be dealt with. I think this point is important as if it is correct, it is a fairly clear line in the sand which would limit the thousands of other SPMRs suddenly coming out of the woodwork in this context.

- assuming there is a LE arguably we are dealing with 1) an existing rather than future benefit (i.e. acceptance into the scheme) albeit not mediation or compensation 2) an assurance given to a class (those SPMRs who put in applications by the cut off date) which in some respects given the documentation involved does have the character of a contract 3) there are fairly clear assurances given in the Q&A 4) this isn't on the "macro political" field so more like any LE will be respected 5) there hasn't been much detrimental reliance except perhaps to the extent any limitation has arisen in the meantime 6) we could mitigate by creating a new scheme or otherwise addressing SPMRs concerns on a case by case basis, unless a decision is taken to abandon it altogether and say tough luck to the SPMRs.

I think if the relevant decisions here involve a public function (to me this is the most difficult question), then there is a real risk we have created a LE here. Whether it could give rise to successful JR Claims I think very much depends on what the Board decides to do. Will it scrap the Scheme altogether with no alternative or just modify?

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