

THE DUTY TO CONSULT: WHAT DOES THE DECISION MAKER HAVE TO SAY TO CONSULTEES ABOUT ALTERNATIVE OPTIONS

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The established principles of common law fair consultation

1. In *R(Rusal) v London Metal Exchange* the Court of Appeal recently reaffirmed some basic principles about what common law fairness requires:¹
 - However, the application of the duty of fairness in consultation cases is intensely case-sensitive; this is not an area of law where it is possible to provide statements of general principle: see *R(Greenpeace Limited) v Secretary of State for Trade and Industry*² (approved Court of Appeal in *Rusal* [28]):³

Judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind.

- The process of consultation will become inordinately complex and time consuming if the consultation body have to set out the options: see Maurice Kay J in *Medway* [28] (approved *Rusal* [26]):

*Other things being equal, it was permissible for him (that is, the Secretary of State) to narrow the range of options within which he would consult and eventually decide. Consultation is not negotiation. It is a process within which a decision maker at a formative stage in the decision making process invites representations on one or more possible courses of action. In the words of Lord Woolf MR in *Ex parte Coughlan*,⁴ 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 and why exactly it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this." This passage was approved by the Court of Appeal in *R (Forest Heath DC) v Electoral Commission* [2010] PTSR 1227 at para 54.*

- Common law consultation, (whether it is a matter of obligation or undertaken voluntarily) requires fairness: see *Medway*,⁵ Maurice Kay J (approved *Rusal* [26]). See also Lord Reed in *Moseley* [38].
- The cases concerned with consultation demonstrate that the Court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair. It is for the court to decide

¹ [2014] EWCA Civ 1271

² [2007] EWHC 311 (Admin)

³ *R(Rusal) v London Metal Exchange* [2014] EWCA Civ 1271

⁴ [2001] QB 23 at para 112

⁵ *R(Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 ADMIN para 28

whether the obligation of fairness has been broken. (approved *Rusal* [27]).

2. The Court of Appeal has indicated in *R(Royal Brompton Foundation Trust) v Joint Committee of Primary Care Trusts* that particular principles need to be applied where the Court hears before the decision is made on the proposals subject to consultation:⁶

- They are all subject to the same threshold objection: the act challenged was a consultation process, not the final decision of a public body. One of the functions of a consultation process is to winnow out errors in the decision-maker's provisional thinking. The JCPCT owes a public law duty to reconsider matters in the light of responses. True consultation is not a matter of simply "counting heads": it is not a matter of how many people object to proposals but how soundly based their objections are.
- It is difficult to know at the earlier stage whether the decision will be persisted in after consultation. Intervention at the earlier stage may also cause wasteful, harmful or avoidable delay, particularly where consultation is conducted on the scale on which it was conducted in this case.
- A further reason for caution is that the decision-maker has to balance the interests of several different groups, not simply those represented before the court. The decision-maker may be in a better position to do this effectively and in such a way as to prevent the interests of one particular group receiving inappropriate precedence over the interests of other groups.
- Not all objections to the accuracy of a consultation process will lead to a full reconsideration of provisional decisions. It is not enough, therefore, for a party seeking to quash a consultation exercise to point to some facts that are inaccurately presented. Their inaccuracy may on reflection lead only to a minor and immaterial scaling down of the case supporting the provisional proposal for change. The arguments for change will not then be as black and white as they appeared in the consultation document, but different shades of grey. Determining the strength of those shades of grey is generally not a matter for the court but the decision-maker.
- In short, it is inherent in the consultation process that it is capable of being self-correcting. The courts should therefore avoid the danger of

⁶ [2013] 126 BMLR [87]-[92]

stepping in too quickly and impeding the natural evolution of the consultation process through the grant of public law remedies and perhaps being led into areas for the professional judgment of the decision-maker. It should, in general, do so only if there is some irretrievable flaw in the consultation process.

What fair consultation requires

3. In *R(South West Care) v Devon CC* Singh J held that the essence of consultation was the communication of a genuine invitation to give advice and a genuine receipt of that advice;⁷ so that there was no consultation where a local authority never issued an invitation to care providers to give advice on the issue of whether fees should be increased for the relevant year.
4. The principles which fairness requires in order for consultation to be adequate are very firmly established,⁸ and have now been reaffirmed by the Supreme Court in *Moseley*.
 - consultation must be at a time when proposals are still at a formative stage;
 - the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
 - adequate time must be given for consideration and response. and
 - the product of consultation must be conscientiously taken into account in finalising any proposals.
5. However, the Supreme Court in *Moseley* also added a new ingredient- whether the decision maker is obliged to consult on alternative proposals which the public body has discarded.

Consultation on proposals which the public body does not wish to pursue

6. Until *Moseley* the Courts allow a public body a wide degree of discretion as to the options on which to consult: see the Divisional Court decision in *The Vale of Glamorgan Council v Lord Chancellor*⁹ at [24] (approved *Rusal* [29]).
7. In *Rusal* itself the Court of Appeal reversed the decision of Philips J and held that there is, in general, no obligation on a public body to consult on options it

⁷ [2012] EWHC 1867 (Admin); and see *R v Secretary of State for Social Services ex p Association of Metropolitan Authorities* [1986] 1 WLR. 1

⁸ *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168

⁹ [2011] EWHC 1532 (Admin)

has discarded. The statement in De Smith's *Judicial Review* that there should be consultation on “every viable option”, taken on its own, is not supported by the authorities:¹⁰ see *Rusal* [31].

The Supreme Court decision in *Moseley*

8. In *Moseley* the Supreme Court decided that a statutory consultation in relation to a council tax reduction scheme could only be fair and fulfil its statutory objective of public participation in the decision-making process if the consultees were made to be aware of other ways of absorbing the shortfall in funding and why the council had rejected them, so that the consultation document itself should have contained a brief outline of the alternative options and the reasons for their rejection. Council tax benefit (which was made by the Department for Work and Pensions and operated by local authorities) was replaced by council tax reduction schemes (CTRS) locally determined by each billing authority under section 13A of the Local Government Finance Act 1992.¹¹ Section 13(A)(2) of the Local Government Finance Act 1992¹² required each local authority to make a CTRS for those whom it considered to be in financial need.¹³
9. Schedule 1A to the 1992 Act, para 2 prescribes in detail the matters which must be included in a scheme,¹⁴ and defines its scope by defining the classes

¹⁰ (7th ed, paragraph 7-054)

¹¹ Section 13A, Local Government Finance Act 1992, as substituted: “(1) *The amount of council tax which a person is liable to pay in respect of any chargeable dwelling ... (a) in the case of a dwelling situated in the area of a billing authority in England, is to be reduced to the extent, if any, required by the authority’s council tax reduction scheme ... (2) Each billing authority in England must make a scheme specifying the reductions which are to apply to amounts of council tax payable, in respect of dwellings situated in its area, by — (a) persons whom the authority considers to be in financial need ...*”

¹² Substituted by section 10(1) of the Local Government Finance Act 2012

¹³ *Each billing authority in England must make a scheme specifying the reductions which are to apply to amounts of council tax payable, in respect of dwellings situated in its area, by —*

(a) persons whom the authority considers to be in financial need, or

(b) persons in classes consisting of persons whom the authority considers to be, in general, in financial need.’

¹⁴ (1) *A scheme must state the classes of person who are to be entitled to a reduction under the scheme.*

(2) *The classes may be determined by reference to, in particular —*

(a) the income of any person liable to pay council tax to the authority in respect of a dwelling;

(b) the capital of any such person;

(c) the income and capital of any other person who is a resident of the dwelling;

(d) the number of dependants of any person within paragraph (a) or (c);

(e) whether the person has made an application for the reduction.

(3) *A scheme must set out the reduction to which persons in each class are to be entitled; and different reductions may be set out for different classes.*

(4) *A reduction may be —*

(a) a discount calculated as a percentage of the amount which would be payable apart from the scheme,

(b) a discount of an amount set out in the scheme or to be calculated in accordance with the scheme,

of persons eligible for a reduction under it and the reduction that people in each class are entitled to. Statutory consultation in accordance with a proposed scheme, therefore, concerned a single issue and is directed to consulting on a financial proposal which was aimed to help those less well off. As a result, , the consultation focused on the proposed scope of a CTRS, ie the classes of eligible people and the extent of reduction available.

10. Sch 1A to the 1992 Act, para 3(c) defines the obligation to consult by requiring the authority to ‘consult such other persons as it considers are likely to have an interest in the operation of the scheme’.

11. The critical factual background which the Supreme Court considered in *Moseley* were described by Lord Wilson [9) that in his introduction to the cabinet report Councillor Goldberg, Haringey's cabinet member for finance, wrote:

“Needless to say it is my belief that this represents one of the most appalling policies of the Government and it is not insignificant that the unemployed will now be facing the prospect of having to pay 20% local taxation levels, which they last were subjected to paying under the poll tax.”

There was nothing wrong with Councillor Goldberg’s expression of indignation. But it did betray an assumption that the shortfall would have to be reflected by provisions in the CTRS which reduced the level of relief below the level previously provided by way of CTB rather than that Haringey should absorb it in other ways.

12. Lord Wilson repeatedly emphasised that the cut in Council Tax Benefit will result in the Council having a shortfall of 20%, even though it did not necessarily have this effect [17], [19], [21], [22]. He states at [31]:

I speak as one who, even after a survey of the evidence filed by Haringey in these proceedings, remains unclear why it was minded to reject the other options. Perhaps the driver of its approach was political. At all events I cannot imagine that an affirmative answer can be given

13. Lord Wilson plainly took the view that the Council had gone too far by consulting on a basis that was positively misleading.

(c) expressed as an amount of council tax to be paid (lower than the amount which would be payable apart from the scheme) which is set out in the scheme or is to be calculated in accordance with it, or
(d) the whole amount of council tax (so that the amount payable is nil).

14. The critical question for the consultation to address in *Moseley* was what should the scope of the scheme be? The answer dictated the cost of the scheme. However, Haringey's proposals started with a costs cap (which was not explained) – and the Council actively discouraged any suggestion that the scheme could cost more or that the scope of the scheme should be broader – in fact, wrongly making the positive suggestion that a broader scheme was not an option. As Haringey was required to consult on the scope of the proposed scheme, it had acted unlawfully.
15. However, it is unclear what the exact *ratio* of *Moseley* is: whether the broad approach taken in *Moseley* by Lords Wilson and Kerr (which appears to cover both statutory and common law consultation) is the majority view, or whether the more restrictive approach by Lord Reed which focuses on the statutory character of the consultation prevails. The position is particularly uncertain in the light of the careful concurring judgments of Baroness Hale and Lord Clarke.

The subsequent cases

16. The critical issue following the Supreme Court decision is whether and to what extent the principle established by *Moseley* now requires consultees to have the opportunity to consult on proposals which the public body does not support. Importantly, none of the cases which have argued for an extension of *Moseley* have succeeded to date.
17. In *R(Robson) v Salford City Council* the local authority decided to stop using its own employees to provide a transport service to enable severely disabled adults to attend day centres. It had assessed the service users' transport needs and proposed to meet those needs by making alternative transport arrangements.¹⁵ The consultation material produced by the local authority had presented an incomplete picture because it dealt with the assessment of the existing service users' transport needs without clearly stating that the proposal was to close the unit. However, that did not mean that there had been a failure to consult, or that misleading material had been provided. The consultation process as a whole was not unfair. What was important for the users was not the continued existence of the unit as such, but the transport arrangements made for them. They had been left in no doubt that the assessments were to see whether, in each individual case, the existing service could be replaced by an alternative. It was implicit that the unit's service

¹⁵ [2015] EWCA Civ 6

would be withdrawn from those for whom a suitable alternative was available. The Court of Appeal held that there was nothing in *Moseley* to cast doubt on the correctness of the legal principles applied by the trial judge; and Richards LJ pointed out that in *Moseley*, the consultation material had conveyed the positively misleading impression that other options were irrelevant, and that was not so in *Robson*. Richard LJ said at [22] in relation to *Moseley* that *'the decision is largely an endorsement at Supreme Court level of principles already established at the level of the Court of Appeal...'*

18. The Supreme Court refused permission to appeal to Robson on 12 May 2015 on the ground that *'permission to appeal be refused because the application does not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal'*.
19. In *R(L) v Warwickshire CC* the claimants applied for judicial review of the defendant local authority's decision to cut funding for social care services for disabled children.¹⁶ The local authority had reduced its Integrated Disability Service budget following government cuts in public sector spending. Whilst most of the reduction had so far been achieved by staffing cuts, the local authority intended to cut one of the front-line services in the coming financial year. Mostyn J held there was no duty to consult at common law and did not apply the *Moseley* principles.
20. In *R(T) v Trafford MBC* the claimant sought judicial review of the defendant local authority's consultation on its proposal to cut its adult social care budget for the 2015/2016 financial year. The claimant was an adult who had autism and learning disabilities and lived in a supported living placement, was dependent on 24-hour supported care. He claimed that he would be at risk should any of the support he received be reduced because the local authority was facing a £24.3 million budget deficit. It published draft budget proposals in October 2014 in advance of its budget-setting meeting in February 2015. In the draft budget it indicated that it would neither increase council tax nor use money from its reserves to meet the shortfall, and it outlined the reasons why. It then publicly consulted on proposed budget cuts to five of its functions, including the provision of adult social care services. The judicial review case was expedited, so it was heard before the budget, itself, was set.
21. The claimant argued that the Supreme Court decision in *Moseley* meant that consultations must spell out that cuts could be addressed- by raising Council tax or spending reserves. The claimant argued that this novel and far

¹⁶ [2015] EWHC 203 (Admin)

reaching principle should extend to the five concurrent consultations Trafford had held before setting its budget on 18 February 2014. He sought a declaration that the consultation process was flawed and an order quashing the consultation process insofar as it related to the adult social care budget cuts. The issues were whether the local authority had a common law duty to include information about realistic alternative options in its consultation; if it did, whether it had discharged that duty; whether relief should in any event be refused on the basis that it would be detrimental to good administration for the court to grant a remedy before the budget was set.

22. Stewart J rejected the judicial review challenge.¹⁷ Stewart J focused on the fact that Lord Wilson said that '*sometimes*' fairness required a public body to consult on alternatives it discarded. He took the view that this obligation might arise where real fairness would result from not doing so (as in *Medway*)¹⁸ or where the public body had been positively misleading. In *R(Medway Council) v Secretary of State for Transport* the Government consulted over the future of air transport, but did not include options for Gatwick. Maurice Kay J accepted that Gatwick must be considered at some stage and that a fair playing field required it to be considered at this stage; otherwise it had obtained an unfair advantage.
23. The Court of Appeal refused an oral application for permission to appeal on 26 November 2016.
24. In *R(Morris) v Rhondda Cynon Taf CBC* the claimants sought judicial review of the decision of the local authority to cease funding full-time nursery education for three-year-olds following the completion of a Childcare Sufficiency Audit (CSA), it set out its CSA plan for 2014-2017. The Council consulted on the proposal for its preferred option for change, namely the provision of part-time nursery education after a child's third birthday and the commencement of full-time provision after a child's fourth birthday. The original consultation period of October until December 2014 was extended by a month, and extra material was provided to consultees, including a description and costing for each of the three options available in terms of nursery provision. The issues before was whether the consultation had been adequate and whether the Council breached its duty under s 22 of Childcare Act 2006 to secure sufficient childcare for working parents.
25. The claimants argued that the information provided in the consultation was insufficiently fair and accurate, and that *Moseley* established a general

¹⁷ [2015] EWHC 369 (Admin)

¹⁸ [2002] EWHC 2516 (Admin)

proposition that it was necessary to invite views on possible alternatives to the proposal so as to enable an intelligent response. Patterson J dismissed the application. Once a consultation had been embarked upon, for it to be fair the public authority had to: (a) let those with a potential interest in the subject matter know clearly what its proposal was; (b) explain why the proposal was under positive consideration; (c) give the consultees sufficient information so that they could make an informed response to the proposal; (d) allow sufficient time for the consultees to submit their informed response; (e) conscientiously consider the product of the consultation and take that into account when reaching and taking the final decision.

26. As part of presenting the information in a clear way, the decision-maker could present the preferred option. Part of the available information to be presented to the public could be alternative options for change. What was an alternative option would depend on the factual and context-specific circumstances of the consultation in question. Patterson J held that *Moseley* showed that fairness in a consultation exercise is very context-specific; and did not establish a rule that alternatives had to be consulted upon in every consultation exercise. Sometimes fairness might require it, so that consultees could make sense of the consultation exercise. When that was the case, the alternatives would have to be realistic alternatives. Patterson J held that the presence of the extra options provided consultees with alternatives to the preferred option.

27. In *R(Hall) v Leicestershire County Council* the claimant challenged the part closure of the Snibston Discovery Museum;¹⁹ and Blake J dismissed the judicial review claim, deciding that Lord Wilson was not holding in *Moseley* that every consultation requires reference to possible alternatives, applying the fact specific approaches adopted by in *R(T) v Trafford MBC* and in *R(Morris) v Rhondda Cynon Taf Council*. Blake J expressed the view that:

difficult issues arise when a local authority is considering withdrawing financial support from a popular regional museum that has plainly added both value to the local economy and the quality of life of visitors, volunteers and staff, and also houses unique exhibits to which the public will no longer have access ... None of the extensive authorities cited by the parties in their written and oral submissions refer to museum closures, and, in my judgment, there is a distinction between cases concerned with the closure of a local library and museums, as in most of these cases books will still be available to the public in the region elsewhere by one means or another ... I would incline to the view that, where such a proposal is under consideration, there is a duty on the local authority to ensure that it has identified and examined every viable proposal by way of alternative to the closure

¹⁹ 23 July 2014

option before the risk of permanent loss of access by the public to collections results. An active search for viable partnerships may therefore be what is required before cultural assets are removed from public access, let alone the irreversible decision to "de accession" such assets by open market sale which may mean that such a public authority forfeits all trust in the future as a guardian of such assets.

However, Blake J accepted that the campaigning body did not put forward any positive alternatives before the consultation period commenced.

28. Similarly, in *R(Tilley) v Vale of Glamorgan Council* Laing J held that the local authority was entitled to consult on its preferred option of community-led libraries without providing any alternatives or explicitly inviting views about reduced hours.²⁰ There was no requirement to refer to the disadvantages of community-led libraries. There was no reason for doubting that the results of the consultation had been taken into account, since the responses had been fully reported to the cabinet. Laing J held that:

obligation to consult on alternatives will depend on the facts of the case in hand, and, in particular, on whether there are any realistic alternatives ... Moseley gives limited help on the question when there will be an obligation to consult on alternatives. It is clear from paragraphs 40 and 41 of Lord Reed's judgment that in some cases there will be no obligation to consult on alternatives; and even when such an obligation does arise, it may not require an authority to discuss alternatives in detail, or the reasons why they have been rejected.

Conclusion

29. The principles which emerge from the Supreme Court decision in *Moseley* should, therefore, not be overstated. It will be a rare case where a consultation is held to be unlawful as a result of a failure by the decision maker to spell out alternatives to its proposals.

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²⁰ [2015] EWHC 3194 (Admin)