BUDDLE FINDLAY

Legal update - Healthcare of New Zealand Ltd v CCDHB (14 December 2012)

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Healthcare of New Zealand (Healthcare) took judicial review proceedings against a series of decisions by Capital & Coast District Health Board (CCDHB) relating to how it plans, contracts, and funds home-based support services. On 14 December 2012 the High Court dismissed Healthcare's claim. Healthcare has appealed that decision.

Background

After consulting with service providers in 2011, CCDHB decided that it could spend up to $2 million less on home-based support services without reducing service levels by making changes to how it contracts those services. The changes included:

- Moving from an uncapped "fee for service" contracting model to a bulk funding contracting model, and
- Reducing the number of providers from three to two, which CCDHB thought would reduce management, administration, and travel costs through improved efficiencies and better economies of scale.

CCDHB issued a RFP seeking providers to provide home-based support services under the new contracting model. Healthcare was one of three incumbent providers of those services in the CCDHB region, but was not offered an agreement following the RFP process.

Healthcare had sought interim orders setting aside CCDHB's agreements with the two successful providers, but the Court declined to grant such orders. Healthcare's substantive judicial review proceedings did not challenge the conduct of the RFP or seek to set aside the agreements. Rather, Healthcare challenged CCDHB's compliance with the annual planning requirements set out in the New Zealand Public Health and Disability Act 2000 (NZPHD Act) and the New Zealand Public Health and Disability (Planning) Regulations 2011.

The regulations require CCDHB to consult in relation to its annual plan if the Minister considers that the plan proposes changes to services that will have a significant impact on the recipients of services (regulation 9(1)). The National Health Board (NHB), which advises the Minister on all DHBs' annual plans, had had discussions with CCDHB about its proposed new contracting model, and had been provided with a draft of CCDHB's annual plan. The NHB advised CCDHB that the plan would be approved by the Minister, and that consultation was not necessary.

Healthcare argued that CCDHB acted unlawfully because its annual plan did not sufficiently inform the Minister of the scale of the changes proposed to the services as it did not have sufficient detail about the new contracting model. Healthcare also argued that CCDHB acted unlawfully because:

- CCDHB's annual plan did not provide a strong explanation of the link between funding, key actions, and outputs, and expected impacts and outcomes, as required by the regulations (regulation 8(c))
- CCDHB did not amend its annual plan on releasing its RFP, which Healthcare considered was necessary because the RFP proposed funding cuts that would entail a reduction in services
- CCDHB entered into contracts under its RFP that Healthcare considered reduced service levels, which was inconsistent with the RFP.

Healthcare also argued that CCDHB acted unreasonably (in that its decision was so unreasonable that no reasonable DHB would have made it). That argument was made on the basis that CCDHB had not reasonable basis for deciding that the same level of services could be provided with less funding, and disregarded Healthcare's concerns as to the adequacy of funding.

CCDHB was equally sure that spending less on the services would not result in a reduction in service levels, because savings could be achieved by changing the contracting model.

The decision

The Court dismissed Healthcare's arguments that CCDHB acted unlawfully in failing to comply with the annual planning requirements in the regulations. Justice Mallon found that DHBs' annual plans are meant to be high level rather than detailed documents, and that CCDHB's plan was "*adequate for its purpose*". Justice Mallon made it clear that it was not the Court's role to supervise the information provided by CCDHB, as the Minister via the NHB should decide whether he or she needs more detail than what a DHB includes in its annual plan. That is because it is the Minister who, under the NZPHD Act, has to approve the plan, and it is the Minister's responsibility to decide whether a proposed change would have a significant impact on the recipients of services such that consultation was necessary.

Justice Mallon also found that it was not necessary for the annual plan to be amended after it was finalised as the result of the release of the RFP as Healthcare alleged. While Healthcare submitted that the reduction in funding meant that a reduction in service levels as inevitable, Justice Mallon found that CCDHB was entitled to proceed with the RFP on the basis that the responses would show whether it was viable that the same level of services be provided despite the reduced funding. CCDHB's decision to enter into contracts pursuant to the RFP was also found to be consistent with the annual plan, because the successful proposers were both able to commit to providing the same level of services for the (reduced) funding on offer.

The Court also rejected Healthcare's claim that CCDHB's decision was unreasonable. Justice Mallon agreed with evidence submitted by CCDHB as to why its decision was reasonable, which included that benchmarking indicated CCDHB was paying over than $1 million more than surrounding DHBs for similar services, and that evidence showed two motivated providers could provide the same level of service even with less funding. Justice Mallon described CCDHB's decisions as being reasonable in the sense they were "*rationally based and borne out by the proposals* [the DHB] *received*".

Points of note

The NZPHD Act and regulations contain a number of requirements relating to the content of annual plans and the process of preparing and finalising annual plans. Each DHB must comply with those requirements, and risks having any decisions it makes on the basis of its plan overturned if it does not.

The significance of this decision is that it is clear that annual plans can be high level documents, and that it is for the Minister to decide how much information he or she needs about proposed service changes.

In addition, the Courts will be slow to intervene in the information flow between a DHB and the Minister, and consider that it is appropriate for the NHB as the Minister's agent to be responsible for that information flow. The Court is clearly of the view that it is for the NHB to determine what information the Minister needs to decide whether the threshold for consultation and other requirements in the Act and regulations are met.

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