



North

Yorkshire County Council

Chief Executive's Group

APPENDIX 4

## COPY

Our ref: AMB 101597

Your ref:

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30 October 2008

Dear Sir

**Proposed judicial review claim against the School Adjudicator in respect of the decision of 29<sup>th</sup> September 2008 ADA 1399-1409: North Yorkshire County Council**

This letter is written pursuant to the judicial review pre-action protocol.

1. To

Office of the Schools Adjudicator  
Mowden Hall  
Staindrop Road  
Darlington  
DL3 9BG

2. The claimant

North Yorkshire County Council  
County Hall  
Northallerton  
North Yorkshire  
DL7 8AD

3. Claimant's reference details

BJ/RC/MES Bernadette Jones

Continued ...

Office of the Schools Adjudicator  
Mowden Hall  
Staindrop Road  
DARLINGTON  
DL3 9BG

Copy to: Treasury Solicitor, One Kemble Street, London, WC2B 4TS DX 123242  
Kingsway

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**4. The details of the matter being challenged**

The Adjudicator's decision of 29th September 2008 ADA 1399-1409 concerning North Yorkshire County Council.

**5. The issue**

In the Council's view, the Adjudicator erred in law as follows.

**1. Misconstruction of powers under section 90 and 90A of the School Standards and Framework Act 1998 ("the Act")**

**(a) In relation to the arrangements to be changed and to be "protected"**

The Adjudicator decided to uphold the objection to admission arrangements determined by the Council for community secondary schools in Harrogate. She determined that:-

*"arrangements ... stand for admissions in 2009, but that a full consultation on possible models for allocating places be conducted before determining the arrangements for 2010 to achieve more equitable arrangements for all applicants, town and rural, for a place at Harrogate community schools."*

By the Act:-

**89 Procedure for determining admission arrangements**

(1) *The admission authority for a maintained school shall, before the beginning of each school year, determine in accordance with this section the admission arrangements which are to apply for that year.*

...

(4) *Once the admission authority have carried out any such consultation, the authority shall—*

(a) *determine that their proposed arrangements (either in their original form or with such modifications as the authority think fit) shall be the admission arrangements for the school year in question; and*

**90 Reference of objections to adjudicator or Secretary of State**

...

(2) *Where—*

(a) *admission arrangements have been determined by an admission authority under section 89(4), but*

(b) *any parent of a prescribed description wishes to make an objection about those arrangements, and*

(c) *the objection falls within any description of objections prescribed for the purposes of this paragraph,*

*that person may refer the objection to the adjudicator.*

(3) *On a reference under subsection (1) or (2) the adjudicator shall ...—*

(a) *decide whether, and (if so) to what extent, the objection should be upheld, ...*

...

(5B) *In the case of any objection referred to him under this section, the adjudicator or the Secretary of State (as the case may be) must publish a report containing the following—*

- (a) *his decision on the objection,*
- (b) *any decision he has made on whether it would be appropriate for changes to be made to the admission arrangements, whether in the light of his decision on the objection or otherwise,*
- (c) *if, in relation to a maintained school in England, he considers that any change required ought not to be protected under section 90A for the number of school years prescribed under section 90A(2), that section 90A is not to apply to that change or that the change will be protected only for such lesser number of school years as he may specify, and*
- (d) *his reasons for the decisions mentioned in paragraphs (a) to (c).*

(5C) *Where the adjudicator or the Secretary of State (as the case may be) decides that it would be appropriate for changes to be made to the admission arrangements, his decision may specify the modifications that are to be made to the arrangements.*

...  
 (8) *... if the adjudicator or the Secretary of State has decided that it would be appropriate for changes to be made to the admission arrangements, those arrangements shall forthwith be revised by the admission authority in such a way as to give effect to the decision.*

**90A Restriction on alteration of admission arrangements following adjudicator's decision**

(1) *Where in accordance with section 90(8) the admission authority for a maintained school in England have revised any provisions of admission arrangements for a school year, this section applies except to the extent that the adjudicator or the Secretary of State determined under section 90(5B)(c), in relation to any change required, that this section was not to apply.*

(2) *In this section—*

*“the protected provisions” in relation to any admission arrangements, means provisions corresponding to those revised in accordance with section 90(8) or regulations under subsection (6) (as so revised);*

*“the required number” means such number as may be prescribed or such lesser number as is specified by the adjudicator or the Secretary of State under section 90(5B)(c) in relation to a particular change.*

(3) *The admission authority for the school—*

(a) *must incorporate the protected provisions in determining the admission arrangements for each of the required number of school years following the school year in relation to which the revision in accordance with section 90(8) was made, and*

(b) *may not vary those arrangements in such a way as to alter the protected provisions.*

By the School Admissions (Alteration and Variation of, and Objections to, Arrangements) (England) Regulations 2007 (“the Regulations”):-

**14 Restriction on alteration of admission arrangements following adjudicator's decision**

(1) *For the purposes of section 90A(2) and (3)(a) the required number of school years is two.*

An objection to the Adjudicator is made in respect of a particular year's admission arrangements: section 90(2)(a) of the Act. The Adjudicator has the power to change those arrangements: section 90(5B)(b). If they are to be changed, the Adjudicator has the power to require that they remain the same (i.e. that they are "protected") for two further years: section 90(5B)(c); section 90A(3); regulation 14 of the Regulations.

Here the Adjudicator:-

- (i) decided not to change admission arrangements for 2009/2010 i.e. the year in respect of which the objection was made;
- (ii) purported to exercise a power to "protect" these unchanged arrangements for that year;
- (iii) required a change in future years.

She had no power to require a change in future years and/or "protect" the arrangements for 2009/2010. Once she had decided not to change the arrangements for 2009/2010, she had exhausted her powers.

(b) In relation to what the Council was required to do

In any event the Adjudicator had no power:-

- (i) to require the Council to undertake a consultation; and/or
- (ii) to determine arrangements to achieve more equitable arrangements for 2010/2011,

in that this:-

(a) was ultra vires section 90. Her powers do not include requiring an admission authority to undertake a consultation, or to achieve more equitable admission arrangements, whether for the admission year in respect of which the objection is brought or otherwise; and/or

(b) was too uncertain a determination to make under section 90. The Adjudicator's website says that implementation of the Adjudicator's decisions is a matter for the DCSF. Presumably what is referred to is the power to make directions under section 497 of the Education Act 1996 (see para 4.19 of the Admissions Code), which may itself be supported by an application for a mandatory order. A Court would not make an order requiring a body to undertake:-

*"a full consultation on possible models for allocating places be conducted before determining the arrangements for 2010 to achieve more equitable arrangements for all applicants, town and rural, for a place at Harrogate community schools."*

Such an order would be too uncertain, too broad and unpoliceable.

2. Irrational decision

(a) In relation to the Adjudicator's finding of a breach of the Code

The basis on which the Adjudicator decided that the objection should be upheld was (para 18) that:-

*"as currently framed the arrangements are not procedurally fair and are not equitable for all groups of children."*

This was based on a part-quotation of para 1.65(c) of the Admissions Code which in the Adjudicator's words (para 7):-

*"says "In drawing up their admission arrangements, admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are procedurally fair and are also equitable for all groups of children."*

Para 1.65(c) of the Code continues "(including those with special educational needs, disabilities, those in public care, or who may be a young carer)". This part of the paragraph was not quoted by the Adjudicator.

The Adjudicator thought that the "group of children" disadvantaged were children living near Harrogate town. This is not a "group of children" as that phrase is used in para 1.65(c) of the Code. It is a description of the children who do not have admission priority in the Harrogate schools.

It is inherent in oversubscription criteria that some children are disadvantaged. On the Adjudicator's reasoning, all oversubscription criteria would be unlawful unless they gave all children equal opportunities to apply, which (other than through a random selection exercise) is impossible.

Further the Adjudicator's reference to "procedural" unfairness is unexplained and is not understood.

(b) In relation to her own conclusion that no more equitable arrangements could be found

Further the Adjudicator (para 28) decided, as regards 2009/2010, that there were no alternatives to the current arrangements which would not be unfair or which would not create different or greater inequity.

In other words she identified no alternatives which should be adopted.

Consequently it was irrational for her to uphold the objection and/or to require the Council to adopt "more equitable arrangements" for 2010/2011.

(c) In relation to her requiring the Council to consult but ruling out the option to keep the current arrangements

The Adjudicator required the Council to undertake "a full consultation on possible models for allocating places". This would naturally include consultation on the current arrangements, and what residents thought about them. However the Adjudicator required the Council not to re-adopt the current arrangements, regardless of the outcome of the consultation. Consequently the Adjudicator was asking the Council to undertake consultation:-

- (i) about various options including one which could not be adopted; and/or
- (ii) the result of which would have to be the rejection of the current arrangements even though they might have support – indeed overwhelming support – from consultees.

This was irrational.

**6. The details of the action that the defendant is expected to take**

The Adjudicator is requested to enter into a consent order quashing the determination.

**7. The details of the legal advisers, if any, dealing with this claim**

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Legal Services  
North Yorkshire County Council  
County Hall  
Northallerton  
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DL7 8AD

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Telephone: 01609 532924  
Fax: 01609 780447

**8. The details of any interested parties**

The interested parties are the objectors and the five Harrogate schools discussed in the determination. They will be sent a copy of this letter.

**9. The details of any information sought**

None at present.

**10. The details of any documents that are considered relevant and necessary**

None at present

**11. The address for reply and service of court documents**

Legal Services  
North Yorkshire County Council  
County Hall  
Northallerton  
North Yorkshire  
DL7 8AD  
DX 69140 Northallerton 3

**12. Proposed reply date**

If there is to be a consultation before the adoption of admission arrangements for 2010/2011 as purportedly required by the Adjudicator, the Council will need to prepare for it soon. This means that, if the Adjudicator does not enter into a consent order as we request, proceedings will have to begin very shortly.

We would therefore be grateful for your reply within 7 days.

Yours faithfully

for Assistant Chief Executive (Legal and Democratic Services)