EIR Reg 8(3) – Charging

David Markinson v IC

EA/2005/0014
28th March 2006

Cases:

Facts
The appellant complained to the IC regarding the charges imposed by the Kings Lynn and West Norfolk Borough Council Council for copies of certain planning documents.

The IC had to decide whether the appellant's request for copies had been dealt with in accordance with Reg 8(3). He concluded that the Council was satisfied that the charge imposed for copies was for a reasonable amount in accordance with Reg 8(3). Therefore, he was satisfied that the Council had complied with Reg 8(3) and did not require any further action to be taken.

Findings
The Tribunal addressed whether the IC identified the correct test to apply in order to determine whether the Council complied with Reg 8(3) in fixing its charging structure and if so whether he applied it correctly to the facts of the case. They also considered that if the IC was wrong in either case, what steps they should take.

Was it the correct legal test?
The Tribunal rejected the appellant's argument that Article 5(2) of the EU Directive 2004/4 EC required the UK government to restate the precise language of Article 5(2) (that being "*Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount."*) in the Regulations as they felt that it was left with some discretion on the way that Article 5(2) was transposed into English law. They held that the government was entitled to take account of the existing English law on Judicial Review and to adopt a form of words which, when read in the context of that law, provided equivalent protection to that set out in Article 5(2). They believed that the language of Regulation 8(3) had that effect and that the correct legal test was therefore to apply the normal Judicial Review test to the public authority's decision

The application of the Legal Test to the facts
The Tribunal considered that the effect was that the IC was required to consider first, whether the council honestly believed that the charge structure it set out did not exceed a reasonable one and, if it did so believe, to consider, secondly, whether that was a belief that a reasonable authority, properly directing itself to the relevant law and facts, could hold or was one that had been arrived at by either taking into consideration irrelevant factors or ignoring relevant ones. The Tribunal was satisfied that the IC had asked the first question.

However, the Tribunal held that the IC did not give due consideration to a number of factors which they considered were relevant in considering whether the Council's decision was one which should be allowed to stand. These were as follows:

> (a) A justification for the £6 per document charge put forward by the Council was that it had checked that it was not dissimilar to those of other councils - it did not offer (and was not asked for) any justification based on the calculation of its own cost base for either that charge or the 50p charge.
> (b) The comparative exercise on which the Council relied was, in any event, stated to be three years old - a relatively long time in the context of falling costs in the field of reprographics;
> (c) A letter also disclosed that the Council had taken into account the officer time in locating and retrieving the documentation , a factor which the Council, and the IC, should have regarded as irrelevant. Regulation 8(2)(b) provides that the information in question should be made available for inspection free of charge and therefore, if the costs of locating and retrieving a piece of information should be disregarded for that purpose, it is not open to a public authority to regard it as reasonable to include them in calculating the cost of copying the same material. The Tribunal found support for this in Recital 18 to the Directive which, while not forming part of the operative part of the Directive (still less the Regulations), provided guidance that only the actual cost of producing copies should be taken into account in considering what a reasonable charge should be. The Tribunal saw no evidence that the Council took these issues into account in fixing any of the charges, or that the IC considered it in deciding whether or not the Council s charge structure satisfied Regulation 8(3).
> (d) It was evident from a Report to the Council's Management that, as late as April 2005, the Council was taking into consideration irrelevant factors, namely, a possible drop in revenue and a possible increase in workload, if the charges were reduced. The Tribunal inferred from this that those factors had formed part of its original decision in fixing those charges and that they were taken into account in deciding not to opt for a 20p per sheet charge. This was despite the fact that Recital 18 to the Directive makes it clear that the permitted charges should not create a profit ("may not exceed actual costs") and that considerations of either a contribution to revenue or impact on workload were clearly irrelevant in calculating a charge that was required to be reasonable in the context of the Regulations (which expressly provided for a free-of-charge right to inspect).
> (e) The Council appeared to have ignored the IC's own letter in which he stated that it was not reasonable for it to pass on the full cost of responding to a request. The IC, having set that factor as clearly relevant to his own consideration of the Council s decision, then appeared to have ignored it in reaching his decision.
> (f) It was also evident from an e-mail from the Councilto the IC that, in relation to planning documents, it considered that the legal

significance of a document was a legitimate factor to take into account in fixing a fee (albeit, in this case, not the 50p one).

The Tribunal also stated that both the Council and the IC failed to take account of relevant material in that they appear to have given no, or no adequate, consideration to the guidance that was available at the time. Guidance on appropriate regimes for charging for copying and staff time is given in the following:

a) DEFRA 'Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004': "*The EIR [i.e. the Regulations] does not require charges to be made but public authorities have discretion to make a reasonable charge for environmental information. When making a charge, whether for information that is proactively disseminated or provided on request, the charge must not exceed the cost of producing the information"*
b) DEFRA 'Guidance to the Environmental Regulations 2004': *"A public authority may make a reasonable charge for the supply of environmental information. These should not exceed the cost of providing the information, for example, the cost of photocopies".*
c) DCA 'Guidance on the application of Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004': "*if you were providing information to an applicant:*
- you could not charge for the time taken to locate, retrieve or extract the information or to write a covering letter to the applicant explaining that the information is being provided,
   - *you could charge for the cost of paper when photocopying or printing the information and printing the covering letter, as well as the cost of postage"* and

   "Authorities can charge for the actual costs incurred, but charges are expected to be reasonable. For example, in most cases, photocopying and printing would be expected to cost no more than 10 pence per sheet of paper"
d) The Office of the Deputy Prime Minister booklet 'Making the planning system accessible to everyone: Good-practice guidance on access to and charging for planning information': *"a reasonable charge would be similar to commercial rates at photocopying shops, that is, 10p for each sheet of A4. This also reflects the lease charge on most photocopier machines."*

The Tribunal held therefore that the IC did not apply to the facts the legal test which he persuaded the Tribunal was the correct one to apply. They concluded that the Council, in fixing its charges, failed to address, properly or at all, the test imposed on it and that the IC, in reviewing the Council's decision, failed to investigate, and therefore to identify, any of the errors, or the guidance, and was consequently in error in not striking it down as being contrary to Regulation 8(3). Therefore, the Decision Notice was not in accordance with the relevant law.

Conclusion

The Tribunal allowed the appeal and substituted a new decision notice.

Observations

The Tribunal had some difficulty in taking into consideration evidence on the reasoning apparently followed by the IC, which did not find its way into the Decision Notice. As a general rule the Tribunal believed that a Decision Notice should be capable of standing on its own in setting out the IC's reasons for his decision, so that appellants may be properly informed when deciding whether to launch an appeal and, if they decided to do so, in determining the lines of argument on which the appeal should be based. They regarded it as particularly unsatisfactory to find that a Decision Notice apparently left out an important part of the legal test to be applied, and/or the manner in which it was applied to the facts, and that the Tribunal was then asked to consider an appeal on the basis of evidence about the IC's reasoning that had not been disclosed to the appellant at the time when he launched his appeal.