

PAUL CARDIN

- and -

CHESHIRE WEST AND CHESTER COUNCIL

ADVICE

1. I am asked to advise Paul Cardin as to the merits of a proposed claim against Cheshire West and Chester Council (“the Council”) arising out of a compromise agreement dated 1 October 2009 (“the Agreement”). Mr Cardin seeks to challenge a clause of the Agreement which purports to restrict his ability to submit requests under the Freedom of Information Act 2000 (“FOIA”) and the Data Protection Act 1998 (“the DPA”)

2. The second sentence of clause 10.2 provides that

“The Employee agrees that he will not submit any request made under the Freedom of Information Act 2000 or the Data Protection Act 1998”

I am instructed that this was not specifically negotiated between the parties – but was simply presented on a “take it or leave it” basis. I am also instructed that this is not a “standard clause” that such clauses have not been included in any other recent compromise agreement.

3. The first point to be considered is what clause 10.2 means, on a proper legal interpretation. Read literally the clause does not make sense: it is not possible to agree not to submit a request which has been made (already). The sentence is, presumably, intended to mean either:

- (1) That Mr Cardin will not submit any FOIA or DPA request (ie the word “made” should be ignored) or
- (2) That Mr Cardin will not pursue any request already made under FOIA or the DPA.

It is not clear which of these interpretations is the one relied on by the Council. If the latter then the clause would have no current effect and would, in my view,

be unobjectionable.

4. On the assumption that the Council is contending that clause 10.2 means that “Mr Cardin will not submit any FOIA or DPA request” the meaning of the provision is still unclear. In my view there are three possibilities:
 - (1) That Mr Cardin will not submit any FOIA or DPA request to the Council in respect of the disputes which led to the Agreement; or
 - (2) That Mr Cardin will not submit any FOIA or DPA request of any kind to the Council at any time in the future, or
 - (3) That Mr Cardin will not submit any FOIA or DPA request of any kind to any public body or data controller at any time in the future.

5. In my view, if the correct construction is that set out in paragraph 4(1) above, it is likely that this would be held to be a lawful provision. Mr Cardin was in dispute with the Council and compromised that dispute, with the benefit of legal advice. He can, in this context, agree not to pursue statutory rights which he would otherwise have.

6. However, the position is very different in relation to the constructions set out at paragraphs 4(2) and (3) above. The rights contained in FOIA and DPA are important and fundamental rights. In relation to the former the rights are available for the benefit of anyone – there is no requirement of “standing”. In relation to the latter, this is a fundamental right of an individual in relation to his or her own personal data. In my view, there is a strong argument that these are rights which cannot be subject of once and for all contractual waiver in terms such as clause 10.2. In my view, it would be contrary to public policy for such a waiver to be enforced and a decision to seek enforcement by the Council would, in any event, be unlawful in public law.

7. Mr Cardin would, in my view, be entitled to a declaration as to the legal effect of clause 10.2. In other words, a Court would be asked to determine which of the various interpretations set out above is correct. If the correct interpretation is that set out at paragraph 4(2) or (3) above then the Court could also be asked

to declare that it was void and of no effect. In my view, such proceedings could be brought by way of a private law claim under Part 8 of the CPR. On the assumption that clause 10.2 bears the interpretations set out at paragraphs 4(2) or (3) above then, in my view, a claim by Mr Cardin would have a 60% prospect of success.

8. In order to crystallise the dispute, my Instructing Solicitors should write to the Council asking them what they contend that clause 10.2 means and stating that unless they confirm that it does not bear either of the meanings set out at paragraphs 4(2) or (3) above Mr Cardin will institute proceedings for appropriate declaratory relief. I would be pleased to draft such a letter. My Instructing Solicitors should not hesitate to contact me to discuss any matters which arise out of this Advice.

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Hugh Tomlinson QC