



Bulletin 178

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PUBLIC SECTOR EMPLOYERS: COMPROMISE AGREEMENTS AND ULTRA VIRES

The case of *Gibb v Maidstone & Tunbridge Wells NHS Trust* highlighted a potential risk for employees entering into a compromise agreement with a public sector employer. The High Court held that the terms of the agreement reached between an NHS Trust and its chief executive were "irrationally generous" and the Trust had acted ultra vires (beyond its powers) and was not bound to pay the outstanding sums due to Ms Gibb under the agreement.

The Court of Appeal has now overturned the High Court's decision and confirmed that a public sector employer will rarely escape liability to pay under a compromise agreement on the ground that it acted ultra vires when entering into an agreement.

In the *Gibb* case the Court of Appeal, held that the NHS Trust could not avoid paying the sums due under the compromise agreement entered into with its previous Chief Executive as it had not acted ultra vires when entering into the agreement. The court made it clear that it will only be in very limited circumstances that a public authority can renege on its contractual commitments on the ground that it had acted ultra vires when entering into the contract.

The views expressed by the Court of Appeal in this case are clearly aimed at restricting the use of similar ultra vires arguments by public bodies in the future. The court felt that there are good policy reasons for doing so for the benefit of both public bodies and those who contract with them.

The decision also makes it clear that public bodies are entitled to make their own financial and management decisions and these should only be open to scrutiny by the courts where they appear inexplicable on the face of it, or in light of the evidence. Where an examination by the court is justified, the court's role is not to act as auditor; it is limited to judging whether the public body's decision was reasonable in the "Wednesbury" sense (Wednesbury is the main case dealing with the extent of the Courts power to intervene on a judicial review of a public bodies' decision).

However, in some situations it may still be appropriate to ensure the compromise agreement includes a warranty from the employer confirming it has the power and necessary authority to enter into the agreement, and an undertaking confirming that it will not withhold or seek repayment of any sum on the ground that the agreement is ultra vires.

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

➤ Practical Tips

In order to ensure that the court does not find any severance agreement to be Wednesbury unreasonable, all public bodies (as while this case concerned an NHS Trust the same principles apply equally to all public bodies, including local authorities) should ensure that they take legal advice and:

- Act within their statutory powers
- Fully document decisions taken
- Take account of all relevant considerations
- Ensure that all decisions are rational and evidence-based.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

If you no longer wish to receive the bulletin please let us know by return e-mail to helen.calvert@brabnerscs.com

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