

## **ARTICLE: Inclusion on the POVA list is a breach of a worker's rights**

**March 2009**

### *Introduction*

A recent case at the House of Lords has declared that the procedure for putting people on the Protection of Vulnerable Adults (POVA) list is incompatible with workers' rights under European legislation. However, the Government plans to change the law in this area in October 2009.

### *Legal position*

Under the Care Standards Act 2000, the Secretary of State keeps a list (the POVA list) of people who are considered to be unsuitable to work with vulnerable adults. Inclusion on the POVA list means that the worker cannot obtain or keep a role as a care worker with vulnerable adults.

The procedure for inclusion begins with a referral from a provider of care services. Providers are obliged to refer the worker in any of the following situations:

- a) the worker is dismissed on grounds of misconduct which harmed or placed at risk a vulnerable adult;
- b) circumstances in which the provider would have dismissed the worker on ground (a) if not for the resignation, retirement or redundancy of the worker;
- c) on ground (a) the worker is transferred to a role which is not a care position; or
- d) on ground (a) the worker has been suspended or transferred to a role which is not a care position, but the provider has not yet decided whether to dismiss or confirm the transfer.

When a referral is received, the worker is provisionally placed on the POVA list while the referral is considered by the authorities. Once a decision has been reached, the worker is either formally included on the POVA list or removed.

### *Facts*

There were three care workers involved in this litigation, all of whom were provisionally included on the POVA list then subsequently removed:

- a care home nurse who was dismissed for gross misconduct;
- an assistant matron in a care home who was the subject of disciplinary proceedings involving (among other things) the allegation that incorrect medication had been given to two residents; and
- a qualified nurse who worked as a team leader in an NHS Trust who was suspended after a patient made an allegation of indecent assault against him.

### *The High Court decision*

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The judge considered whether inclusion on the POVA list affected a worker's rights under articles 6 and 8 of the European Convention on Human Rights. These are respectively: the right to a fair and public hearing in the determination of a person's civil rights, and the right to respect for private life.

Examining the procedure the judge found that a worker might lose their job on the grounds of alleged misconduct only, without first being able to put their case. The judge held that this breached article 6.

The judge held that article 8 was also engaged by the procedure since inclusion on the POVA list also interfered with a worker's relationships with colleagues and the vulnerable people with whom they worked.

#### *The Court of Appeal decision*

The Court of Appeal agreed that the procedure breached article 6, but held that this could be remedied by reading additional words into the legislation giving the worker an opportunity to make representations before being provisionally listed.

The Court held it was not necessary to consider article 8 and the workers appealed, claiming that both articles were engaged.

#### *The House of Lords decision*

The Lords considered the two articles separately. In relation to article 6, they asked two questions. Firstly, was there a civil right in issue here at all? The Lords answered in the affirmative, commenting that a civil right can include the right to practice a profession.

Secondly, did inclusion on the POVA list result in the determination of this civil right? In answering this question, the Lords took into account the fact that the worker is given the opportunity to make representations – albeit only after inclusion on the POVA list.

The Lords concluded that provisional inclusion on the POVA list without a chance to state their case had "a clear and decisive impact" on the worker's right by effectively denying them the opportunity to work within their profession.

Furthermore, the Lords disagreed with the Court of Appeal's remedy, commenting that the effects of inclusion on the POVA list were so detrimental to the worker that providing later access to a tribunal did not sufficiently remedy the breach. Denying the chance to make representations is the denial of a fundamental right.

The Lords added that, where immediate listing was necessary to protect vulnerable adults, nevertheless swift hearings were required to avoid causing irreparable damage to the worker. The Lords noted that this was not the case in reality since delays of 3-6 months occurred between a referral and listing.

Considering article 8, the Lords noted that the right to respect for private life includes the right to establish and develop relationships. The Lords concluded that inclusion on the POVA list (and the stigma attached to it) would indeed interfere with the worker's relationships and so breach article 8.

#### *Conclusions*

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Having concluded that both articles 6 and 8 were breached, the Lords were swift to comment that they did not make any suggestions as to how the scheme could be improved. Instead, they acknowledged that there was “a delicate balance to be struck” and also noted that a new scheme was due to replace the existing one under the Safeguarding Vulnerable Groups Act 2006.

### *Safeguarding Vulnerable Groups Act 2006*

The 2006 Act was introduced in the wake of the Soham murders. It has various aims, including the introduction of a national intelligence system to share information and the creation of an easily-searched database for all alleged sexual offenders.

The 2006 Act also proposes a new system for vetting and registering those working with children and vulnerable adults, known as the Independent Safeguarding Authority (ISA) scheme. This will run in conjunction with the current CRB check which provides information about a person’s criminal record.

Membership of the ISA scheme (which can be taken from job to job) will be free to volunteers while costing those in paid employment a one-off fee of £64. Employers can check a worker’s registration with the ISA scheme through a free online service.

It is possible for an individual to become “barred” from the POVA list, and there are certain offences which will result in automatic barring. Once the decision has been made to bar an individual, there is no opportunity for a review of that decision until the end of a minimum period. At that point, the individual may apply for permission to apply for a review and a chance to prove that they no longer pose a risk.

Applying for a job with vulnerable adults or children if you are a barred individual will be a criminal offence. Employers who fail to carry out necessary checks on a worker or who recruit candidates who should be members of the ISA scheme but are not, could face fines of up to £5,000. An individual’s membership of the scheme will be reviewed if any new information comes to light.

The ISA scheme is not finalised yet but is due to go live on 12 October 2009.

If you would like to discuss how these legal changes will impact on your business or any other Employment law matter, please contact Lucy Bond at [lbond@davidsonlarge.com](mailto:lbond@davidsonlarge.com) or David Hill at [dhill@davidsonlarge.com](mailto:dhill@davidsonlarge.com).