



Public Consultation does not necessarily need to set out alternative options – *Moseley* revisited

There has been speculation about whether additional burdens on public authorities in consultations were required following the Supreme Court judgment in *Moseley* in October 2014. In particular, whether public authorities had to set out other options they considered where they were consulting on proposals reflecting a preferred option.

At the very least, it seemed likely that the *Moseley* judgment would feature prominently in subsequent consultation challenges and that its scope would be tested.

R (Angharad Morris and Donna Thomas) v Rhondda Cynon Taf County Borough Council [2015] EWHC 1403 (Admin) considers the scope of *Moseley* in detail in respect of the duty to give information on alternative options in consultations.

The case, like *Moseley*, involved a consultation over cuts in funding; on this occasion for nursery education. The Council issued a leaflet setting out the background, the proposed funding arrangement and the Council's reasoning for the proposed cuts. A period of consultation then began and was extended following the decision in *Moseley* (with additional materials describing alternative ways in which nursery funding could be changed made available). Following the consultation, the Council decided to proceed with the proposed cuts to nursery education and the termination of free school transport but abandoned plans to cut free school meals for children in part-time nursery education. It was material in this case that the Council had already previously consulted more generally on cutting spending when it published its draft budget (as it did annually).

The applicants challenged on grounds including that the Council had not provided sufficient information on the alternatives and preferred option.

Paterson J held that *Moseley* did not create an inviolable rule that consideration of alternatives is a necessary part of every consultation. Rather, the common law duty of procedural fairness could, in some circumstances, require information as to consideration of alternatives and, in any event, only realistic ones.

Moseley therefore did not reflect any change from previously determined principles on consultation (notably the *Sedley* criteria) but held in the context of that case that fairness and the requirement to provide sufficient information to consultees in that case required information as to alternatives (of which there was none in *Moseley*). Without it, the consultees could not make informed responses and the consultation was effectively misleading.

Patterson J reiterated the principles upheld by *Moseley* that a consultation will be fair if it:

1. communicates the public authority's proposal to those with a potential interest;
2. explains why that proposal is being considered;
3. provides the consultees with sufficient information to make informed responses to the proposals;
4. allows the consultees sufficient time to submit their informed responses; and
5. conscientiously takes their responses into account when making the final decision.

Information as to alternative options is a facet of whether sufficient information to make informed responses has been given to consultees. This is fact-dependent and there is no universal principle that such particulars must be provided nor that a consultation could not present a preferred option. In this case, the steps taken by the Council in the relevant consultation (post-*Moseley*) and its previous broader consultation on its draft budget dealt adequately with the realistic alternatives.

In summary, *Morris* clarifies that a public authority's duty to consult before finalising its decisions is not significantly more onerous than it was before *Moseley*. Practically-speaking, a consultation which presents a preferred option as the only option with no reasoning is susceptible to a *Moseley*

challenge on conventional principles of fairness. However, where proposals reflect a preferred option, as long as reasonable detail as to realistic alternatives and reasoning for the selection of any preferred option is given, that is likely to satisfy the requirement for sufficient information to make informed responses.

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