



Area Health Board prevented by legislation to perform surgery

Legislation	Ombudsmen Act 1975, Social Security Act 1964
Agency	Area Health Board
Ombudsman	Nadja Tollemache
Case number(s)	A2907
Date	1992

Costs—unreasonable refusal to accept complainant's payment of hip prosthesis, thereby delaying surgery

The son of an elderly gentleman wrote to the Ombudsman about the circumstances surrounding his father's requirement for a hip replacement operation. Apparently on the waiting list for a considerable period of time, his enquiries of the Board revealed that while beds and operating facilities were available, the Board had no funds for the artificial hip joint. His offer to pay for the prosthesis himself was refused on the grounds that the Board is precluded legally from undertaking surgery when the prostheses are provided by the patient. The situation was seen by the Board itself to be unreasonable.

It was clear to the Ombudsman that the underlying issue was that the Board's decision was based on its understanding that it was bound under the Social Security Act 1964, sections 91 and 101.

On investigating this complaint, the Ombudsman learned that the Board had obtained a legal opinion on this question before coming to its decision, and was unhappy that the legislation as it stands made its refusal necessary. The General Manager advised:-

'As a Board we are concerned that legislation places us in a position where we cannot act humanely and flexibly to help patients receive the treatment they require. Some may think we have acted unreasonably in this situation but we are not prepared to act illegally. We would be pleased if your investigation of this matter led to a more flexible and helpful interpretation of the legislation.'

A legal opinion the Ombudsman obtained differed somewhat from the Board's. This was conveyed to the Board who considered it at length. A second legal opinion was sought by the Board which supported the first, bringing the Board to the view that:-

'... the clear point is that a statutory body, such as the Area Health Board, a quasi Government Agency, can on charge if there is a clear mandate to that effect.'

The Board advised that it had forwarded copies of all the opinions to the Department of Health with a request that consideration be given to amending Part II of the Social Security Act.

Because the Board sought a legal opinion before coming to its decision and referred the matter to the Department for possible amendments to the Act, it was the Ombudsman's view that the complaint that the Board had acted unreasonably could not be sustained.

As it appeared to the Ombudsman that there was an anomaly in the relevant legislation, and that a similar situation could arise again, the Ombudsman decided to draw the anomaly to the attention of the Minister of Health.

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