

Briefing Note: POVA Ban is a Potential Breach of a Care Worker's Human Rights

An Introduction to the Guide

This briefing note provides care home owners and managers with information on the latest case law affecting the suspension of an employee from working with vulnerable adults. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

The Inland Revenue are currently writing to thousands of contractors and subcontractors on the issue of Employment Status of Construction Workers to check contractors are correctly classified. This is the largest audit since A Court decision handed down at the end of January gives important guidance to those in business in the care home sector.

The House of Lords has ruled that care workers have the right to a hearing before they are included on the POVA (Protection of Vulnerable Adults) list and banned from working with vulnerable adults.

Under current legislation care homes are required to make a POVA referral if they reasonably believe that a care worker is guilty of misconduct which has harmed, or has placed at risk of harm, a vulnerable person in their care.

Such referrals have historically been made by care homes to the Secretary of State. However from 20 January 2009 care homes must make POVA referrals to a new body, the Independent Safeguarding Authority (ISA). ISA has now taken over the responsibility for considering referrals and determining whether a care worker should be placed on the POVA list. The result of inclusion on the POVA list is that the care worker is barred from working with vulnerable adults.

While the current system intended to protect the most vulnerable, the recent ruling in *Wright & Others v Secretary of State for Health* highlights that in its quest to do so, the human rights of care workers have been infringed.

Under the current system, care workers can be provisionally placed on the POVA list without having the opportunity to dispute the allegations against them. It can often then take many months before a final decision is made as to whether or not they should be permanently included on the list. It is only after this decision has been made that the individual is provided with a forum to appeal. During this time the care worker is deprived of their job and unable to get another within the care sector. Significantly, many care home owners and managers are advised by the police or the local authority not to do anything which may interfere with the external investigation and so the care worker can end up being suspended on full pay for many months, at significant cost to the care home.

The House of Lords has determined that the current system is inconsistent with Article 6 of the European Convention on Human Rights – the right to a fair hearing. It concluded that because those who were provisionally listed were treated in the same way as those whose inclusion on the POVA list had been confirmed, in that they were barred from working with vulnerable adults, they were detrimentally affected by not being afforded a fair hearing within a reasonable time of the allegation being made against them.

A declaration of incompatibility was made between s. 82(4) of the Care Standards Act 2000 (the legislation creating the POVA scheme) and Article 6 of the European Convention on Human Rights.

Briefing Note
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Summary:

Guidance for care home owners on the effect of a recent case on suspending employees from working with vulnerable adults

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Where does this leave care homes?

For the time being, the decision does not change anything as, until the Government chooses to amend it, the relevant part of the legislation remains fully in force and must be followed. However a change in the legislation is virtually certain and we will keep you updated on any development that may affect you.

In the meantime ISA have announced that individuals will no longer be provisionally placed on the POVA list without their case being fully investigated. Quite what this means remains to be seen.

While consistent with the approach taken in the House of Lords, it does potentially make things difficult for care homes as they will not be immediately alerted if individuals seeking employment with them are under investigation by ISA. Care homes will now have to be particularly diligent when considering the references and employment history of prospective employees. ISA recommends contacting the previous employer to ask if they have made a POVA referral in respect of the employee. In addition there are certain steps that we recommend that care home owners and managers take:

Firstly, review your disciplinary procedures. Make it clear that, if a worker is provisionally included on the POVA list, any suspension will be without pay. Unless you explicitly state this, suspension must be on full pay.

Secondly, be prepared to conduct your own internal disciplinary investigation and hearing regardless of the wishes of the police and other authorities. If you are placed under pressure not to conduct your own investigation then do take legal advice. Disciplinary investigations should be conducted as soon as possible – sometimes before a referral to ISA is made. Employees should be required under your own disciplinary procedures to co-operate fully with any such investigation.

If you have any queries relating to making a POVA referral or concerns about employing someone under investigation by ISA, please do not hesitate to contact us.

We are experts in the care home field and can provide you with legal advice on all aspects of running a care home, including employment issues and care home acquisitions and disposals. We regularly host free seminars dealing with the latest developments in the care sector. If you would like to be included on our mailing list, please email carehomes@gabyhardwicke.co.uk and we will inform you of developments in the care home sector and send you details of our free care home sector seminars.

If you would like to know more about this topic or our other legal services, please contact:

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