

**Ombudsman's Report and Summary and Analysis of the Ombudsman's
Relevant Findings and Recommendations**

1. The Ombudsman investigates whether there has been maladministration and whether a complainant has suffered injustice as a result. In his Report, the Ombudsman made a finding that the Council's Third Party Contribution payment arrangements did not follow the Care and Support Statutory Guidance and that the Council had not given adequate reasons to depart from the Guidance in this way (details below). The Ombudsman said that this was maladministration and impliedly also found that it had caused injustice to the complainants.
2. The Ombudsman's recommendations, set out in paragraph 60 of the Ombudsman's Report, are that the Council:-
 - Review its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
 - Review its top-up fee contract to reflect the option to pay the top-up fee directly to the Council;
 - Review existing top-up agreements to bring them into line with the Care Act; and
 - Assess whether staff are aware of the Council's duties under the Care Act and provide further training if necessary.
3. The relevant part of the Ombudsman's decision states:-

"50 The Ombudsman considers whether a Council's actions are maladministration. Not every departure from guidance is maladministration and if the Council had, for example, chosen to move away from one part of the guidance for well-considered and legitimate reasons, the Ombudsman would not have found fault.

51 However that is not the case here. The Council has ignored three fundamental concepts of the guidance which are:

- *Councils will deter arrangements for top-up payments to be paid directly to a provider.*
- *Any arrangement to make payments directly to the provider will only be by agreement with the person.*
- *Councils should consider the individual circumstances of each case*

52 It has ignored the guidance without adequately providing reasons apart from administrative convenience. It has adopted a blanket policy of direct

payment to the care home which is far from the letter and the spirit of the guidance. This is maladministration.”

As stated above, the Ombudsman also found that this caused injustice to the complainant. The Council accepts, as it is obliged to do, the findings of maladministration and resultant injustice. It is for the Council to decide whether to accept the recommendations in the light of the findings of maladministration and injustice.

- 4 The Ombudsman’s recommendations are not only that the Council reconsider its Third Party Contribution system in the light of the Guidance, but that, having done so, it adopts a new system whereby the contribution is paid directly to the Council. The Statutory Guidance says:-

“8.33 Where a local authority is meeting needs by arranging a care home, it is responsible for contracting with the provider. It is also responsible for paying the full amount, including where a ‘top-up’ fee is being paid. However, where all parties are agreed it may choose to allow the person to pay the provider directly for the ‘top-up’ where this is permitted. In doing so it should remember that multiple contracts risk confusion and that the local authority may be unable to assure itself that it is meeting its responsibilities under the additional cost provisions in the Care Act. Local authorities must ensure they read the guidance at Annex A on the use of ‘top-up’ fees.”

Annex A of the Guidance says:-

“In terms of securing the funds needed to meet the total cost of the care (including the ‘top-up’ element) a local authority has 3 options ... In choosing which option to take it will need to consider the individual circumstances of the case, and should be able to assure itself of the security of the arrangements and that there is no undue pressure on the person making the ‘top-up’ payment to increase the level of payment. Whichever option it chooses, it remains responsible for the total amount. The 3 options are:

- treat the ‘top-up’ payment as part of the person’s income and therefore recover the costs from the person concerned through the financial assessment*
- agree with the person, the third party paying the ‘top-up’ (if this is not the cared for person) and the provider that payment for the ‘top-up’ element can be made directly to the provider with the local authority paying the remainder. However, as stated earlier, this is not recommended.*
- the person making the ‘top-up’ payments pays the ‘top-up’ amount to the local authority. The local authority then pays the full amount to the provider”*

The Ombudsman has found that the Council’s existing arrangements fall into the second category and that this can only be implemented with the agreement of the third party. As the third party is not offered the third option they cannot be said to have agreed to the second option and so the second option is contrary to the Guidance.

- 5 However, since this is statutory guidance the Council is not obliged to follow it if it has cogent reasons to depart from it. The position of the Council in relation to statutory guidance can be characterised as follows on the basis of the case of *R (on the application of X) v Tower Hamlets London Borough Council*.

“In summary, therefore, the guidance does not have the binding effect of secondary legislation and a local authority is free to depart from it, even 'substantially' but a departure from the guidance would be unlawful unless there is cogent reason for it, and the greater the departure, the more compelling must that reason be. Conversely a minor departure from the letter of the guidance while remaining true to its spirit may well be easy to justify or may not even be regarded as a departure at all). The court will scrutinise carefully the reason given by the authority for departing from the guidance. Freedom to depart is not necessarily limited to reasons resulting from 'local circumstances' . . ., although if there are particular local circumstances which suggest that some aspect of the guidance ought not to apply, that may constitute a cogent reason for departure. However, except perhaps in the case of a minor departure, it is difficult to envisage circumstances in which mere disagreement with the guidance could amount to a cogent reason for departing from it.”

- 6 The Ombudsman’s decision seems to accept that the Council can depart from Guidance if it has a cogent reason.
- 7 On the basis of these findings the Council must give consideration to whether it accepts the Ombudsman's recommendations as set out in paragraph 2 of this Appendix. In making that decision the Executive Councillor should note that the Council does not have to accept the recommendations of the Ombudsman if it has cogent reason not to.

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