

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Lincolnshire County Council
(reference number: 19 006 248)**

12 February 2021

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Report summary

Adult social care: charging

The Council's fixed charge for short-term residential care was not in line with statutory guidance.

Finding

Fault found causing injustice and recommendations made.

Recommendations

We recommend the Council:

- reimburses those people it has already identified as having overcharged based on the figures it already has available; and
- estimates the remaining cases (for people who are still alive) on the basis of financial information currently available to the Council. If this is not possible, offers those people a retrospective financial assessment and calculates any refunds due for those who respond to the Council's offer. For the avoidance of doubt, there is no need for the Council to take any action for those who do not respond to its offer of a retrospective financial assessment.

Refunds should be in respect of the period since the Care Act 2014 came into force.

The complaint

1. The Council's fixed charge for short-term residential care was not in line with statutory guidance.

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
3. It is for the Ombudsman to determine what constitutes maladministration, which is not the same as unlawfulness. Failure to follow the law and guidance (including statutory guidance) may amount to maladministration (fault). (*R (on the application of Doy) v. CLAE [2002] Env. L.R.*)
4. The law says we cannot normally investigate a complaint when someone could take the matter to court. However, we may decide to investigate if we consider it would be unreasonable to expect the person to go to court. (*Local Government Act 1974, section 26(6)(c), as amended*)
5. The Courts have considered the suitability of judicial review as an alternative remedy and have decided that complaining to us is in general more appropriate. (*Anufrijeva v London Borough of Southwark (2003) EWCA Civ 1406*)
6. We normally expect complainants to use a council's complaints procedure before we start an investigation. This is because the law says a council should have a reasonable opportunity to respond to the complaint. However, we may disapply this rule if we do not consider it reasonable for the council to have had a reasonable opportunity to respond. (*Local Government Act, section 26(5)*)
7. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
8. Where we identify fault in an investigation, we may make recommendations not only to remedy injustice sustained already, but also to prevent injustice being caused in the future in consequence of similar fault. (*Local Government Act 1974, section 31(2B), as amended*)

How we considered this complaint

9. We produced this final report after examining relevant documents and taking into account comments from the Council on two drafts.

Investigation

10. When investigating another complaint against this Council (our reference [17 009 926](#)) about charging for adult social care, we noted the Council was charging a fixed rate for short-term residential care without carrying out a financial

assessment. This policy applied from 2012. In 2018, the fixed weekly charge for residential care lasting no longer than eight weeks was:

- £72.11 for those aged 18 to 24;
- £89.16 for those aged 25 to pension credit age; and
- £138.02 for those receiving pension credit.

The policy said people could have a full financial assessment if they wished.

11. We considered there may be fault in the Council's policy causing injustice to members of the public and decided to investigate in accordance with our powers under section 26D of the Local Government Act 1974. The Council objected. It said no individual had complained about the flat-rate charge and we needed to be able to identify a particular complainant to use our power to investigate.
12. Having taken advice, our view is that we can use our powers under section 26D if, during an investigation, we can identify a group or class of people (in this case, users of short-term residential care) who may be affected by injustice. The Council disagrees. Its view is we need to be able to identify particular individuals affected.
13. We consider the Council's interpretation of section 26D does not give effect to the purpose of the power and could avoid scrutiny on a legal technicality. If the Council was correct, we would be powerless to intervene although in possession of knowledge that an authority may be operating a faulty policy with potential injustice to members of the public. We do not consider Parliament would have given us the power it has, if we could not use it where we had identified potential fault with a particular policy during the course of an investigation.
14. We note there is a potential alternative legal remedy available for those affected by the Council's policy: judicial review. The Council told us judicial review would achieve the same means as an investigation by us and may be preferable as any remedy (which may include damages) would be enforceable. We accept that a judicial review may achieve a similar outcome. But, we do not consider this remedy appropriate or reasonable for those affected because they are unlikely to have the means to pursue a remedy through the courts, especially given the limited funding now available through legal aid. And, the Courts have considered the suitability of judicial review as an alternative remedy in situations such as this and have decided that complaining to us is in general more appropriate.
15. The Council also said the matter was a question of lawfulness and not maladministration (fault). We agree with the Council that it is for the courts to determine unlawfulness and our role is to determine maladministration causing injustice. We make no comment in this report about whether the Council's policy is lawful or not. The courts have confirmed that it is for us to decide what amounts to maladministration which may in some cases include a failure to follow statutory guidance.
16. We exercised discretion to investigate this complaint even though the Council has not received or had an opportunity to respond to individual complaints through its local complaints procedure. We do not consider it reasonable for those affected by this issue to have complained to the Council or for it to have responded. We have taken into account that those affected are a vulnerable group, typically not well-versed in the law and statutory guidance and the finer details of the adult social care charging regime. The Council has had an opportunity to respond to the issues through our investigation.

Relevant law and guidance

17. The rules on charging for adult social care are in the Care Act 2014 and in Regulations. Further clarification is in Care and Support Statutory Guidance.
18. Case law has confirmed a council can depart from statutory guidance if it has cogent reasons. (*R(X) v Tower Hamlets LBC [2013] EWCA Civ 904*)
19. Where a council charges people for social care, it must:
 - carry out a financial assessment of what the person can afford to pay, following detailed guidance that sets out how it should treat a person's capital and income;
 - give a written record of that assessment to the person; and
 - regularly reassess a person's ability to meet the cost of any charges to take account of any changes to their resources. (*Care Act 2014, section 17*)
20. The law gives councils discretion to charge for short-term care in a care home and/or to assess and charge the person as if they were receiving non-residential care. 'Short term' means residential care for less than eight weeks. (*Regulation 8, Care and Support (Charging and Assessment of Resources Regulations 2014)*)
21. Councils can carry out light-touch financial assessments. A light-touch financial assessment is where a council treats a person as if a full financial assessment has been carried out. If a council uses light-touch assessments, it must still be satisfied on the basis of evidence from the person that they can afford the charge. (*Care and Support Statutory Guidance, paragraph 8.22*)
22. Guidance explains the situations where a council may consider a light-touch financial assessment.
 - Where a person has significant finances and does not want a full assessment for personal reasons, but wants to access council support.
 - Where a council charges a small or nominal amount which the person is clearly able to meet and would clearly have the relevant minimum income left and carrying out a financial assessment would be disproportionate.
 - Where a person receives basic benefits that show they cannot contribute towards their care costs (for example, income-based job seeker's allowance). (*Care and Support Statutory Guidance, paragraph 8.23*)
23. When carrying out a light-touch assessment, a council needs to satisfy itself the person can afford the charge. The ways a council could satisfy itself that the person could pay the charge are:
 - the person has property or savings worth more than the capital limit (currently £23,250);
 - the person has sufficient income left following the charge due. (*Care and Support Statutory Guidance, paragraph 8.24*)
24. The council should still ensure people are not charged more than is reasonable for them to pay and should consider the level of charge proposed as well as evidence the person provides. They must tell the person when a light-touch financial assessment has taken place and explain they can have a full financial assessment if they wish. (*Care and Support Statutory Guidance, paragraphs 8.25 and 8.26*)

Comments from the Council

25. The Council told us:

- flat-rate charges are allowed under paragraph 8.22 of Care and Support Statutory Guidance which refers to circumstances where a council can treat a person as if a financial assessment has been carried out. This means the Council does not have to carry out a financial assessment at all in those circumstances, including where it charges a small or nominal amount for a particular service which a person is clearly able to meet and would clearly have the relevant minimum income left and carrying out a financial assessment would be disproportionate;
 - it asked people about their financial circumstances. If they have over the capital threshold, they are charged full cost. If not, they are charged a flat rate which considers the benefits they are entitled to claim so the sum charged is one the person can afford to pay;
 - it had reviewed its charging policy and was no longer applying a flat-rate charge for residential respite care. Instead, it would be charging people as if they were receiving non-residential care (see paragraph 20);
 - the decision on one of our complaints about charging against Stockport MBC (our reference [17 008 420](#)) concluded that its policy of flat-rate charging '*mirrored the statutory scheme*'. So we have adopted an inconsistent position on the same issue.
26. The Council told us 7,088 people had received respite care since the Care Act came into force. Of those, 2,701 had since died. The Council told us it would cost over £1 million in staff time, using agency staff, to do financial assessments of all those involved and this was not proportionate.
27. The Council also told us it had identified the charges of 4,387 respite users who later went on to full-time residential care. It said:
- 2,991 paid the correct charge or underpaid;
 - 115 overpaid by £10;
 - 156 overpaid by £20; and
 - 164 overpaid by between £21 and £50.
- The above figures are per episode of respite care (some individuals may have had more than one episode).
28. We asked the Council for the background papers that led to the approval and implementation of its charging policy in 2012. The reason for our request was to give the Council the opportunity to evidence it had cogent reasons for departing from the predecessor to Care and Support Statutory Guidance when it decided to approve the policy in 2012. Despite our request, the Council has not provided this evidence.

Findings

29. We consider there was fault in the Council's policy on flat-rate charges for short- term residential care. Our reasons are:
- Care and Support Statutory Guidance emphasises the overarching principle of affordability. We do not consider the fixed charge takes account of this principle;
 - in the context of light-touch assessments, paragraphs 8.22 and 8.24 of the Care and Support Statutory Guidance envisage consideration by the Council of some evidence of the person's finances, including their income and limited

assessment by the Council of affordability for the individual. We accept that this assessment would be short of a full financial assessment with all the paperwork which that would entail. But the practice of ascertaining a person's capital and not looking at their income at all, falls short of the expectations of the Care and Support Statutory Guidance;

- the Council can depart from statutory guidance if it has cogent reasons. The Council has not given us any information about this and so we conclude it had no cogent reasons when it implemented the policy;
 - councils have some discretion around charging people for short-term residential care. They can choose not to charge at all or can charge people as if they are receiving non-residential care. And they can depart from Care and Support Statutory Guidance with cogent reasons. None of these approaches applied to the 2012 charging policy; and
 - we do not consider the discretion around charging for short-term residential care was intended to have the effect that people may pay more than if they had a full financial assessment.
30. We note the Council's view that we have adopted an inconsistent position. We do not share that view. The complaint about Stockport MBC was about charges for residential care, about inadequate information and other issues not concerning the flat-rate charge. And our comment that Stockport's charging policy mirrored the statutory scheme was a general comment about the policy and not in the context of any finding of fault about its flat-rate charge.

Injustice

31. The Council has already identified some people who it says have been charged more than they should have been and it has given us some figures which we set out in paragraphs 26 and 27. Those people have suffered a financial loss. We do not regard the charges involved as being 'small or nominal'. These are charges that might make a material difference to someone's income.

Recommendations

32. The Council has already given us figures for some of those who received respite care. We recommend the Council:
- reimburses those people it has already identified as having overcharged based on the figures it already has available; and
 - estimates the remaining cases (for people who are still alive) based on financial information currently available to the Council. If this is not possible, offers those people a retrospective financial assessment and calculates any refunds due for those who respond to the Council's offer. For the avoidance of doubt, there is no need for the Council to take any action for those who do not respond to its offer of a retrospective financial assessment.

Refunds should be in respect of the period since the Care Act 2014 came into force.

33. The Council has accepted the above recommendations, which we welcome.
34. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Final decision

35. The Council was at fault because its charging policy for short-term residential care was not in line with Care and Support Statutory Guidance. To remedy the injustice, it has agreed to make repayments identified in this report.

This page is intentionally left blank