



The Commission for
Local Administration in England

Report

on an Investigation into
Complaint No 99/B/00799 against
Essex County Council

74 March 2001

Introduction

1. Mr Trent complains about the failure of the Council to provide a putting to bed service for his father, Mr Derwent, when the Agency providing the service on behalf of the Council withdrew its provision. Mr and Mrs Derwent were both extremely distressed by the withdrawal of the service. Both died within three weeks of the service being withdrawn. Mr Trent believes that the distress and anxiety they suffered hastened the deaths of his parents.
2. The complainant and the Council were invited to comment on a draft of this report, before the conclusions were written. I have taken account of their comments in preparing the final text and reaching my conclusions.
3. For legal reasons, the names used in this report are not the real names of the people concerned.¹

Legal and Administrative Background

4. A Council has a duty to assess the need for community care services.² The legislation does not define “need” but refers to a person who appears to have a need for such services.
5. In May 1998 there was a policy change in the way the Council provided home care services. The Council decided that no more than 50% of home care provision should be provided in-house. The aim was to move towards 50% of provision from the private sector in each of the 12 District Council areas covered by the Council.
6. The Council contracted with the private sector on the basis of a flat rate fee for the care to be provided. A sub-committee of the Social Services Committee has formally agreed the flat rate fees to be paid for home care.
7. An officer may refer individual cases, where additional funding or specialist services are required, to a panel comprising the Service Manager, a representative of the Health Service and the panel clerk. The panel met weekly to assess requests for additional funding, such as payment of a mileage allowance. This panel dealt with all requests for external provision.

1 Local Government Act 1974, section 30(3).

2 Section 47 NHS and Community Care Act 1990.

8. In R -v- Gloucestershire County Council ex-parte Barry [1997] AC 584 HL it was accepted that it was for the local authority to decide whether a person had a need for a service and whether it was necessary to meet that need. The Council's overall financial resources would be a relevant factor for councils to take into account when assessing an individual need for community care.
9. However, in R -v- Sefton Metropolitan Borough Council ex-parte Help the Aged and others [1997] All 532 it was held that once an individual assessment has been carried out and a need for service had been identified against the Council's agreed criteria, if the authority is under a duty to provide the service it cannot use lack of resources as a reason for not providing it. Within that constraint, however, a Social Services authority has discretion as to what services should be provided to meet the assessed need.

Investigation

10. Mr and Mrs Derwent were elderly and disabled. Mr Derwent was 90 and suffered severe Parkinson's Disease, arthritis and kyphosis of the spine. He had mobility problems and needed assistance in getting up and going to bed. Mrs Derwent, who was 92 and his main carer, suffered from angina and breathing problems, and she was registered blind.
11. On 8 November 1995 Mr Derwent had been assessed (see paragraph 4) as needing a carer in the morning and two carers in the evening to help him in and out of bed and with dressing and undressing. It was agreed that one carer with a hoist might be an acceptable alternative for the evening care. In June 1998 he was assessed as still needing evening care, as well as two carers in the morning. The care in the morning was provided by the Council while the evening putting to bed care was provided by the Agency. These arrangements operated seven days a week.
12. On 1 February 1999 Officer A (a Social Worker) received a telephone call from The Agency to say it could not continue to provide the putting to bed service at weekends as it only had one carer in the area and the Agency was unwilling to allow him to continue to work seven days per week. The Agency confirmed, by fax, on 8 February that the service would cease with effect from the first weekend in March.
13. Officer A rang all the agencies which had contracts to provide care on behalf of the Council to see if any was able to provide the service required. Only one agency

- said that it might be prepared to provide staff, but it requested that the Council pay the mileage costs of the staff attending. The cost of the mileage allowance was not quantified, but the Council's own care staff received 34 pence per mile at the time of these events.
14. Officer A said that the Council had considered whether it would be appropriate to pay the additional mileage costs, but she had been informed, after discussions between Officer B (Team Leader), Officer C (Service Manager) and Officer D (County Manager, Services for the Elderly) that it was not the Council's policy to pay mileage over and above the flat rate fee to carers (see paragraph 6).
 15. On 19 February 1999 Officer A received a telephone call from the Agency to say that it would not be able to provide the weekday evening service after Friday 2 April.
 16. On 2 March Officer A visited Mr and Mrs Derwent to explain that the Agency planned to withdraw the putting to bed service at weekends with immediate effect because it did not have the staff available to meet Mr Derwent's needs. Officer A explained that the District Nurse would provide interim cover at weekend evenings, while the Council tried to find an agency to resume the putting to bed service. She explained that the Council would try to find alternative carers, but if none were available Mr Derwent would be offered respite care at weekends at a residential home (the Home). Officer A told Mr and Mrs Derwent and their daughter Mrs Avon, that transport would be available to take Mr Derwent, in his wheelchair, to the Home.
 17. Mr Trent wrote on 2 March to the Council asking that it make arrangements to ensure that the putting to bed service, which his father had been assessed as needing, continued. He explained that the residential care offered was inappropriate because of the stress his father would suffer if he had to leave his home every weekend.
 18. On 12 March Mr Trent telephoned Officer A to discuss his parents' situation. In the course of that conversation Mr Trent was informed that the weekday putting to bed service would cease on 26 March.
 19. On 21 March the District Nurse told Mrs Derwent that she was not able to continue providing the weekend evening service and would be unable to put Mr Derwent to bed for the weekend of 26/27 March.

20. On 24 March Mrs Derwent was admitted to hospital. Mr Trent spoke to the duty social services officer and asked that respite care be arranged for Mr Derwent for the weekend because Mr Trent had been unable to arrange alternative care at such short notice.
21. On 26 March there was no transport available and Mrs Avon had to arrange to transport Mr Derwent to the Home where respite care had been arranged.
22. Mr Derwent was admitted to hospital from the Home and died on 21 April. Mrs Derwent died in hospital on 16 May 1999.
23. Mr Trent made a complaint to the Council about the withdrawal of the service and, as he was dissatisfied with the outcome, he made a complaint to me.

The Complainant's View

24. Mr Trent thought that the Council should have informed his parents immediately it was aware that The Agency planned to withdraw the putting to bed service. He explained, at interview, that the family arranged for a nurse to "live in" from time to time to give his mother respite from caring for Mr Derwent. There was insufficient time to arrange alternative help when Officer A gave Mr and Mrs Derwent five days' notice that the weekend service was to be withdrawn.
25. Mr Trent believes that the Council should have agreed to pay mileage (see paragraph 14) if this would have secured the service. He said that Mr and Mrs Derwent would have been willing to make a contribution to ensure the service was provided.
26. Mr Trent explained that his mother had been well, though frail, until she was told Mr Derwent would have to go into respite care for the weekends if no replacement for the Agency could be found (paragraph 16). He read to the Commission's officer extracts from her journal to illustrate how the worry about her husband had affected her and the officer was able to examine the journal at the end of the interview.

The Council's View

27. In its comments on this complaint the Council explained that the terms of the contract then existing with agencies providing home care services did not permit the contractor to withdraw from the provision of the service under any circumstances. An agency could refuse to accept an initial order to provide a

service to a new client on the grounds that it had insufficient staff. The new contract, in force since April 1999, provides an agency cannot withdraw from the provision of a service unless the Council agrees. If the Contractor does withdraw, it is liable to pay liquidated damages in the sum of £75.

28. The Council explained that it did not agree to pay mileage (see paragraph 13) as this would have set a precedent. In its comments on the complaint the Council said:

“the Council contracted with the independent sector on the basis of a flat rate for care to be provided The cost is set on the basis of covering all aspects of rotas and travel and it is for the independent providers to determine how they should remunerate their staff to ensure that they have adequate cover to meet the care packages It would be damaging to stable contracting arrangements if the Council agreed to pay enhanced rates as and when an individual firm broke their contract.”

29. The Council explained that there was considerable pressure on the agencies and the in-house service providing personal care because of a lack of staff to provide the services. This was particularly acute in the more rural parts of the Council’s area and, in recognition of this, the Council agreed to Targeted Supply Areas (TSA) which pay a higher inclusive rate to providers in respect of all clients within the TSA.
30. The Council says that the weekend respite care for Mr Derwent (see paragraph 16) cost £100 per weekend. The cost of transport to and from the Home was not quantified.

Conclusions

31. I am sure the Council needs no reminding that the home care it provides to vulnerable elders is among the most important and sensitive of all its services. No-one reading the facts of this complaint, however, can reasonably doubt that the Council’s treatment of Mr and Mrs Derwent fell far short of acceptable standards.
32. The Agency notified the Council on 8 February 1999 that Mr Derwent’s weekend putting to bed service would end through staff shortages on 1 March, with effect from the following weekend of 6/7 March; and on 19 February that its weekday evening putting to bed service would end on Friday 2 April. The consequence of the first service failure was that Mr Derwent would probably have to go into a respite home at weekends. Mr and Mrs Derwent, both in their 90s, were not told

of this until 2 March. No doubt the Council, which was trying to put alternative provision in place, did not want to worry them. It would have been better, I think, if the Council had discussed with Mrs Avon and Mr Trent their problems with the Agency as these began to emerge because, given more notice, they might have been able to do more to help their parents out. But I do not conclude that the delay here amounts to maladministration.

33. Maladministration did arise, however, in the Council's consideration of alternative care for Mr and Mrs Derwent. It cannot be easy to arrange for home care in the rural parts of the County's area, and even the best contractual agreements must fail from time to time. But it seems to me that when a service failure occurs, the Council might well have to seize any realistic opportunity to make the service good. Here it had such an opportunity. Another home care contractor offered to provide the weekend putting to bed service to Mr Derwent but only if the Council would pay its staff travel costs over and above the flat rate fee for providing home care. Doubtless there are many tussles between the Council and its providers over such arrangements and I can understand why the Council might have considered this a precedent and the thin end of the wedge, but what was that to Mr and Mrs Derwent? It seems to me that Mr Derwent's home care was entirely sacrificed to maintain the purity of the Council's contractual arrangements. No-one seriously thought of making him an exception to policy, even though the cost of the weekend respite care was likely to outweigh by far the travel costs of agency staff to Mr and Mrs Derwent's home, and even though Mr Trent says that the family would willingly have contributed to travel costs (they already paid for a nurse to live in from time to time to give Mrs Derwent rest). In fact, the Council - for reasons of policy - put such an exception entirely out of its mind. This was a classic case of the Council fettering its discretion, and was maladministration.
34. What injustice did this cause? On balance, had the Council properly weighed the needs of Mr and Mrs Derwent and the costs of alternative provision, I believe it likely that weekend home care would have continued without the need for Mr Derwent to attend a respite home. That, as Mrs Derwent's journal makes clear, would have saved them some considerable anguish at the time. Mr Trent and the family now have to live with the pain of knowing that this avoidable problem overshadowed, to some extent, their parents' last days. I cannot, however, conclude that it hastened their deaths, because so many other factors would have borne on those events.

Finding

35. For the reasons given in paragraph 33, I find maladministration by the Council causing the injustice I have described in paragraph 34. To remedy that injustice I recommend that the Council makes Mr Trent an ex-gratia payment of £500. I also recommend that the Council puts in place arrangements to ensure that, as far as possible, the maladministration I have identified does not recur.

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