

The investigation of a complaint
against Isle of Anglesey County Council

A report by the
Public Services Ombudsman for Wales
Case: 201705774

The Complaint

1. Mr G complained to the Ombudsman that, contrary to Welsh Government guidelines, the Isle of Anglesey County Council ('the Council') declined to fully fund his choice of an alternative placement for his wife, Mrs G, when the EMI¹ care home in which she had been residing could no longer accommodate her.² Mr G complained that the Council:

- Engaged with the process of identifying alternative placements for Mrs G only four weeks before the change in the care home's registration, despite being aware of the need to do this for several months.
- Failed to reassess or review Mrs G's care and wellbeing needs prior to identifying alternative care homes that it considered 'suitable'.
- Failed to consider how the disruption of moving to a new care home would adversely impact on Mrs G's dementia.
- Declined to fully fund Mr G's first choice of care home, obliging him to pay substantial top-up fees. Mr G complained that other, less expensive care homes identified by the Council did not fully meet his wife's needs.

Investigation

2. I obtained comments and copies of relevant documents from the Council and considered those in conjunction with the evidence provided by Mr G. I have not included in this report every detail that the investigation has considered, but I am satisfied that nothing of significance has been overlooked.

3. Both Mr G and the Council were given the opportunity to see and comment on a draft of this report before the final version was issued.

¹ EMI: Elderly Mentally Infirm. Specialist EMI homes care for people with dementia who are no longer able to be looked after at home. EMI beds are sometimes also available in residential care and nursing home settings.

² Following a change of registration-status. The care home reverted to residential care only, due to financial pressures.

Relevant legislation and regulation

4. In accordance with the provisions of the Social Services and Wellbeing Act (Wales) 2014 (“SSWA”), the Council is required to promote the wellbeing of people who need care and support. Wellbeing is defined by s2 of the SSWA in relation to a number of factors. They include a person’s physical and mental health, their emotional wellbeing and domestic, family and personal relationships.

5. The Welsh Government issued a Code of Practice in April 2016 (“The Code of Practice”) regulating how local authorities should calculate charges for persons in need of care in community and care home settings. Annex C of the Code of Practice (Choice of Accommodation and Additional Costs) specified a person’s right to choose to be accommodated in a particular care home,³ but outlined how, in certain circumstances, their preferred choice may lead to them incurring additional costs.

6. Section 2.1. of Annex C stipulates that a local authority is only obliged to accept a person’s choice of care home if:

- The care home is suitable to meet the person’s assessed needs.
- A place in the care home is available.
- The choice would not cost the local authority more than the amount it would usually expect to pay for accommodation of that type.
- The provider of the care home is willing to enter into a contract with the local authority to provide the accommodation on the local authority’s terms and conditions.

7. Section 4.2. provides that, in cases where the availability of care homes suitable to meet the person’s assessed needs (at the standard cost) are limited: ‘..a person must not be asked to pay an additional cost...where no suitable accommodation is available at its standard amount to meet a person’s assessed needs in full, the local authority must arrange a placement in a suitable, more expensive setting and adjust its funding

³ Once the type of care home they require has been identified via the needs-assessment process.

accordingly to ensure the needs are met. In such circumstances, the local authority must not ask the person being placed or a third party to pay the additional costs’.

8. Section 6.2. emphasises that a local authority must do everything it can to take into account a person’s circumstances and preferences when arranging their care home placement.

9. Section 92 of the Welsh Government’s Code of Practice governing the Assessment of the Needs of Individuals (issued under Part 3 of the SSWA) states that ‘..where a previous assessment has not fully addressed the person’s care and support needs, or there may be new needs due to a change in circumstances then a review of an assessment must be undertaken’.

10. Article 8 of the European Convention on Human Rights (ECHR) provides a right to respect for one’s ‘private and family life, home and correspondence’, subject to certain restrictions that are ‘in accordance with law’ and ‘necessary in a democratic society’. The ECHR was incorporated into UK law by the Human Rights Act 1998 (“the HRA”). All public authorities must follow the HRA. It is not the function of the Ombudsman to make definitive findings about whether or not a public body has breached an individual’s human rights by its actions or inaction. However, he will identify where human rights matters are engaged and comment on a public body’s regard for them.

Relevant background information and events

11. In June **2017**, Mr G was informed by the manager of the EMI residential care home (“the First Home”) in which his wife, Mrs G, resided, that, following protracted discussions with the Council over funding (for over two years), a decision had been made to change its registration status from EMI residential care to residential care only. The Council had been informally told this in May 2017. This meant that Mrs G, who was 91 years of age and had advanced dementia, would no longer be able to reside at the First Home. Alternative EMI accommodation would need to be found for her. On 27 June, the Team Manager of Adult Services (“the Team Manager”) requested that Mrs G’s social worker (“the Social Worker”) carry out a fresh assessment of Mrs G.

12. The First Home formally notified the Council of its decision on 4 July 2017. It was agreed that its EMI residents would each undergo a fresh assessment of needs, and, via a phased approach, would be found appropriate alternative placements.⁴

13. On 7 July, the First Home updated Mr G at a meeting held with him. The following day, Mr G wrote to the Team Manager, seeking clarification of the Council's plans in respect of Mrs G. The Team Manager replied on 24 July, confirming that the Social Worker would arrange a meeting at the First Home to discuss the matter in due course. The First Home formally confirmed its change of status in a letter to Mr G on 28 July. In that letter, the First Home's Manager said that the Council was aware of the situation and, as funding sponsor for Mrs G, would assist Mr G in finding a suitable alternative placement for his wife (a process that would need to be completed by the end of August).

14. On the same day (28 July), Mr G met with the Social Worker and the First Home Manager to discuss alternative placements. The Social Worker recorded that Mr G expressed a strong preference for Mrs G to be moved to an EMI home located only one and a half miles away from his home ("the Second Home"). However, the Social Worker suggested that Mr G should also consider other options, as, at that time, it was not clear if the Second Home was accepting new residents. Mr G considered the other options proposed by the Council to be unsuitable as they were located, respectively, at 10 miles ("the Third Home"), 14.5 miles ("the Fourth Home") and 22 miles ("the Fifth Home") from his home.⁵ Mr G argued that these distances would make it very difficult for him to visit his wife on a daily basis (as he had been doing for the last two years) and, given that he was himself 90 years old, together with the fact that he had recently recovered from a heart-attack, the additional driving would be both onerous and dangerous.

15. The Social Worker also recorded that the First Home Manager considered that Mrs G's worsening dementia (and the challenging behaviour this gave rise to) required increasing levels of supervision and support, such

⁴ The relocation of the EMI residents was to be conducted in three phases and Mrs G was included in phase two – the exact timing of which was not specified.

⁵ The First Home was located some 5 miles from his home (i.e. a 10-mile round trip).

that the First Home, in any event, might no longer have been a suitable placement for her. The Social Worker agreed to contact the Second Home as soon as possible but stressed that Mr G should explore other alternatives.

16. Mr G wrote to the Council on 7 August to request an update on its efforts to secure a place for Mrs G at the Second Home. As he did not receive a reply, he independently arranged to view the Third Home that the Council had proposed. Though 10 miles away (and in the area of a different County Council), the Third Home agreed to accept Mrs G depending on the outcome of an assessment of her needs. However, the care offered would cost considerably more than that provided by the First or Second Home. As it was not clear whether the Council would pay this additional cost, Mr G agreed that he would initially pay the additional sum as a top-up fee. On 10 August, the Social Worker visited the First Home with the intention of conducting Mrs G's needs assessment. However, Mrs G had been taken out by Mr G on that day and the assessment was not performed.

17. On 24 August, the First Home Manager contacted the Council and asked when Mrs G could be transferred to the Third Home. The Council said that it was not aware of this arrangement and that the proposed move should be delayed as Mrs G's assessment had not yet been carried out and the Council had not had an opportunity to consider the funding implications. On 28 August, the First Home Manager informed the Council by email that staff from the Third Home had travelled to the First Home and had carried out their own assessment of Mrs G and, on that basis, were happy to accept her. The move was planned for the following day. The Council contacted the First Home and asked if the transfer could be delayed.

18. On the same day, Mr G wrote to the Team Manager, informing her of his intention to move Mrs G to the Third Home as it was his view that it was the only option that met all her needs. On 29 August, the Team Manager telephoned Mr G and requested that he postpone the transfer until the assessment of Mrs G's needs had been completed and the finances had been properly secured. Mr G declined and insisted on transferring his wife that day. The Council explained that the additional cost issue would have to be resolved prior to his wife's move and that the Council would not be

responsible for paying it. The conversation ended when the Council said that they would again speak to the Manager of the Second Home to see if a bed had become available. Mr G agreed to this.

19. The Council contacted the Second Home and was told that there was the possibility of a bed becoming available the following week. The Council contacted Mr G again to inform him of this. It also told Mr G that the First Home would be willing to accommodate Mrs G for an additional week or so until the assessment was completed. However, Mr G replied that this was not acceptable as the placement at the Second Home was not guaranteed and that he needed to act immediately.

20. Mr G went ahead with the move and, after some consideration, the Council agreed to pay the Third Home its standard EMI rate (but remained of the view that Mr G was responsible for the top-up fees). In view of this decision, Mr G submitted a formal letter of complaint to the Council on 4 September. In his letter he stated that:

- The Council gave no consideration to the adverse impact that the move had on Mrs G's dementia.
- The Council's decision to refuse to pay the additional costs of Mrs G's care at the Third Home ran contrary to the Code of Practice.

21. The Council formally replied to Mr G's letters of 7 and 28 August on 13 September. In its letter it said that:

- The First Home had agreed to extend Mrs G's residence by a few days in order to allow Mrs G's assessment to be conducted.
- The Second Home might be able to accommodate Mrs G in the next two weeks.
- Neither the Second nor the Fourth Homes required the payment of top-up fees.
- Mr G's formal complaint would be dealt with under the Council's complaint procedure.

22. The Council subsequently investigated Mr G's complaints and issued a Stage 2 investigation report on 16 November. Neither complaint was upheld. Mr G was unhappy with this and subsequently complained to the Ombudsman. In correspondence with the Council, the Ombudsman asked whether Article 8 of the ECHR had been taken into account in identifying alternative placements for Mrs G.

23. Sadly, after a short illness, Mrs G passed away on 20 May 2018.

Mr G's evidence

24. In his letter to the Council of 7 August, Mr G said that the need to secure an alternative placement for his wife had become urgent as the First Home could not guarantee that she could remain there beyond the end of August and the Second Home appeared unable to accept her. Mr G requested that a fresh assessment of all Mrs G's needs be expedited and should include consideration of how the proposed move might adversely affect her wellbeing. Mr G added that any move that prevented him from visiting his wife every day would be 'out of the question' and in breach of her and his human rights. He said that in the meeting on 28 July, the Council seemed more interested in finding a home without top-up fees which satisfied some of Mrs G's needs, as opposed to all of her needs (as yet unassessed). Mr G said he was told the Council did not pay top-up fees,

25. Mr G said that, as he had received no reply from the Council to his letter of 7 August, he had felt obliged to independently arrange and initiate Mrs G's move to the Third Home. Mr G said that the increased driving distance to and from the Third Home (a 20-mile round trip) might restrict his ability to visit his wife every day, but he considered that the move was in her best interests as it "hopefully, satisfied all her needs". Mr G said that he was not aware of any agreement with the First Home Manager that Mrs G could remain in the First Home beyond the end of August (the date stipulated in the letter he had been sent).

26. In his letter to the Ombudsman, Mr G stressed that:

- During and following the move, Mrs G's dementia symptoms worsened. As a measure of her deterioration, she was subsequently assessed as requiring EMI nursing care.

- The proposed move to the Second Home was never confirmed and remained only a possibility.
- Despite requests, the Council never carried out a fresh assessment of Mrs G's needs/wellbeing.
- He received no advance notification of the Social Worker's plan to conduct an assessment of Mrs G on 10 August.

The Council's evidence

27. In its Stage 2 investigation report, the Council said that the First Home gave adequate notice to all concerned that its EMI status would be coming to an end. It was agreed that residents would be assessed and appropriately transferred in three phases. Whilst Mrs G's assessment was not completed (due to staff annual leave), the Council engaged with the process and offered Mr G a series of suitable alternative placements which he chose to decline. The Council said that a place at the Second Home would (probably) have been available within a matter of days, but Mr G did not wait to see if this transpired.⁶

28. The Council said that the Team Manager was on annual leave from 9-20 August and that the Social Worker was on annual leave from 11-25 August (having failed to see Mrs G the previous day). As a result, neither member of staff was available to progress Mrs G's assessment or move to an alternative placement.

29. The Council said it was not obliged to pay the additional fees, as there was no evidence that Mrs G was forced to move to a more expensive care home out of necessity rather than personal preference. The Council said that the Code of Practice allowed for a person to enter their home of choice provided that the four criteria (outlined in paragraph 6 of this report) were met. The Council said that, in Mrs G's case, only the first two were met.

⁶ However, a copy of an internal email (from the Team Manager to the Stage 2 investigator) subsequently provided to the Ombudsman confirmed that the Second Home was unable to accept any new admissions before December 2017.

30. The Council said that funding a more expensive home might be necessary if the client had particular needs which could not be met in the accommodation offered. This included the need to be near relatives such as the client's spouse. However, the Council said, this was not the case with Mrs G, as she was moved by her husband out of county when options to meet her needs on Anglesey had not been explored. The Council said that Mr G had refused to co-operate in delaying his wife's move to the Third Home and allowing a full assessment to be carried out. The Stage 2 investigation had therefore not upheld his complaints.

31. In a letter to the Ombudsman, the Council said that Mr and Mrs G's rights under Article 8 of the ECHR were considered in this case: "...in discussions with Mr G we supported his view on locating a care home closer to home to enable him to visit his wife on a regular basis and sustain a close relationship between both parties".

Analysis and conclusions

32. The investigation has considered four complaint elements and I will address each of them in turn:

The timeliness of identifying an alternative placement for Mrs G

33. I have carefully considered this element of Mr G's complaint and, having done so, I am concerned to note that:

- The Council did not inform Mr G about the First Home's impending change of status, and its implications for him and his wife, at its earliest opportunity (in May – early June) when the position was clear. It had known about the potential for the change in status for considerably longer.
- The Council did not respond to Mr G's letter of 8 July before 24 July.
- The Council did not provide Mr G with any written assurance that the First Home was prepared to extend Mrs G's residence while enquiries about alternative care homes were underway – bearing in mind that the only written communication Mr G had received was from the First Home saying that Mrs G needed to vacate before the end of August.

- The Council failed to reply (at all) to his letter of 7 August and failed to provide confirmation, or otherwise, of the availability of a vacancy at the Second Home (which evidence has shown did not exist).
- Council staff annual leave during the month of August clearly disrupted progress at a crucial time leaving Mr G without advice and support during the final weeks of Mrs G's residency. There was no mechanism in place by which a named person within the Council was delegated to assist Mr G while key personnel were on annual leave, bearing in mind the finite date given by the First Home for moving Mrs G.

34. I am of the view that these factors amount to significant failings of communication on the Council's part and amount to maladministration. This would have heightened Mr G's sense of being alone in managing these disruptive events. Given his already acute anxiety about his wife's future care and wellbeing, this may well have prompted Mr G to secure the first viable placement that arose for Mrs G regardless of financial, or other, pressures that might otherwise have made him hesitate. As such, these communication failures represented a significant injustice to him. I therefore **uphold** this element of Mr G's complaint.

The Council failed to reassess or review Mrs G's care and wellbeing needs

35. As I have outlined above, the process of finding alternative EMI accommodation for Mrs G (and all of the other EMI residents) rested on completing individual assessments and determining, via that process, appropriate alternative care homes capable of meeting their needs. I am therefore concerned to note that:

- The Council was aware of a recent, behavioural deterioration in Mrs G which required (even without the impending transfer to another home) a fresh assessment of her needs. The previous review of her needs was conducted in February 2017 and was clearly out of date. The Social Worker was first asked to conduct a fresh assessment on 24 June 2017.
- Mr G was not notified of the plan to assess Mrs G on 10 August, and no alternative arrangement was subsequently put in place.

- The Council's views on the appropriacy of the care home options it was advocating were therefore not based on the precise, current details of Mrs G's needs and wellbeing. Thus, claims made about the suitability/non-suitability of the care homes that were discussed were, to some extent, speculative in nature.
- Mr G opted for the nearest, available care home suggested by the Council which, among other things, met the need to be within a reasonable travelling distance for him to visit his wife.
- Given the timeframe available to the Council to arrange a fresh assessment of Mrs G's needs (from May to the end of August), and given that Mr G had made several urgent requests for one to be completed, there was an unreasonable delay.

36. In conclusion, I accept that the Council may have conducted a fresh assessment of Mrs G's needs when the Social Worker visited on 10 August (albeit without Mr G's involvement). However, the fact remains that it failed to do so in the considerable timeframe available to it. Whilst I note the reasons given by the Council for the delay (see paragraph 28), this only accounts for the latter period. It fails to explain its inaction from May (when it already knew Mrs G had deteriorated and required a review), or from 24 June when the request to undertake the assessment to plan Mrs G's move was first made. Moreover, since the assessment of needs was not completed, it appears that the grounds on which the Council argued against the suitability of the Third Home (and the appropriacy of the alternatives) were purely financial and not based on any clear, up-to-date sense of precisely what Mrs G's needs were. The needs assessment drives the question of suitability, not the reverse.

37. For these reasons, I consider the failure to conduct a fresh assessment of Mrs G's needs to be both maladministration and a service failure. They represent a considerable injustice to Mrs and Mr G and, as such, I **uphold** this element of Mr G's complaint.

That the Council failed to consider how moving to a new care home would adversely impact on Mrs G's dementia.

38. I have carefully considered this aspect of Mr G's complaint, and, whilst it is possible that a detailed and carefully conducted needs assessment prior to Mrs G's transfer, may have identified ways of lessening the adverse impact of the move, it is likely that, sadly, any major change in her circumstances, however sensitively handled, would have aggravated Mrs G's dementia symptoms. **I do not uphold** this aspect of the complaint.

39. I note Mr G's critical comments concerning the Council's financial management of the care home funding in its area, and his view that funding for the First Home to retain its EMI registration should have been provided. However, I have seen no evidence to suggest that this decision was improperly arrived at and, in any event, contractual matters between the Council and the First Home are not the subject of this investigation.

That the Council declined to fully fund Mr G's first choice of care home, obliging him to pay substantial top-up fees.

40. Whilst I accept that the Third Home did not appear to meet the third and fourth criteria for choosing a care home as set out in the Guidance (see paragraph 6), I am not persuaded that any of the alternative care homes the Council advocated (the Second, Fourth and Fifth) met them. Neither am I persuaded that the Council gave due consideration to the matters set out in paragraph 7 above. In the context of what I have found above, it is perhaps somewhat immaterial. The lack of an assessment of needs meant that it could not be determined for certain which care home met Mrs G's needs. However, I will briefly look at the options.

41. The Second Home was clearly not a viable option as there was no vacancy at the time (or, indeed, before December 2017). As there was no needs assessment, it was not established that the Fourth and Fifth Homes were suitable. In determining suitability, the assessment would also depend on whether the travelling distance from Mr G's home to the Fourth and Fifth Homes would have precluded or restricted his visiting Mrs G. These are relevant considerations in terms of whether they met Mrs G's needs as a whole. The significance of Mr G's daily visits was assessed as being

fundamental to Mrs G's wellbeing and, as such, brings into consideration both her and Mr G's human rights under Article 8 of the ECHR. In the absence of a needs/wellbeing assessment that directly addressed and determined the significance of this point, I do not consider it acceptable to discount or ignore it. Therefore, Art 8 is engaged in this case.

42. I am of the view that the Council's decision not to increase its funding to match the costs of the Third Home was not reached with due regard to this consideration. Despite what the Council says (paragraph 31) I am not wholly convinced it paid sufficient due regard to Art 8 in Mr & Mrs G's case, given the failures I have already found above. That is as far as I can go. It is not for me to make a finding of breach as Mr G suggests. The following factors are also pertinent:

- Mr G had, some years previously, moved his wife to the First Home precisely because the home in which she then resided made visiting her difficult.
- Mr G stated clearly in correspondence that visiting the home daily was a key factor in his and Mrs G's family life.
- The Third Home had conducted a needs assessment concluding that its accommodation, and location, was suitable for Mrs G.
- Mr G was under severe time pressure, needing to secure appropriate, alternative accommodation for his wife (whose condition was deteriorating). This pressure was compounded by the Council failing to adequately assist and advise him in a timely manner.

43. I am therefore unable to agree with the Council's conclusion that the Fourth and Fifth Homes were able to fully meet Mrs G's assessed needs and, on this basis, that it was reasonable to decline to fund the additional costs of the Third Home. The Council had not completed a needs assessment upon which to base this decision. I am satisfied that, for the reasons given above, the Council failed to have regard to how section 4.2. of Annex C of the Code of Practice applied to Mrs and Mr G's circumstances. Consequently, I conclude that Mr G should not have been asked by the

Council to pay the additional costs of his wife's care in the Third Home in the form of top-up fees in light of the events and circumstances of this case. I therefore **uphold** this complaint.

Recommendations

44. I recommend that, within **one month** of the final version of this report being issued, the Council:

- a) Provides Mr G with a fulsome written apology for the communication failings this investigation has identified.
- b) Makes a payment to him of £250 in recognition of the time and trouble to which he was put in complaining to the Ombudsman as a result of the identified failings.
- c) Reimburses the top-up fees that Mr G made in respect of his wife's care costs at the Third Home from 29 August 2017 to 20 May 2018.

45. I further recommend that, within **three months** of the final version of this report being issued, the Council demonstrates that it has taken steps to refamiliarise relevant Adult Services personnel with:

- The Council's charging policy
- Annex C of the Code of Practice issued to the Social Services & Wellbeing Act 2014.
- Article 8 of the ECHR and the HRA.
- The statutory requirement and importance of performing and reviewing assessments of needs and wellbeing.
- The importance of responding to correspondence.

46. I am pleased to note that in commenting on the draft of this report the Council has agreed to implement these recommendations.

A handwritten signature in black ink, appearing to read 'BNolan', with a horizontal line underneath.

Bernard Nolan
Investigation Officer

10 April 2019

ENDNOTE

This document constitutes a report under s.21 of the Public Services Ombudsman (Wales) Act 2005 and is issued under the delegated authority of the Ombudsman.

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