

Report by the Local Government Ombudsman

**Investigation into a complaint against
Tameside Metropolitan Borough Council:
(reference number 12 019 862)
24 September 2014**

The Ombudsman's role

For 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.

Investigation into complaint number 12 019 862 against Tameside Metropolitan Council

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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.

Key to names used

Mr X - the complainant

Mrs Y - the complainant's mother who sadly passed away on 16 March 2014.

Report summary

Adult Social Care

Mr X's complaint relates to decisions the Council made about his mother, Mrs Y. Mr X complains that the Council changed the contractual funding arrangements for his mother's residential care placement. As a result Mrs Y was paying a top up fee of £88.70 per week. During the period the complaint was being investigated Mrs Y sadly passed away on 16 March 2014.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused the Council should:

- re-imburse Mrs Y's estate the full amount of the third party top-up payments that have been made;
- provide Mr X with a full written apology;
- pay Mr X £250 to recognise his time and trouble pursuing the complaint ;
- review the individual cases of other affected residents and consider whether a similar remedy is appropriate. This applies to all affected residents placed at Auden House and any other care homes that have set their fees above the Council rates. This applies only to residents placed in care homes prior to the introduction of the Quality Framework.

Introduction

1. Mr X's complaint relates to decisions the Council made about his mother Mrs Y. Mr X complains that the Council changed the contractual funding arrangements for his mother's residential care placement. As a result Mrs Y was paying a top up fee of £88.70 per week.

Legal and administrative background

2. Commissioning external services for older people was a pivotal responsibility that was passed to local authorities by the NHS and Community Care Act 1990. Much of the continuing care of elderly and disabled people was provided by the NHS. Now much of that has been re-defined as social care and is the responsibility of local authorities. There was a clear agenda about developing a mixed economy of care, i.e. a variety of providers. There are now many independent residential and nursing homes.
3. The NHS and Community Care Act 1990 – Section 47(1): *The Local Authority has a duty to carry out an assessment of need for community care services where a person appears to be someone for whom community care services could be provided.*
4. The Department of Health 2010 Guidance 'Prioritising need' acknowledges that: *an individual's needs are likely to change over time and regular reviews of support plans are required. The review should cover key aspects of the person's circumstances and the working of the support plan, including changes to outcomes, needs, risks, requirements, finances and coordination arrangements.*
5. The Department of Health LAC(2004)20 Guidance on:

National Assistance Act 1948 (Choice of Accommodation) Directions 1992; National Assistance Act (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001:

3.5.1 When making arrangements for residential care for an individual under the National Assistance Act 1948, a council is responsible for the full cost of that accommodation. Therefore, where a council places someone in more expensive accommodation, it must contract to pay the accommodation's fees in full. The resident's or third party's contribution will be treated as part of the resident's income for charging purposes and the council will be able to recover it in that way...

3.5.2 Councils will be aware that under section 26(3A) of the National Assistance Act 1948 (as inserted by the NHS and Community Care Act 1990), it is open to them to agree with both the resident and the person in charge of their accommodation that, instead of paying a contribution to the council, the resident may pay the same amount direct to the accommodation, with the Council paying the difference. In such a case, the third party would also pay the accommodation direct on behalf of the resident. However, it should be

noted that even when there is such an agreement for the resident to make payments direct to the accommodation, the council continues to be liable to pay the full costs of the accommodation should either the resident or relative fail to pay the required amount.

3.5.3 Where top-ups are required from a resident or third party, the resident will therefore need to demonstrate that either they or the third party is able and willing to pay the difference between the council's usual rate and the accommodation's actual fees.

6. The Department of Health Charging for Residential Accommodation Guide (CRAG) sets out the circumstances in which a resident can pay a top-up from *their own funds*: 11.011 *From October 2001, a resident may top up from his own resources as listed below only if they and the LA [Local Authority] have made a deferred payments agreement or the resident is subject to the 12-weeks property disregard.* The guidance then details deferred payment agreements and property disregards.
7. The individual contractual agreement between the Council and the care home sets out the terms and conditions under which the contract can be changed. The contract is clear that the Council is able to change the contract, by giving seven days notice, if, following a review or re-assessment, the service user no longer requires the services because:

the care needs of the service user are such that it is agreed that the Care Home is unable to provide appropriate care;

in their opinion (confirmed by a doctor or local authority officer) the service user's behaviour is having a persistent and detrimental effect on the well being of other Service User's and residents.

How we considered this complaint

8. This report has been produced following the examination of relevant files and documents.
9. The complainant and the Council have been given a confidential draft of this report and invited to comment before the report was finalised.

Investigation

10. Mrs Y was an 80 year old lady. She had dementia and did not enjoy good health. She had lived at the care home since October 2010. She was settled, and her son Mr X, was happy with the quality of care provided.
11. Mrs Y's placement at the care home was arranged and funded by the Council. The Council agreed to pay the care home contractual weekly care fees of £470.70 a week (this included Mrs Y's assessed contribution to her care, which was £113.20 a week). The placement was not subject to a third party top-up.
12. During the early part of 2012 the Council undertook a review of the care fee rates it paid for residential and nursing care placements. We have reviewed the way in which the Council did this. It is clear from the evidence the Council has supplied that it consulted widely on this issue and there is no evidence of fault in the process the Council followed.

13. At the same time the Council reviewed its care fee rates, it also introduced a new Quality Framework system for all residential and nursing homes. The purpose of this was to identify criteria which measured and rewarded quality care provision in care homes in its area.
14. The Council says that it did this in response to an oversupply of beds in its area.
15. The Council estimated that it needed approximately 1,200 beds. At the time there were approximately 1,900 available in its area. The Council and the Primary Care Trust were commissioning approximately 900 beds.
16. The Council carried out a procurement exercise which was based on measuring quality of care only. This involved each care home demonstrating that it was able to deliver care to a standard that is higher than the Essential Standards of Quality and Safety set by the Care Quality Commission. Care homes which could demonstrate they met the higher standards would then receive an enhanced payment from the Council.
17. Forty-one care homes applied to be on the Quality Framework, one of which is the care home Mrs Y was resident in. The Council has provided us with a copy of the criteria by which the care homes were assessed. The outcome was:
 - 27 were successful in being admitted to the Quality Framework;
 - 14 care homes were not admitted to the Quality Framework despite meeting the enhanced quality criteria set by the Council. One of these was the care home Mrs Y resided in;
 - 2 care homes did not apply to be assessed for the Quality Framework.
18. The Council did not admit all the care homes that met the enhanced standards onto its Quality Framework. It ranked all the applicants in numerical order depending on their evaluated scores. The Council admitted the higher scoring applicants, those that met a 70% threshold, onto the Quality Framework until the point it had allocated 1,200 beds. After which it rejected all other applicants who successfully met the enhanced standard.
19. The Council introduced an Off Framework agreement for all 16 care homes not admitted on to its Quality Framework. All 16 care homes signed up to the Off Framework contract.
20. There are 160 residents placed in Off Framework care homes. Eight of these residents being in the same care home as the one where Mrs Y resided.
21. In February 2013 following the outcome of the selection process the Council sent letters to all residents placed in Off Framework care homes. The Council has provided us with a copy of this letter. The letter explained that the resident was now placed in an Off Framework care home and as such the care home was able to charge whatever commercial rate it chose to after 10 March 2013. It went on to say the Council would pay a fixed sum to the care home for each resident and that the care home may choose to accept this or a family member would have to pay the difference. If neither of these options were possible then alternative accommodation would have to be found.

How this affected Mrs Y

22. In Mrs Y's case the Council previously paid contractual care fees totalling £470.70 a week. This was made up of £381.70 weekly residential fee, (this included Mrs Y's assessed contribution) £30 for an en-suite room, £9 for a room of 12 square metres or over and £50 for a level 3 Quality Premium. Quality premiums are paid to care homes that meet higher care standards.
23. As Mrs Y was placed in an Off Framework care home the Council reduced the care fees paid to £382 a week. This resulted in a shortfall of £88.70 per week in the contractual care fee. Mrs Y was advised by the Council this amount would need to be paid as a top-up payment. This was in addition to the £113.20 assessed contribution Mrs Y already paid towards her care. The Council's new fee structure meant that their cost of care calculation recognised that the requirement for Off Framework providers had reduced. The Council says that the care provider made a business decision to charge residents at the previous fee level. Mr X, her son, did not have the funds to meet the top up so he began paying the additional £88.70 per week from his mother's savings from 10 March 2013.
24. Mr X complained to the Council. He said that the reduction in care fees amounted to a breach of contract. He told the Council the additional money would have to come out of his mother's savings and that she had little choice other than make the payments if she were to remain in the care home. Mr X explained his mother had dementia and was settled in the care home and it would not be in her best interests to move her.
25. Mr X asked the Council to assess the risk of moving his mother to another care home.
26. The Council told Mr X that it would carry out a re-assessment of his mother's care needs if it was necessary for her to move. As Mr X had refused to move his mother the Council did not undertake either a risk assessment or a reassessment of her care needs.
27. In response to our enquires about the procedures the Council followed for assessing risk to those service users affected and who may find a change in care provider challenging the Council said in its correspondence dated 4 October 2013 *"This would be done as a matter of course, through an assessment of need at the time a move was being considered"*. Following further enquiries on this issue it re-iterated this in its letter dated 15 November 2013 *"In the case of Mrs Y, the Council has not undertaken an assessment because Mr X has appeared unwilling to consider moving his mother"*. The letter goes on to say *"The offer of an assessment remains available"*.
28. The Council says all of the other eight residents in the same care home as Mrs Y have been similarly affected and are now subject to third party top-up payments to bridge the gap in payments.
29. The Council says it has not undertaken re-assessments or risk assessments of other residents affected because all have agreed to fund the shortfall in care fees by way of a third party top up meaning no resident has had to move to a different care home.

30. At the point Mrs Y passed away the Council had not completed a specific risk assessment or a re-assessment to determine whether the care home, where she was resident, should continue to meet her needs.

Conclusions

31. The Guidelines as set in LAC (2004)²⁰ say that only when an individual has expressed a wish for more expensive accommodation than that of the usual cost paid by the Council can a third party be asked to pay a top-up fee. Mrs Y did not express such a wish.
32. The Guidelines are clear that Councils must contract to pay the full cost of accommodation including the top up. And, that a resident cannot pay a top up, other than in exceptional circumstances, which do not apply here, but a third party can pay on their behalf, but only with everyone's agreement. That is not what happened here. Mr X paid the top up from his mother's resources, of which the Council was aware. Mr X made the payments from his mother's savings not because of a willingness to pay but because he believed there to be no other option other than moving his mother from the care home where she was settled. The Council is at fault here.
33. When Mrs Y was admitted to the care home there was no third party top up. This was a consideration Mr X had made prior to choosing the care home. It is neither fair nor reasonable to expect Mr X or any other affected third party to pay a third party top up which has been effectively forced upon them as a result of the actions of the Council, and which do not relate to a change in care needs as per the care contract. Therefore this is fault.
34. According to the contract both residents and relatives had a legitimate and reasonable expectation that the Council would meet the contractual payments that were agreed on admission, unless there was a change to care needs.
35. The changes the Council made to the contract for Mrs Y's care are not allowable changes as set out in the contract.
36. In any circumstance where there is a change to care fees, which may impact on a resident, the Council should complete a financial assessment to establish a residents ability or willingness to pay and to go on paying the extra charge. It did not do this. This is fault.
37. Although the care home in which Mrs Y was a resident met all the criteria set out in the Quality Framework it was not included because it did not meet the 70% quality threshold set by the Council. The Council says that it did not include all the care homes that met the criteria because it had identified, following an assessment, that it only needed a specific number of beds and that that there were too many in the area. However, the Council would only fund those beds which were occupied. The Council would still be contracting with care homes that were excluded from the 'Quality Framework' but at a reduced fee. The Council was not entering into block contract arrangements with care homes included in the 'Quality Framework'.

38. The Council says there has *“been no appreciable impact”* on residents as a result of the introduction of the Quality Framework. This is not the case. The Council failed to assess the impact of its actions on Mrs Y’s wellbeing. This is fault. The Council implemented a new fee structure which resulted in a reduction in what they contributed towards the care cost, over which Mrs Y and others had no control.
39. The Council says it would have re- assessed Mrs Y’s care needs *“at the time a move was being considered”*. This is not adequate. The Council had a duty to assess the impact on Mrs Y of moving to a different care home prior to any proposed change. Mrs Y had dementia and did not enjoy good health. It is widely acknowledged that moving an individual with dementia can be detrimental to their well being.
40. The Council is entitled to take account of its resources in setting care fees, in line with LAC (2004)²⁰. However in the case of Mrs Y and the other affected residents the circumstances relate not to the setting of care fees but the Council’s decision to limit places on to its Quality Framework. This resulted in some care homes being excluded and being subject to a change in contractual care fees. The care home Mrs Y was resident in previously attracted a premium for providing enhanced quality care, described by the Council as a *“Quality Premium”*.
41. The injustice caused to Mrs Y was significant. She suffered the uncertainty of not knowing if, and how long she would be able to remain in a home that she was settled in. Mrs Y went into the care home with the reasonable expectation that she would be able to remain there so long as the home could meet her care needs. Mr X says his mother was aware and distressed by the changes to her care fees. She was also aware of the implications. Mr X says she developed shingles in the weeks after the changes had been made. Her finances were also considerably depleted by meeting the additional and unexpected care fees.
42. Mr X has also suffered considerable injustice. He had the responsibility of managing his mother’s financial affairs and he was aware of the implications for his mother if her finances ran out. He was also concerned with his mother’s increasing frailty and the effect that a move to a different care home may have on her.
43. The faults identified in this case appear to have a much wider impact because there are 160 residents who may be similarly affected and who may have cause to complain to us.
44. It seems that many vulnerable elderly residents and their families have either had to consider a move from a care home in which they may be settled or accept new terms and conditions which they could not have reasonably foreseen when choosing the care home.
45. Apart from the unreasonableness or unfairness of the Council’s actions it has acted contrary to the law and government guidelines.

Decision

46. The Council is at fault for failing to act in accordance with the law and relevant government guidance. It:
- did not adhere to the guidance as set out in the Department of Health Charging for Residential Accommodation Guide (CRAG);
 - failed to adhere to the terms of the individual contractual agreement;
 - failed to reassess Mrs Y's care needs as set out above in paragraphs 4 and 5.
47. The Council's actions caused Mrs Y and Mr X a significant injustice, and potentially 160 other residents may be similarly affected.

Recommendations

48. To remedy the injustice caused the Council should within one month of the date of this report:
- re-imburse Mrs Y's estate with the full amount of the third party top-up payments that have been made;
 - provide Mr X with a full written apology; and
 - pay Mr X £250 to recognise his time and trouble pursuing the complaint.

The Council should also review the individual cases of all other affected residents and consider whether a similar remedy is appropriate i.e. the above three recommendations. This applies only to those individuals who were placed in care homes prior to the introduction of the Quality Framework. The Council should report its findings back to this office within three months.