

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

**Investigation into a complaint against
Lincolnshire County Council
(reference number: 16 003 268)**

17 November 2017

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.

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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

Ms B – the complainant

Mr C – Ms B's father

Mrs C – Mr C's wife

Report summary

Failure to carry out duties under the Care Act

Ms B says the Council failed to offer her father, Mr C, a care home without a top-up fee and did not offer to pay the full fee the care home charged. It did not explain its duties under the Care Act.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice to Ms B, Mr C and Mrs C, we recommend the Council takes the following actions within three months. The Council should:

- acknowledge the faults and apologise to Ms B, Mr C and Mrs C;
- reimburse the top-up fee of £65;
- pay Ms B and the family £300 to reflect their distress; and
- pay Ms B £300 for her time and trouble pursuing the complaint.

We recommend the Council, within six months, brings its procedures in line with the Care Act by:

- reviewing its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
- reviewing its top-up fee contract to reflect the option to pay the top-up fee directly to the Council; and
- reviewing existing top-up agreements to bring them in line with the Care Act.

Introduction

1. The Council placed Mr C in a care home on an emergency basis. Ms B complains that the Council failed to:
 - offer a care home without a top-up fee;
 - pay the full fee the care home charged when no care home without a top-up fee was identified;
 - explain a person's rights and the Council's duties under the Care Act;
 - offer Mr C a personal budget;
 - offer the option to pay the top-up fee to the Council;
 - intervene when Mr C was threatened with eviction from the care home; and
 - properly address the threatening and intimidating language used by the care home.

Legal and administrative background

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***)

Care Act 2014

3. The Care Act 2014, the Care and Support Statutory Guidance 2014 (updated 2017) and the Care and Support (Charging and Assessment of Resources) Regulations 2014 set out the Council's duties towards adults who require care and support and its powers to charge.
4. The Act says that, if a person needs residential care and their capital falls below the threshold of £23,250, they will be eligible for council funding to pay for this. However, a top-up fee may still need to be paid, in certain circumstances.

What is a personal budget?

5. The Council has a duty to assess adults who have a need for care and support. If the needs assessment identifies eligible needs, the council will provide a support plan which outlines what services are required to meet the needs and a personal budget which calculates the costs of those services. (***Care Act 2014, section 24***)

When is a top-up fee payable?

6. When it has been decided that a person's needs are best met in a care home, the council must ensure that at least one accommodation option is available within the person's personal budget and it should ensure that there is more than one of those options. The council must ensure that the person has a genuine choice of accommodation. **(Guidance, section 8.37)**
7. However, a person is able to choose alternative options, including a more expensive setting, if a third party or in certain circumstances the resident is willing and able to pay the additional cost (the top-up fee). An additional payment must always be optional and never as a result of commissioning failures leading to a lack of choice. **(Guidance, section 8.37)**
8. If no suitable accommodation is available at the amount identified in the personal budget, the council must arrange accommodation in a more expensive setting. In those circumstances, the council should increase the personal budget to ensure the needs are met.

Council's duties when a person chooses to pay a top-up fee.

9. The Guidance says that, if a person chooses a care home that is more expensive than the amount identified in the personal budget and a top-up fee has to be paid, the council has to **(Guidance, annex A, sections 22 to 24)**:
 - ensure the person paying the top-up understands the full implications of this choice, remembering that this is often at a point of crisis;
 - provide the person with sufficient information and advice so they understand the terms and conditions, including actively considering the provision of independent financial information and advice;
 - ensure the person is willing and able to meet the top-up, recognising that this may be for some time in the future; and
 - ensure the person enters a written agreement with the council, agreeing to meet the cost.

Who is the top-up fee paid to?

10. The Guidance says councils will need to consider the individual circumstances of the case and should deter arrangements for top-up fees to be paid directly to the care home. The Guidance says there are three options **(Guidance, annex A, section 29)**.
 - The council treats the top-up as part of the cared for person's income and recovers the costs from the person. This is on the assumption that the third party pays the top-up to the person in the care home.

- The council agrees with the cared for person, the third party and the provider that the top-up is paid directly to the care home. The guidance says this is not the recommended approach.
- The third party pays the top-up to the council and the council then pays the full amount to the care home.

Who is responsible for the costs?

11. Whatever the option chosen, the council remains responsible for the total cost of that placement. If there is a break down in the arrangement to pay the top-up, the council is liable for the fees until it has either recovered the costs or made other arrangements to meet the person's needs. (**Guidance, annex A, section 28**)

What information and advice should the council give?

12. The council should provide information about the choices open to individuals and should explain a person's rights under the Care Act. This must include information about the different care providers and advice to help people understand the charges so that people can make informed financial decisions.

Market shaping and commissioning of adult care and support

13. Councils must promote the efficient and effective operation of a market in services for meeting care and support needs to ensure that a person has: (**Care Act 2014, section 5**):
 - a variety of providers to choose from who provide a variety of services;
 - a variety of high quality services to choose from; and
 - sufficient information to make an informed decision about how to meet the needs in question.
14. Councils must not undertake any actions which may threaten the sustainability of the market as a whole, for example, by setting the fee levels below an amount which is not sustainable for the provider in the long term. (**Guidance, section 4.35**)

How we considered this complaint

15. We have produced this report following the examination of relevant files and documents and interviews with the complainant and relevant employees of the Council.
16. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

Investigation

Key facts

17. Mr C is an elderly man who has dementia and physical disabilities. He was living at home with support from his wife. He was eligible for council funding and a care package for care at home was in place.
18. At the end of March 2016 Mr C's condition deteriorated and his needs could no longer be met at home. His daughter, Ms B contacted the Council asking for urgent help. The Council agreed that an emergency residential placement was needed, initially as a respite option.
19. The social worker contacted Ms B and said she had found a care home for Mr C. She explained the Council would pay its usual rate but, as the care home's rate was higher, the family would need to pay a top-up fee. The top-up fee was £60, but the family could negotiate a lower price with the care home if it was not able to pay. Ms B said she thought she had no other option as this was a crisis situation and she therefore agreed.
20. Mr C moved to the care home on 30 March 2016. The care home agreed to a reduced top-up fee of £20 per week.
21. Ms B contacted the Council on 29 April 2016. She had read the Care Act and now understood more about top-up fees. She told the Council that it had a duty to offer Mr C a placement without a top-up fee and this had not happened. The social worker's response was that Ms B would need to ring the care homes herself and ask about top-up fees as a lot of the care homes charged them. Ms B said she may have to move Mr C to another care home as her mother could not afford the top-up fee.
22. In May 2016 the care home contacted the Council as the top-up fee and contribution for Mr C had not been paid. The care home said it wanted to evict Mr C within 7 days. The care home said it had not yet informed the family of this as the family had been 'difficult' last week. The care home was worried that, if it informed the family, the family would not pay at all.
23. Ms B assured the Council she would pay but she wanted to know what she was paying and whether it was legal for the care home and the Council to ask for this top-up fee. It was her understanding that her mother should not have been asked to make this payment. She said she wanted to speak to somebody at the Council about the legalities of the top-up fee and the Council's responsibility to find a care home without them.
24. The care home wrote to Ms B about the top-up fee on 21 April 2016 and said: "*The top-up rate was set in consultation with the council and reflects the fact that the council has been unable to raise the care fees they pay us sufficiently to meet our higher staffing and running costs*".
25. On 10 May 2016, the care home wrote to Ms B giving Mr C 14 days notice to leave the care home. The care home's email dated 12 May 2016 said: "*Third Party contributions were introduced to meet the costs of the Living National Wage and mandatory pensions*".

for staff implemented by the government and timely payment of these fees is imperative for us to pay the wages of our staff. The families of our council funded residents are understanding of this financial reality and pay the third party contributions four weeks in advance. Unfortunately, your account is 42 days in arrears. You can imagine the financial predicament we would be in and the distress it would cause if all resident accounts were in arrears”.

26. The care home’s second letter dated 18 May 2016 said: *“Your refusal to sign the contract was duplicitous and unacceptable while you continued to accept a service from the care home. Your behaviour in refusing to make this payment makes the work of the Adult Social Care Services even more difficult at an already challenging time for the social care sector. I am, of course, taking legal advice on the matter and my solicitor will handle any further communication with you”.*
27. Ms B was very upset by the care home’s threats and the language in the letter and contacted the social worker. She tried to speak to somebody at the Council about the legality of top-ups and continued to contact the Council desperate for help. A note on the files records the care home had spoken to the Council and the Council had confirmed the care home could give notice to Mr C as the family were aware of this and were actively looking for another home for Mr C without a top-up fee.
28. Ms B wrote to the care home pointing out how its understanding of the law on the fees was flawed and provided links to the correct law and guidance. The care home said in its email dated 25 May 2016: *‘Many thanks for the information you have provided. I do agree that it would be far simpler were the county council to fund the full cost of care but unfortunately this is not the case and each year the funding we receive falls below the true cost of care’.*
29. A best interest meeting took place on Friday 20 May 2016 and a care home without a top-up was found for Mr C. The plan was to move Mr C to this care home on 24 May 2016 when the eviction deadline ended.
30. However, later that day, the new care home called to say it had given Mr C’s room to somebody else. This meant that Mr C still had no care home to move to and was about to be evicted.
31. The social worker contacted 4 care homes to find a place for Mr C. She found two care homes which had vacancies but they both charged top-ups. The social worker told Ms B to find a care home without a top-up over the weekend.
32. Ms B contacted 23 care homes over the weekend and found only one care home without a top-up. Mr C moved to this care home the following week.

Ms B’s complaint

33. Ms B complained to the Council in June 2016. She pursued her complaint for several months as she tried to clarify different issues. We have summarised her complaint as follows.
- The Council failed to give her appropriate information and advice about her rights under the Care Act at every stage of the process. She said the information had been poor and misleading and she doubted whether the social workers knew the correct process and the Council's duties.
 - The Council never informed her it had a duty to find a care home without a top-up and never told her it had a duty to pay the care home fees if it could not identify a care home without a top-up.
 - The family should never have been asked to pay the top-up as the Council had never offered Mr C a care home without a top-up fee.
 - The Council should have given Mr C a personal budget.
 - The Council should have intervened when the care home was threatening to evict Mr C.

The Council's response

34. The Council said:
- the procedures were all online and in the Council's leaflets;
 - it expected care homes to pursue the family for payment of the top-up fee, but only if the appropriate paperwork had been completed. In this case, the paperwork had not been signed so the care home should not have acted as it did. It later agreed it should have paid the top-up fee;
 - it could not become involved in the choice of care homes as it had to remain neutral;
 - it did not provide personal budgets to residents of care homes as it had agreed rates of payment;
 - the language used by the care home was insensitive and it had recommended that the care home address this directly with Ms B. It monitored correspondence between the care home and service users as part of its contract with them.
35. The Council wrote several emails where it clarified its position.
- *"The choice of care home is an area where the Council would not be involved in directly as we have to remain neutral in terms of the market. If called upon we may be able to give details of which homes have vacancies."*
 - *"In relation to choice of care home, the Council has to be careful to remain neutral; we are not allowed to promote individual homes. There is, at present, pressure on*

care home beds, which meant that there are times when there are a very limited number available and real choice can be quite difficult in an emergency, especially choice which does not involve a top-up... This is a particularly difficult area at present as there are a very limited number of care homes in the area without top-ups and for obvious reasons these homes are often full.”

- *“A personal budget does not currently apply to residential or nursing placements in Lincolnshire and there are agreed rates which the County Council develop and consult with the market before publishing.”*

36. The difficulties Ms B and the social worker had in finding a care home without a top-up fee, the Council’s responses to the complaint and the care home’s correspondence suggested that there may be a wider problem of a shortage of care homes without a top-up fee.
37. We therefore contacted the Council to ask further questions about market shaping. The Council’s website has details of the Council’s market position statement, joint strategic needs statement and joint health and wellbeing strategy, in line with the Care Act. The Council asked an outside agency to conduct an independent evaluation of the residential care market in 2015 and this contributed to deciding how much the Council pays to care homes. It is going through a similar exercise at the moment to set the rates for the future.
38. We asked the Council how many care homes there were without a top-up fee on the day we spoke (13 April 2017). The Council said it had 754 vacant beds across the county and 220 did not charge a top-up fee. This could be broken down by area. The area of Lincoln (where Mr C was living) had 30 vacancies without a top-up fee. It explained that, every week, it sends a list to practitioners which shows the available care homes without a top-up fee in the area so they can help people in identifying care homes.

Conclusions

Choice of accommodation and charging of the top-up fee

39. There was fault in the Council’s actions in March 2016 when an urgent placement had to be found for Mr C. The Council did not identify a care home without a top-up fee. Therefore it should have paid the entire cost of the care. Instead the Council told the family it had to pay the top-up fee which is fault.
40. When Mr C was facing imminent eviction in May 2016, the Council repeated the same mistake and did not offer a place without a top-up fee or explain to Ms B that it would pay the entire fee if it could not find a place. Instead it expected Ms B to find a placement during the weekend.

Information and advice

41. The Council failed to explain to Ms B what the Council's duties were. It never told her it had a duty to identify at least one place without a top-up fee. It also did not say that it was responsible for paying for the placement if no place without a top-up fee had been identified.
42. Ms B looked up the advice on the Council's website but this was not clear and there was no clear mention of the fact that the Council had a duty to find a care home without a top-up fee or that it would pay the costs if it could not find one. This was also fault.
43. We were, in addition, concerned about the Council's comments in its written replies to Ms B and us. Ms B repeatedly asked the Council whether, in other cases, it informs people of their right to a care home without a top-up. The Council never clearly answered this question. It said it gave people the general information about the charging and general information about care homes. It said it could not recommend a particular home because it had to remain 'neutral in terms of the market' and said it was not allowed to promote individual homes.
44. We were therefore concerned whether other people had suffered the same problems as Ms B. We spoke to the Council and it acknowledged that the information on its website was previously not as clear it should be. It said it recently changed its online information. We have read the Council's online information on top-up fees and it is clearer than before.
45. The Council said it also changed its process. It says it gives people the directory which includes all the care homes, but does not give information about availability or whether they charge top-up fees. If a person chooses a care home which charges a top-up fee, the Council will explain to the person that they have a right to be offered a care home without a top-up. It will offer an alternative without a top-up fee if this is what the person wants. If no alternative care home without a top-up fee is available, it will offer the lowest cost alternative and pay the top-up fee.

Personal budget

46. The Council did not give Mr C a personal budget and said in the complaints correspondence that it never provided personal budgets to residents in care homes. This is fault as the Care Act says councils have a duty to provide personal budgets.
47. The Council has clarified that this has changed and that residents in care homes now have a personal budget.

No option to pay the top-up fee to the Council

48. The Council told Ms B that it did not become involved in the top-up agreement as this was a matter between the care home and the person paying the top-up fee. This is fault. The council has told us that it has, since then, changed its procedures and the social worker now becomes involved in the signing of the agreement.
49. The Council also failed to offer Mrs C the option to pay the top-up fee to the Council. It says it never does this as it always expects people to pay the fee directly to the care home. It acknowledges that this is not the preferred option under the guidance but says

there is nothing stopping them in law from following that route. It says it has taken this approach because it is cheaper and less of an administrative burden on the Council.

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.

Failure to intervene when the care home threatened eviction

53. There was fault by the Council in its response to the threat of eviction by the care home.
54. Firstly, Mr C should not have been put in the position where he was being threatened with eviction because of non-payment of the top-up fee. Ms B was right in questioning the requirement to pay and the Council should have intervened immediately and paid the entire fee.
55. Secondly, the fault was made worse by the fact that the Council did not offer Mrs C the option to pay the top-up fee to the Council. One of the reasons why the legislation says that councils should offer this option is to avoid situations such as this one. Ultimately the Council is responsible for the payment of the top-up fee, not the third party. If the top-up fee is paid to the Council, any failure to pay is dealt with by the Council and should not result in a threat of eviction by the care home.
56. Finally, the language used by the care home in its letters to Ms B was inappropriate and the Council should have intervened sooner and more directly. The Council is responsible for the actions of those who are providing a service on its behalf.

Injustice

57. Ms B and Mr C suffered weeks of distress as they were worried that Mr C would be evicted. They knew Ms B's mother could not continue to pay the top-up fee and needed help but were not given this help. Instead of assisting Ms B in her search for a suitable care home, the Council put the burden on her to find somewhere suitable.

Decision

58. The Council did not act in line with the Care Act 2014 or the guidance when it responded to Ms B's request for assistance in support for Mr C. The Council failed to:
- offer a care home within Mr C's personal budget;
 - pay the full fee the care home charged when no care home within the personal budget was identified;
 - explain a person's rights and the Council's duties under the Care Act;
 - offer Mr C a personal budget;
 - offer the option to pay the top-up fee to the Council;
 - intervene when Mr C was threatened with eviction from the care home; and
 - properly address the threatening and intimidating language used by the care home.

Recommendations

59. To remedy the injustice to Ms B, Mr C and Mrs C, we recommend the Council takes the following actions within three months. The Council should:
- acknowledge the faults and apologise to Ms B, Mr C and Mrs C;
 - reimburse the top-up fee of £65;
 - pay Ms B and the family £300 to reflect their distress; and
 - pay Ms B £300 for her time and trouble pursuing the complaint.
60. We recommend the Council, within six months, brings its procedures in line with the Care Act by:
- reviewing its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
 - reviewing its top-up fee contract to reflect the option to pay the top-up fee directly to the Council;
 - reviewing existing top-up agreements to bring them in line with the Care Act; and
 - assessing whether staff are aware of the Council's duties under the Care Act and provide further training if necessary.

61. 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 or Cabinet and we will require evidence of this. (***Local Government Act 1974, section 31(2), as amended***)