

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

**Investigation into a complaint against
Lincolnshire County Council
(reference number: 16 007 469)**

10 August 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

Mr A – the complainant

Mrs A – Mr A's wife

Report summary

Adult social care – domiciliary care

Mr A complains Lincolnshire County Council placed his wife Mrs A in a care home for 10 months because there was no home care available. He says Mrs A lost out on a welfare benefit as a result and the Council should compensate her for this.

Finding

Fault causing injustice and recommendations made.

Recommendations

To remedy the injustice, we recommend the Council:

- pay £750 to Mr A to reflect his distress;
- pay £1,000 to Mrs A to reflect her distress; and
- refund Mr A's travel expenses based on the Council's rate for mileage.

The Council has accepted the above recommendations.

The Council's correspondence suggests there may be others in the same situation as Mr and Mrs A. So we are making wider recommendations to remedy injustice to others who have not complained. We recommend the Council do the following:

- Review any short-term residential care placements between the start of the new home care contract and the date of this report to establish whether they were deficit beds* and if they were, whether the placement was for more than the Council's short-term care period of eight weeks. If the deficit placement was for longer than eight weeks, the Council should consider payments for avoidable distress and/or travelling expenses where appropriate. The Council has accepted this recommendation.
- For those people it identifies as still being in deficit beds for longer than eight weeks, the Council should take all reasonable steps to source suitable home care providers and ensure care and support plans are up to date.
- Report back to us within three months on points on its review and the steps it has taken.

(*When commissioning residential care for a person which may be because there is no home care available, the Council uses the term 'deficit bed'.)

Introduction

1. Mr A complains Lincolnshire County Council (the Council) placed his wife Mrs A in a care home for 10 months because there was no home care available. He says Mrs A lost out on a welfare benefit as a result and the Council should compensate her for this.

Legal and administrative background

2. We investigate complaints about 'maladministration' and 'service failure'. 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. 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, as amended**)
4. If we find fault, we may recommend a council takes action to prevent future injustice. (**Local Government Act, 1974, section 31 (2B)**)
5. We may publish a report of our investigation, taking account of the public interest, as well as the interests of the complainant and of any other persons we consider appropriate. (**Local Government Act 1974, section 31B**)
6. A council must carry out an assessment for any adult with an appearance of need for care and support. The assessment must be of the adult's needs and how they impact on their wellbeing and the outcomes they want to achieve. It must also involve the individual and where appropriate their carer or any other person they might want involved. (**Care Act 2014, section 9**)
7. The Care Act spells out the duty to meet eligible needs (needs which meet the eligibility criteria). (**Care Act 2014, section 18**)
8. An adult's needs meet the eligibility criteria if they arise from or are related to a physical or mental impairment or illness and as a result the adult cannot achieve two or more of the following outcomes and as a result there is or is likely to be a significant impact on well-being.
 - Managing and maintaining nutrition
 - Maintaining personal hygiene
 - Managing toilet needs
 - Being appropriately clothed
 - Making use of the home safely
 - Maintaining a habitable home environment
 - Accessing work, training, education

- Making use of facilities or services in the community
- Carrying out caring responsibilities.

(Care and Support (Eligibility Criteria) Regulations 2014, Regulation 2)

9. The Care Act explains the different ways a council can meet eligible needs by giving examples of services that may be provided including: accommodation in a care home, care and support at home, counselling and social work and information advice and advocacy. *(Care Act 2014, section 8)*
10. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. *(Care Act 2014, sections 24 and 25)*
11. A council should revise a care and support plan where circumstances have changed in a way that affects the care and support plan. Where there is a proposal to change how to meet eligible needs, a council should take all reasonable steps to reach agreement with the adult concerned about how to meet those needs. *(Care Act 2014, sections 27(4) and (5))*
12. The care and support plan must set out a personal budget. A personal budget is a statement which specifies the cost to the local authority of meeting eligible needs, the amount a person must contribute and the amount the council must contribute. *(Care Act 2014, section 26)*
13. The High Court has confirmed that an individual's wishes are not the same as their needs and wishes are not the paramount consideration. A council has to have 'due regard' to an adult's wishes as a starting point, but social workers are entitled to exercise their professional skills and judgement in deciding how to meet eligible needs. *(R (Davey) v Oxfordshire County Council [2017] EWHC 354 (Admin))*
14. A person with eligible care needs can have a council arrange their care. Or, if they wish, they can arrange their own care using a payment the council gives them ('direct payment'). *(Care Act 2014, section 31)*
15. Councils must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring any person in its area wishing to access services in the market has a variety of providers and services to access. *(Care Act 2014, Section 5)*

How we considered this complaint

16. We produced this report after examining relevant files and documents and comments from the parties. We also made further enquires beyond the complainant's case and corresponded with the Council about others who may be similarly affected.
17. We gave the complainant, the Council and Bloomsbury Homecare confidential drafts of this report and invited them to comment. We took their comments into account before finalising the report.

Investigation

Home care services in Lincolnshire

18. The Council told us it used to have over 75 arrangements with home care providers and this led to several providers working in small areas. Work was not guaranteed and this made it difficult for many providers to maintain a stable workforce. There was not enough capacity to meet demand.
19. Between March and July 2015, the Council selected new home care providers by a procurement exercise. The result was the Council contracted with 12 home care providers across the county ('prime providers'). Transition to the new contracts took place between June and September 2015 with 3,500 people moving over. Bloomsbury Homecare was awarded the contract for Mrs A's area with two other providers as back-up.
20. The Council made it clear to all providers that they would be accountable for the successful delivery of all homecare services within their zone. The contracts had penalty clauses for any failure to deliver services and to recover the Council's costs for funding alternative care arrangements. The Council said it expected prime providers to transfer all care packages over.
21. When commissioning residential care for a person because there is no home care available, the Council uses the term 'deficit bed'. The Council told us its use of the term 'deficit bed' is not '*intended to imply a deficit in the nature of the care being provided rather a deficit in market availability at a specific point in time*'. The Council does not charge people anything for their care in a deficit bed. The Council says it would be impossible to guarantee 100% capacity and 68 people were in deficit beds just before the new model came in and this increased to 100 afterwards, during winter 2015 when there was increased demand. Twelve months after the new model was introduced, the number had reduced to 10.
22. The Council also told us that of those placed in residential care referred to in the previous paragraph, there were a variety of reasons for the placement, which may not have been related to the availability of home care.
23. During the period Mrs A was in residential care, 19 others who lived in Bloomsbury Homecare's zone were also in deficit beds. The Council told us it took action to address the lack of capacity with Bloomsbury Homecare, including issuing a default notice under the contract. It considered terminating the contract but felt this would be disproportionate and would affect a large number of people. A senior council officer was based in Bloomsbury Homecare's offices for several months to oversee matters. The Council acknowledged that '*there were few viable contingencies in place*'.
24. The Council told us it had responded to six other complaints about lack of home care provision. Three of these were upheld because provision was not available at the time required and three were partly upheld.

Mrs A's case

25. Mrs A has physical disabilities and cannot weight bear. She is nursed in bed. Mr A is her main (unpaid) carer. The Council completed a social care assessment and Mrs A had a care and support plan stating home care would meet her eligible needs. She received a package of home care of four calls a day delivered by an agency arranged and funded by the Council. The home care package was suspended when Mrs A went into hospital for an operation on her hip. Following successful surgery, Mrs A was ready to be discharged from hospital on 9 June 2015.
26. The brokerage team contacted potential home care providers asking if any would take on Mrs A's package. Bloomsbury Homecare could not take on her package as there was no capacity for calls by two carers, as required here.
27. The brokerage team noted on 15 June that they had contacted 11 home care providers asking if they could take on Mrs A's package.
28. On 17 and 22 June, the brokerage team contacted 10 home care providers offering incentives (mileage payments) to take on Mrs A's care package.
29. On 24 June, the brokerage team contacted 12 home care providers. None had capacity in the area of the county where Mr and Mrs A lived. Mrs A's social worker emailed the brokerage team to say the case was urgent to facilitate Mrs A's discharge from hospital. A social worker visited Mrs A in hospital and went through the care and support plan with her. The social worker explained Mr A was looking at a care home for her. Mrs A said she was not sure about this. The social worker explained she was also looking for a home care provider for Mrs A.
30. The brokerage team emailed Bloomsbury Homecare on 29 June. Mrs A was on its waiting list.
31. Mrs A remained in hospital. There continued to be no home care available for her. So officers began looking into vacancies in care homes. Mr A rejected a couple of possible homes as unsuitable (one because it was too far for him to travel to). On 30 June, the Council offered Mrs A a bed in a residential care home out of county. Mr A had been involved in selecting the care home. The social worker's managers approved the placement, and the case notes indicate officers set up a spot contract (one-off contract) with the care home.
32. On 2 July, the brokerage team contacted Bloomsbury Homecare about picking up Mrs A's care package. On 6 July, the brokerage team contacted other home care providers and offered them enhanced rates.
33. A social care assessment dated July said Mrs A had had a right hip replacement and needed a package of care to return home consisting of four care calls a day, each with two carers. Mrs A could communicate her wishes and views. She needed meals and drinks prepared for her. She could eat and drink independently. She could not weight bear

and was bed bound. Mrs A was eligible for support because she had significant difficulties in:

- managing and maintaining nutrition;
- maintaining personal hygiene;
- managing toilet needs; and
- being appropriately clothed.

As a result of these difficulties there was a significant impact on her wellbeing. There was no mention of the costs of care on the assessment form.

34. Mrs A moved into a room on the care home's dementia unit on 7 July. Mrs A does not have dementia. The weekly cost of the deficit bed was about £554. A social worker later visited Mrs A in the care home and noted Mrs A was locking herself in her room because other residents, who had dementia, were wandering in and out. Mr A visited her every day.
35. On 27 August, the social worker spoke to Mr A and noted that '*Mrs A was on the dementia unit which is a problem*'.
36. The brokerage team chased Bloomsbury Homecare and other providers weekly in July and August. There was no record of any liaison between the brokerage team and potential home care providers in October; one contact in September and two in November.
37. On 26 November, Mrs A's physiotherapist contacted the Council to say her condition had improved and she only needed one carer and not two. The brokerage team re-contacted potential providers with these new details.
38. On 22 December, Mr A went to the Council offices to speak to the social worker. The social worker noted they '*discussed the deficit bed and how this is now having a detrimental effect on the improvement and wellbeing of Mrs A.*' Mrs A had been moved to a different room in the care home and was no longer on the dementia unit. They spoke about direct payments for Mrs A's care.
39. On 12 January and 3 February 2016, the brokerage team contacted Bloomsbury Homecare. There was no progress and Mr A complained to the Council.
40. On 5 February, the social worker noted Mr A did not want to employ carers directly himself. She left a message asking Mr A to get costs from other agencies. Mr A told the social worker he was not sure about direct payments. On 24 February, he said Mrs A was emotionally affected by not having a date to return home. During February the brokerage team chased up potential home care providers three times.
41. On 2 March, the social worker and Mr A spoke. Mr A had been making enquiries with home care providers. The charges were noted to be higher than those the Council set for

home care. The social worker said the Council's rates were 'quite rigid'. Mr A asked why the Council could not use the extra money it was paying for residential care towards Mrs A's home care instead. The social worker later raised this with her manager.

42. On 16 March, Mr A gave the social worker details of an out of county agency which had carers available in his area. The charge was £15 an hour. The social worker spoke to the agency which confirmed this. The Council told us Mr A could have had a direct payment to use this agency, but he did not want this. The Council told us it would not spot contract with the agency because "*the request was not commercially viable as the purpose of the prime provider model was to stabilise the market and increase capacity for all users. There was no commercial option to spot contract unless there were exceptional specialist needs*". The Council also told us spot contracting may have undermined prime providers' confidence in their contracts with the Council and so the benefits of the model may have been jeopardised.
43. On 18 March, an internal email noted Bloomsbury Homecare may have a vacancy. Further contacts by the brokerage team indicated the agency had a new carer starting.
44. On 5 April, Mr A told the social worker Mrs A felt imprisoned in the care home.
45. On 7 April, Bloomsbury Homecare offered a start date of 15 April.
46. There was then a delay in getting Mrs A home because of problems sourcing an appropriate pressure-relieving mattress for her. Mr A wanted one brand of mattress, which the NHS would not provide. This delay was not the Council's fault because it was not responsible for providing pressure mattresses. Mrs A returned home and Bloomsbury Homecare started providing care to her on 16 May.
47. Payments of Mrs A's attendance allowance stopped during the period she was in residential care. This is in line with the rules on eligibility for this state benefit.
48. Mrs A's care and support plan of June 2016 says she was to receive one call a day of 45 minutes no later than 8.45am for assistance with personal care. (The difference between the assessment of July 2015 and this later care plan was that Mrs A's condition had improved and Mr A said he could manage with only one call a day.) The care and support plan said Mrs A was to be cared for in bed and to receive help to: change into fresh nightclothes, use the bed pan, apply creams to her skin and encourage repositioning (Mrs A could reposition herself on the bed). Mr A would support Mrs A with everything else. The weekly cost of care was £72.71 (5.25 hours at £13.85 an hour).

Mr A's complaint to the Council

49. Mr A complained to the Council about Mrs A's loss of attendance allowance and about other matters not raised with us. The Council's response to his complaint says:
 - there was no home care provider available and it was sorry for this;
 - the care home placement was not the preferred alternative but it did meet Mrs A's needs;

- the Council would pay the full cost of the care home;
 - officers remained in regular contact with home care providers to find her a service; and
 - attendance allowance stopped because Mrs A did not meet the criteria for payment. She was first in hospital and then in a care home on discharge so was not entitled.
50. Mr A told the Council he had a 30 mile daily round trip to visit Mrs A and that he and his wife suffered mental anguish and anxiety about not being at home together.

Conclusions

The home care commissioning model

51. The Council considers section 5 of the Care Act 2014 (see paragraph 15) does not oblige it to ensure the market in Lincolnshire provides for every individual's specific needs or that they receive a specific form of care and support. We accept the Council's argument. We consider the Council is entitled to have a panel of agencies to carry out its duty to meet eligible needs under Sections 8 and 18 of the Care Act 2014.
52. The Council said an individual spot contract may have threatened providers' confidence in their prime provider status. We consider the risk of undermining the market in this way is a persuasive explanation for the Council's reluctance to use an off-panel agency. We also note that Mr and Mrs A could have engaged an agency of their choice using a direct payment, although we also appreciate managing a direct payment involves a degree of responsibility which not everyone is willing to accept. On balance, we are satisfied there was no fault in the Council's decision not to spot contract because of the danger of threatening prime providers' status. Nevertheless, the Council accepted in response to a draft of this report that the balance of care planning considerations for Mrs A were such that her needs should have taken precedence over the concerns it had over spot-contracting outside the prime provider model at an earlier stage.

The Council's scope to meet eligible care needs in a way that is different from the care and support plan

53. Section 27 of the Care Act 2014 required the Council to keep Mrs A's care and support plan under review and to revise it where circumstances changed in a way that affected the plan. This was to ensure the plan remained up to date. Circumstances had changed since the care and support plan was issued because there was no agency with enough capacity to provide the home care services set out in the plan. In order to keep the plan up to date, the Council should have revised it and it was at fault for failing to do so, especially when the problem with home care capacity persisted for 10 months.
54. Although the Council was at fault for not reviewing the care and support plan, we are satisfied the Council tried to engage with Mr and Mrs A to try and reach an agreement in relation to how Mrs A's needs should be met; although agreement was not achieved. The High Court has confirmed that an individual's wishes are not the same as their needs and are not the paramount consideration. Both the assessment of Mrs A's needs and the decision on how to meet those needs were decisions for the Council. Had the Council

correctly reviewed the care and support plan at the right time, more likely than not a residential placement would have been arranged. There was no absolute duty on the Council to arrange home care for Mrs A.

55. Mrs A did not have dementia yet was placed on a dementia unit for several months and had to lock herself in her room for safety to prevent other residents coming in her room uninvited. We do not consider a room on a dementia unit was a suitable way of meeting the needs of a woman who had physical disabilities but no cognitive impairment. Although Mr A was involved in choosing the placement, the Council has accepted this was fault and agrees it should not have arranged residential care for Mrs A in a dementia unit.

Injustice

56. The fault meant Mrs A lived in a dementia unit initially which did not give her optimal control over her immediate environment. And the Council accepts she remained in what was identified as a short-term placement, for too long. This caused avoidable distress. The case records evidence Mrs A suffered increasing frustration and distress at being interrupted by other residents and also in being separated from her husband and not being in her own home. And Mr A also suffered distress and incurred daily travel expenses in visiting his wife, which he would not otherwise have incurred.

Decision

57. The Council was at fault when it allowed Mrs A's placement in residential care to continue for 10 months and placed Mrs A in a dementia unit. Further, the Council was at fault for failing to act in line with the Care Act 2014 by not revising Mrs A's care and support plan when circumstances changed. The fault meant Mr and Mrs A could not live together as a married couple for 10 months. This caused avoidable distress and Mr A incurred daily travel expenses in visiting his wife.

Recommendations

58. To remedy the injustice, within three months of this report, the Council should:
- pay £750 to Mr A to reflect his distress. This is in line with our Guidance on Remedies;
 - pay £1000 to Mrs A to reflect her distress. This is in line with our Guidance on Remedies;
 - refund Mr A's travel expenses based at the Council's rate for mileage based on visits every day for the period 9 June 2015 to 15 April 2016.

The Council has accepted the above recommendations.

59. Mr A considers the Council should pay for a welfare benefit Mrs A missed when she was in the care home. We do not consider there are grounds to recommend this because there is no direct causal link between the fault and the loss. Mrs A's benefit stopped because of another public body's rules on eligibility that cannot fairly be attributed to the Council's fault. Attendance allowance is payable to meet care needs. Those needs were being met by the council-funded placement during the 10-month period it ceased, albeit not in the way Mr and Mrs A wished.

60. Our powers to enquire into other cases enable us to investigate wider matters which emerge during an investigation if it appears another member of the public, who has not complained, has suffered injustice. The Council says we have not investigated similar cases who have not complained to us and so have no power to make any wider recommendations beyond those concerned with Mr and Mrs A.
61. We do not share the Council's view. We sought explanations from the Council about the number of people cared for in deficit beds. We also asked the Council about others who have made similar complaints. The Council's correspondence suggests others may be in a similar position.
62. Our powers allow us to recommend a council takes action to prevent future injustice as a result of similar fault. This is a power to make preventative recommendations as well as remedial ones. The Council has agreed to carry out a review of any short-term residential care placements between the start of the new home care contract and the date of this report to establish whether they were deficit beds and if they were, whether the placement was for more than the Council's short-term care period of eight weeks. If the deficit placement was for longer than eight weeks, the Council will consider payments for avoidable distress and/or travelling expenses where appropriate.
63. For those people it identifies as still being in deficit beds for longer than eight weeks, we recommend the Council takes all reasonable steps to source suitable home care providers and ensure care and support plans are up to date.
64. The Council should report back to us within three months on how it has implemented the recommendations in paragraphs 62 and 63.
65. We consider it to be in the public interest to publish this report because we have identified potential injustice sustained by others and to highlight the issues surrounding new commissioning models to other councils who may be considering implementing them.