Local Government
OMBUDSMAN

Report by the Local Government Ombudsman

Investigation into a complaint against

Wokingham Borough Council

(reference number: 15 017 863)

8 February 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.

Investigation into complaint number 15 017 863 against Wokingham Borough Council

Contents

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 K the complainant

Report summary

Adult care services: charging

A Solicitor complains the Council has failed to assess Ms K's daughter's finances properly by failing to disregard the daughter's personal injury payment.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should backdate its payments to the date it accepted Ms K's daughter had eligible care needs.

Introduction

1. A Solicitor complains Wokingham Borough Council (the Council) has failed to assess Ms K's daughter's finances properly by failing to disregard the daughter's personal injury award.

Legal and administrative background

2. Since April 2015 councils have had to follow the Care Act 2014 and the associated guidance and Regulations. Under the guidance councils can expect people with capital over £23,250 to pay for their own care. However, some forms of capital must be disregarded including:

   - capital from an award of damages for personal injury which is administered by a court or which can only be disposed of by a court order or direction; and

   - the value of the person's main or only home where the person is receiving care in a setting that is not a care home.

3. The position on personal injury awards is reflected in Regulation 18 and Schedule 2 of the Care and Support (Charging and Assessment of Resources) Regulations 2014. Regulation 18 deals with the treatment of capital and Schedule 2 lists the capital to be disregarded. Paragraph 25 of Schedule 2 says to disregard "*Any amount which falls within paragraph 44(2)(a), and would be disregarded under paragraph 44(1)(a) or (b), of Schedule 10 of the Income Support Regulations ...".*

4. Paragraph 44(1) of the Income Support Regulations says to disregard "*Any sum of capital to which sub-paragraph (2) applies and" -*

   - "*which is administered on behalf of a person by the High Court or the County Court under Rule 21.11(1) of the Civil Procedure Rules 1998 or by the Court of Protection";*

   - *"which can only be disposed of by order or direction of any such court".*

5. Sub paragraph (2) "*applies to a sum of capital which is derived from an award of damages for a personal injury to that person or compensation for the death of one or both parents where the person concerned is under the age of 18".*

6. The current position on personal injury awards is essentially the same as the pre-April 2015 position. Before April 2015 councils had to follow the Department of Health's *Charging for Residential Accommodation Guide (CRAG)* when assessing capital, including for people receiving care in their own homes.

7. The Court of Appeal held in 2007 that capital from a personal injury compensation claim administered by the Court of Protection could not be taken into account when deciding a person's contribution towards the cost of their home care. At paragraph 78, the judge said:

"*CRAG provides that the value of funds held in trust or administered by a court which derive from a payment for personal injury is a capital asset that is disregarded indefinitely. It follows that the Fairer Charging policy provides that in the means testing of the claimant's resources the capital sum represented by the damages award in this case would be left out of account."* ***[Crofton v NHS Litigation Authority (2007) EWCA Civ 7]***

8. In June 2014, the High Court also held that capital from a personal injury claim managed by a Deputy appointed by the Court of Protection should be ignored when deciding a person's contribution towards the cost of their home care. Walsall Metropolitan Borough Council's policy of charging for the cost of social care services was unlawful in that it had taken account of capital from the claimant's personal injury payment. ***[R (ZYN) v Walsall MBC (2014) EWHC 1918 (Admin)]***

9. In a 2009 case in the Court of Appeal, damages for a medical negligence claim were agreed. Issues arose about the cost of the claimant's future care and whether this should be paid for by the NHS body responsible for the negligence or by the local authority. The public bodies had concerns about double recovery, that is, a person receiving damages for their future care costs by a civil claim and receiving council funding for that care as well. The Court of Appeal held that where a court has awarded future care costs, there is no duty on the Deputy to seek public funding from a local authority as this would be double recovery. The judge accepted an undertaking from the Deputy to apply to the Court of Protection for approval to apply for local authority funding for care as a way of dealing with the risk of double recovery in the future. The court also held, in line with *Crofton*, that all the damages would be disregarded in a local authority financial assessment. ***[Peters v East Midlands SHA (2009) EWCA Civ 145]***

How we considered this complaint

10. This report has been produced following the examination of relevant files and documents, and discussions with Ms K's Solicitor.

11. The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised. We have also got advice from Counsel on the legal issues raised by the Council.

Investigation

12. In 1998 Ms K's daughter received a personal injury award of £1,279,000 for medical negligence in 1975. A Deputy appointed by the Court of Protection has administered this money. Since January 2015, when the original Deputy stood down, this has been Ms K's Solicitor. Ms K's Solicitor does not have a copy of the Court Order making the award in 1998. She says this is because the firm of solicitors which dealt with the claim destroyed its file.

13. However, the Solicitor has provided "*advice on terms of settlement*" prepared by Counsel which sets out the basis of the award. This includes £729,675 for "*future care and*

assistance" out of a total claim for £1,312,000 (£33,000 more than the agreed award). This was to cover the daughter's care costs for 17 years (i.e. until 2015).

14. The Order appointing the Solicitor as the daughter's Deputy allows her to:

    - control her property and affairs, including purchasing, selling and letting property;
    - appoint an investment manager;
    - without obtaining further authority from the Court dispose of her money or property by way of gift.

15. Ms K and her daughter lived in Wokingham between 2006 and 2009. When the Council did a financial assessment in 2006 the daughter's personal injury award produced a monthly income of some £3,500. Her Deputy used this to pay for her care.

16. Ms K and her daughter returned to Wokingham in June 2015. On 30 June the Solicitor told the Council a Deputy appointed by the Court of Protection administered the personal injury award and therefore it should disregard the award.

17. The Council started assessing the daughter's needs on 7 July. It decided she had eligible needs for care and support. It identified an indicative personal budget of £3,910. The assessment notes the need to resolve the question of whether to include the daughter's personal injury award in her financial assessment.

18. On 10 August the Council asked the Solicitor to provide information about the personal injury award. It said it had concerns about "*double recovery*". It asked the Solicitor to provide information including:

    - Counsel's advice to accept the award (see paragraph 13 above);
    - income the daughter was entitled to from the award;
    - the current capital and how this had been spent since the date of the award.

19. On 19 August the Solicitor told the Council she had little information about the award apart from Counsel's advice (see paragraph 13). She said the firm which dealt with the award had misplaced or destroyed the file. She said the award included around £700,000 for care. She said around £47,000 a year had been spent on care, meaning the care element would have been spent in 15 years. She said the daughter's capital included a home worth £520,000, an investment bond worth £30,000 and cash of £790, none of which provided income. She said most of the daughter's capital was earmarked for other costs and her Deputy's expenses, and could not be used for care. She said the daughter's capital should have been disregarded since at least 2010.

20. The next day the Council asked for a statement of all of the daughter's current capital. It also asked for evidence the daughter's capital was committed to expenses other than on care.

21. On 17 September the Solicitor told the Council she was still waiting for the firm which dealt with the personal injury claim to respond. She sent the Council a copy of Counsel's advice (see paragraph 13 above). She provided information about the amounts spent on care between 2005 and 2012. She questioned the need for information about non care expenditure. She said she had already confirmed the extent of remaining capital and therefore the Council had the information it needed to assess the daughter's expenses and start funding her care. She said the daughter no longer had enough cash to pay for her care.

22. The Council replied on 29 September. It said to satisfy itself funding the daughter's care would not amount to "*double recovery"* it needed evidence of her income and expenditure, and the depletion of capital. It also asked if Counsel's advice to invest £850,000 in an annuity had been followed and, if not, why not. It said this would have yielded income for life to cover 85% of projected care costs.

23. On 21 October the Solicitor filled in a financial assessment form for the daughter. This identifies income from state benefits, disability related expenditure (petrol and parking charges), invested capital of £20,704.11 at 30 September 2015 and a zero bank balance.

24. The Council completed its financial assessment on 27 October and sent a copy to the Solicitor. It said it would not charge for non-residential services but would charge £15.97 a week for short breaks or respite services. It said this would apply "*from the date services commence"*. We understand the Council started funding the daughter's care from 27 October 2015, although in some of its correspondence it says it did this from 1 November 2015.

25. On 4 November the Solicitor wrote to the Council. She said no undertaking to prevent "*double recovery"* had been given in the daughter's case, as had happened in the *Peters* case (see paragraph 9 above). She said the daughter's claim had included £34,000 for future accommodation but she spent £520,000 on her current home, having moved four times since 1998. She said the daughter's capital (her home and limited amount of money) had to be disregarded in the financial assessment. She said the Council was not entitled to a breakdown of how money had been spent. She sent the Council a breakdown of the daughter's income based on her tax returns. She said she had already provided details of money spent on care and copies of the Deputyship accounts (although that was not the case), which the Office of the Public Guardian had approved. The Solicitor told the Council "*there is now no capital or income – it has all been spent*".

26. The Council replied on 11 December. It said it did not accept the position on "*double recovery"* only applied when an undertaking had been given to the Court. Among other things it referred to Regulation 18 of the Care and Support (Charging and Assessment of Resources) Regulations 2014, and paragraph 16 of Schedule 2, which lists the capital to be disregarded. Paragraph 16 says to disregard capital which should be disregarded under paragraph 12A of Schedule 10 of the Income Support Regulations "*with the exception of any payment that has been specifically identified by a court to deal with the cost of providing care"*. Paragraph 12A of the Income Support Regulations provides for the disregard of:

"*Any payment made to the claimant or the claimant's partner in consequence of any personal injury to the claimant or, as the case may be, the claimant's partner*".

1. "*But sub-paragraph (1)*" -

   (a) "*applies only for the period of 52 weeks beginning with the day on which the claimant first receives any payment in consequence of that personal injury":*

   ...

   (c) "*ceases to apply to the payment or any part of the payment from the day on which the claimant no longer possesses it;"*

2. "*For the purposes of sub-paragraph (2)(c), the circumstances in which a claimant no longer possesses a payment or a part of it include where the complainant has used a payment or part of it to purchase an asset".*

27. The Council said this meant it could take account of the capital in the daughter's home. The Council said it had agreed interim funding based on the financial assessment the Solicitor had completed, which identified income from benefits only. It said the information provided showed the daughter had capital over £23,250.

28. On 17 December the Solicitor wrote to the Council. She said Ms K and her daughter had had to move several times which meant the use of the personal injury award had not been as planned. She said it was not Counsel's role to provide investment advice. However, she said money from the award had been invested but since 2000 the returns had been low because of low interest rates. She questioned the Council's interpretation of the Regulations.

29. When the Council replied on 18 December it said it had concerns about the way the daughter's award had been spent, as most of it had gone on accommodation, rather than care. It said paragraph 12A of the Income Support Regulations (see paragraph 26 above) meant it did not have to disregard the money used to buy the daughter's home. It said its interim funding would end on 8 January 2016, subject to any further information or arguments the Solicitor might make.

30. When the Solicitor replied on 23 December she said the daughter's home was under her Deputy's control and therefore had to be disregarded. She said the daughter had no money to pay for her care and urged the Council not to remove its funding.

31. On 29 December the Council asked the Solicitor to explain why the daughter's home should be disregarded. It said it believed it could take this into account because:

- an asset bought using a personal injury payment is not disregarded; and
- more than 52 weeks had passed since the award was made.

32. The Council said it remained concerned about how much of the award had been spent on property. It said it would extend the interim funding until 22 January 2016 to allow the Solicitor more time to present further arguments by 15 January.

33. The Solicitor wrote to the Council on 6 January 2016. She said a legal case (see paragraph 8 above) meant a Deputy could invest money without losing the protection afforded by statute for personal injury awards administered by the Court of Protection. She said regardless of where the money to buy it had come from, the daughter's home had to be disregarded. She pointed out that the decisions to buy property had to be made in the daughter's best interests following the principles of the Mental Capacity Act 2005. She said the Court of Protection had approved the purchase of the daughter's current home via Court Order.

34. On 11 January the Council asked the Solicitor to provide:

- a breakdown of the daughter's income broken down by source and with an explanation of the rapid decline since 2009;
- information about the money earmarked for non-care expenses;
- a breakdown of the daughter's remaining capital;
- information on the decisions which led to the award being spent down to its current level.

35. On 19 January the Solicitor sent the Council deputyship accounts from 2007 to 2015. She said apart from the 2015 accounts, which had only been submitted in December 2015, they had all been approved by the Office of the Public Guardian. The accounts for December 2015 say the daughter's assets were:

- £520,000 - freehold property;
- £21,211 - investment bond;
- £7,702.39 - cash in the daughter's bank account;
- £308.60 - cash in the Deputy's client account.

36. Following a telephone call, the Council wrote to the Solicitor on 25 January. It asked her to comment on these issues.

- The expenditure on care costs which was significantly higher than the personal budget identified by the Council.
- Professional fees of over £100,000 since 2011.
- The depletion of capital due to the purchase of property and the rationale behind the property transactions.

- The claim that the daughter had no capital or income from the personal injury award when the 2015 accounts list assets and cash of £29,222.

37. It also sent her a list of questions which is too long to include here.

38. The Solicitor replied on 28 January and answered the Council's questions at some length. She also provided copies of Court Orders. The Solicitor wrote again on 2 February 2016 providing more information about the investment of money from the daughter's award.

39. On 4 February the Council asked the Solicitor to provide more information about:

- investment performance;
- professional fees;
- the daughter's involvement in decision making;
- the plan for meeting the daughter's care needs over the remaining decades of her life, apart from applying for local authority funding;
- the rationale behind the property transactions; and
- the need for Ms K to fund her daughter's care when the Deputy had £30,000 of her funds.

40. The next day the Solicitor wrote to the Council to complain about the way it had dealt with the daughter's financial assessment. She said the Council had ignored, misunderstood or misapplied the Care and Support (Charging and Assessment of Resources) Regulations 2014.

41. On 25 February the Council wrote to Ms K. It said after taking Counsel's advice it had decided to reinstate the daughter's funding.

42. On 1 March the Solicitor wrote to the Council again to complain about its handling of the daughter's financial assessment. She asked the Council to backdate its funding to the date it assessed her.

43. On 22 March the Council told the Solicitor it did not routinely backdate funding. It said it had asked for information in August and September 2015, and January 2016 which the Solicitor had only provided on 28 January and 2 February 2016. It said it did not think the need for backdating arose but offered to consider any further information provided about this.

44. The Council increased its funding for the daughter on 26 April to £17,300 a year and backdated this to 27 October 2015.

45. The Council says it has made no decision about funding before 1 November 2015 (i.e. 27 October 2015). It says it is prepared to fund care before that date if the Solicitor

provides evidence that the daughter lacked the funds to pay for her own care (i.e. had capital below £23,250 including that from her personal injury award).

46. The Council says it has "*no more than a duty to 'act under'"* the Department of Health's *Care & Support Statutory Guidance*. It says this means it is not prevented from acting differently in any case where it has good reason to do so. It says the good reason in this case is that Ms K's daughter has received damages which cover the cost of care she is now asking the Council to fund.

Conclusions

47. Under normal circumstances capital from a personal injury award administered by a Court appointed Deputy must be disregarded. That position is reflected in the Regulations and case law (see paragraphs 3 to 5 and 8 above). The only time that would not be the case is if the Court Order making the personal injury award included an undertaking to prevent "*double recovery"*, as in the *Peters* case (see paragraph 9 above). Although the *Peters* case makes it clear there is no duty on a Deputy to apply for state funding, it does not follow that a Deputy cannot do so. For the Council to suggest that is not so ignores the clear requirement to disregard personal injury awards administered by a court, set out in the Regulations and reflected in the Care Act guidance. As the Court Order awarding the daughter personal injury compensation is not available we do not have the evidence to show whether it included an undertaking to prevent "*double recovery"*. However, given that her award predated the *Peters* case and based on the balance of probabilities, we are satisfied it did not. That means the award had to be disregarded.

48. Within that context, the question of whether part of the award had been earmarked for care costs is not relevant.

49. Deputies appointed by the Court of Protection have to act in the best interests of their clients. They are accountable for the use of their client's money to the Court and the Office of the Public Guardian, to which Deputies provide annual financial returns. It is not for the Council to question how an award has been spent. The Council has taken up much time asking the Solicitor to provide information about the use of the personal injury award over many years which is not relevant to the financial assessment of the daughter's current circumstances. The Solicitor provided information about the daughter's capital in August 2015.

50. In not backdating payments before 27 October 2015, the Council has taken account of the daughter's personal injury award. That was fault.

51. While the Council is right to say it has a duty to "*act under"* the Department of Health's *Care & Support Statutory Guidance*, it must follow the Care and Support (Charging and Assessment of Resources) Regulations 2014. These clearly set out the need to disregard a personal injury award administered by a Court appointed Deputy. If Parliament had wanted to change the legal position it would have done so when it introduced the Care Act and the 2014 Regulations.

Injustice

52. Ms K's daughter has suffered a financial loss as the Council has failed to backdate its contribution towards the cost of her care before 27 October 2015.

Decision

53. The Council was at fault because it has failed to disregard the daughter's personal injury award and backdate payments before 27 October 2015.

Recommendations

54. To remedy the injustice, the Council should within two months of this report backdate its payments for the daughter's care to the date it accepted she had eligible care needs.