

Committee: Cabinet and General Purposes

Date: 21 October 2013 and 7 November 2013

Agenda item

Wards: All

Subject: Local Government Ombudsman (LGO) finding of maladministration regarding top up fees charged by a residential care home

Lead officer: Caroline Holland. Director of Corporate Services

Simon Williams. Director of Community and Housing

Paul Evans. Monitoring Officer

Lead member: Councillor Linda Kirby. Cabinet Member for Adult Social Care and Health

Forward Plan reference number: 1302

Contact officer: Fiona Thomsen. Head of Shared Legal Services

Recommendations:

A. That the contents of this report are noted and lessons learned for the future.

1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY

1.1. To receive the report on the findings of the LGO regarding top up charges made by Sutton Court Care Centre (Sutton Court) operated by Hydefall Limited and the finding of maladministration against the authority causing injustice. A copy of the LGO report is appended to this report.

2 DETAILS

2.1. Mrs B was assessed as needing residential nursing care following her discharge from hospital in October 2010. Her daughter Mrs A, was provided with a list of suitable homes which accepted the council's terms and conditions and she chose Sutton Court. The council negotiated fees and arranged the placement at Sutton Court. An individual service agreement (ISA) was signed by Mrs B, and her daughter Mrs A, Sutton Court and the council in October 2010.

2.2. The ISA did not specify that a third party contribution was payable or identify a third party responsible for such payment. The summary of costs listed the actual costs of the placement and contributions payable by the council and the NHS. Mrs B's contribution was subject to an assessment of her financial circumstances. The section for a third party contribution was left blank. A third party contribution (top up) was not required by the council as the costs of the placement were not more than it would expect to pay to meet Mrs B's assessed needs.

2.3. There was a delay in completing the assessment of Mrs B's contribution because she part owned a property with Mrs A and it was difficult to ascertain the value of her interest. There was, therefore, some uncertainty as to whether she should be assessed as contributing fully towards the costs

of the placement. Following an assessment of Mrs B's contribution, Mrs A was informed of the contribution for 2011 and 2012 and a new ISA was signed on 23 November 2012 by Mrs B, Sutton Court and the council. Save for listing Mrs B's contribution towards the costs of the placement, the terms and conditions of the agreement were the same as agreed in October 2010.

- 2.4. In December 2011, the council became aware of top up payments being made by Mrs A to Sutton Court on behalf of Mrs B to settle invoices submitted to her. Due to the Christmas period there was a delay in contacting Sutton Court but in January 2012 they were reminded that there was no third party top up payable for the placement. Mrs A was also advised that she should stop paying top up fees from the end of December 2011.
- 2.5. In October 2012, the council was informed of Mrs A's complaint to the LGO. Her complaint was that a top up should not have been charged by Sutton Court and that the council failed to properly advise her regarding such charges at the time of the placement in 2010. She stated that she contacted the council and the hospital social worker when she first received an invoice from Sutton Court in January 2011 and was advised to pay the charge.
- 2.6. There is no evidence of contact and discussions with Mrs A prior to December 2011, regarding top up payments to Sutton Court. The council did not discuss top up payments with her in 2010 as such charges were not payable or applicable to the placement.
- 2.7. The council sent a response to the complaint and provided documents and information requested by the LGO during her investigation. On 16 April 2013, the LGO advised that she might decide to issue a final report and enclosed a draft conclusion for general comments. The council accepted that a top up should not have been charged but was of the view that Sutton Court acted outside of the scope of the ISA. The council reminded the LGO that Mrs A was aware from the terms of the ISA which she signed, that a top up was not payable. The council was of the view that she entered into a separate agreement with Sutton Court to make such payments without the knowledge of the council. The council therefore did not accept the finding of maladministration and considered that a refund of the top up payment should be made by Sutton Court and not the council.
- 2.8. The LGO sent a draft of her report to Sutton Court and received their comments. Sutton Court stated that they were not disputing the LGO's decision and will co-operate with the council in refunding the charges made. They, however, did not accept that it was in the public interest to name the home.
- 2.9. The LGO issued the council with her final report on 3 September 2013, recommending that the council reimburse Mrs B directly and then seek to recover the amount from Sutton Court. The LGO also recommended that the council ensure that all parties it contracts with to provide care on its behalf are aware that it cannot charge service users or their family members extra fees for the care included in the contract. The council is also required to report back to the LGO within three months on actions taken in respect of the recommendations.

- 2.10. Although officers do not accept the finding of maladministration causing injustice, it has decided not to challenge the decision further. The only means of doing so would be by way of judicial review proceedings, the costs of which would be disproportionate to the potential outcome.
- 2.11. In line with the LGO recommendations a press release was published in two local papers, advising the public of the LGO findings. A copy of the LGO report is published on the council's website.
- 2.12. Following the recommendations of the LGO, Mrs B has been corresponded with and the council await confirmation of additional monies paid to Sutton Court. On receipt of this information, the council will reimburse her directly and claim this money back from Sutton Court. Sutton Court has already indicated that they will refund the council the full amount.
- 2.13. A letter has been drafted to be included in envelopes when posting out invoices for residential and nursing care. This will inform and remind customers of the process of the financial assessment and setting up arrangements for the funding of residential and nursing care placements, including contractual requirements. Customers will be very clearly reminded that they should not be asked to make additional payments by providers for any service that is already included in the contract for their care and advised to contact the Commissioning team if they are approached by a care provider to make any additional payments. The council will then take the matter up with the care providers on behalf of the customers
- 2.14. All residential care home providers have been written to, reminding them of the funding arrangements with the council. They have, in particular, been reminded that the council's customers, their families and/ or their representatives should not be asked for or expected to pay additional fees for care and support covered by the ISA.
- 2.15. The Council has recently begun a process of reviewing all relevant contractual documentation relating to residential and nursing care placement agreements, with the aim of ensuring that the findings of the LGO investigation are addressed. When this is complete, up-dated documents will be issued to all providers for approval. This is expected to be completed by the end of December 2013.
- 2.16. All relevant Adult Social Care staff will be given training by Legal Services on the legal framework of third party top up arrangements and the implications for individual placement agreements. Steps are being taken to ensure that all relevant staff are aware that providers cannot charge top up fees.

3 ALTERNATIVE OPTIONS

- 3.1. Not applicable

4 CONSULTATION UNDERTAKEN OR PROPOSED

- 4.1. Not applicable

5 TIMETABLE

- 5.1. Not applicable

6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 6.1. Any costs paid to Mrs A would be recovered from Sutton Court.

7 LEGAL AND STATUTORY IMPLICATIONS

- 7.1. The LGO has power to investigate complaints where there has been alleged or apparent maladministration or service failure. A finding of maladministration can only be challenged by way of judicial review proceedings on the basis that the findings were irrational.
- 7.2. Under section 25 of the Local Government Act 1974, where an authority exercises a function entirely or partly through contracting with another person, actions taken by or on behalf of that person in carrying out the arrangements shall be treated as actions taken on behalf of the authority and in the exercise of the authority's function.
- 7.3. Under the section 31 (2) of the Local Government Act 1974, the council has three months, following a finding of maladministration, to consider the report and to notify the LGO of actions taken or it intends to take to resolve the complaint. If the LGO is not satisfied with the proposed action of the council a further report can be issued with recommendations.
- 7.4. The Monitoring Officer is required to produce a report under section 5A (3) (b) of the Local Government and Housing Act 1989, following an investigation by the LGO and finding of maladministration.

8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 8.1. Section 149 of the Equality Act 2010 requires the council to have due regard to the Public Sector Equality Duty. In the management of contracts, care providers need to be reminded that when dealing with vulnerable adults, general sensitivity should be exercised and in particular when dealing with financial matters, to prevent unnecessary distress.

9 CRIME AND DISORDER IMPLICATIONS

- 9.1. Not applicable

10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 10.1. The finding of maladministration against the council is an organisational reputational risk.

11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

- LGO report Case ID - 12010181

12 BACKGROUND PAPERS

- 12.1. The placement contracts with Sutton Court

Report

on an investigation into
complaint no 12 010 181
against the London Borough of Merton

3 September 2013

Investigation into complaint no 12 010 181 against London Borough of Merton

Table of Contents	Page
Report summary	1
Introduction	2
Legal and administrative background	2
Investigation	4
Key Facts	4
The Council's comments on the complaint	5
The Care Provider's comments on the complaint	5
Conclusions	6
Finding	7
Remedy	7

The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The personal names used in this report are therefore not the real names.

Key to names used

- Mrs A The complainant
- Mrs B Mrs A's mother, the person affected

Report summary

Adult Social Care – Council charging

Mrs B needed residential care when she was discharged from hospital in October 2010. The Council provided her daughter, Mrs A, with a list of care homes which accepted the Council's funding rates. Mrs A identified a suitable home, Sutton Court Care Centre operated by Hydefall Limited ("Sutton Court") and the Council arranged a placement.

Sutton Court arranged separately with Mrs A to recover the full private cost of the placement. Mrs A was not aware at the time that she should not be paying a top-up fee as the contract for the placement was between the Council and the care provider.

Finding

Maladministration causing injustice.

Recommended remedy

The Ombudsman found maladministration because the Council arranged the placement for Mrs B and the contract for care was between the Council and Sutton Court. The law says that the actions of the care provider in carrying out these arrangements shall be treated as actions of or on behalf of the Council.

The Council disagrees with the Ombudsman's recommendations and says it cannot be responsible for actions taken by Sutton Court outside the scope of the contract. Sutton Court misunderstands the basis of the arrangement and what it was entitled to charge.

The Ombudsman recommends the Council should;

- a. reimburse Mrs B the money paid directly to Sutton Court in top up charges and seek to recover the amount directly from the care provider. I note that the Council and the care provider have agreed to work with each other to facilitate reimbursement;
- b. ensure all parties it contracts with to provide care on its behalf are aware it cannot charge extra fees for the same care directly to the service user or their family members;
- c. report back to my office within three months on the action it has taken under both points.

Introduction

1. Mrs B needed residential nursing care following discharge from hospital on 20 October 2010. Mrs A, her daughter, told the Council of her preferred care home, Sutton Court Care Centre (operated by Hydefall Limited, which I shall call "Sutton Court" in the rest of this report). The Council arranged for Mrs B to be placed there. The Council, Mrs A on behalf of her mother and Sutton Court agreed and signed a contract in October 2010. At the time it was not known what Mrs B's financial contribution to her care fees would be, as she jointly owned a property with Mrs A. In May 2011 the Council decided that the property would be permanently disregarded from the financial assessment.
2. On 1 January 2011 Mrs A received an invoice from Sutton Court for £1374.48. This was for the difference between what the Council was paying for Mrs B's care each week, £585.46, and the home's private rate of £700 a week. Sutton Court set up a separate arrangement with Mrs A at a rate of £650 instead of £700 each week from 1 July 2011.
3. The Council wrote to Mrs B in January 2011 and to Mrs A in June 2011 advising what Mrs B's contribution to care would be. Mrs A contacted the Council, as she thought she had been paying the contribution directly to Sutton Court.
4. The Council wrote to Sutton Court in March 2012 apologising for the delay in reminding it that Mrs B was not self funding her care. It explained the service agreement was between the Council, Sutton Court, and Mrs B, and made in October 2010 at an agreed rate of £585.46. It acknowledged the document signed by Mrs A and the care provider dated 1 July 2011. The letter explains it had advised Mrs A to stop paying additional top-up charges with effect from the end of December 2011. It said the arrangement between Sutton Court and Mrs A was not valid because the Council was responsible for funding the placement.
5. Mrs A's complaint is that Mrs B should not have been charged a top-up amount directly by Sutton Court, as her savings were below the threshold for contribution to residential care.

Legal and administrative background

6. The Ombudsman investigates complaints of fault where someone says it has caused them injustice. If the Ombudsman finds fault but no injustice, she will not ask a Council to provide a remedy. If she finds both fault and injustice, she may ask for a remedy. (*Local Government Act 1974, Part 3, sections 26(1) and 26A(1)*)
7. The Ombudsman has power to investigate complaints about the actions of social care providers in cases where social care is privately arranged and funded. But she may not investigate a complaint against a social care provider if the complaint is about a matter which can be investigated against a local authority under Part 3 of the Act. (*Local Government Act 1974, Part 3A, and Schedule 5A*)

8. The law says local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State. (*Local Authority Social Service Act 1970, section 7*)
9. The Secretary of State has issued guidance to councils on charging for residential care which makes it clear the Council is wholly responsible to a care provider for the full amount of the contracted fee, even if a service user makes payment of his or her contribution direct to the care provider. (*Department for Health - Charging for Residential Accommodation Guidelines (CRAG)*)
10. The authority's function relevant to this case is to make arrangements to provide residential accommodation for persons aged 18 or over who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. An arrangement under this function may be made with a private care provider. (*National Assistance Act 1948, sections 21 and 26*)
11. Where an authority to which Part 3 of the 1974 Act applies exercise a function entirely or partly by means of an arrangement with another person, action taken by or on behalf of the other person in carrying out the arrangement shall be treated as action taken;
 - a. on behalf of the authority, and
 - b. in the exercise of the authority's function(*Local Government Act 1974, section 25(6) and (7)*)
12. In issuing a report the Ombudsman shall not normally mention the name of any person or include particulars which are likely to identify any person and can be omitted without impairing the effectiveness of the report. However, the Ombudsman has power to decide it is necessary to mention the name of a person or include relevant particulars, after taking account of the public interest as well as the interests of the complainant and of other persons. (*Local Government Act 1974, section 30(3)*)
13. With regard to the public interest, identifying a residential care home where a loved one is to reside is a complicated and emotive issue of which some members of the public have limited knowledge and experience. Any information, in this case around the issues of funding, that enables members of the public to make an informed choice when identifying care provision, should be made available. It is not acceptable for care providers to act as this one did, and it has clearly not yet accepted where it is at fault.
14. I have considered whether it is necessary in the circumstances of this case to mention the name of the care provider which could, in turn, identify others. I have taken into account that the complainant has no objection to the care home being

named. I have concluded in all the circumstances that, on balance, it is in the public interest to include the name of the care provider in this report.

Investigation

15. As part of the investigation an officer of the Commission has;
 - a. discussed the complaint with Mrs A and considered the documents she provided;
 - b. made formal enquiries of the Council and considered the documents it provided;
 - c. shared the contents of my provisional findings with the complainant, Council and Sutton Court, the care provider, and considered their responses.

Key Facts

16. Mrs A advised the Council on 15 October 2010 that she was looking into residential nursing care for her mother. A multi-disciplinary needs assessment completed on 19 October 2010 showed that Mrs B required nursing care following discharge from hospital.
17. The Council provided Mrs A with the details of current vacancies in nursing homes which accepted the Council's usual funding levels, including Sutton Court.
18. Mrs A told the Council that her mother's savings were below the threshold for fully self-funded care, but they jointly owned the house where her mother lived prior to going into hospital.
19. The Council arranged a nursing care placement with Sutton Court and agreed to pay £476.76 each week for the placement. The NHS would provide £108.70 nursing care contribution, bringing the total to £585.46 per week. The Individual Service Agreement (ISA) signed on 20 October 2010 by Mrs A, Mrs B, Sutton Court and a representative of the Council refers to the need for a client contribution assessment.
20. A financial assessment in November 2010 refers to Mrs B as being assessed to contribute £237.80 a week with effect from 20 October 2010, £166.40 from 16 November 2010 and the full cost from 12 January 2011. That would assume Mrs B's property share had a capital value above the threshold, and that she should be expected to pay the full cost.
21. The Council received legal advice that it was difficult to ascertain a value of the property and it should be disregarded from Mrs B's financial assessment. However, the property was being rented out and the Council was advised that 25% of the rental income should be taken into consideration.

22. A financial assessment in June 2011 refers to Mrs B as being assessed to contribute £198.39 a week from 11 April 2011 and £260.97 from 27 April 2011. That assessment included some rental income from her property, but no capital value.
23. A financial assessment in May 2012 refers to Mrs B as being assessed to contribute £271.55 a week from 9 April 2012.
24. Sutton Court invoiced Mrs A on 1 January 2011 for nursing care fees from 20 October 2010 to 11 January 2011 at £700 a week. It deducted the Council's weekly rate of £585.46 which left £114.54 outstanding each week. The total amount due for payment was £1374.48. Mrs A says she was concerned about this bill. She contacted the council's assessment team and the hospital social worker who advised she should pay it. I have not seen any evidence to show this advice was given. However Sutton Court's contract only entitled it to charge the Council.
25. Mrs A was concerned that her mother's savings were low. Sutton Court wrote to her on 12 July 2011 enclosing copies of a revised contract at a new rate of £650.00 a week for Mrs B's care with effect from 1 July 2011.
26. A new contract was agreed and signed by the Council, Sutton Court and Mrs B on 23 March 2012. The terms and conditions were the same as the initial contract agreed on 20 October 2010. The Council would pay the agreed rate of £585.46 a week and invoice Mrs B for her contribution as assessed. Mrs A says she has not paid any top up directly to the care provider since then.
27. The Council wrote to Sutton Court on 1 March 2012. The letter reminded the care provider that Mrs B was not self funding her care. The letter refers to the ISA agreed and signed by the Council, care provider and Mrs B dated 20 October 2010, and that invoicing arrangements for the full cost of the care totalling £585.46 should be through the Council. It acknowledges the top-up charged by the care provider and says it has advised Mrs B's family to stop paying additional top up fees from the end of December 2011. The letter reminded the care provider that the agreement for care costs is between the Council and care provider.

The Council's comments on the complaint

28. The Council accepts that Mrs B should never have been charged top up fees as the contract for care was always between the Council and Sutton Court. It says the home acted outside of the scope of the contract and authorisation from the Council and was therefore, not acting on its behalf. The Council says in these circumstances it cannot be held responsible for refunding monies paid directly to the home.

The Care Provider's comments on the complaint

29. The care provider says it has not acted wrongly, because, at the time of invoicing, Mrs A was subject to a 12 week disregard. It understood Mrs A had a home to sell and would be a privately funded client. It says the Council “does not accrue the debt arising between the quanta of the Council rate and the private rate and therefore the Home has to bill this direct”. The provider has also referred to delay in the Council’s administration, uncertainty over the value of the house and when it might be sold, and maintains that the provider is entitled to charge the full private rate for part of the period covered by the complaint.

Conclusions

30. Here, the Council is exercising its functions under the National Assistance Act 1948, section 21, by means of an arrangement with a private care provider. The authority’s function, under section 21(1)(a), is to make arrangements to provide residential accommodation for persons aged 18 or over who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. Pursuant to section 26 of the Act, an arrangement under section 21 may be made with a private care provider.
31. By law, action taken by the provider in carrying out the arrangement shall be treated by the Ombudsman as action taken on behalf of the authority and in the exercise of the authority’s function. Invoicing the resident an illegal top up fee was action taken by Sutton Court in connection with the same services funded and arranged by the local authority. Whether or not the authority had permitted the top up fee is not relevant; the authority would not similarly permit bad care of its resident, but the Ombudsman might still hold it accountable by law. The top up fee did not relate to a separate arrangement nor was it in connection with separate services that fall outside those funded by the authority and so, by virtue of section 25(7) of the 1974 Act, the care provider’s action is deemed to be on behalf of the authority.
32. Further, the placement was wholly arranged (and funded) by the Council and thus falls under Part 3 of the Local Government Act 1974. There was clearly fault causing injustice. As the matter can fall within Part 3 of the 1974 Act, it is excluded from my jurisdiction under Part 3A (see Schedule 5A to the Act). So, I cannot investigate this complaint directly against the care provider. The resident cannot be left without a remedy, and I conclude it is for the Council to reimburse the resident and pursue Sutton Court separately, through its contractual relationship, for a refund.

Sutton Court’s contract was between it and the Council. Its understanding of the legal position and what it is entitled to charge is, however, clearly wrong. It is irrelevant whether the client is funding their own care, nor whether there is a property whose value is disregarded for twelve weeks. There is only one contract for care provision, with the price of the care stated in it, which can be in existence at any one time. So, the provider was not entitled to try to make any other arrangements for additional payment in respect of the same services.

Finding

33. For these reasons I find there has been maladministration by the Council causing injustice to Mrs B which requires the Council to provide a remedy.

Remedy

34. In order to remedy the injustice, I recommend the Council should;
- a. reimburse Mrs B the money paid directly to the care provider in top up charges and seek to recover the amount directly from Sutton Court. I note that the Council and the care provider have agreed to work with each other to facilitate reimbursement;
 - b. remind all providers with whom it arranges the provision of care services they cannot charge additional fees for the same services directly to the service user; and
 - c. report back to my office within three months on the action it has taken under both points.



Dr Jane Martin
Local Government Ombudsman
The Oaks No 2
Westwood Way
Westwood Business Park
Coventry
CV4 8JB

3 September 2013

This page is intentionally left blank