

Report

on an investigation into
complaint no 05/C/13158 against
North Yorkshire County Council

24 July 2007

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Key to names used

Mrs Medway	The Complainant
Mrs Trent	Her Mother
Mrs Aire	The Complainant's sister

Report summary

Social Services

The complaint was made by a daughter on behalf of her mother who required aftercare under Section 117 of the Mental Health Act 1983 (following compulsory detention for treatment) and became a resident in a care home. There were two main aspects to the complaint:

1. The interpretation of the law on the costs of care under Section 117, and in particular: whether the mother could pay, from her own resources, the difference in cost between the rate charged by a home chosen by her family and the rate available in other homes.
2. Whether the Council properly took into account the assessed needs of the mother when deciding that a home that could provide care for her at the Council's usual costs was suitable.

The law and guidance on local authority responsibility for fully funding the costs of aftercare under Section 117 of the Mental Health Act is clear¹. However, there is no specific statutory provision, case law or guidance on whether someone needing Section 117 after-care and wanting to go into a more expensive home can meet the difference between those costs and the costs that a council would incur for a home that could equally well meet assessed needs.

The Council initially said that only a third party could meet the additional costs of a home chosen by the family for their mother. It then reviewed that decision and concluded that it would be reasonable for the mother to meet the difference in costs from her own resources

A home in the Council's area had vacancies and the Council said that this home could meet the mother's needs. The Council therefore refused to pay any more than the amount of that home's fees. Her care plan included frequent contact with family members. The home that the Council said could meet her needs was in a rural location and difficult for family members to reach.

The Council now accepts that the home chosen by the family is appropriate and it will meet the full costs.

I found that the Council:

- had not properly considered whether the home it had identified would meet the mother's assessed needs and had not taken into account the impact on family contact;

¹ See 'Legal and Administrative Background' below.

- had delayed reviewing its initial decision about third party top-ups after representations from the daughter, her M.P. and her solicitors.

If the Council had properly considered the mother's assessed needs and reviewed its decision about 'top-up' payments sooner, unnecessary distress to the complainant would have been avoided. I found that the Council acted with maladministration.

Finding

Maladministration and injustice

Recommended remedy

The Council should pay the complainant £500

Introduction

1. The complaint is made by Mrs Medway, whose mother, Mrs Trent, receives after care services under s117 of the Mental Health Act 1983. On 13 June 2005, Mrs Medway, who is her mother's nearest relative and next of kin, was appointed as Receiver, with authority in relation to her mother's income, capital and property.
2. Services to meet care needs under the Mental Health Act must be provided free of charge. Mrs Medway complains that the Council:
 - refused to meet its responsibility to fully fund her mother's care needs;
 - failed to give clear, consistent and prompt responses to her inquiries about aspects of funding and, in particular, whether additional care may be purchased through top-up payments from Mrs Trent's own funds;
 - attempted to evade its legal obligations by insisting that it would fully fund Mrs Trent's care at a home which it has identified as suitable, but which was not a care home acceptable to Mrs Medway or other members of the family.
3. Inquiries have been made of the Council and others. The Council and Mrs Medway and Mrs Medway's sister, have been given an opportunity to comment on a draft of this report. For legal reasons the names of people and care homes referred to in the report are not their real names.²

Legal and Administrative Background

4. Section 117 of the Mental Health Act 1983 requires the National Health Service and social services authorities such as the County Council to provide aftercare services for anyone who has been discharged from compulsory detention in hospital until the person concerned no longer needs such services.
5. There is no express power in the Act to charge for such care services. After a series of court judgements the House of Lords ruled that charges can not be made³.
6. There is no definitive guidance as to whether people accommodated under s117 of the Mental Health Act can 'top-up' payments towards the cost of their care, if they wish to be accommodated in a home where the charges are more expensive than the council normally pays or is willing to pay.

² Local Government Act 1974 s30(3)

³ R v Richmond upon Thames LBC ex p Watson (1999) and subsequent rulings by the Court of Appeal and the House of Lords

7. Top-up payments can be made for people who are accommodated under the National Assistance Act 1948, (i.e. assessed as needing and receiving residential care) and whose care is publicly funded. Top-up payments can only be made by a third party, such as a family member⁴, and cannot be made by the resident (except for two specified circumstances that are not relevant to this complaint).

The Events

8. Up to March 2005, Mrs Trent lived in Ripon, North Yorkshire. Her daughter, Mrs Medway, lives in Kent; another daughter, Mrs Aire and family, live in West Yorkshire; her son and sister live in Harrogate.
9. In March 2005 Mrs Trent was compulsorily detained in hospital for a short time under the Mental Health Act. When Mrs Trent was ready to leave hospital, her family sought a care home able to cater for elderly, mentally infirm residents. Initial attempts to find a suitable home with vacancies in Harrogate were unsuccessful, as all had waiting lists.
10. While the family were still seeking a suitable care home, Mrs Medway and the Council became involved in a dispute about payment for Mrs Trent's care. Mrs Medway involved solicitors and her MP. The points at issue, described in a letter from Mrs Medway dated 19 April 2005, were:
 - the level of fees that the Council would pay;
 - whether the Council would fund all the costs of care at a home close to Mrs Aire and acceptable to the family;
 - whether it would be possible for Mrs Trent herself to 'top-up' any short fall between the actual cost of care and the amount which the Council was willing to pay;
 - the legal basis for the Council's views and decisions.

Mrs Medway stressed the importance of resolving these issues so that her mother could move out of hospital.

⁴ National Assistance (Residential Accommodation) etc Amendment Regulations 2001. S.I.2001. No3441 and Department of Health Circular LAC(2004)20 paragraph 3.2

11. The Council responded in telephone conversations and in letters dated 24 May, 21 June and 6 July. It said that:
 - it should not pay the full charges for care at the home close to Mrs Aire (or any other home charging more than the amount it usually paid) because suitable care was available, at lower cost in 'Northholme' a care home in its area;
 - the difference between what it would contribute and actual care home charges would have to be paid by a third party (such as Mrs Trent's family) and could not legally be paid from Mrs Trent's own funds. It based its position on 'Charges for Residential Accommodation Guidance' issued by the Department of Health (DoH). This deals with top-up payments for people receiving residential care under the National Assistance Act 1948 (but see below, the Council's revised view of the issue).
12. In July 2005 the Council's officers drew up a care plan for Mrs Trent that included '*It is important to maintain social well being that [Mrs Trent] has frequent contact with family members...*' That month Mrs Trent moved into 'Westholme' a care home in the same town as her daughter, Mrs Aire and family. The charges were higher than the amount the Council said it would pay and the issues raised by Mrs Medway had not been resolved. Mrs Medway's aim was ultimately, to secure accommodation for her mother in a care home in Harrogate.
13. Mrs Trent's family rejected Northholme because of what they saw as its poor standards of care and accommodation and because, due to distance and location it would have been very difficult for the family to maintain regular contact. In particular, it would not have been possible for Mrs Aire to visit daily, as she could (and has) at Westholme.
14. Solicitors for Mrs Medway questioned the legal basis for the Council making any charge for Mrs Trent's care as she was receiving care under Section 117 of the Mental Health Act.
15. The Council changed its view about who could pay for any top up charges. From November 2005 it took the view that the Mental Health Act was entirely separate from the National Assistance Act 1948. This meant that Charging for Residential Accommodation Guidance did not apply. Therefore it believed that top-up payments could be met from Mrs Trent's own funds.
16. In recognition of the time taken to clarify the issue, the Council agreed to pay the full cost of Mrs Trent's care at Westholme from when she moved in (July 2005) to when it came to its revised decision (21 November 2005). Thereafter, it would pay at its usual local rate that was lower.

17. During 2006, Mrs Medway wanted to move her mother to another home near Harrogate and use her mother's funds to buy her 'the Ritz of care' for the rest of her life. This was contrary to the wishes of Mrs Aire and to the Council's assessment of what would be in Mrs Trent's best interests. The High Court ruled in January 2007 that Mrs Trent should stay at Westholme.

Investigation

18. Throughout 2006 the Council continued to maintain that Northolme would provide suitable care for Mrs Trent and the costs that the Council would pay for Mrs Trent's care would be no more than those charged by Northolme. I asked the Council about its assessment that Mrs Trent's needs could be met at Northolme. In particular, I asked how that assessment had been reconciled with the reference in Mrs Trent's care plan to the need for frequent family contact, given the difficulty the family would have in getting to Northolme.
19. The Council has produced no positive evidence to demonstrate the basis for its view that Northolme was suitable. No officer visited Northolme and Northolme did not assess Mrs Trent's needs because the family did not wish her to live there. The Council told me that discussions between social services officers and care home staff about a putative resident's care needs would normally take place only if there was some potential difficulty in providing the care.
20. In response to a draft of this report the Council said that it had actively considered whether Northolme met Mrs Trent's needs. However:

“Had we been more insightful of what was required of us in the care planning process, we would have concluded that Westholme, in meeting the care need, should have been confirmed as the appropriate placement for Mrs Trent, meeting Mrs Trent's needs and fulfilling our responsibility to deliver an adequate (care) plan.”
21. To avoid uncertainty that might have been damaging for Mrs Trent, in January 2006 the Council agreed to pay the full cost of Westholme for all the time that she is there (after 21 November 2005; see paragraph 16 above) and then recover, from her estate, the difference between the home's charges and the Council's usual rate. That undertaking was confirmed on 1 March 2006, in response to my inquiries. However in a letter of the same date to Mrs Medway's solicitors, the Council said this arrangement would only last until the conclusion of my investigation.
22. However, the Council's position has now changed and it has agreed not to recover any of the costs of Mrs Trent's care at Westholme.

23. The Council says that it was reasonable to take seven months to review its initial view about who could make top up payments and that Mrs Trent could. It points out that there is no specific guidance or case law on this point. It says that its early replies to Mrs Medway were the result of a considered decision that was not unreasonable. Mrs Medway's further representations made in August 2005 and then in more detail in September caused it to review its position. Mrs Medway was told of the revised view about top ups in November 2005.

Conclusion

24. The issues about Mrs Trent's care at Westhome have now all been resolved. The care she is receiving is acceptable to Mrs Medway, although she believes it is less than ideal. Mrs Aire is happy with the arrangements. The Council now accepts that Westholme is the appropriate care home and will fully fund Mrs Trent's care there.
25. I have seen no convincing explanation why the Council could not have reached this position in mid-2005.
26. Although the issue of top-up payments for Section 117 care is not clear, the evidence that I have seen shows that it took considerable effort from Mrs Medway, her M.P., and her solicitors to get the Council to review its position. Only after Mrs Medway had made personal contact with the Chief Executive's Office did the Council's 'People Services Lawyer' spend a day examining the issues to provide advice for '*a decision at a high level*'.
27. The Council insisted that Northolme could meet Mrs Trent's needs and that the Council should pay no more than its fees for her care. This did not take account of what was said in her care plan and the difficulty that her family would have in visiting her.
28. The Council's delay in reviewing the matter and its insistence that Northolme would meet Mrs Trent's needs were maladministration. This resulted in uncertainty for Mrs Trent's family between April and November 2005. Mrs Trent was ready to leave hospital in April but did not move to a home until July. From July to November the family, and Mrs Medway in particular, did not know whether they would be liable to meet the additional cost of Mrs Trent's care at Westholme. This uncertainty exacerbated the family's stress of dealing with their mother's situation. As Receiver, Mrs Medway was responsible for her mother's financial affairs and so the injustice particularly affected her. In recognition of this the Council should pay her £500.

Finding

Maladministration and injustice

Advice

In the absence of specific guidance or case law on the subject of 'top-up' payments related to Section 117 aftercare, local authorities need to take care when reaching decisions on individual cases. A council should be able to show that it has: considered all relevant factors including the particular circumstances of the individual case; reached a reasoned decision without undue delay; and considered any representations that it receives with an open mind. If this can be shown, I would be unlikely to criticise a council or find maladministration.

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