

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

**Investigation into a complaint about
Northumberland County Council
(reference number: 20 001 819)**

02 November 2021

The Ombudsman's role

For more than 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.

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 X	The complainant
Mr P	The complainant's father

Report summary

Adult Care Services - charging

Mr X complained that the Council failed to consider holiday travel and accommodation costs for a carer as a disability-related expense. He says this caused him an injustice because he was concerned he may not be able to go on holiday.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should:

- apologise to Mr X for the fault identified;
- pay Mr X £200 to acknowledge the time and trouble Mr X took to deal with this complaint; and
- review Mr X's request for holiday costs for his carer to be considered a disability-related expense. Any assessment should include a detailed explanation of the reasoning behind any decision taken.

The complaint

1. Mr X complained about the Council's decision not to consider travel and accommodation costs for his carer when on holiday as a disability-related expense.
2. He says this causes him an injustice because he cannot go on holiday without a carer and cannot afford these costs himself.
3. Mr X said that he had already arranged a holiday before the Council changed its approach to charging and this has impacted him financially.

Legal and administrative background

The Ombudsman's role and powers

4. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

Relevant law, guidance and policy

5. The Care Act 2014 ('the Act') introduced a requirement that local authorities should promote 'wellbeing' and signifies a shift from existing duties on local authorities to provide particular services, to the concept of 'meeting needs'. The concept of meeting needs recognises that everyone's needs are different and personal to them. Local authorities must consider how to meet each person's specific needs rather than simply considering what service they will fit into. (*Care and Support Statutory Guidance, Chapter 1, ('The Guidance')*)
6. If a council decides a person is eligible for care, it must prepare a care and support plan. This must set out the needs identified in the assessment. It must set out a personal budget 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*)
7. When a council takes into account in the calculation of an adult's income any disability benefits the adult receives, the council must disregard any disability-related expenditure (DRE) incurred by the adult. (*Part 1, Sums to be disregarded, Schedule 1 of the Care and Support (Charging and Assessment of Resources) Regulations 2014, paragraph 4(1) and 15(1)*)
8. In April 2019, the Council agreed a new charging policy. It meant that some disabled people would be charged more than they had been previously. However, it was agreed, among other things, that service-users would be told of their entitlement to an assessment of their DRE. The costs the Council said it would take into account are the excess costs above what would be expected if the person did not have a disability.
9. The Guidance sets out what should be considered a DRE. The list includes:
 - the costs of any privately arranged care services required, including respite care;
 - day or night care which is not being arranged by the local authority;

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- personal assistance costs, including any household or other necessary costs arising for the person; and
 - other transport costs necessitated by illness or disability. (*The Guidance, paragraph 40*)
10. The Guidance also says the following:
- The above list “... is not intended to be exhaustive and any reasonable additional costs directly related to a person’s disability should be included.” (*The Guidance, paragraph 40*)
 - That a person’s care plan “... may be a good starting point for considering what is necessary disability-related expense. However, flexibility is needed. What is disability-related expenditure should not be limited to what is necessary for care and support.” (*The Guidance, paragraph 41*)
 - When assessing disability-related expense, councils should “... allow the person to keep enough benefit to pay for necessary disability-related expenditure to meet any needs which are not being met by the local authority.” (*The Guidance, paragraph 39*)
11. In a section addressing charging in The Guidance, it also sets out that where a person receives benefits to meet their disability needs that **do not** meet the eligibility criteria for care and support, the charging arrangements should ensure that they keep enough money to cover the cost of meeting those disability-related costs. [*our emphasis*], (*The Guidance, paragraph 8.42*)

How we considered this complaint

12. We have spoken to Mr X, who has been assisted in this complaint by his father, Mr P.
13. We produced this report after examining relevant documents and interviewing the complainant and relevant employees of the Council.
14. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

Background

15. This is not meant to be an account of everything that happened. We have focused on the material issues in the complaint.
16. Mr X is disabled. He needs full-time care.
17. In April 2019, the Council’s new charging regime came into force. Mr X was concerned that the changes to the Council’s policy would mean that he did not have enough money to pay for a holiday. He says this is because he needs to take a carer with him because of his disability. He says that in the past his father accompanied him but to further his independence he would like, in the future, to take a carer instead.
18. The Council asked Mr X’s Care Manager to complete a DRE assessment. In August 2019, the Council emailed Mr X with the outcome of the assessment. A number of expenses that the Council considered DRE, were allowed. However, some were not, including travel and accommodation costs for a carer on holiday.

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- The assessor said these expenses were “... *not a requirement, but a choice that you make.*”
19. Mr X complained. The Council later agreed that its wording had been unfortunate, over-simplifying the issues involved. It said it should have said:
“... *your care manager has advised that certain items of expenditure were not necessitated by your disability.*”
 20. The Council arranged a meeting in October 2019 to discuss the DRE assessment. Some other expenses were agreed. But a note of the meeting recorded that Mr X and his father Mr P, were told:
“... *we are led by the outcomes listed in the Care Act in order to meet [Mr X's] needs ... holidays are not covered by the legislation.*”
 21. In a further note about the meeting, the officer recalled how he had explained to Mr X that holidays “... *did not come under the outcomes listed in the Care Act.*” The officer said he sent Mr X a copy of the list of outcomes.
 22. In a November 2019 email to Mr X the Council again told him “... *that supporting people to take holidays does not come under the outcomes set under the Care Act.*”
 23. In correspondence with Mr X in December 2019, the Council said it had considered Mr X's concerns and the United Nations Convention on the Rights of Persons with Disabilities. It maintained that his requests were not covered by the Care Act or DRE guidance.
 24. Mr X asked the Council to reconsider, explaining, among other things, how its decision took into account its duty to support and promote wellbeing.
 25. In February 2020 the Council said its position had not changed. It relied on its policy, saying that it sets out that where the policy is silent, “... *the minimum requirements set out in the national legislation and guidance will be taken to apply.*” And, it said, the statutory guidance “*says only*” that local authorities had to “... *allow the person to keep enough benefit to pay for necessary disability-related expenditure to meet any needs which are not being met by the local authority.*”
 26. It said its policy had been adopted after considering carefully the balance to be struck between the impact of charges on disabled people and its other priorities, within the limited funding available. It said it would not be fair to diverge from this policy in individual cases.
 27. In April 2020 the Council said the “... *clear message*” from the descriptions of DRE in the Care Act statutory guidance was that the “... *intention is to take account of costs which are necessary, in a fairly narrow sense*” focused on day-to-day necessities and services which the local authority would have funded itself if the person wasn't arranging them privately.
 28. In correspondence with us, in December 2020, it said the paragraph in The Guidance which related to how DRE should be considered was “... *carelessly written*”. But it accepted that the point made in The Guidance is clear, “... *that there may be further kinds of necessary day-to-day expenditure arising as a result of disability which would not be likely to be included in a care and support plan.*” It pointed out that it had considered this to be items such as the cost of purchasing bath towels for Mr X.
 29. Further, it said that “*The eligible outcomes listed in [the Regulations] do not include being able to take holidays.*” It said that it sometimes provided support to

people in relation to holidays but that this was, “... *ordinarily because an assessment has concluded that there is an eligible need for respite care ...*”. It went on to also say that:

“Since we had not assessed that [Mr X] had an eligible need under the Care Act regulations which required him to spend money on the costs of taking a care worker on holiday with him, we would not have considered those costs to be DRE.”

30. The Council does not consider that holiday costs could be intended to be included as a DRE. It says the fair and effective way to achieve the objective of funding financial support to take holidays would be through the eligibility criteria, not the rules for DRE.
31. In response to our draft report, the Council said that it accepted holiday costs could, in some circumstances be required to achieve one of the outcomes in the eligibility criteria, but not in this case.

Conclusions

32. Councils have to make policy decisions about how to meet service-users’ needs within limited budgets. It is a balancing exercise and can mean that sometimes, difficult policy decisions must be made. If decisions are properly considered and in line with relevant legislation and guidance, there is no fault. But if a council adopts a rigid approach to decision-making, failing to consider the merits of a particular case, the council will be fettering its discretion. In this case we consider that happened. That is fault and it caused Mr X an injustice.
33. In the Council’s communications with Mr X, it said that, because holidays were not identified as an eligible need in his care and support plan, they are not considered a “*necessary*” DRE. We consider this to be an overly rigid approach to the exercise of its decision-making powers.
34. The Guidance says that decision-making around DREs should be flexible. It leaves it open for councils to consider that those needs that are not considered eligible in a care plan can still be considered a DRE.
35. The Council says it does not limit its discretion. It points out that it accepted some necessary day-to-day expenditure would be considered as DRE even if it is not in a care and support plan. But, although the Council met with Mr X to discuss the questions he had about elements of its assessment of his DRE, it did not consider the issue of holiday costs because, on that issue, it considered itself to be bound by its prior assessment of his eligible needs. It specifically set this view out in its correspondence with us in December 2020, saying that as it had not assessed Mr X as having an eligible need to take a care worker on holiday with him, it would not have considered those costs to be a DRE.
36. It has since said that it did not limit its use of discretion in that way. But in our view the explanations given to Mr X suggest that the Council did in practice consider itself bound by the eligible needs identified in the care plan (or by the eligibility outcomes generally), when its discretion was not properly limited in that way.
37. The Council was, therefore, limiting or restricting the exercise of its own powers by conflating the assessment of DRE with identifying eligible needs and care and support necessary to meet those needs. That approach does not appear to allow for exceptions or consideration of individual circumstances as part of the financial assessment.

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38. The Guidance expressly envisages situations where the local authority will have to look outside the care and support plan when considering DRE. So, the process of needs assessment is not sufficient for the purposes of a financial assessment.
 39. The financial assessments are not an assessment of needs; when considering DRE, the assessment is whether the expenditure covers “*reasonable additional costs directly related*” to the individual’s disability. Naturally, the care and support plan will be a good place to look to identify what reasonable costs a person might incur because of their disability, but it is not a complete answer. It is a starting point, not an endpoint. A distinct decision-making process is required.
 40. On several occasions Mr X asked the Council to reconsider its decision, bearing in mind his wellbeing. In October 2019, his father explained Mr X felt a holiday was essential to him to maintain his emotional health. In January 2020, Mr X explained that he wanted to go on holiday by himself and that the Council’s actions in this case did not promote his individual wellbeing. If the Council needed further explanation about why Mr X felt this cost was reasonable and necessary, it could have sought further explanation.
 41. The Council said it had considered Mr X’s wellbeing, but the evidence shows that its consideration was consistently tied to the fact that holidays are not mentioned as an eligible outcome in the Care Act. It said The Guidance said “*only*” that the Council should allow a person enough to pay for necessary DRE to meet needs not met by the Council.
 42. The Guidance also says that any reasonable additional costs directly related to a person’s disability should be included in assessing DRE, and that the care plan may be a good starting point for considering what is necessary DRE. This does not mean that because Mr X believes holiday costs are a reasonable additional cost, the Council should consider the same. However, the Council should not limit its discretion by categorising these items of expenditure as DRE only where holiday needs are identified as eligible needs in the care plan.
 43. We accept that The Guidance on charging could be clearer. It is difficult for councils to reach a view on what is considered “*necessary*” DRE without a clear framework to help it reach that view.
 44. But even so, it should not limit the use of its discretion as it did in this case, where it said it would “*not be fair to diverge from [its charging policy] in individual cases.*” It is for the Council to ensure that it develops and applies criteria for decision-making which take account of individual circumstances as part of financial assessments, rather than treating such assessments as being pre-determined by prior needs assessments.
 45. We cannot assess what should be considered a DRE. But, on the evidence we have seen, we have recommended that the Council reviews how it applies its policy in this case.
 46. We have also made other recommendations to acknowledge the time and trouble Mr X has been caused by the Council’s inflexible approach.

Recommendations

47. The Council should:
 - apologise to Mr X for the fault identified;

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- pay Mr X £200 to acknowledge the time and trouble caused by the need to pursue the matter with the Council; and
 - review Mr X's request for holiday costs for his carer to be considered a DRE. Any assessment should include a detailed explanation of the reasoning behind any decision taken.
48. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet, or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

49. We have completed the investigation of this complaint. There was fault by the Council which caused injustice to Mr X. The Council should take the action identified in paragraph 47 to remedy that injustice.

Parts of the complaint that we did not investigate

50. Mr X is concerned that he had already funded a holiday before he knew about the increase in charges. The Council says it had not understood this concern to form part of Mr X's formal initial complaint. It says it is happy to consider this issue.
51. If Mr X is unhappy with the Council's response to him on that issue, he can return to us.