

Scottish Parliament Region: Mid Scotland and Fife

Case W021313: Perth and Kinross Council

Category

Local government: Social Work; charges for services

Overview

The complainants claimed that, in refusing to fully fund the care of a family member, Perth and Kinross Council (the Council) were acting in contravention of the legislation on free personal and nursing care and guidance issued by the Scottish Executive.

Specific complaint and conclusion

The complaint which has been investigated is that no charge for care should have been made and that, in making such a charge, the Council contravened the statutory regulations on the provision of full personal and nursing care and failed to take account of guidance issued by the Scottish Executive (*not upheld*).

Redress and recommendation

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. This complaint was made by Mr and Mrs C on behalf of Mrs C's mother, Mrs A. In April 2002 Mrs A was hospitalised with a severe stroke which left her partially paralysed and with speech loss; after a period in the area general hospital and the local cottage hospital she was discharged in October 2002, returning to her own home under a 'care package' arranged by the Council's Health and Social Care Co-operative (Care Together). From that point Mr and Mrs C were required to make a financial contribution to the cost of Mrs A's care.

2. Mr and Mrs C contended that, because the care package was one which had been assessed by the local authority as meeting Mrs A's needs, no charge should have been made; that in making such charge the authority had contravened the statutory regulations on the provision of full personal and nursing care and had failed to take proper account of the relevant guidance issued by the Scottish Executive; and had discriminated unfairly against Mrs A in their handling of her care package. The complaint was not upheld.

The complaint

3. Mr and Mrs C made a formal complaint against the Council about their handling of Mrs A's case, and they exhausted the authority's internal complaints procedure. They also, at a later date, sought a referral, under the terms of the statutory social work complaints procedure, for a Complaints Review Committee (CRC). The CRC held a hearing of the complaint on 6 May 2005 attended by Mr C and representatives of the authority, following which the CRC decided not to uphold the complaint.

4. Mr and Mrs C made a request for an external review to the Ombudsman, alleging that there was administrative fault or service failure by the Council which had caused their family financial hardship; they also complained about the outcome of the CRC which they did not accept, on the basis that the members of the CRC did not have sufficient information available to them to enable them to make a proper decision on the matter.

Investigation

5. In September 2002 Mr C wrote to his local MSP about Mrs A's situation, indicating that he believed that she was entitled to free personal care and nursing care; Mr C also referred to the 'capping' of costs for the care of the elderly at home. The MSP took this up with the General Manager of Care Together; he also wrote to the Deputy Minister of Health and Community Care at the Scottish Executive. The Deputy Minister replied to the MSP on 8 and 29 October 2002 in the following terms:

'People aged 65 or over who live at home can no longer be charged for the personal care element of a care package agreed by the local authority. However, all eligibility must be subject to an assessment of needs and implementing this policy has had to dovetail with local authorities' existing arrangements for assessments.

Any decision taken about care needs by Social Work departments should be based on a detailed assessment of a person's needs and wishes, however, it is for authorities to prioritise the use of resources in meeting the needs of their local population.

If a service user or their family wish to purchase additional home care to allow them to stay at home or choose to pay for care over and above that which the local authority assess them as needing then of course they are free to do so. Eligibility for attendance allowance for people living at home is not affected by the introduction of this policy, and this benefit may be used to purchase care over and above that provided by the local authority.'

6. The Deputy Minister subsequently confirmed that:

'I reiterate the points I made in my letter of 8 October. Local authorities have cash limited budgets and must prioritise their use of resources. A number of local authorities operate a capped system and the policy of free personal care does not change this.

The Scottish Executive Guidance on free personal and nursing care is clear that 'Local authorities and NHS will have agreements in place on how personal care services are provided locally and by whom. The implementation of free personal care should fit in with these arrangements.'

7. The General Manager of Care Together also replied to the MSP on 29 October, advising him as follows:

'Mrs A was discharged from the Cottage Hospital on 7 October and is now staying at her own home with support services. While still early days, my understanding is that this arrangement seems to be to everyone's satisfaction.

The statutory duty of a Council as a social work authority is to provide assistance to satisfy an individual's assessed Community Care needs. However, a Council is entitled to choose between different options where there are equally suitable ways of meeting these needs. In their case the Council is choosing to meet its obligations by providing Mrs A with care in her own home. If the care at home option becomes substantially more expensive then my Council may have to offer to provide a residential care placement as an alternative.

It should be noted that individuals are entitled to refuse a service option offered by the Council. In such circumstances, however, the Council will be treated as having discharged its duties to that client.

The legislation introducing Free Personal Care does not require Councils to provide unlimited services to an individual. Each Council has to determine an eligibility criteria for services and then to decide the range, level and frequency of service provision within their framework. While my Council applies a financial ceiling for Home Care Service, the Locality Manager has discretion to provide home care services in excess of these financial ceilings when the particular circumstances justify it.'

8. The MSP forwarded copies of these replies to Mr and Mrs C at the beginning of January 2003, apologising for the delay in doing so – which he attributed to an 'administrative error' in his own office.

9. Mr C subsequently made representations to his local councillor, and approached his MSP again. The councillor wrote to the Deputy Minister for Health and Community Care on 17 January 2003, contending that the leaflet (and web-

site) on 'Free Personal and Nursing Care' issued by the Scottish Executive was misleading and asked for its withdrawal and replacement with ...'one that conveys what actually happens on the ground'...

10. Mr C (along with the local councillor) also visited his MSP's surgery, following which the MSP made further representations to Care Together and the Scottish Executive. The Deputy Minister replied to the MSP on 31 January indicating that discussions were on-going with the local authority on the provision of home care; notwithstanding which he stated that:

'as this would seem to be an issue concerning Council policy rather than the policy of free personal care itself we do not propose to remove the information leaflet or amend the website.'

This reply was forwarded to Mr C shortly afterwards.

11. At that point Mrs A's situation was the subject of an article in the local newspaper under the headline 'Stroke victim misled by free care claims'.

12. The article identified Mrs A and included several quotes from Mr C and the local Councillor criticising the government's legislation on free personal care for the elderly which was described as 'misleading'. Mr C indicated that the family's contribution to Mrs A's care package amounted to £180 per week, which he claimed was putting financial constraints on the family.

13. The article also quoted a Scottish Executive spokeswoman who confirmed that they were seeking clarification from the Council on the question of whether this was a free personal care issue or a more general issue surrounding the assessed care package provided by the Council. The spokeswoman confirmed that the free personal care element of a person's assessed care package could not be charged for. Mr C sent a copy of the newspaper article to the MSP and the Deputy Minister.

14. At that point Mrs C made a formal complaint to the Ombudsman on behalf of her mother (by e-mail on 3 March 2003 and followed up by letter with background papers on 7 March 2003). She complained that the Council's Care Together service had failed to implement the Scottish Executive's free personal care policy, and that as a consequence the family was required to make a weekly payment

towards her mother's care. She sought re-imburement of all the payments made since her mother's discharge from hospital. However, since it was apparent that Mrs C had not yet exhausted the Council's own internal complaints procedure, she was advised to do so. Mr C then indicated that an informal approach had been made to Care Together in an attempt to settle the matter locally. However, Mr C subsequently indicated that this had not materialised and, therefore, he made a formal complaint in writing to the Council's Chief Executive on 28 April 2003.

15. Following Mr C's approach to the Chief Executive, he appears to have spoken by telephone with the Legal Manager, Care Together; during this conversation, which Mr C describes as 'alleged' the Legal Manager referred to the statutory Social Work complaints procedure, indicating that it was open to him to pursue a formal complaint against the Council's Health and Social Care Co-operative, Care Together, which included provision for a hearing by an independent Complaints Review Committee (CRC). This procedure was laid down under the provisions of the Social Work (Scotland) Act 1968 and provided that, if such complaint was upheld, the CRC was entitled to make a recommendation for remedial action to the Social Work authority.

16. Notwithstanding this, Mr C indicated that he wished to proceed with the Council's own corporate complaints procedure. There was no record of any confirmation of the availability of the statutory social work complaints procedure on file, although Mr C confirmed that he had received a leaflet from the Council which explained the social work complaints procedure.

17. In her formal reply to the complaint of 21 May 2003 the Chief Executive informed Mr C that:

'The statutory duty of Perth and Kinross Council as a Social Work Authority is to provide assistance to satisfy an individual's assessed community care needs. In deciding whether an individual's assessed needs are such that services should be provided the Council has regard to a locally agreed scale of need (otherwise known as 'eligibility criteria').

The assessment process relating to an individual may in some cases identify community care needs which are capable of being met by two alternative care packages. The Council's aim will always be to secure the most cost-effective

package of services that meet the user's care needs, taking account of the users and carers own preference. However, the Council has a responsibility to meet assessed community care needs within resources available, and this will sometimes involve decisions where it will be necessary to strike a balance between the needs identified within available resources and meeting the care preferences of the user/carer.

The Council has a practice of applying a financial ceiling for Home Care Services for £240 per week within rural localities and £200 within the City (the difference reflecting the additional cost of transport in the rural localities). Each Locality Manager, however retains the discretion to provide Home Care Services in excess of these ceilings when the particular circumstances justify it.

The difficulty for the Council arises from the information shown in the Free Personal and Nursing Care leaflet and website by the Scottish Executive which indicates that users will not have to pay for the personal care that they are assessed as needing. This allows people to believe that they are entitled to free care at home whatever the cost. Clearly this is not sustainable by any Council. The responsibility of Councils to meet assessed community care needs is related to its available resources. Care services will, therefore, require to be 'regulated' to ensure that assessed community care needs are met by the most cost-effective service. The information issued by the Scottish Executive stated that Councils may choose in situations where home care costs exceed a certain financial ceiling that the service user may be offered a more cost-effective package of services such as a care home placement.

While personal care is not 'capped' the application of eligibility criteria and financial thresholds for certain types of service conflicts with the general impression and understanding that you and other members of the public have on the effect of the introduction of Free Personal and Nursing Care.

It is acknowledged that it should be a priority for both the Scottish Executive and the Council to ensure that the information on Free Personal Care reflects the need for Councils to secure the most cost-effective package of services

that meets the users care needs (which includes the need to apply financial ceilings) and that while personal care is 'free', services may not always be provided in accordance with the users and carers own preference. I understand that the Legal Manager, Care Together is corresponding with the Scottish Executive on this issue and I will ask the Legal Manager to contact you as soon as he receives a formal response.

18. In forwarding this reply to the Ombudsman Mr C contended that:
'... the content of the letter was merely a re-hash of all that has been previously stated to me ... and neither does it satisfactorily address the contradiction between the principle of the Scottish Executive's legislation and Perth and Kinross Council's implementation ...'

19. At that juncture it was apparent that Mr C's complaint had not been considered by a Complaint Review Committee, the final stage of the statutory social work complaints procedure; in view of this the Ombudsman's Office suggested to the Council that, despite the expiry of the statutory timescale, they should consider such request for referral from Mr C as an exceptional circumstance. The Council agreed to do so, and subsequently made appropriate arrangements to hold a hearing under the CRC procedure.

20. Generally, the statutory social work complaints procedure involves three stages; in the first informal problem-solving stage, every attempt should be made to mediate and resolve the complaint. In the second stage an unresolved complaint should be formally recorded and investigated by specially designated staff. Where a complaint is upheld, the authority must endeavour to resolve the issue amicably.

21. In the final stage, the formal Complaints Review Committee should aim to bring an objective and independent eye to bear on the complaint to give the complainants an additional safeguard that their needs are being considered fairly and the complaint investigated properly. This requires the membership of the CRC to be independent and objective in relation to the authority's actions. The conduct of the CRC (and the outcome) is open to scrutiny by the Ombudsman who requires a written record of the reasoning behind any decision or recommendation made by

the CRC. Failure to provide such explanation may be regarded as grounds for a finding of maladministration.

22. The terms of the complaint considered by the CRC at the hearing on 6 May 2005 related to Mr C's claim that the Council had not fully implemented the Scottish Executive's free personal care legislation in respect of his mother-in-law during the period between 7 October 2002 and 3 October 2004.

23. The CRC considered submitted documentation; heard Mr C and representatives of the Social Work Department in person; and thereafter considered the case after the parties had withdrawn from the meeting.

24. The minute of the CRC records that, following an assessment of need by the Social Work Services and discussion with Mr and Mrs C about a possible offer of a care home placement for Mrs A to meet her care needs, Mr C had agreed that the family would contribute to the costs of a care package which would allow her to remain living in her home. The Committee noted Mr C's contention that this arrangement had been reached under duress in order to secure an agreement that would enable Mrs A to leave hospital and return to her home. He believed that, under the Community Care and Health (Scotland) Act 2002, the Council were legally obliged to meet the entire cost of personal care and that the family contribution would be reimbursed. Accordingly, Mr C had intimated his objections to the Council, at the same time agreeing to meet part of the care costs on an interim basis until the dispute was resolved.

25. The Committee confirmed that the Social Work Department had undertaken a community care assessment of need for Mrs A; this assessment identified that she required a significant amount of personal care. In deciding how to meet the assessed needs, Social Work discussed a care home placement, but this was immediately rejected by Mr and Mrs C. In order to meet the family's wishes for Mrs A to remain in her own home Social Work negotiated with Mr and Mrs C that they would purchase a portion of the required care themselves. Social Work agreed to provide care at home up to a specified level in order that Mrs A could leave hospital and be cared for in her own home.

26. There was no dispute with regard to the level of need for Mrs A. After seeking legal advice and taking into account the family's views, a care package was agreed with the family at a case conference held on 28 August 2002.

27. It was decided that Carewatch Care Services could most effectively provide the home care element and that they would send invoices for the family's contribution to Mr C, which he had paid. The Committee accepted that, in law, this created a contract despite there being no written agreement.

28. The Committee considered that Mr C had agreed to provide part of the necessary care package in order that Mrs A could return home. They accepted that this meant Social Work were entitled to take this into account in deciding what services were necessary for them to provide. They believed that, if Mr C had not agreed to this contribution, Social Work would have exercised the option to alternatively offer a care home placement in fulfilment of their legal obligation.

29. This had already been discussed in principle with Mr C and rejected by him. This had not been offered specifically or in writing due to the family's very strong desire for Mrs A to be cared for at home. The Committee commended Mr and Mrs C's commitment to the long-term care of Mrs A. They also acknowledged that Social Work had acted sympathetically and helpfully towards the family and, in doing so, had provided a package of care at a cost greater than that of a care home placement.

30. The Committee accepted that there had been delay in responding to Mr C's concerns. In terms of informal and formal complaints, the Committee considered this might be explained by administrative or postal error in the first instance. However, the Committee were concerned that information relating to the assessment and decision-making process should have been recorded more clearly and shared in writing with Mr C. The Committee suggested that, in future, clear information should be given to families at every stage.

31. The Committee expressed concern at the lack of written documentation submitted by Social Work. It was suggested that, for example, a written submission outlining the basic facts would have been helpful. The documentation

submitted assumed a certain basic knowledge of the history which Committee members could not have.

32. The Committee were surprised that Mr and Mrs C's family were not being provided with certain healthcare products free of charge by the health service; and were pleased that Social Work had indicated that this would be raised on their behalf with the health service.

33. The Committee referred to what they considered was the inadequacy and the over-generalisation of the Scottish Executive's leaflet 'Free Personal and Nursing Care from 1 July 2002' and agreed that it was misleading. In their view, the leaflet had served to raise Mr and Mrs C's expectations as to what could be provided by the Council. The leaflet did not make it clear that the effect of the 2002 Act was that local authorities could not charge for any personal care provided by them or which they secure the provision of. The local authority continued to have to make decisions about which care needs in respect of a client required the provision of services. Where personal care was not provided by a local authority the client would have to pay for this.

34. The Committee concluded that if there had been any response to the Council's representation to the Scottish Executive in this respect (referred to in the Chief Executive's letter dated 21 May 2003) this response should have been submitted to the Committee.

35. The Committee also concluded that Social Work had fulfilled their legal obligations in the arrangements made for the case of Mrs A within the terms of the Community Care and Health (Scotland) Act 2002 and the Social Work (Scotland) Act 1968. Accordingly, they decided not to uphold Mr C's complaint.

36. Notwithstanding this, they agreed to recommend to the Council's Standards and Scrutiny Committee that

- written information be shared with Social Work clients at every stage of assessment and decision-making
- supporting papers submitted to the CRC by Social Work should be comprehensive and provide written evidence of the processes that have been undertaken in decision-making

37. Unfortunately, there was delay on the part of the Council in notifying Mr and Mrs C of the outcome of the CRC (due to under-stamping of the decision letter which was returned by the postal service). The authority subsequently apologised for this on 2 August 2005, at which point they confirmed the decision of the CRC and supplied Mr and Mrs C with a copy of the minute of the meeting.

38. Thereafter Mrs C wrote to the Ombudsman on the delay and expressed concern about the outcome, which she found unacceptable – in her view the members of the CRC did not have sufficient background information to make a balanced judgement on the case.

39. Mr C wrote further (11 August 2005) to the Ombudsman, re-iterating the point raised by his wife earlier on the lack of supporting evidence submitted to the CRC by the Council. Mr C contended that

...'Any member of an adjudicating tribunal must surely have a full understanding of the relevant legislation pertaining to the case in question in order to be able to pass judgement within the parameters of the legislation'.

40. Mr C made further representations (10 February 2006) claiming that the CRC had been told during the hearing by a representative of Social Work that he (Mr C) had agreed to pay part of the care package; he denied having made any such agreement.

41. On raising this with the Council they explained that:

'Perth and Kinross Council do not claim to be able to charge for any part of a care package provided by them where that care falls within the relevant definition of social or nursing care in the 2002 Act. The charges paid by (Mr and Mrs C) were in relation to a portion of the care package which they indicated they wished to provide themselves to avoid (Mrs A) being placed in a care home.

Where the local authority decide that a person's community care needs are such that services will be required, the local authority is then entitled to decide how to meet the eligible needs. Although the family's wishes will

always be considered, where there is more than one option available the local authority can offer to meet the need in the most cost effective manner.

In this case the Council offered to meet (Mrs A's) needs through a care home placement since the cost of a home care package was going to be much higher than the cost of a care home placement. However, the family rejected this entirely. During ensuing discussions with the family they indicated that to allow (Mrs A) to remain at home they were willing to provide a portion of care themselves. In light of this (Mrs A's) care needs, which would be met by the care arranged and paid for by the family came out of the equation and were not something that the Council had to concern themselves with further. It was only the remaining unmet eligible needs which the Council had to address and provide for. The Council did, however, agree to a care package in excess of its normal home care maximum level to meet the remainder of (Mrs A's) eligible needs.

It is on this basis that the Council are clear that (Mrs A) has not been charged by them for any personal care. The charges relate to the level of care which the family offered to meet and thus this was not provided by the local authority'.

Conclusion

42. I am satisfied, as a result of my investigation, that the Council, as the responsible Social Work authority, carried out a full and proper care assessment of Mrs A on the basis of which they decided that her needs were best met by the provision of a care package which allowed her to remain in her own home, rather than be placed in a residential care home. This decision was reached after taking due account of the views expressed by Mr and Mrs C, who agreed at that point to make a contribution to the cost of the care package (apparently in the belief that they would be reimbursed at a later date).

43. It is clear that, had Mr and Mrs C not made such an arrangement, the authority would have offered Mrs A a care home placement, the costs of which would have been met by the authority.

44. Mr and Mrs C's belief that the Council required to meet the full cost of the care package was incorrect, and was based on a misunderstanding of the information contained within the Scottish Executive's leaflet on 'Free Personal and Nursing Care from 1 July 2002'. While this confirmed that a person over 65 and living at home would not have to pay for the personal care assessed by the local authority, a person living at home was still required to pay for non-personal care such as day care, lunch clubs, meals on wheels, community alarms and help with shopping and housework.

45. Mr and Mrs C agreed to purchase additional home care to enable Mrs A to stay at home and, in effect, elected to pay for care over and above that which the authority assessed her as needing.

46. I do not consider there is any evidence that, in providing the care package for Mrs A, the Council contravened the statutory regulations or failed to take proper account of the guidance issued by the Scottish Executive. In these circumstances there was no basis on which to uphold the complaint of maladministration. Nor is there any evidence that the authority unfairly discriminated against Mrs A in the handling of her care package.

47. With regard to the supplementary complaint relating to the administration of the CRC, I consider that the members of the CRC acted independently of the local authority and offered the complainants a proper opportunity to air their grievance during the hearing procedure.

48. The decision of the CRC was properly reasoned and minuted and, while there was a delay in transmitting it to Mr and Mrs C which was unfortunate, the authority duly apologised for this. Notwithstanding the fact that the CRC did not uphold the complaint, they recommended that improvements be made in the provision and sharing of written information held by Social Work. In these circumstances the decision and recommendation of the CRC on the matter was something on which they were entitled to exercise their discretion.

49. The question of whether the information on free personal and nursing care issued by the Scottish Executive was adequate was not raised by Mr C, whose complaint was solely against Perth and Kinross Council. However, given the

comments made by the CRC on this aspect of the matter, and the reference made by the Chief Executive in her earlier letter to Mr C, the adequacy of the material published on this issue is something I would expect the Council to follow up with the Scottish Executive to ensure that proper information is available to all users of the service.

28 November 2006

Explanation of abbreviations used

Mr C	The complainant
Mrs C	The complainant's wife
Mrs A	The complainant's mother in law
CRC	Social work Complaints Review Committee