

Report

on an investigation into
complaint no 12 007 311 against
Shropshire Council

11 April 2013

Investigation into complaint no 12 007 311 against Shropshire Council

Table of Contents	Page
Report summary	1
Introduction	3
Legal and administrative background	3
Investigation	5
Time	5
Background information	5
Conclusion	8
Failure to Assess	8
Failure in the complaints process	9
Duties owed to carers	9
Injustice to Mr Ryan	10
Injustice to Mrs Ryan	10
Finding	11
Remedy	11

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

Key to names used

Mr and Mrs Ryan – The complainants

Report summary

Adult Social Care

Mr and Mrs Ryan complain that the Council failed to provide Mrs Ryan with appropriate 24 hour care in a timely manner. This resulted in Mr Ryan having to leave work to care for Mrs Ryan.

Finding

Maladministration causing injustice

Recommended remedy

The Ombudsman recommends that the Council:

- makes payment of £61,270 to Mr Ryan in recognition of the care he provided which was not funded by the Council at the appropriate time;
- provides an apology to Mr and Mrs Ryan about the time that it has taken to deal with the complaint;
- reviews its procedures for complaint handling in light of comments made in this report; and
- pays Mrs Ryan £1000 for the time and trouble in making the complaint and the further delay in obtaining the remedy.

Introduction

1. Mr and Mrs Ryan complain that the Council failed to:
 - operate its complaints procedure effectively;
 - assess Mrs Ryan's community care needs in a timely manner;
 - provide services to meet Mrs Ryan's assessed eligible needs;
 - back date direct payments for when Mrs Ryan was assessed as having eligible needs; and
 - provide services to meet Mr Ryan's needs as a carer.
2. The Council agreed to recommendations made by my investigator (see paragraph 36 below) and the complaint was closed in January 2012. The complainants contacted my investigator to say that they had not received the agreed settlement. On contacting the Council it said that it had misunderstood the settlement and as a consequence the complaint was re-opened.

Legal and administrative background

3. Direct payments are payments for care where service users, including carers, are given cash payments and are expected to purchase and manage services themselves, providing an alternative to social care services provided by a local council.
4. Section 1 of the Community Care (Direct Payments) Act 1996, which came into force in April 1997, gave local authorities the power to make direct payments if they decide that a person has a need to secure the provision of social care services. The payment must be sufficient to pay for the service and be spent on the service the person has been assessed as needing.
5. The Community Care (Direct Payments) Act 1996 was repealed by the Health and Social Care Act 2001. This Act gave local authorities the power to provide direct payments to those assessed as needing certain social care services in order to enable them to obtain those services for themselves.
6. In 2002 the Department of Health issued Fair Access to Care Services Guidance¹, (FACS) providing advice for determining eligibility for adult social care services. It states that the decision as to whether an adult is eligible for help should be made following an assessment of their presenting needs, which should then be evaluated to determine the risks to an individual. It goes on to say that the identified risks to independence should be compared to a council's eligibility criteria in order to determine eligible needs. It states that the determination of

¹ LAC 2002(13) This was made pursuant to Local Government and Social Services Act 1970, section 7

eligibility should take into account the support provided by carers, family members, friends and neighbours which the individual can access to help them meet presenting needs. It goes on to state that if an individual can perform several personal care tasks without difficulty with the help of a carer, and the carer is happy to sustain a caring role, then the individual should not be perceived as having eligible needs. It also states that even where carers and others are providing support to an individual, the nature of that individual's need and level of care could be such that the individual is eligible for community care services. It goes on to state that councils should be ready to support carers and consider a separate assessment of their circumstances.

7. In 2003 the Community Care, Services for Carers and Children's Services (Direct Payments) England Regulations 2003² made it a duty for local authorities to offer direct payments as an alternative to all service users and their carers who have been assessed as needing community care services or equipment and meet the local authorities' eligibility criteria. This duty applies where the Council is satisfied "that the person's need for a service can be met by securing the provision of it by means of a direct payment."
8. The Carers (Equal Opportunities) Act 2004 places a duty on councils to ensure that all carers know that they are entitled to an assessment of their needs and to consider a carer's outside interests (work, study or leisure) when carrying out need assessments.
9. The term Care Programme Approach (CPA) has been used since 1990 to describe the framework that supports and co-ordinates effective mental health care for people with severe mental health problems. It is used to assess, plan, review and co-ordinate the range of treatment, care and support needs for people with severe mental health problems.
10. NHS continuing healthcare is a package of continuing care provided outside hospital, arranged and funded solely by the NHS, for people with ongoing healthcare needs.
11. The Local Government Act 1974 says the Ombudsman may not normally consider complaints concerning events that the complainant knew about over 12 months ago. The Ombudsman does have the power to investigate events that have taken place outside the 12 month time limit though if, for example, the injustice to the complainant is very great, and if she considers that a fair and satisfactory investigation could still be conducted and a worthwhile remedy achieved. I have considered whether I have jurisdiction to investigate this complaint, taking into account those restrictions. I have decided to exercise my discretion to investigate matters from 2008.

Investigation

12. As part of the investigation my investigator has considered documents provided by the Council and the complainant and completed a file review of the Council's records.
13. Both the complainants and the Council were sent a copy of the factual part of this report in draft. Where appropriate their comments are reflected in the text.

Time

14. Mrs Ryan complained to the Council about similar matters in 2007 but did not complain to me at the time. It would be difficult to investigate now, or to decide with certainty, what happened then, so I have not done so.
15. But I have decided to exercise my discretion to consider events in this complaint from 2008. This is because from 2008 Mrs Ryan made regular concerted efforts to resolve the matter with the Council. Mrs Ryan's representative wrote to the Council from then and made a formal complaint to the Council in December 2008. That was on behalf of Mrs Ryan only.
16. Mr Ryan complained to the Ombudsman in August 2011 because it became clear the Council's actions may have also caused him injustice. He says he thought representations were being made both on his behalf and that of Mrs Ryan. I accept that this was a reasonable conclusion to reach and that it is appropriate to exercise my discretion to consider matters relating to Mr Ryan from 2008.

Background information

17. Mrs Ryan lives in her own home and has complex mental health problems. She is supported in the community by her partner Mr Ryan and a relative. Mrs Ryan also obtains assistance from both health and social care professionals and is on the Care Programme Approach (CPA).
18. In January 2008, an Analytical Psychotherapist identified that:

"Up to now [Mrs Ryan] has required 24 hour care from her husband.....It is vital for the whole family's mental health that her husband return to work as soon as possible...."
19. Mrs Ryan's care was reviewed through the CPA process. In February 2008 a decision was made to provide her with 50 hours of care per week via a direct payment.

20. The decision panel held on 12 March 2008 said:

“1. [Mrs Ryan’s] partner is the only person able to provide the care due to her specialist mental health.

2. A 50 hour care plan will be mostly funded by CHC [Continuing Health Care].

3. A direct payment for [Mrs Ryan’s] partner has been requested for an interim period only whilst a robust care package is put in place. This is likely to take 2-3 months to set up and will then be funded by CHC.

4. Due to [Mrs Ryan’s] mental condition it is not appropriate for her partner to provide her care on a permanent basis. He is unable to work whilst providing care, so experiencing financial difficulties.”

21. This was not based on a community care assessment and FACS (see paragraph 6) was not applied so there was no identification of Mrs Ryan’s presenting and eligible needs.

22. The Council says that a community care assessment was inappropriate as the situation in terms of engaging with Mrs Ryan was already strained and an assessment may have alienated her further.

23. The Council also says that the level of care provided was not an arbitrary figure but based on Mr Ryan’s need to work. It was felt through the review meeting that this amount would enable Mr Ryan to continue to work and care for Mrs Ryan.

24. A CPA review meeting dated 19 June 2008 considered ways to increase the direct payment by 10 hours to 60 hours per week. It was acknowledged that although Mr Ryan was being paid for 50 hours of support per week he was actually providing 24 hour care.

25. It was identified that Mr Ryan was under considerable stress as he was providing 24 hour support to Mrs Ryan.

26. Mr Ryan says that he was forced to leave work. He lost a secure job in order to provide the care that Mrs Ryan needed. As a result he has lost contributions that he could have made to a work pension and the ability to progress a career path.

27. Mrs Ryan’s representative says that the Council was aware of the need for 24 hour care, he refers to a number of documents and review meetings which he says is evident that the Council was aware of Mrs Ryan’s need for 24 hour care.

28. A CPA review on 16 October 2008 completed by two care co-ordinators indicated that Mrs Ryan required 24 hour care. At this point it was evident that the use of home carers to support Mrs Ryan was not going to be successful.

29. On 5 November 2008 there was a request for an increase in care to 24 hours per day. This was rejected by the Council. A formal letter of complaint was made on

behalf of Mrs Ryan on 30 December 2008. The Council advised that due to the complexity of the case it would not be able to respond until February 2009.

30. The Council responded on 19 February 2009 stating that although care co-ordinators had assessed Mrs Ryan as requiring 24 hour care, its view was that her condition had improved. It was also concerned that the package that had been identified was short term and that a longer term care package was still being sought. It considered that Mr Ryan took the role of both a “formal and informal carer”.
31. A CPA meeting dated 23 April 2009 decided that a request should be made for 24 hour care to be funded for Mrs Ryan. A direct payment for 24 hour care was agreed from April 2010. At the same time the Assistant Director of Adult Social Care agreed to consider when to backdate the direct payment in recognition that Mrs Ryan had a need for 24 hour care prior to April 2010.
32. The Assistant Director of Adult Social Care made no decision on backdating and as a result Mr and Mrs Ryan requested that their complaint be considered by the Ombudsman.
33. During our investigation the Council agreed to backdate the difference in direct payments that Mrs Ryan should have received from April 2009. The Council said that it did not consider it appropriate to backdate the payment further as a care plan was not compiled until 2009.
34. Mr and Mrs Ryan were unhappy with this and wanted the back payment to be made from February 2008. They requested that the complaint be investigated by the Ombudsman to decide when the reimbursement should commence.
35. My investigator considered comments made by Mr Ryan that he was forced to leave work in order to care for Mrs Ryan. Mrs Ryan had continued to receive care from Mr Ryan throughout the period of the complaint. My investigator therefore focused a remedy recommendation on Mr Ryan’s injustice, in particular that he had to leave work in order to support Mrs Ryan because the Council had failed to provide appropriate support.
36. The Council said it agreed that Mr Ryan had suffered injustice and asked my investigator to recommend a suitable remedy for the whole period instead of simply backdating Mrs Ryan’s direct payment. We invited the Council to take a number of actions including recompensing Mr Ryan for care that he provided which he was not paid for, because this more accurately reflected Mr Ryan’s loss. We discontinued investigating because the Council agreed to these proposals.
37. Mr and Mrs Ryan contacted my investigator on 2 April 2012 to say that they had still not received payment from the Council. On contacting the Council my investigator was told that the Council had misinterpreted the recommended settlement. It said that it understood the remedy to be based on what Mr Ryan

lost when he had to leave work, and that the Council should pay the difference between what he would have earned being in work and what he received by way of a direct payment. It said that otherwise the remedy would be disproportionate and inappropriate given the Council's wider public responsibilities.

38. The Council said that it based its understanding on comments made by my investigator during the investigation that it was Mr Ryan that had suffered the injustice rather than Mrs Ryan, as she continued to receive support from Mr Ryan.
39. My investigator asked the Council for figures to support its view that the proposed remedy would be disproportionate. The Council did not provide any figures and after a series of exchanges, my investigator established that the likely amount for the settlement would be approximately £65,000.

Conclusion

Failure to Assess

40. Mrs Ryan has complex health problems and there were a number of health and social care staff trying to support her needs. I am however concerned that the Council did not base its original decision about Mrs Ryan's needs and how they could be met on an assessment.
41. It is clear in February 2008 that Mr Ryan was providing a considerable amount of care to Mrs Ryan. The care package was however based on how Mr Ryan could be assisted to work full time and care for Mrs Ryan. This produced an ad hoc method of establishing how to meet Mrs Ryan's needs.
42. There was an attempt to provide services for 50 hours per week which was unsuccessful. The Council then provided direct payments to Mrs Ryan so that she could employ Mr Ryan. It says that direct payments could not at the time be increased as it was unclear whether Mr Ryan could be paid through direct payments as he lived with Mrs Ryan and was her partner.
43. An assessment would have identified what Mrs Ryan's social care needs were and which of these needs were eligible needs. The Council would then have been able to identify what services could meet these needs. If it was considered that direct payments were an appropriate way to meet the needs then a decision should have been made in a timely way about whether this should occur. This is a decision which would be applicable to Mr Ryan being employed either for 50 hours per week or for 24 hours per day.
44. In addition there would have been clear demarcation between health and social care needs. The report completed by the Psychiatric Consultant stated that it was not in Mrs Ryan's interests that Mr Ryan was her long term carer. If this

continued to be the case then further long term planning would also have been included in the assessment/support plan.

45. It also appears that Mrs Ryan was entitled to NHS continuing health care which was never progressed. This would have been clearly established had there been an assessment and support plan. I am aware that the CPA reviews were used to record developments in Mrs Ryan's care; I consider that these would have been vital in contributing to an assessment.
46. Mr Ryan should have also been assessed separately to consider how his needs as a carer could be met. His needs were not considered until he raised the fact that he could not possibly work 50 hours a week and then provide additional care for Mrs Ryan without a break.
47. Mr Ryan himself did not request additional care until November 2008. While it may be considered that representations should have been made by Mr Ryan or Mrs Ryan's representative earlier there is clear recording that Mrs Ryan was saying that Mr Ryan was providing 24 hour care. Records also indicate that the general view of the Council was that Mrs Ryan would not be able to obtain more than 50 hours of care per week.
48. I consider the Council's failure to properly assess Mr and Mrs Ryan is maladministration. I also consider that had Mr and Mrs Ryan been assessed it is likely that it would have been established that Mrs Ryan would have required 24 hour care in February 2008.

Failure in the complaints process

49. There are clear failings in the length of time that the Council has taken in dealing with this complaint and trying to reach a resolution.
50. The complaints procedure was not instigated in a timely manner and decisions made were protracted. It was not until the complaint reached the Ombudsman that a final decision was made by the Council in terms of actions that it intended to take. While I appreciate that the matter was complex this in itself should not have prevented the Council from reaching an earlier resolution or response. I consider the failures in the complaints process amount to maladministration.

Duties owed to carers

51. I appreciate that Mrs Ryan has complex needs. This however does not excuse the Council from exercising its statutory functions in a proper and timely manner. Carers provide a lot of valuable informal care and the law has been amended over the years to recognise carers' rights.
52. This complaint highlights how the distinction between informal and formal care can become blurred and how over reliance on a carer can occur by a council. If

councils perform their statutory duties as assessor and commissioner to meet eligible needs for service users this can be avoided.

53. Mr Ryan was working in excess of 48 hours which is considered to be the maximum by the Working Time Directives. The Council at the time took no account of this and indeed considered that Mr Ryan could carry out paid work and then support Mrs Ryan when he returned home. This is totally inappropriate.
54. I consider the failure to properly consider Mr Ryan's needs as a carer amounts to maladministration.

Injustice to Mr Ryan

55. My investigator spoke with Mr Ryan about the level of care that he has been providing to Mrs Ryan. It is clear to me that Mr Ryan was providing and continues to provide, 24 hour care with the assistance of a relative who provides some respite.
56. Mr Ryan was effectively working 24 hours a day as a carer in very difficult circumstances. The Council has accepted this is an appropriate case where direct payments can be paid to a relative. Mr Ryan has effectively been providing care in this way since February 2008 if not longer.
57. Mr Ryan says that he has lost his job, pension and career prospects as a result of the inaction of the Council. Remedies are proposed which as far as possible put the complainant back in the position that they would have been in but for the maladministration of the Council. In Mr Ryan's case it is unclear whether other carers would meet Mrs Ryan's needs.
58. If other carers could not meet Mrs Ryan's needs, Mr Ryan would have been, and would continue to be, the only person able to provide the majority of Mrs Ryan's care. He would therefore in any event have had to leave his employment unless he had chosen not to continue to provide Mrs Ryan's care. The proposed remedy accounts for pay that he would have received had the Council acted earlier.
59. In the event that other carers can be trained to support Mrs Ryan, Mr Ryan will have the opportunity to return to work and resume his career path.

Injustice to Mrs Ryan

60. The Council found it difficult to provide home support for Mrs Ryan and therefore direct payments were provided to her in order that she could employ Mr Ryan.
61. When it was assessed that Mrs Ryan required 24 hour care this was made as a direct payment and Mr Ryan was employed to provide the majority of the care.
62. Throughout this period Mrs Ryan was being provided with care by Mr Ryan. I am therefore unable to establish that Mrs Ryan was caused significant injustice by

the failure of the Council to provide 24 hour care to her. This is because there was no period when she was not receiving care from Mr Ryan.

63. Mrs Ryan says that she did however suffer financial hardship as Mr Ryan was unable to work due to his caring commitments. I am however unable to establish that at this point the family income was less than when Mr Ryan was working as he was being paid for 50 hours of care per week and his previous work record fluctuated due to his increasing caring commitments.
64. Mrs Ryan has however incurred stress, time and trouble in pursuing her complaint as the Council was not fulfilling its statutory duties. Because of Mrs Ryan's health conditions this would have affected her more than another person.

Finding

65. For the reasons set out above I find maladministration by the Council causing injustice to Mr and Mrs Ryan.

Remedy

66. The Council does not dispute that there has been maladministration or that there should be a financial remedy. It however says that the remedy should be based on Mr Ryan's previous earnings so that he should be awarded the difference between what he earned via direct payments and that of his previous employment. I have considered this and my investigator obtained information from Mr Ryan about his previous employment and his payslips.
67. I have however decided that it would be difficult to discover what Mr Ryan's losses were in relation to his employment. This is because due to his increased caring role Mr Ryan had to leave his job as a full time employee as a manager and was then paid on a sessional basis when he could undertake departmental tasks. His ability to take on this work decreased as Mrs Ryan's care needs increased. It also appears that he had to leave his job in order to care for Mrs Ryan. It is therefore difficult to get an accurate picture of how much work he could have done. In addition I would be unable to put a figure on Mr Ryan's lost pension contributions and the possibility that had he remained in employment he may have been promoted.
68. The remedy I therefore propose more accurately addresses Mr Ryan's loss namely receiving a payment for what he would have been paid by Mrs Ryan had the Council provided services to meet Mrs Ryan's needs. I therefore recommend that the Council:
 - makes payment of £61,270 to Mr Ryan. This would be a payment in recognition of the care Mr Ryan provided which was not funded by the Council at the appropriate time, but is not a precise backdated calculation of wages;

- provides an apology to Mr and Mrs Ryan about the time it has taken to deal with the complaint;
- reviews its procedures for complaint handling in light of the comments made in this report; and
- pays Mrs Ryan £1000 for the time and trouble in making the complaint and the further delay in obtaining the remedy.

Handwritten signature of Jane Martin in black ink, with a horizontal line underneath.

**Dr Jane Martin
Local Government Ombudsman
The Oaks No 2
Westwood Way
Westwood Business Park**

**Coventry
CV4 8JB
11 April 2013**