

The Ombudsman's final decision

Summary: Mr X complained the Council did not use reasonable care when determining his tax status, and did not provide reasons for its determination after a written request. There was no fault in the process leading to the determination. Although the Council did not respond to the request for reasons, given the lapse of time, number of parties involved and lack of evidence I cannot say whether the Council was at fault.

The complaint

1. Mr X complained the Council did not use reasonable care in reaching its determination that two contracts were "inside" the "off payroll" rules under Her Majesty's Revenue & Customs (HMRC) guidance IR35. He said he believed the Council adopted a blanket approach and did not consider his particular situation.
2. He also complained that the Council did not tell the agency that employed him what the determination was, nor provide its reasons for it after he made a written request for that information.
3. As a consequence, Mr X says he paid too much tax and national insurance contributions. Mr X had to employ accountants to resolve the issue with HMRC, which took many months but the additional tax was refunded and an adjustment made for the national insurance contributions. Mr X also had to pay fees to an intermediary company.

The Ombudsman's role and powers

4. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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*)
5. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
6. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)

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7. Mr X complained to us in February 2020 about the Council's determination on contracts in 2017 and 2018. We would not usually investigate events more than 12 months before the complaint to us. In this case, the Council initially referred Mr X to HMRC, which was appropriate. HMRC did not make a decision on this tax position until 2019, following which Mr X made a formal complaint to the Council. The Council's final response was dated November 2019 and Mr X complained to us within a reasonable time after that. Given that Mr X was actively pursuing the matter throughout, I exercised discretion to investigate. However, given the lapse of time, it has not been possible to obtain all the evidence requested.
 8. When considering complaints, if there is a conflict of evidence, we make findings based on the balance of probabilities. This means that we will weigh up the available relevant evidence and base our findings on what we think was more likely to have happened.
 9. We investigate complaints about councils and certain other bodies. Where an individual, organisation or private company is providing services on behalf of a council, we can investigate complaints about the actions of these providers. (*Local Government Act 1974, section 25(7), as amended*) In this case the Council was carrying out activity to inform decisions made by HMRC. I investigated the Council's actions as these were administrative functions of that authority.
 10. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

11. I considered:
 - the information provided by Mr X and the Council;
 - relevant law and guidance, as set out below.
12. Mr X and the Council had an opportunity to comment on my draft decision and I considered their comments before making a final decision.

What I found

Relevant law and guidance

13. Her Majesty's Customs and Revenue (HMRC) issued new rules, in a guidance note IR35, which came into effect in April 2017. The rules were intended to prevent workers avoiding being liable for tax by using an intermediary, such as their own personal company. I have called these the "off payroll rules" in this decision.
14. The guidance says if the person was employed by a public sector body, such as a council, that body would determine whether the person was "inside" the "off payroll" rules or not. If they were "inside" the rules, the employer would need to deduct the same tax and NICs as would be the case for normal council employees. For most agency workers employed through an intermediary, this would mean they would pay more tax and NICs.
15. In making the determination, the public sector body would need to consider:
 - whether the person could send a substitute to complete the work;
 - whether the person was directly supervised; and

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- whether the person was required to use their own equipment.
16. In addition, HMRC provided a tool called Check Employment Status for Tax (CEST) which public sector bodies could use to help them make a determination. However, they did not have to use this.
 17. If the person believed they had been taxed incorrectly they could challenge this through their self-assessment tax return, which HMRC will consider.
 18. The rules state the public sector body must provide its reasons for its determination within 31 days of a written request.

What happened

19. Mr X was employed by agency A, which was on a panel of suppliers for agency B. Agency B had a contract with the Council to provide workers across a number of Council service areas. Mr X carried out work for the Council as part of this arrangement. Mr X disputed the Council's determination of his IR35 status on two contracts: the first ran from April to June 2017, and the second from January to June 2018.

Determination of status

20. Mr X said he believed the Council made a blanket decision that all agency workers in his service area would be "*inside*" the "*off payroll*" rules. He said the Council had not used reasonable care in reaching its determination
21. In respect of the 2017 contract, the Council said it:
 - worked with agency B to consider the impact of IR35 on its agency workers;
 - considered all agency workers as individuals, and did not make blanket decisions; and
 - communicated its determination to agency B and agency B communicated with agency workers, or in Mr X's case, agency A.
22. The Council said it considered the three criteria set out at paragraph 15 above. It determined that given Mr X was supervised and managed in his assignments, and it would not have accepted a substitute in his place, he was inside the "*off payroll*" rules and therefore treated as a normal employee for payroll purposes.
23. Although the Council did decide most agency workers were "*inside*" the "*off payroll rules*", I have seen evidence to show the Council considered the position for agency workers individually and did not take a blanket approach.
24. The Council was not able to provide evidence to show when it communicated its determination to agency B or what information was shared at that point. Agency B was not able to provide evidence that it communicated the determination to agency A. However, both the Council and agency B have confirmed that following the determination Mr X asked for an increase in his daily rate to offset the additional tax and national insurance he would incur as a result. The Council declined the request in early April 2017. Mr X says he discussed the matter with a Council officer but the Council has no record of any such discussion.
25. In respect of the 2018 contract, the Council said it made a determination at the time the contract was entered into. It said agency B had confirmed all candidates were made aware of the Council's position on IR35 determinations. It said its reasons for its determination in 2018 were the same as in 2017.

Provision of reasons for the determination

26. Mr X said he initially requested information about his IR35 status from his line manager at the Council on 16 March 2017. I have seen his email, which asked whether the Council had used the HMRC CEST tool. He said he had run the test himself, with the result he was “outside” the IR35 rules. He said if that was not the case, the contract would not be viable for him. During the complaint process, Mr X said he was told to either accept the amended contract terms or leave at the end of March 2017.
27. After contacting HMRC, he made a formal written request to agency A on 11 May 2017. Agency A confirmed, in mid July 2017, that the Council had not provided specific reasons “*per role or candidate*”.
28. The Council says it has no record of a request from agency A for written reasons for its determination. Agency B was not able to identify and provide copies of emails to show whether it received a request and passed it on to the Council. This was because a key employee was no longer working for it and it was necessary to access archives and email Inboxes. It could not confirm the evidence still existed.

My findings

Determination of status

29. It is not my role to say whether the Council’s determinations in 2017 and 2018 were correct. The fact that HMRC later took a different view does not on its own mean the Council’s original’s determinations were made with fault.
30. I have considered the decision-making process. The Council considered the correct criteria when making its determinations. It provided evidence to show it considered each agency worker individually and did not make a blanket decision.
31. On balance, I find it probably communicated its determination in 2017 to agency B, which communicated it to agency A. As a result, Mr X asked for an increase in his daily rate, which was not agreed. There was no fault in the decision-making process.
32. In 2018, Mr X was aware of the basis on which the Council he would be working for the Council.

Reasons for the determination

33. Mr X made a written request to agency A for the Council’s reasons for its determination. I have not seen evidence to show agency A passed on this request to agency B but have no reason to doubt that it did so.
34. I have not been able to obtain records from agency B to show whether it received the request from agency A and, if it did, whether it passed on that request to the Council. The Council said it did not receive a request from agency A. However, it is more likely it would have received the request from agency B.
35. Agency A said, in July 2017, it had not received specific reasons for the determination in Mr X’s case.
36. The rules state the public sector body must provide its reasons for its determination within 31 days of a written request. On balance, I consider the request was probably made to agency B, although I cannot confirm agency B received it, but if it did, either agency B did not pass on the request or the Council overlooked responding to it. Given the passage of time, lack of records and the

involvement of multiple organisations, I cannot say, even on the balance of probabilities, that there was fault by the Council.

37. Although the failure to provide written reasons caused frustration for Mr X and uncertainty about whether the Council had used reasonable care in reaching its determination, I cannot say this was because of fault by the Council.

Final decision

38. I have completed my investigation. I have not made findings of fault.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: We cannot investigate Miss X's complaint about the adequacy of an Education Health and Care Plan as the Tribunal is considering this. We will not investigate whether any Council delays caused Miss X an injustice until the Tribunal finishes and the final needed provision is known.

The complaint

1. The complainant, whom I shall call Miss X, says the Council failed to provide a satisfactory Education Health and Care Plan (EHC Plan) and failed to ensure she is provided with a suitable education.

The Ombudsman's role and powers

2. We cannot investigate a complaint if someone has appealed to a tribunal or a government minister or started court action about the matter. (*Local Government Act 1974, section 26(6), as amended*)
3. SEND is a tribunal that considers special educational needs. (*The Special Educational Needs and Disability Tribunal ('SEND')*)
4. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I refer to this as 'injustice'. We provide a free service, but must use public money carefully. We may decide not to start or continue with an investigation if we believe:
 - the fault has not caused injustice to the person who complained, or
 - the injustice is not significant enough to justify the cost of our involvement. (*Local Government Act 1974, section 24A(6), as amended*)

How I considered this complaint

5. I considered the information Miss X provided with her complaint. Miss X had the opportunity to comment on a draft version of this decision.

What I found

6. Miss X has an EHC Plan. A child with special educational needs may have an Education, Health and Care (EHC) plan. This sets out the child's needs and what arrangements should be made to meet them. The EHC plan is set out in sections.

We cannot direct changes to the sections about education, or name a different school. Only the Tribunal can do this. The Council is responsible for making sure that arrangements specified in the EHC plan are put in place. We can look at complaints about this, such as where support set out in the EHC plan has not been provided, or where there have been delays in the process.

7. The Council held Miss X's EHC Plan annual review in January 2020. Miss X says it then delayed in producing an amended EHC Plan and in particular that it did not name a suitable placement to start in September 2020. She says she has not been provided with the education she should have had as a result and the uncertainty affected her health.
8. Miss X appealed the EHC Plan to SEND. It is still considering the case.

Analysis

9. We cannot consider the same issues the Tribunal is. This means we cannot investigate if the EHC Plan is worded appropriately or if it names the right setting for Miss X's education.
10. We could not work out any injustice to Miss X caused by delays in providing the EHC Plan until the Tribunal's decision is known. This is because we cannot know what Miss X has missed until we know what she should have received.

Final decision

11. We will not and cannot investigate this complaint. This is because the Tribunal is still considering the case.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: Miss X complains about the Council's decision to reduce her care package. She also complains the Council contacted her doctor about her mental health without consent. We find fault with the Council for not completing a care assessment properly and for not meeting all of Miss X's eligible needs. We also find fault with the Council for contacting Miss X's doctor without consent, but this did not cause a significant injustice.

The complaint

1. Miss X complains about the Council's decision to reduce her care package. She says the Council changed her care package four times in one year and has significantly reduced the care hours she receives. She also complains the Council contacted her doctor about her mental health without consent. Miss X says the Council's actions have caused her distress and caused her health to worsen.

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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*)
3. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

5. I spoke with Miss X and considered the information she provided.
6. I made enquiries with the Council and considered the information it provided.
7. I sent a draft decision to Miss X and the Council and considered their comments.

What I found

Legislation and guidance

8. Councils must carry out an assessment for any adult who appears to have a need for care and support. Decisions made by councils about whether someone's needs are eligible for care and support must be made on the basis of an assessment. (*The Care Act 2014*)
9. The purpose of an assessment is to identify the person's needs, how they impact on the person's wellbeing, and the outcomes the person wishes to achieve in day-to-day life. Assessments provide a full picture of the person's needs. (*Care and Support Statutory Guidance, Sections 6.5, 6.9, 6.12 and 6.13*)
10. In considering whether an adult with care and support needs has eligible needs, councils must consider whether:
 - The adult's needs arise from or are related to a physical or mental impairment or illness.
 - As a result of the adult's needs the adult is unable to achieve 2 or more of the specified outcomes (described below).
 - As a consequence of being unable to achieve these outcomes, there is a significant impact on the adult's wellbeing.
11. The outcome areas are:
 - Managing and maintaining nutrition
 - Maintaining personal hygiene
 - Managing toilet needs.
 - Being appropriately clothed.
 - Being able to make use of the home safely
 - Maintaining a habitable home environment: councils should consider whether the condition of the adult's home is sufficiently clean and maintained to be safe.
 - Developing and maintaining family or other personal relationships: councils should consider whether the adult is lonely or isolated, because their needs prevent them from developing or maintaining personal relationships.
 - Accessing and engaging in work, training, education or volunteering.
 - Making use of necessary facilities or services in the local community including public transport and recreational facilities or services.
 - Carrying out any caring responsibilities the adult has for a child.
12. If the council identifies eligible needs through an assessment, it has a duty to meet those needs. (*The Care Act 2014, section 18*)
13. The law does not set a timescale for local authorities to complete an assessment. However, statutory guidance says it should be carried out over an appropriate and reasonable timescale.
14. When a person has eligible needs, councils should provide a care and support plan which sets out what needs a person has, what they want to achieve and what they are able to do by themselves or with existing support. The plan should include a personal budget which is the money the council has calculated that it will cost to arrange the necessary care and support for the person.

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15. Section 27 of the Care Act 2014 gives an expectation that councils should conduct a review of a care and support plan at least every 12 months. The authority should consider a light touch review six to eight weeks after agreement and signing off the plan and personal budget. It should carry out the review as quickly as is reasonably practicable in a timely manner proportionate to the needs to be met. As well as the duty to keep plans under review generally, the Act puts a duty on councils to conduct a review if the adult or a person acting on the adult's behalf asks for one.

What happened

16. Miss X has a long-term neurological condition which affects her mobility and muscles. Miss X's condition causes fluctuating needs. She lives with two of her children and her partner. The back of Miss X's property has been adapted to meet her needs.
17. In April 2019, the Council completed a care plan which set out Miss X had eligible needs in all outcome areas. It also set out the Council would provide Miss X with support for:
- personal care;
 - meal preparation;
 - essential cleaning of the home
 - accessing the community; and
 - parenting, such as getting the youngest child ready for school and taking them to school.
18. The Council provided 21.5 hours of support each week to meet Miss X's eligible needs. This included hours for a personal assistant to support Miss X. The Council later amended the care plan and increased Miss X's support hours to 26.5 hours a week.
19. The records showed the Council arranged for a care agency to provide the support hours.
20. In May 2019, the records showed Miss X cancelled the visits from the care agency. The records noted Miss X was unhappy with her carers and felt the carers were not meeting her needs. Miss X told the Council she would recruit a personal assistant. The social worker asked Miss X what support she would need in the meantime, but it was noted Miss X said she would manage.
21. The social worker tried to arrange a meeting between Miss X, the Council and the care agency to discuss the problems Miss X had. However, Miss X cancelled the meeting that was arranged. The evidence suggests Miss X received no support in May 2019 after she cancelled the care agency visits.
22. In June 2019, the Council completed a reassessment of Miss X's care needs. The case records noted Miss X told the social worker mornings were the worst time of day for her. She said on a typical day she struggles in the morning to undertake all tasks. It was also noted Miss X told the social worker she was struggling to keep on top of running the house and needed support after school.
23. The assessment noted Miss X could not shop independently and that Miss X had some difficulty with:
- Preparing meals and drinks, eating, and drinking.
 - Washing herself.

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- Washing and drying clothes.
 - Getting to the toilet and managing her continence.
 - Dressing and undressing.
 - Getting out of bed and getting up from sitting.
 - Using the stairs.
 - Keeping the house clean and safe.
24. The Council completed Miss X's care plan in July 2019. The care plan noted Miss X had eligible needs in the following outcome areas:
- Maintaining a habitable home environment
 - Making use of necessary facilities
 - Carrying out caring responsibilities for a child.
25. The care plan set out the Council would provide around 13.5 hours a week of child minder support to help Miss X with her youngest child. The Council removed the rest of the support hours Miss X received to support her.
26. The case records noted the Council did not consider it was suitable for Miss X to have a personal assistant as Miss X was able to meet a lot of her needs. It noted that the Council discussed with Miss X that she had found it intrusive to have carers coming in and out of her home. The Council noted there was agreement with Miss X that the care package with the carers had not worked because it caused Miss X stress and anxiety.
27. At the end of July and August 2019, there is evidence the social worker tried to work with Miss X to provide support in other ways, such as through assistive technology. Miss X turned this down due to the cost and because she said she could not use it effectively.
28. There is also evidence the social worker discussed Miss X's needs with her doctor and nurse. There is no record of the Council asking Miss X's doctor for any information regarding her mental health. The Council said there was no evidence it had asked Miss X for consent to contact her doctor.
29. In September 2019, Miss X complained about the Council's reduction of her support hours. Following her complaint, the Council agreed to provide Miss X with three hours for a personal assistant. This was to support Miss X with maintaining her home and shopping.
30. In October 2019, the Council offered Miss X a short-term assessment and reablement team intervention (START). The purpose of this was to identify what Miss X could do and what areas could be worked on. The Council's records noted Miss X decline this as the team could only offer an early morning assessment time. Miss X said she did not decline it but was advised this option would not benefit her. Miss X did not specify who told her this.
31. In mid-October 2019, the Council reassessed Miss X. The assessment noted Miss X was not independent with shopping and getting to and using community leisure facilities. The assessment also noted Miss X had significant difficulty, or some difficulty, with:
- Washing herself
 - Dressing and undressing.

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- Getting to the toilet and managing her continence.
 - Preparing meals and drinks, eating, and drinking.
 - Washing and drying clothes.
 - Get in and around her home.
 - Getting out of bed.
 - Using the stairs.
 - Keeping the house clean and safe.
 - Meeting and making friends.
32. The Council completed Miss X's care plan in October 2019. The care plan noted Miss X had eligible needs in the following outcome areas:
- Maintaining a habitable home environment
 - Making use of necessary facilities
 - Carrying out caring responsibilities for a child.
33. The care plan set out the Council would continue to provide 13.5 hours of child minder support. The Council also provided Miss X with support hours for cleaning, community support, and personal care. Totalling 6.5 hours a week.
34. In December 2019, the Council reassessed Miss X. The Council's assessment noted Miss X had significant difficulty, or some difficulty, with the same areas as in the October 2019 assessment.
35. In mid-December 2019, the Council met with Miss X to discuss her assessment. The Council said it needed to complete a START assessment, which would take place over two weeks, so that it had a better idea of Miss X's needs. This was due to Miss X's condition causing her needs to fluctuate depending on if she was having a good or bad day. Miss X agreed to this.
36. The Council completed the START assessment in mid-January 2020. The Council's occupational therapist observed Miss X's capabilities over two weeks. The Council completed the support plan in February 2020.

Analysis

37. In April 2019, the evidence shows Miss X had a care plan which set out the Council would provide 26.5 hours of support per week to meet Miss X's eligible needs. The Council was not able to provide a copy of the assessment which led to this care plan.
38. There is evidence Miss X cancelled the care agency that was providing her with the support hours in May 2019. The evidence also suggests Miss X received no support in May 2019 after she cancelled the care agency.
39. The records outlined a discussion between the social worker and Miss X about how it was not appropriate for Miss X to have a personal assistant as she was able to meet most of her needs and because the care package had not worked in April 2019.
40. However, the evidence shows the Council's assessment in June 2019 noted Miss X had some difficulty in most outcome areas and noted Miss X could not shop independently. The evidence also shows Miss X told the social worker she struggled in the morning and to keep on top of running the house. There is no evidence Miss X told the Council her abilities or condition had improved.

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41. Miss X's care plan in July 2019 noted she had eligible needs in three outcome areas. However, the care plan only provided support to meet Miss X's needs in one outcome area, carrying out caring responsibilities for a child.
 42. The evidence shows the social worker was trying to put in place support in other ways, not just through a traditional care package. However, these were not successful. This effectively means some of Miss X's eligible needs were not met until October 2019, when Miss X was reassessed. The law is clear that if the Council identifies eligible needs, it has a duty to meet those needs. This is fault.
 43. Further, it is not clear from the evidence what had changed between April 2019 and June 2019 to cause Miss X's eligible needs to change. The evidence available shows Miss X told the Council she still struggled with most tasks and that she needed support.
 44. The case records do suggest Miss X went without any support in May 2019. However, if this impacted on the social worker's assessment of Miss X's eligible needs, this information should be clearly highlighted in the assessment.
 45. Therefore, it is not clear from the evidence how the Council made its decisions as there is no evidence to suggest Miss X's condition or abilities had improved since April 2019. Therefore, I am not satisfied the Council completed its assessment of Miss X's care and support needs in June 2019 properly. This is fault.
 46. I also find fault with the Council for not considering a light touch review following the implementation of the new care plan in July 2019. Given the large reduction in support hours, it would have been appropriate for the Council to review the care plan within six to eight weeks to see how Miss X was coping without the support hours she had previously received.
 47. I consider the faults identified has caused Miss X an injustice. I cannot say on balance what support the Council would have put in place had it completed its assessment properly in June 2019. This has therefore caused some uncertainty as to whether Miss X received the support she needed. I also consider the faults identified caused Miss X some distress and anxiety regarding how her eligible needs were going to be met by the Council.
 48. The October 2019 assessment shows the Council had assessed Miss X to have greater difficulty in some outcome areas, when compared with the June 2019 assessment. The assessment notes Miss X's views on the things she struggled with and how things had changed since the June 2019 assessment.
 49. Therefore, I do not find fault with the Council's October 2019 assessment as it is clear from the evidence how the Council made its decisions. The Council was entitled to decide what Miss X's eligible needs are as it has properly assessed Miss X.
 50. I also do not find fault with the Council's care plan in October 2019. This is because the Council provided some support hours to meet Miss X's other eligible need. Therefore, I am satisfied the Council met its duty to meet the eligible needs it identified during the October 2019 assessment.
 51. The Council has recently completed a START assessment for Miss X and issued her with a new care plan. These matters occurred after Miss X submitted her complaint to the Ombudsman. Therefore, I have not considered the Council's START assessment or most recent care plan.

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52. If Miss X is unhappy about her most recent care plan, it would be open to her to make a new complaint to the Council to consider. If she is unhappy with the Council's response, she can make a new complaint to the Ombudsman.
53. Miss X said the Council contacted her doctor about her mental health without her consent. The available evidence does suggest the Council contacted Miss X's doctor without her consent. However, there is no evidence the Council contacted Miss X's doctor to discuss or get information about her mental health.
54. I find fault with the Council for contacting Miss X's doctor without her consent or knowledge. The Council may have had good reason to contact Miss X's doctor without her consent. However, it would be good practice for the Council to record its reasons for not getting Miss X's consent before making its enquiries.
55. I acknowledge Miss X was unhappy the Council contacted her doctor. However, the Council did not share any sensitive information about Miss X and asked her doctor for relevant information to help inform its assessment. The Council also told Miss X it had contacted her doctor a few days later. Therefore, I do not consider the fault identified caused Miss X any significant injustice.

Agreed action

56. To remedy the injustice caused by the faults identified, the Council has agreed to complete the following:
- Apologise to Miss X for the injustice caused by the faults identified.
 - Pay Miss X £500 to recognise the distress, anxiety, and uncertainty caused by the faults identified.
57. The Council should complete the above within four weeks of the final decision.

Final decision

58. I find fault with the Council for not completing the June 2019 assessment properly and for not meeting all of Miss X's eligible needs. I also find fault with the Council for contacting Miss X's doctor without consent, but this did not cause a significant injustice. The Council has agreed to my recommendations. Therefore, I have completed my investigation.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: Mr B complains the Council did not take action to prevent an Academy School closing a footpath used by parents to access an Infant School. We uphold the complaint finding the Council did not properly consider the impact of the closure on users of the path when it decided not to take legal action against the Academy. We also its reply to Mr B's complaint was misleading. These faults caused Mr B injustice. Because it is uncertain if the Council would have taken the same approach but for its fault and he was put to unnecessary time and trouble in this matter. The Council accepts these findings and at the end of this statement we set out action it has agreed to remedy this injustice.

The complaint

1. I have called the complainant 'Mr B'. His complaint concerns the decision taken by an Academy School to change the times when it locked gates which allowed access to a path running across its grounds on land formerly owned by the Council. He complains the Council is at fault for not taking action to prevent this. Mr B believes the Council had the power to do so as it transferred the land to the Academy's predecessor (a Foundation School). The deed of transfer required the path remain accessible at "*all reasonable times*" to allow parents and pupils access to a neighbouring Infant and Nursery School.
2. Mr B says as a result he has experienced inconvenience in having to use a longer walking route to accompany a child to the Infant and Nursery School. He also considers the Council's actions disadvantage other users of the path, including potentially those with disabilities or who use pushchairs.

The Ombudsman's role and powers

3. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. We must also consider whether any fault has had an adverse impact on the person making the complaint. I 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*)

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5. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. Before issuing this decision statement I considered:
- Mr B's written complaint to the Ombudsman and any supporting information he provided. I also spoke to Mr B by telephone to clarify my understanding of his complaint.
 - Correspondence exchanged between Mr B and the Council about the subject of his complaint, which pre-dated my investigation.
 - Information provided by the Council in reply to our enquiries. This included legal advice it sought about the issue at the crux of this complaint.
 - Comments made by Mr B and the Council in response to a draft decision statement where I set out my provisional thinking about the complaint.

What I found

Key facts

7. Mr B accompanies a child to a local Infant and Nursery School. This forms one half of a Primary School located on a split site, with the Junior School forming the other half. Between the two sites are the grounds of what is now an Academy (previously a Foundation School). Across those grounds runs a footpath used by parents and pupils moving between the two sites. There are gates at either end of the footpath where it crosses the Academy grounds (and another gate allowing access from another location). When locked, the walking route between the two primary school sites involves a significant diversion using local roads.
8. Until February 2019 the gates on the footpath were kept open until Infant School hours began. Further the footpath had temporary fencing running alongside it, meaning that pedestrians using it could not access the Academy across its grounds.
9. In February 2019 that temporary fencing came down. The Academy took the decision to lock the gates at either end of the footpath when its school day began, around half an hour before that of the Infant School. Before taking this decision the Academy had consulted with the primary school and neither of its headteachers objected. But parents affected received only limited notice of the change and the Academy did not consult with the Council.
10. The Academy says it took this decision to safeguard pupils on its site. It highlighted a concern that once it removed the temporary fencing there was nothing to stop an intruder crossing the grounds and gaining unauthorised access to its buildings.
11. When Mr B learnt of the Academy's actions he complained directly to it and alerted the Council. A senior officer in the Council's Children's Services contacted the Academy within a few days and questioned its actions. The Council said "*it was not in the Academy's gift*" to take this decision unilaterally. The Council took this view because it had previously owned the land across which the footpath runs. It had transferred this to the Academy's predecessor in title, the Foundation School. In doing so it had placed a covenant in the transfer agreement requiring

the Foundation School maintain access along the path to the Infant School, at *“all reasonable times by day and night”*.

12. The Academy argued its actions were reasonable. Despite the Council contacting it shortly before the decision to close the gates early took effect, the Academy proceeded with this action. It told the Council it had consulted the Primary School headteachers. But the Council repeated it considered its actions unsatisfactory. In a further email sent in February 2019 it said this was because the Academy had not consulted with it *“or parents”*.
13. I have not identified that any communications followed between Council and the Academy until July 2019 when two Health and Safety specialist officers working for the Council visited the Academy. But I noted in June 2019 a meeting held at the Academy recorded the view that it faced being *“sued”* by the Council for its actions.
14. The July 2019 report concluded the actions of the Academy reasonable, taking account of its safeguarding concerns. That report did not consider the impact of closure of the gates on parents or pupils using the path to access the Infant School.
15. In August 2019 the Council sought legal advice. This confirmed it had the power to go to Court and seek to enforce the covenant. It could ask the Court for a declaration requiring the Academy to keep the gates open long enough to enable parents and pupils to access the Infant School for the start of its school day. But such action was at its discretion.
16. Later that month the Council corresponded with the Infant School. Its headteacher confirmed the Academy had told it of its intent to close the gates earlier in the morning before it took this action. They confirmed the Infant School had not objected at the time and nor did it object at the time of the Council’s enquiry. The Infant School said it knew of only two parents unhappy with the decision. Separately the Academy had commented to the Council that it was only aware of Mr B’s dissatisfaction with its decision. While the Council says it has only received one complaint about this matter, from Mr B.
17. The Council also took further legal advice, although this was not confirmed in writing until November 2019. This second legal advice considered the extent to which the Council’s overall duty to have regard to the safeguarding of children impacted on the initial legal advice given. The legal advice did not change in respect that the Council still had the power to go to Court and seek a declaration requiring the gates remain open longer in the morning. However, the decision to seek such a declaration remained at its discretion.
18. Before receiving confirmation of this advice in writing, the Council had already written to Mr B saying it did not plan on taking further action. In October 2019 it wrote to him saying that in view of the Infant School’s position it did not consider it reasonable to take further action. It said this was because the covenant was for the benefit of that school and it did not object to the Academy’s actions.
19. Later, Mr B also made a complaint to the Council. In its reply the Council again defended its actions saying:
 - the issue raised by Mr B was not one *“our complaints process would pick up [...] as the area of land is neither owned, maintained or controlled by the Council”*;
 - the Academy had the ‘prerogative’ to close the path on safeguarding grounds;

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- the Infant School had supported the Academy's decision.
20. I have noted that separately Mr B also corresponded with the Council's Countryside Access Team, who process requests to register footpaths as public rights of way. He asked if it was possible to "*dedicate a private right of way*" in favour of a specific purpose, to allow parents and pupils access to the Infant School. That Team has told Mr B there is no procedure to do this. I understand Mr B accepts this advice and he has not sought to prolong this correspondence. I will not return to this matter in my findings below.
21. During this investigation Mr B told me the gates had re-opened for longer hours in response to measures taken to secure the safe passage of children during the COVID-19 pandemic. Subsequently the Academy has erected new perimeter fencing and the path to the Infant School has now re-opened at the earlier time. The path takes a slightly different route to previously and is narrower as a result of how the fencing has been erected.
22. In comments on a draft of this decision the Council asked me to take account of various legislation including sections from the School Standards Framework Act 1998 and the Education Act 2002. The passages it quoted refer in general terms to the powers of school governing bodies, consultation arrangements and schools' safeguarding duties.

Findings

23. I find the Council had no adequate warning of the Academy's decision to restrict the opening times of the gates serving the footpath in February 2019. The Council therefore had no opportunity to question or object to this course of action. I also find that when it learnt of the Academy's actions the Council did as I might expect. It questioned with the Academy why it had taken this step and registered its unhappiness at not being consulted. I find no fault in its immediate response and in entering this correspondence with the Academy.
24. But when it became clear the Academy did not intend to change its actions, the Council had to decide what to do next. I find there is little information that sheds light on the Council's thinking between March and June 2019, but it appears in this time to have viewed the Academy's actions unacceptable. It gave the Academy reason to believe it would take legal action. I am satisfied from reading the legal advice it later received, the Council could have had such recourse if it chose.
25. However, that decision was at the Council's discretion. It was never obliged to take legal action to require the gates stay open longer. I am satisfied two factors persuaded the Council not to do so. The first being that it accepted the Academy had legitimate child safeguarding concerns. The second being that the Primary School and particularly the Infant School did not object to the Academy's actions.
26. I explained above the role of the Ombudsman is not to criticise a Council's decision on the basis that a complainant disagrees with it. So long as the Council has made its decision properly we have no reason to fault it. A 'proper' decision in this context is one that has taken account of relevant matters and not taken account of anything irrelevant.
27. In this case I consider the matters referred to at paragraph 25 are relevant to the Council's decision. I also accept that in taking this decision it was relevant for the Council to consider the legislation it has referred to. Although I also note all this legislation was in place at the time it transferred land to the Academy's

predecessor in title, the Foundation School. So, none of this legislation prevented the Council having discretion to seek to enforce the covenant if it chose.

28. I am also satisfied the Council took nothing irrelevant into account. But I find it did not take account of one further relevant factor. It did not consider the impact of the early closure of the gates on parents (and by implication pupils) who used the footpath. This was despite it identifying in February 2019 the Academy did not appear to have taken the needs of this group into account.
29. I cannot see the Council ever returned to consider this issue further. I note that only Mr B appears to have pursued a complaint about the early closure of the gates. I find this may indicate few parents were inconvenienced or dissatisfied with the Academy's actions. However, I do not think this can be assumed. I also do not think it follows that just because the Infant School Headteacher did not object that they spoke for parents who were not consulted. I note there is no evidence the Infant School undertook its own consultation on the earlier closure times, for example.
30. I note the Council undertook a comprehensive study to understand why the Academy closed the gates early. I make no criticism of that. It wanted to understand the 'pros' of the Academy's decision. But it should also have made a similarly detailed study of the potential 'cons' – namely the impact on parents and pupils of closing the gates early. It should have considered the inevitable inconvenience caused to some users of the path, including any impact on disabled users. One way the Council could have done this was by approaching this matter 'as if' it owned the land. In which case I am sure it would have considered its duty to consult on such a change and considered its duties under the Equality Act. It should have weighed such considerations in the balance before making its decision on legal action. It did not do this. This was a fault.
31. I cannot say if taking better account of footpath users would have led the Council to a different decision on the merits of taking legal action. But nor can I rule out that it might have done. We regard such uncertainty as an injustice.
32. I have gone on next to consider how the Council answered Mr B's complaint. I consider it was wrong for it to say the matter he wanted to complain about was not one falling under its complaint procedures. His complaint engaged with decisions and actions taken by its Property Services and Children's Services, both of whom clearly knew of the Council's power to potentially pursue legal action against the Academy.
33. It was also wrong to say the Academy had the 'prerogative' to close the gates when it wished. This might imply the Academy could close the gates when it liked. This is not what the covenant said. It is only reserved to the Academy to close the gates at reasonable times. The Council could say it considered the Academy complied with this, but it should not have implied the Academy had unfettered rights over the gates. Its choice of language was poor here.
34. The Ombudsman expects local authorities to be open and transparent in their communications with those who complain. I find this response potentially misleading on these two counts as combined they implied there was nothing the Council could do about the Academy's actions. This is not the case. It used its discretion not to take legal action, which is a different matter. It is the difference between choosing not to take a course of action rather than being unable to. By giving the wrong impression the Council failed to meet the standard we expect. That justifies a second finding of fault.

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35. The injustice this has caused Mr B is that of some understandable and avoidable time, trouble and frustration in pursuing his complaint.
36. I welcome that since Mr B made his complaint events have moved on and a solution has been found which has led to the re-opening of the path at the earlier time. I note that has resulted in a slight re-routing of the path and its narrowing in places. The Council is invited to consider the implications of these actions. But it outside the scope of this investigation for me to express any view on these matters.

Agreed action

37. In paragraphs 31 and 35 above I have set out where I consider fault by the Council caused Mr B an injustice. The Council accepts this finding. In order to remedy this injustice, it has agreed that within 20 working days of this decision it will:
- a) apologise to Mr B accepting the findings of this investigation;
 - b) seek assurance from the Academy about whether it has any plans to change the opening times of the gates in future. In making such contact the Council will set out what it considers would be sufficient notice of any such plans that would enable it to consider the merits of such changes before they are enacted. This is specifically to allow for consideration of the needs of the users of the footpath in any decision.

Final decision

38. For reasons set out above I uphold this complaint finding fault by the Council causing injustice to Mr B. I am satisfied the Council has agreed action that will remedy this injustice. Consequently, have completed my investigation satisfied with its response.

Investigator's decision on behalf of the Ombudsman

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

**Investigation into a complaint against
Nottinghamshire County Council
(reference number: 19 015 363)**

27 January 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

Ms B	The complainant
Mrs D	Her mother
Mr D	Her father (the user of the service)

Report summary

Adult social care

Ms B complained the Council delayed assessing her father's (Mr D) care needs, delayed assessing his mental capacity to decide where to live, and delayed making a decision in his best interests. We have upheld these complaints. This meant Mr D stayed at a care home longer than necessary and has a debt of over £15,000, for care fees which he cannot afford to pay because the Council failed to act in his best interests. The Council's actions also had an impact on Ms B's mother (Mrs D) at a time she was suffering carer crisis. The Care Provider has pursued her for the fees, including threatening bailiff action, which has been distressing.

Finding

We found fault causing injustice and made recommendations.

Recommendations

To remedy the injustice caused, the Council will take the following action, within three months of the date of this report.

- Apologise to Mr D, Mrs D and Ms B for:
 - its delay completing an assessment of Mr D's care and support needs;
 - its delay completing an assessment of Mr D's mental capacity;
 - its delay completing a best interests decision for Mr D;
 - failing to consider whether it was necessary and proportionate for Mr D to remain away from home, given his human right to enjoy his home peacefully; and
 - failing to adequately support Mrs D at a time of carer crisis.
- The Council has told the Care Provider it will take over responsibility for the outstanding care fees, so it should stop pursuing Mrs D. The Council will pay the outstanding care fees.
- Pay Mrs D £500 to acknowledge the distress caused by the pursuance of the care fees over the last year, and the distress caused by not having a clear plan for Mr D's care and support from April to October at a time of carer crisis.
- Pay Ms B £250 to acknowledge her time and trouble pursuing the complaint and supporting her parents at a time there was no clear plan for Mr D's care and support.
- Review the reasons for the delays in this case and implement any identified improvements to service.
- Give relevant staff training on applying the Human Rights Act 1998 to adult social care cases. So that staff are aware when the Articles of the Act might be engaged, and what is required of them to ensure individuals' rights are not unlawfully interfered with. And that the Council documents any consideration it has to the Human Rights Act 1998 in individual cases.

The Council has wholeheartedly accepted our recommendations, is committed to improve, and has already started acting on the recommendations. The Council has started improvement work by reviewing its Mental Capacity Act documentation, making necessary changes to it, and issuing guidance to staff. We welcome the Council's commitment to learning from past mistakes.

The complaint

1. Ms B complained on behalf of Mr D that the Council:
 - delayed assessing Mr D's care needs, did not assess his mental capacity and failed to hold a best interests meeting;
 - failed to inform Mr D's family about charges for care; and
 - wrongly applied charges for a period when Mr D was in a care home and wrongly pursued the family for these charges.
2. Mr D now has a large debt which he cannot afford to pay back. The Care Provider has pursued Mr D's wife, Mrs D, for over a year for care charges which now stand at over £15,000. Mrs D is very distressed, especially when threatened with bailiff action. Ms B has spent a lot of time trying to resolve the issues and support her parents.

Legal and administrative background

The Ombudsman's role and powers

3. 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 and guidance

The Care Act 2014

4. A council must carry out an assessment for any adult with an appearance of need for care and support, applying national criteria to decide if a person is eligible for care. (*Care Act 2014, section 9*)
5. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. (*Care Act 2014, sections 24 and 25*)

The Mental Capacity Act 2005 and Code of Practice to the Mental Capacity Act

6. A person lacks mental capacity to make a decision if they have a temporary or permanent impairment or disturbance of the brain or mind and they cannot make a specific decision because they are unable to:
 - understand and retain relevant information;
 - weigh that information as part of the decision-making process; or
 - communicate the decision (whether by talking using sign language or other means.) (*Mental Capacity Act, 2005 section 3*)
7. The Code of Practice to the Mental Capacity Act (the Code) is statutory guidance which councils must have regard to. The Code sets out the principles for making decisions for adults who lack mental capacity. An assessment of a person's

mental capacity is required where their capacity is in doubt. (*Code of Practice paragraph 4.34*)

8. Decisions taken for a person lacking mental capacity must be in their best interests. The Mental Capacity Act and the Code provide a checklist of factors decision-makers must work through when deciding what is in a person's best interests.
 - Take into account all relevant circumstances.
 - If faced with a particularly difficult or contentious decision, practitioners should adopt a 'balance sheet' approach.
 - Involve the individual as fully as possible.
 - Take into account the individual's past and present wishes and feelings, and any beliefs and values likely to have a bearing on the decision.
 - Consult as far and as widely as possible.
 - Record the best interests decision. Not only is this good professional practice, but decision-makers will need an objective record should the decision or decision-making processes later be challenged.
9. A decision-maker should consider the least restrictive option. This means before a person acts or makes a decision for someone who lacks capacity, they should consider if the purpose can be achieved in a way that is less restrictive of the person's rights and freedoms. (*Mental Capacity Act 2005, section 1*)

The Human Rights Act 1998

10. The Human Rights Act 1998 brought the rights in the European Convention on human rights into UK law. Public bodies, including councils, must act in a way to respect and protect human rights. It is unlawful for a public body to act in a way which is incompatible with a human right. (*Human Rights Act 1998, section 6*)
11. It is not our role to decide whether a person's human rights have been breached. This is for the courts. We decide whether there has been fault causing injustice. Where relevant, we consider whether a council has acted in line with legal obligations in section 6 of the Human Rights Act. We may find fault where a council cannot evidence it had regard to a person's human rights or if it cannot justify an interference with a qualified right.
12. The Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to. Article 8 protects your right to respect for your private life, family life, your home and your correspondence. You have a right to enjoy your existing home peacefully. Public authorities should not stop you entering or living in your home without very good reason.
13. Article 8 is qualified which means it may need to be balanced against other people's rights or those of the wider public. A qualified right can be interfered with only if the interference is designed to pursue a legitimate aim, is a proportionate interference and is necessary. Legitimate aims include:
 - the protection of other people's rights;
 - national security;
 - public safety;
 - the prevention of crime; or
 - the protection of health.

How we considered this complaint

14. We produced this report after examining relevant documents and speaking to the complainant.
15. 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

16. Mr D lived at home with his wife; he has dementia. Their son had terminal cancer; Mrs D was finding it hard to cope with caring for her husband and her son's illness. Ms B and Mrs D placed Mr D in a residential care home for a respite stay in April 2019. They contacted the Council and explained that Mrs D was struggling to cope with Mr D at home, so he was currently in a care home. Mrs D initially told the Council in February that she was struggling, and Mr D had a week stay in a care home to give her respite then, which the Council funded. The Council said it would fund a two-week stay in April, but anything after that would be funded privately by the family.
17. Mr D stayed at the care home after the two-week respite ended, as Mrs D felt she could not cope with him at home. The Council was aware of this.
18. The Council's view throughout was that Mr D was entitled to return to his home, that he did not need residential care, and that his needs could be met with additional care calls at home to take some pressure off Mrs D. The Council had not completed a review or assessment at this time despite Mr D's change of circumstances, to establish Mr D's care and support needs and whether these could be met in the community without Mrs D's support. The Council had not completed any carer review or reassessment, to assess the support Mrs D needed.
19. The Council's responsibility was to complete a review or assessment of Mr D's care and support needs given his change of circumstances. The Council also needed to complete a mental capacity assessment with Mr D to assess whether he could understand his current situation, make a decision regarding his care and support, and consent to remain in the care home and incur the fees. If Mr D did not have mental capacity to make decisions about his care and support and/or finances, then the Council needed to make a decision in his best interests in accordance with the Mental Capacity Act 2005.
20. The Council did not take any action between April and July. It then tried to complete a care needs assessment and mental capacity assessment but could not do so because Mr D had an infection which can cause confusion.
21. The Council completed an assessment of Mr D's care and support needs in September and assessed his care needs could be met in the community with a package of support. The Council completed a mental capacity assessment which assessed Mr D did not have the capacity to decide where to live or make decisions about his finances.
22. The Council agreed short term funding to pay for the care home from the date of its assessment, until Mr D moved to a unit for further assessment and consideration of where to live long term. Mr D moved to the assessment unit in October.

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23. The care home has pursued Mrs D for over a year for outstanding fees for Mr D's stay from April to October. This is ongoing and currently stands at over £15,000.
 24. A note from the Council's safeguarding team says "Despite [Mrs D] refusing to have [Mr D] back home from [the care home], the property is in joint names, and if [Mr D] did not have eligible needs for 24 hour care, it is in my professional opinion that [Mr D] should have been supported to return home, as he has remained in 24 hour care without giving consent for this and is not liable for a large bill."

Conclusions

25. The Council failed to act promptly to complete an assessment of Mr D's care and support needs and his mental capacity when it knew he had moved from home into a residential care home. The Council's own records acknowledge it allowed this case to drift. This was fault.
26. Mrs D had told the Council she could not cope with Mr D at home. The Council should not expect family members to act as carers unless they are willing and able to do so. The Council did not complete an assessment of Mr D's needs and how they would be met until he had been away from home for five months and it did not assess Mrs D's needs as a carer. This was fault.
27. Because of the Council's delay Mr D remained away from his home without the Council establishing and recording a good reason. Mr D had a right under Article 8 to respect for his family life and home, and to enjoy his existing home peacefully. The Council did not consider Mr D's Article 8 right and whether it was necessary and proportionate for him to be away from his home. This was fault.
28. The Council failed to act in Mr D's best interests, as someone lacking capacity under the Mental Capacity Act to make decisions about his care and finances. The Council's delay meant a large bill for residential care has accrued. The Council's own records say Mr D remained in 24-hour care without giving consent and is not liable for the bill. This was fault.
29. Mr D did not have mental capacity to agree to the care home fees, and nobody held power of attorney for finances to make that decision on his behalf. The onus was on the Council to decide in his best interests, in accordance with the Mental Capacity Act 2005. It delayed doing that, and this was fault.
30. Following the Council's assessment in September it agreed to fund the care home fees until Mr D moved. This was because the Council was concerned about mismanagement of his finances given no-one was paying the care home fees. If the Council had completed the required assessments sooner, this issue could have been identified and resolved sooner. This indicates had the Council completed the required assessments without delay, it would then have agreed responsibility for the funding, Mr D would have moved from the care home sooner, and he would not have incurred the outstanding fees.
31. Despite this the Council has, until our investigation, failed to acknowledge its errors and the impact that has caused. The Council knew Mrs D was struggling to cope with looking after Mr D and the death of her son; she was going through carer crisis. The Council knew the Care Provider was pursuing Mrs D for care fees, and she was finding that distressing as the family cannot afford the fees. The family did offer a repayment plan, which the Care Provider turned down as the monthly amounts were too small. The Council's delay has added to Mrs D's distress. Ms B has had time and trouble trying to resolve the issues and support her parents.

Recommendations

32. To acknowledge the injustice caused by its fault, and to prevent future failings, the Council will take the following action.
- Apologise to Mr D, Mrs D and Ms B for:
 - its delay completing an assessment of Mr D's care and support needs;
 - its delay completing an assessment of Mr D's mental capacity;
 - its delay completing a best interests decision for Mr D;
 - failing to consider whether it was necessary and proportionate for Mr D to remain away from home, given his human right to enjoy his home peacefully; and
 - failing to adequately support Mrs D at a time of carer crisis.
 - The Council has told the Care Provider it will take over responsibility for the outstanding care fees, so it should stop pursuing Mrs D. The Council will pay the outstanding care fees.
 - Pay Mrs D £500 to acknowledge the distress caused by the pursuance of the care fees over the last year, and the distress caused by not having a clear plan for Mr D's care and support from April to October at a time of carer crisis.
 - Pay Ms B £250 to acknowledge her time and trouble pursuing the complaint and supporting her parents at a time there was no clear plan for Mr D's care and support.
 - Review the reasons for the delays in this case and implement any identified improvements to service.
 - Give relevant staff training on applying the Human Rights Act 1998 to adult social care cases. So that staff are aware when the Articles of the Act might be engaged, and what is required of them to ensure individuals' rights are not unlawfully interfered with. And that the Council documents any consideration it has to the Human Rights Act 1998 in individual cases.
33. 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*)
34. The Council has already confirmed agreement to all the above, has started acting on the recommendations, and making improvements to its service. We are pleased to see the Council's proactive approach and willingness to learn and improve.

Decision

35. We have upheld Ms B's complaint the Council delayed assessing Mr D's care needs, delayed assessing his mental capacity and delayed making a decision in his best interests. This meant Mr D accrued care home fees which was not in his best interests. The Council will take the actions identified in paragraph 32 to remedy that injustice.

The Ombudsman's final decision

Summary: I will not investigate this complaint about the Council's decision to refer the complainant to Social Work England. This is because we are unlikely to find fault in the way the decision was taken.

The complaint

1. The complainant, who I refer to here as Mr K, says that the Council maliciously and unjustly referred him to Social Work England (SWE), alleging exploitation of vulnerable clients.

The Ombudsman's role and powers

2. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I refer to this as 'injustice'. We provide a free service, but must use public money carefully. We may decide not to start or continue with an investigation if we believe it is unlikely we would find fault.
(*Local Government Act 1974, section 24A(6), as amended*)

How I considered this complaint

4. I considered the information provided by Mr K's representative, and I have sent a draft decision for his comments.

What I found

5. Mr K owns an agency which provides advice and support to vulnerable clients. Allegations were made to the Council that Mr K, through his agency, was exploiting and financially abusing clients.
6. The Council considered the allegations and decided to refer Mr K to SWE. Mr K complained about the decision.

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7. The Council told him that it has a responsibility to report relevant concerns to SWE. It said that the triggers for referral were met, and that the officer followed the Council's policy correctly.
 8. Mr K has now complained to the LGSCO, but we will not investigate the complaint. This is because we cannot consider the merits of a decision that has been properly taken by the Council.
 9. In this case, the allegations made are covered by SWE's list of triggers which should be referred to it. The Council must take action in these circumstances, and it has confirmed that the officer correctly checked her understanding before making the referral.
 10. Consequently there is no evidence of fault in the way the decision was made. We will not look at the substance of the evidence the officer considered, as that is now a matter for SWE to investigate.

Final decision

11. Subject to any comments Mr K might make, my view is we should not investigate this complaint. This is because there is no evidence of fault in the way that the Council made its decision to refer him to SWE.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: We will not investigate this complaint about Mr X's garden and whether a section of it is part of the adopted highway. This is because it is a matter for the courts to decide the extent of the adopted highway.

The complaint

1. The complainant, whom I have called Ms Q, complained on behalf of Mr X about Nottinghamshire County Council. She said the Council wrongly said a section of Mr X's garden is part of the adopted highway.

The Ombudsman's role and powers

2. The Local Government Act 1974 sets out our powers but also imposes restrictions on what we can investigate.
3. The law says we cannot normally investigate a complaint when someone could take the matter to court. However, we may decide to investigate if we consider it would be unreasonable to expect the person to go to court. (*Local Government Act 1974, section 26(6)(c), as amended*)

How I considered this complaint

4. I considered the information Ms Q provided. I considered the information the Council provided. I considered Ms Q's comments on a draft of this decision.

What I found

5. The Council believes a section of Mr X's garden is part of the adopted highway. Ms Q gave the Council evidence which she thinks proves it is not. She said the Council had lost key documents and could not prove the land is part of the adopted highway.
6. We have no power to determine whether a section of Mr X's garden is part of the adopted highway. Only the courts can decide the extent of the highway. So it would be reasonable for Mr X to go to court if he wants to determine whether a section of his garden is, in fact, part of the adopted highway.

Final decision

7. We will not investigate this complaint. This is because Mr X can go to court.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: We have discontinued our investigation into Mr X's complaint about the Council's decision to recover the outstanding care fees for his relative Mr Y. The Council has offered to waive the outstanding care fees which remedies any injustice caused.

The complaint

1. Mr X complained about the Council's decision to recover outstanding fees for the care it commissioned for Mr Y. He said the care home failed to provide appropriate care for Mr Y, resulting in a safeguarding investigation.
2. Mr X wanted the Council to waive the outstanding care fees, not just those following the safeguarding referral. He also wanted the care home to make service improvements to ensure other residents did not experience similar issues.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word 'fault' to refer to these. We provide a free service, but must use public money carefully. We may decide not to start or continue with an investigation if we are satisfied with the actions a council has taken or proposes to take. (*Local Government Act 1974, section 24A(7), as amended*)
4. Under our information sharing agreement, we will share this decision with the Care Quality Commission (CQC).

How I considered this complaint

5. I considered the documents provided by Mr X.
6. I considered the Council's response to my enquiries.
7. Mr X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

What I found

8. In July Mr Y went into a care home. Mr X and his family often visited Mr Y and were concerned about the quality of care the home provided.
9. Mr X and his mother reported the issues to the care home. After the care quality did not improve, Mr X made a safeguarding referral to the Council in December 2019. The Council started a safeguarding investigation, however, Mr Y died shortly after.

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10. The following year, in January the Council contacted Mr X and asked him to settle the outstanding invoices for Mr Y's care.
 11. Mr X expressed his concerns about the Council's decision to recover the cost of care and said the care Mr Y received in the care home was below the acceptable standard.
 12. The Council decided not to charge for Mr Y's care from the day Mr X made a safeguarding complaint but said Mr X would have to pay the outstanding fees for care provided before the safeguarding referral. In February the Council confirmed the outstanding balance amounted to £3,420.
 13. In March the Council upheld the safeguarding complaint Mr X made in December 2019. It found Mr Y did not receive the standard of care he would have expected to receive. Mr X complained to the Council; he said he would not pay the outstanding care balance because the Council had confirmed the care was not up to standard.
 14. The Council considered the complaint further but decided not to waive the charges.
 15. In October 2020 Mr X complained to the Ombudsman about Council's decision to recover fees for the care it commissioned for Mr Y. In response to my enquiries the Council offered to waive the outstanding care fees. It stated it had also suspended the contract with the care provider.

My findings

16. As the Council has offered to waive the outstanding care fees and has also suspended its contract with the care provider, there is nothing more we can achieve by investigating this complaint further. Therefore, I have discontinued my investigation.
17. Under our information sharing agreement, we will share this decision with the Care Quality Commission (CQC) to decide if it needs further investigation about the quality of care provided to Mr Y.

Final decision

18. I have discontinued my investigation as the Council has offered a suitable remedy to Mr X.

Investigator's decision on behalf of the Ombudsman

The Ombudsman's final decision

Summary: We will not investigate Mrs B's late complaint about the Council charging her late mother, Mrs C, for respite care she received in 2017. This is because Mrs B could have come to the Ombudsman sooner if she was concerned about the charges. There is no good reason to disapply the law and investigate this late complaint.

The complaint

1. Mrs B complained to the Council in July 2019 that it should not attempt to recover respite care charges for her late mother, Mrs C, for a period of respite care she received between 8 and 22 September 2017 amounting to £912. Mrs B says she was not told in 2017 there would be a charge in addition to the top-up amount. Mrs B says the Council should waive the charges because she disagreed with the charges in 2017 and believed they had been cancelled.

The Ombudsman's role and powers

2. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)

How I considered this complaint

3. I considered the information and documentation Mrs B and the Council provided. I sent Mrs B a copy of my draft decision and considered her comments on it.

What I found

4. Mrs B says she received a letter in August 2017 from the Council explaining that the top up for Mrs C's chosen care home would be £688 for two weeks in addition to Mrs C paying her usual contribution of £80. The letter says this is subject to a financial assessment. Mrs B says she did not know Mrs C would be required to pay anything else towards her care.
5. Following completion of the financial assessment the Council wrote to Mrs C care of Mrs B in November 2017. The letter explains as Mrs C owned her own property, and had capital over the threshold for Council funding, she would be required to pay the full cost the Council were paying towards her care charges, that is £456 per week in addition to the £344 paid by family as a top-up.

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6. Mrs B knew in November 2017 Mrs C was liable to pay the full cost of her care and wrote to the Council, challenging the decision to charge Mrs C, in January 2018. Mrs B complained to the Council in July 2019 that it was trying to recover a debt from Mrs C she believed to be cancelled. The Council responded to Mrs B's concerns and explained in November 2019 that the letter sent in 2017 explained Mrs C had capital over the threshold for council funding. I have not seen any evidence that Mrs B was advised the care costs were to be cancelled.
 7. Mrs B pursued the complaint about the charges in 2019 following the death of Mrs C when the Council invoiced her for the care costs. Mrs B could have come to the Ombudsman in 2017 or 2018 when she knew about the charges. There is no good reason for us to disapply the law in this case.

Final decision

8. We will not investigate this complaint. This is because Mrs B could have come to the Ombudsman sooner. There is no good reason to disapply the law and investigate this late complaint.

Investigator's decision on behalf of the Ombudsman