CASCAIDr

Centre for Adults' Social Care, Advice, Information and Dispute resolution

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BY EMAIL ONLY TO: The Monitoring Officer of the Council, the DASS and the Chief Finance Officer

(copied to NAFAO, and to the Local Government and Social Care Ombudsman)

22nd January 2021

Dear Sir or Madam

Referral to your statutory Monitoring Officer under the Local Government and Housing Act 1989 - your charging policy for non residential services - allegation of contravention of the Human Rights Act and s78(1) of the Care Act to act under the Guidance

Following the judgment in SH v Norfolk County Council [1] on 18th December 2020, we are writing to all Monitoring Officers, Finance Directors and DASSs within social services local authorities in England (cc to the LGSCO and NAFAO) to highlight a concern about likely contravention of an enactment and various rules of law, regarding many councils' non-residential care charging policies.

You may be aware that the Administrative Court held that Norfolk's charging policy discriminates against severely disabled people, contrary to Article 14, once read with Article 1 of the First Protocol of the European Convention on Human Rights.

The policy was found to be discriminatory in terms of human rights because it had a disproportionate impact on severely disabled people who have high care needs and significant barriers to work.

Norfolk has already resolved to make an initial amendment to the charging policy for non-residential care for people of working age, setting a minimum income guarantee of £165 per week, and using discretion to disregard the enhanced daily living allowance element of Personal Independence Payment.

We would like to explain why we think all councils need to reconsider their own charging policies, not just for minimum MIG thresholds, but also other ways in which their policies could be said to be discriminatory.

The court's reasoning

Severely disabled people receive higher benefits than less severely disabled people. Where someone is severely disabled and in receipt of the high rate of PIP for example, they will receive £89.15 per week. Where a person is less severely disabled, they will receive £59.70 per week.

The purpose of PIP is to help with the extra costs incurred as a result of having a long-term health condition or disability. Care is not the only extra cost incurred and severely disabled people are objectively likely to incur higher costs in terms of daily living than those who are less severely disabled, because mitigating dependencies incurs expenditure.

When comparing the incomes of the two groups and what they would be charged under a charging regime that adopts the bare minimum MIG figure with regard to the overall requirement that the charging policy must be affordable, it is clear that the most severely disabled people will pay a larger proportion of their income to councils meeting their needs.

Extending these concerns to Disability Related Expenditure policies

Many councils apply a **standard** DRE disregard that would leave less severely disabled people and those that are able to work, with little to no charging contribution, whilst severely disabled people's contributions would **remain high**.

The court held that where a charging policy has a disproportionate impact on severely disabled people who have high care needs and significant barriers to work, this is unlikely to be able to be justified, and hence constitutes unlawful indirect discrimination.

Any such policies have the perverse impact of limiting independence and are contrary to the advice in the Care and Support Statutory Guidance.

Income comparison demonstrating discriminatory impact of charging policies taking all available income after MIG

	Working	**Severely disabled**
Employed income at NMW	£360	£0
ESA	£0	£113.55
PIP	£59.70	£89.15
Disability Premium	£0	£34.95
Total income	**£0**[2]	**£237.65**
MIG[3]	£91.40	£91.40
DP	£40.35	£40.35
EDP	£19.70	£19.70
Total MIG	**£151.45**	**£151.45**
Contribution (income - MIG)	**£0**	**£86.20**

Actual income left	**£419.70**	**£151.45**
(after charging contribution)		

[1] SH, R (On the Application Of) v Norfolk County Council & Anor [2020] EWHC 3436 (Admin) (18 December 2020)

[2] £0 as employed income is excluded from the charging calculation

[3] MIG is based on a single working age adult with the applicable premiums contained in LAC 2020/2021

In the *Norfolk* case, the local authority tried to contend that SH's higher needs meant that she would incur a higher level of disability related expenditure ("DRE") and as this would be paid for with disability benefits, it would be disregarded as available income under regulation 15(1) of the regulations, allowing her to benefit from disregarded income in the same way as those with earnings are entitled to have those earnings disregarded.

The court rejected this argument as DRE is not at all coterminous with the higher rate of PIP and it is harder to prove and claim, than the full disregard of earnings, for those able to earn them. Much of SH's higher needs were met by support services provided by the council which cannot be claimed as privately incurred disability related expenditure in any event. The impact of the policy was that she had to pay for her statutory rights with every penny of assessable income she had, whereas others did not.

At CASCAIDr, we regularly act for people embroiled in challenges against local authorities' handling of DRE requests, claims against people for unpaid charges, and challenges to care plans where the Direct Payment is paid net of the charges as assessed, instead of gross.

The charging regulations place a duty on local authorities where disability related benefits are taken into account to exclude DRE incurred by the adult in the calculation of income. The concept is not defined by the regulations but examples are given in the guidance, along with the stance that authorities may not treat the concept of 'necessity' as based on the wholly separate analysis of what it is necessary to arrange or to provide under the Care Act, in order to meet the needs to the extent that lifts a person out of the descriptors and conditions that make for eligibility under the Care Act regulations.

Despite this, we find we frequently have to require authorities to address:

1. Failure to explain what the concept of DRE is in the first place as an aspect of Advice and Information duty – this results in many people not understanding what can be included as DRE, so as to be disregarded from their assessable income
2. Fettering of discretion through policies or practices which deem certain expenditures to be 'lifestyle choices' even if clearly related to the person's disability or condition,

without any further articulation as to why they are not 'necessary' expenditure for that person.

3. Rejection of asserted DRE on the basis that the expenditure is a 'health need' even though mental or physical illness is as relevant to establishing an entitlement to adult social care funding, as is a disability.
4. Failure to take into account evidence which suggests that expenditures are not merely related to the person's disability but that the expenditure ought to be regarded as 'necessary' because of human rights jurisprudence that refers to a principle whereby leisure and recreational activities can sometimes be the only way in which a disabled person is able to develop their personality within society, as provided for by the scope of article 8 Convention Rights - **and all the more so, the more seriously disabled the person is.**
5. Debt recovery action based on charging assessments that have not been reviewed in light of the circumstances in which the charges debt has arisen, contrary to the Guidance, or that have not ever included a thorough DRE assessment or consideration of affordability, despite that being the over-arching principle that is supposed to information charging discretion.
6. Inadequate care plans for direct payment clients, where the amount stated as the personal budget in the care plan is reduced by the client's assessed charges, and paid net of the charge, rather than invoiced for, leaving the service user with no option but to carry on funding the difference between the full personal budget and the amount received from the council into the DP account, unless they challenge the charging assessment by whatever means the council deigns to offer.

In the Norfolk case, the discriminatory impact was held not to be rationally connected to the asserted objective of saving public expenditure. We think that this means that if a council wished to assert or evidence that some other objectives were properly considered, it might be able to defend its policy, even if it was the same as Norfolk's.

However, even then, the judgment was very strongly worded in drawing attention to the fact that the guidance explicitly suggests an alternative policy (applying a maximum percentage of disposable income to be taken into account in charges). So any council with a policy like Norfolk's that treated all of the legally assessable income as available to be taken in charges would not only struggle in terms of being justifiable, but would also be challengeable for failure explicitly to consider the alternative suggested by the guidance, in terms of mitigating the disproportionate impact.

We think that any charging policy that takes all income over and above the MIG as available for care charges is now very likely to be unlawful, because the Guidance advises against it, and a very good reason is required to justify departure from that Guidance, in any event (*Rixon*).

Likewise, we contend, with standardised allowances for Disability Related Expenditure or unstated practice guidance as to why expenditure should not be regarded as worthy of disregard.

In our view, local authorities ought immediately to review their charging policies, and

a) Make a proposal to the Members to adapt the local policy so as to ensure that it does not discriminate against severely disabled people by ensuring that it does not take all available income over the MIG, as this is contrary to statutory guidance; and so that it takes account of the severity of a person's disability in some other way, as does the benefit system, **including as to the content of the DRE aspect of the policy**;

b) Review current debt recovery files, bearing in mind that all defendants will be entitled to raise the public law defence of illegality in the civil law proceedings in open court;

c) Review any care plans of those with direct payments that are being paid net of the charges, with a view to recalculating their charges on a proper basis and making up the shortfall between the amount paid and the amount that would have been required, had the person's charge been lawfully required to be lower, to make up the full amount of the personal budget, for the last year;

d) Review the last year's worth of charging assessments they have done, on the basis that many councils moved to a minimum MIG in that period, and people can complain to the council and then to the LGSCO for at least one year back in time - so as to quantify the number of people who are likely to be entitled to restitution of charges already paid, and communicate with them with a view to making a fresh calculation, based on a lawful policy.

We think that failure to do so will result in a flood of public law challenges (many, legally aided, and others by way of defence to civil proceedings, with applications as to the costs occasioned) that local authorities will be unable to defend.

The challenges would be framed in terms of the lawfulness of assessments, disputes about DRE and debt recovery in particular. For example, if a person is in debt for failure to pay care charges and the authority makes an application to the county court - the claim can be defended (perhaps even summarily) on public law grounds, because the policy upon which the charges are calculated will be unlawful. So it is in the immediate interest of local authorities to amend their policies as well as those they serve.

If we do not hear back from your Monitoring Officer within 30 days, an FOI request will follow to any non-responding authorities, enquiring as to whether the applicable minimum income guarantee has been **set** at the minimum, locally, and if so, for how long has that been the case; what is its approach to Disability Related Expenditure in terms of practice or policy guidance given to the staff; and asking how many people are being charged in each authority; how many at each banded rate; how many charged through being paid their budget net of the purported charge; how many people are in debt and how many county court applications the council in question has made.

We will then use this information to produce a report, highlighting which authorities have adopted a presumptively unlawful policy, and publicising it as widely as possible.

The impact of this will be that any person with an issue with their financial assessment or who is being pursued for a care charging debt will be enabled to apply to have their assessment quashed until the policy deficit and DRE approach has been addressed and their charging contribution and/or net budget lawfully arrived at. Failure to do so will inevitably result in judicial review proceedings for anyone who meets the means test.

That is why we suggest that the matter is one that is ideally suited to the Monitoring Officer's duty of overall governance.

If any recipient of this letter is unaware of the scope of the Monitoring Officer's role, and the independence required of that statutory officer, please see the accompanying annex for WHY, in terms of Parliament's intention, the role of the Monitoring Officer was introduced, and what is required of that named officer.

Yours faithfully

Belinda Schwehr, CEO

CASCAIDr

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Copies to

Michael King, LGSCO

NAFAO

Annex - the Monitoring Officer's role

The Centre for Adult Social Care Advice, Information and Dispute Resolution (CASCAIDr) is a registered charity that provides legal advice to users of adult social care.

CASCAIDr tries to help people enforce their rights to a full and fair Care Act process for identifying their needs and a sufficient personal budget.

We always prioritise dispute resolution before litigation and therefore use other appropriate remedies – for instance, the management review referred to in the statutory guidance at para 10.86 of the Care and Support Guidance, in the case of a disputed care plan, on which there is no agreement.

We use informal communication channels with Principal Social Workers and contacts within social services departments, rather than going straight to a threat of legal proceedings.

We also use referrals to the council's statutory Monitoring Officer under s5 of the 1989 Local Government and Housing Act.

The duty in that section is a separate and personal non-delegable function for which that office holder is responsible, under colour of that named paid statutory office. It is a lead governance role, not related only to the *Members'* conduct, but to the officers' discharge of their statutory duties (in enactments) and discretions (under enactments in light of core public law principles or binding case law precedents). It is conceptually distinct from that officer's *reporting* role in the case of any *prior* finding of the LGSCO, upon a complaint already rejected by the council in question.

The duty requires consideration and a decision, one way or the other, by the M.O., as to whether a referral alleging a contravention or likely contravention of an enactment, or rule of law is made out, or not. Anyone can make a referral, and it is free to make. There is no 'standing' test, as there is for a complaint or an application for judicial review. It is the purest kind of 'good governance' function that Parliament has ever thought fit to introduce.

As much as any other statutory duty, this duty is governed by public law principles and the statutory purpose.

a. The complaint system is not a means of disposing of a referral to the M.O.

When we make MO referrals we are sometimes told we should or could complain instead.

The statutory duty cited above, to come to a conclusion as the MO on any such referral, is not dependent on a prior complaint being made, and the client cannot be 'deemed' to be making a complaint in the situation where he or she is clearly refusing to do so.

Further, the scope of the MO's duty requires consideration that cannot feasibly be *expected* from a complaints officer, or an independent investigator, because of the fact that a sophisticated degree of legal knowledge may be required.

The courts (particularly the Administrative Court) do not regard the complaints system as an adequate or appropriate remedy for clear matters of *law*, in most cases.

b. It is a basic principle of public law that a named statutory officer given a specific role by Parliament is not allowed to delegate that statutory role (other than to a deputy M.O.).

We would fully expect you to want to pass the concerns in our referral on, eg to the Head of Service, and the Charging lead, for a view as to the facts, and for expressing your view as to the need to shift the council's position on this matter. The whole point of this internal lead governance role is so that an MO can justify not providing a report to all the Members by dint of internal influence in the light of law and legal principle.

But it cannot be a valid discharge of the role simply to pass it on to the Head of Service or Charging, *as if it were a complaint or a letter before action.*

c. The MO's duty must BE discharged, within a reasonable time, and in accordance with public law principles of transparency.

It is not acceptable in public law terms for an MO simply to refuse to *engage*, or a bald 'No likely contravention here' sort of a reply, when an MO could so easily state his/her reasons, or give at least an overview of any legal advice received, as to why a referral was so misconceived as to warrant an MO's disagreeing that it was made out.

Even a response to a pre-action protocol letter requires reasons for rejection of the contentions made.

d. The need for the M.O's independent opinion

We do not know if anyone in the legal department has been involved in providing advice to the social services department or the charging team, or an equalities officer, regarding the council's decision regarding its MIG.

If the client department has sought advice initially, we believe that your in-house solicitors from social services legal staff or the financial assessment and charging legal staff would be professionally conflicted from advising the Monitoring Officer.

In-house council solicitors are subject to the same duties to the Court and professional regulations regarding conflict of interest, as solicitors are, in private practice.

e. The test is not that the matter must be *proven*, in order to constitute a sound referral.

The statutory test includes the concept of the contravention being 'LIKELY', not proven, established, or clear.

There is governance to be done here, and that is why the MO has been given both the protection and resources, with which to do the duty, we would suggest.

We have researched the background to the creation of the Monitoring Officer Role, and would want you to take this into account please, from Hansard, July 1989:

Lord Hesketh

The duties which we have given to the monitoring officer and the chief finance officer are to draw to the attention of all members of the council the cases where the authority is about to do something illegal or improper, judged against objective standards, and not where they disagree with a matter of *judgment*.

The noble Baroness, Lady Fisher, referred to the descriptive term at the top of Clause 5 and asked whether the monitoring officer would just be providing friendly advice. As I said earlier, we want to reduce the number of cases. We hope that we shall be able to settle matters by giving advice rather than going to due process. That is obviously far more satisfactory in any walk of life.

Baroness Blatch

…I think that it is very important for there to be some form of protection for the officer, who will from time to time be required, in an atmosphere of intimidation, to give advice. He may have to warn a single member, a small sub-committee or the council as a whole that they may well be heading for a situation which is unconstitutional or illegal. For that reason, I think that all authorities should have someone nominated within the authority to ensure that all that the authority is doing in carrying out its functions is being done within a constitutional and legal framework.

...I was referring to any local authority anywhere contemplating either wittingly, or unwittingly, a particular proposal which may well turn out to be illegal or unconstitutional. It seems to me to be appropriate that someone within the authority should have the responsibility to advise and try to prevent such a situation from occurring. Further, where a particular member or members insist upon a particular proposal, then it is absolutely necessary to invoke this clause and to present a report. Moreover, I believe that it is right that that should go to the whole council.

...I think that this Clause provides the kind of protection which at least strengthens the arm of the "proper officer", as we would call him in my authority of Cambridgeshire, where he is backed by law and has not only the authority but also the duty to tell a member, members or the authority itself where they may be going wrong.

...I believe that if the monitoring officer is doing his job he will try everything short of having to produce that report; in other words, he will try holding meetings, private meetings, talking to members off the record and using all the avenues which are open to him to prevent such a situation. Therefore, early intervention is certainly not precluded by the clause.