

# **Report by the Local Government Ombudsman**

## **Investigation into a complaint against Cheshire East Council (reference number: 14 005 078)**

**22 July 2015**

## The Ombudsman's role

For 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.

## Investigation into complaint number 14 005 078 against Cheshire East Council

### Contents

Report summary.....	1
Introduction .....	2
Legal and administrative background .....	2
How we considered this complaint.....	4
Investigation .....	4
Conclusions.....	9
Decision .....	13
Recommended action.....	13

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 X - the complainant's mother and representative

Mr Y - the complainant

## Report summary

### Adult Social Care

Ms X complains on behalf of her adult son, Mr Y, who suffered spinal injuries playing sport in 2013. Ms X's complaint is about how the Council decided what care Mr Y needed; in particular the way the Council dealt with Mr Y's request to employ his mother as his carer using direct payments. The Council's decisions meant that while it had assessed Mr Y as needing 76 hours of care per week, the direct payment agreement it set up was for 48 hours care per week.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

To remedy the injustice caused the Council should within the timescales stipulated at the end of this report:

1. Apologise to Mr Y and Ms X for the faults identified.
2. Review its procedures.
3. Develop a risk assessment framework for support planning and provide a copy to the Ombudsman.
4. Provide training and / or written guidance to staff.
5. Retake its decision whether Mr Y can employ Ms X for more than 48 hours per week taking into account Government guidance on balancing choice and risk.
6. Discuss and update Mr Y's support plan and direct payment agreement to include his social hours and share it with him.
7. Pay Ms X the equivalent cost of the 76 hours per week care she has provided from 6 January 2014 until the date it retakes its decision about the number of hours Mr Y may employ her.
8. Pay £250 to Mr Y in recognition of the uncertainty and distress caused by the Council.
9. Pay £250 to Ms X in recognition of the uncertainty and distress caused by the Council.
10. Pay Ms X £100 for her time and trouble in bringing the complaint.

The Council has agreed to carry out these recommendations.

## Introduction

1. Ms X complains on behalf of her adult son, Mr Y, that the Council's social services team:
  - delayed in completing an assessment of need for Mr Y
  - delayed in deciding how many hours care Mr Y needed
  - delayed in deciding whether Mr Y could employ Ms X as his carer using direct payments under the Council's policy
  - wrongly limited the number of hours Mr Y could employ Ms X as is carer by reference to the Working Time Regulations
  - failed to provide satisfactory advice about direct payments and flexibility, choice and risk.

## Legal and administrative background

2. Councils have duties to make care arrangements for disabled persons under:
  - a. Section 21 of the National Assistance Act 1948
  - b. Section 2 of the Chronically, Sick and Disabled Persons Act 1970
  - c. Section 47 of the National Health Service and Community Care Act 1990.
3. Section 47 of the National Health Service and Community Care Act says a Council has a duty to carry out a community care assessment when a person comes to its attention that may be in need of services.
4. The Community Care (Delayed Discharges Act) places a duty on the health service to notify the Local Authority where a patient or their carer may be in need of services on discharge from hospital.
5. The basis for Councils to provide community care services via direct payments is set out in:
  - a. Section 57 of the Health and Social Care Act 2001
  - b. The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations, 2009 ['The Regulations']
  - c. Department of Health guidance: '*Guidance on Direct Payments for community care, services for carers and children's services*', 2009 ['The Guidance'].
6. The Regulations and Guidance say a Council cannot allow people to use direct payments to secure services from a close relative with whom they live unless '*it is necessary to meet a person's needs*'.

7. The Guidance says:
  - a. support planning and direct payments should empower individuals to make their own informed decisions, including decisions about risk; and
  - b. decisions about choice and risk must be accurately recorded in writing (*paragraph 97*).
8. The Department of Health has issued guidance: *'Independence, choice and risk: a guide to best practice in supported decision making'*, 2007. This says Councils should adopt a framework for risk assessment that takes into account that:
  - a. An individual with mental capacity who chooses to live with a level of risk is entitled to do so but a Council does not have to fund it
  - b. There needs to be a robust process whereby conflict about acceptability of risk can be properly debated and resolved
  - c. Services may need to intervene where one person's choice places unmanageable responsibility on another (for example a carer)
  - d. Risk management is not about bureaucratic back covering or hiding behind legislation
  - e. When a difficult decision has to be made a risk assessment should:
    - i. Identify hazards
    - ii. Decide who might be harmed and how
    - iii. Evaluate risks and decide on precautions
    - iv. Record findings and act on them
    - v. Review and update if necessary

*'These provide a framework to achieving the delicate balance between managing risks posed to the carer's own well-being against the pressures of their caring role and the needs and rights of the person using care services' (paragraph 2.36).*
9. Government guidance *'Putting People First'*, 2010 says if after an assessment a person is eligible for services, a support plan should be discussed and agreed and a copy given to the service user.
10. The Working Time Regulations 1998 ['WTR'] say an employee should not work more than 48 hours a week, unless they choose to. The law does not apply to domestic servants in a private household or to unmeasured working time. Unmeasured working time is where the duration of a worker's time is not measured or predetermined, or can be determined by the worker herself, for example family workers.

## How we considered this complaint

11. This report has been produced following the examination of relevant documents provided by the complainant and the Council and from information provided by Ms X by telephone.
12. The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

## Investigation

### Factual background

13. Mr Y was a full time student at university when he received a serious spinal injury playing sport in September 2013.
14. Ms X is Mr Y's mother. Ms X is a single parent who was in employed work before her son's injury. Ms X gave up work to become her son's carer.
15. The hospital notified the Council's adult's social services team about Mr Y in September 2013.
16. The Council says it was in contact with the hospital to ensure its own occupational therapist (OT) could become involved at '*the relevant time*'. The Council has provided no records to support this. There is no evidence of involvement by the Council's OT.
17. The hospital discharged Mr Y on 19 December 2013.
18. The Council told us reablement services were available to Mr Y from 19 December 2013. It has not provided any records from the reablement team. The Council says Ms X and Mr Y refused reablement services until 6 January and then would only accept one hour per day for personal care.
19. Ms X told us Mr Y did ask to defer reablement services from 19 December until the New Year. This was so he could settle in at home after a long hospital stay. Ms X denies Mr Y refused services. Ms X says the Council only offered one hour per day, which was inadequate. As Ms X could not leave Mr Y unattended at home all day she had to stop work.
20. Mr Y saw one of the young reablement carers on a night out with friends. Mr Y found this highly embarrassing and after this became reluctant to have Council care staff attend to his personal care needs.
21. The Council says reablement services stopped in January 2014 when Mr Y moved to Oxford for rehabilitation.

22. Ms X told us Mr Y did not have rehabilitation but was offered an eight week course of intensive physiotherapy in Oxford funded by a sports organisation. Mr Y had to be accompanied as the service was not a residential unit or care home. Ms X had to stay with Mr Y in Oxford and meet his care needs for eight weeks. Ms X says the Council offered no support during this period.
23. On 24 February 2014, an occupational therapist at the unit in Oxford encouraged Ms X to approach the Council about social care direct payments for Mr Y. This OT also contacted the Council.
24. The Council assigned Mr Y a social worker (Officer A) on 28 February 2014.
25. Officer A met Mr Y on 19 March. Reablement and agency services were discussed. Mr Y said these services could only offer visits at times which were too restrictive, for example the afternoon visit would be too early. Mr Y asked if Ms X could be his personal assistant (PA).
26. Officer A considered that Mr Y had an argument for declining Council or agency services. As a young man who enjoys socialising with his friends direct payments would give Mr Y more flexibility and choice in meeting his care needs.
27. Officer A referred the request to a more senior colleague (Officer B) to consider whether there were '*exceptional circumstances*' to employ Mr Y's mother.
28. Ms X told us they heard nothing further from the Council until she made a complaint on 13 May 2014 about delay. Officer A discussed the request for Ms X to be Mr Y's PA with Officer B that day. Officer A has recorded that Officer B told her to offer a package of care, not direct payments but did not record Officer B's reasoning.
29. Officer A then told Mr Y that Ms X could not be his PA. Officer A has made a detailed note of this discussion and that Mr Y was upset by it. The notes do not show what reasoning Officer A gave Mr Y for the decision, only that the Council had refused the request.
30. Mr Y again said he did not want a stranger carrying out personal care tasks. He also complained that his mother had given up work to care for him and this was causing financial difficulties. Officer A said Ms X decided this before any involvement from social services.
31. Officers A and B met Ms X and Mr Y on 28 May 2014. Ms X explained she had given up her job to care for Mr Y and felt Mr Y's situation warranted her becoming his PA. Officer B explained the guidelines for employing a family member living with Mr Y and that this was possible in '*exceptional circumstances*'. Ms X felt Mr Y met this test.
32. Officers A and B explained the Council had assessed Mr Y as needing eight hours per day personal care (56 hours per week):
  - a. 2.5 hours morning (washing, dressing, continence, breakfast)
  - b. 1 hour lunch (food preparation and personal care as required)



- c. 1 hour afternoon (preparation evening meal and personal care as required)
  - d. 1 hour night (undressing, catheter care, transfers)
  - e. 1 hour overnight (repositioning, catheter care, reassurance due to spasms)
  - f. 1.5 hours support to access standing frame
33. There was also a discussion about Mr Y receiving extra social hours as part of his care package. The Officers did not give a copy of the assessment or proposed support plan to Mr Y.
  34. Officer B said he would discuss Mr Y employing Ms X with his manager (Officer C).
  35. On 2 June 2014, the Council assessed that Mr Y should have 20 social hours per week for supported sport and leisure activities as well as the 56 personal care hours. Again, it did not share a written assessment or plan with Mr Y.
  36. On 13 June 2014 the Council responded to Ms X's formal complaint about delay and said it hoped to make a decision about employing Ms X and to complete the assessment / care plan soon.
  37. Ms X then brought her complaint to the Ombudsman.
  38. In June 2014 Officer C advised Officer A that Ms X *'cannot legally work the hours assessed and an alternative needs to be discussed'*.
  39. Officer A asked to visit Ms X again. Ms X declined another visit. Officer A explained by telephone that *'legally she could not work the hours Mr Y has been assessed as needing'*. Ms X says Officer A referred to the Working Time Regulations 1998 (WTR) and told Ms X the maximum she could work under WTR was 46 hours.
  40. Mr Y was firm he did not want care from any other source. On 1 July 2014 Ms X told the Council she would accept 46 hours via a direct payment and would provide the rest of Mr Y's care without pay. Officer A then advised that direct payments for Mr Y to employ Ms X had not yet been agreed.
  41. Ms X told us she agreed to a reduced package because she was by then struggling to pay the mortgage and bills.
  42. On 3 July 2014 Officer B asked Officer A to amend the support plan to 46 hours.
  43. Officer A then visited Ms X and Mr Y at home on 7 July. Ms X and Mr Y complained about delay. Officer A said the Council had still not decided whether Mr Y could employ Ms X as his PA.
  44. Officer A noted Ms X and Mr Y wanted to discuss the 46 hour limit *'as recorded earlier by Team Manager under employment law'*. Ms X said she wanted to opt out of the WTR. Officer A then explained Ms X could not work more than 46 hours as the Council had to consider the impact on her to prevent carer breakdown.

45. At this meeting Mr Y told Officer A he would like to use his social hours to employ his grandfather, or a friend, to escort him to social activities.
46. On 21 July 2014 (after intervention from us about delay) the Council said it would backdate any direct payments it agreed to February 2014.
47. On 11 August the Council told Ms X it would allow her to be Mr Y's PA. It confirmed this in writing on 13 August, but said it would review the position quarterly.
48. On 12 August Ms X again told the Council she wished to opt out of the WTR as Mr Y should receive the full 76 hours of support as assessed. Officer A referred the matter to Officer B to respond. The Council did not provide a response.
49. On 13 August Ms X told us the Council had put direct payments on hold because of our investigation. We told the Council the investigation should not interfere with it putting Mr Y's care package in place.
50. On 28 August, Officer A visited Mr Y to complete the direct payment agreement. Ms X says Officer A had been due to visit on a previous day but had to cancel. Officer A then turned up without an appointment on 28 August when Mr Y was in, but Ms X was not.
51. Ms X told us Mr Y did not want to sign the agreement as he had concerns this would impact on the dispute about assessed hours. When Ms X returned home she discussed the agreement with Mr Y and he agreed to sign it. Officer A had insisted the agreement be returned immediately so Ms X says she hand delivered it. Officer A was not at the office so Ms X left it with a colleague of Officer A.
52. On 10 September 2014, in response to our enquiries, the Council said it had not yet set up the direct payment as Mr Y had refused to sign the agreement. In fact the signed agreement was logged as received by the Council on 2 September. The agreement referred to 47 hours direct payments.
53. We intervened again and the Council agreed it had received the agreement and would now pay the direct payments.
54. The Council recognised there had been unreasonable delay on its part. It received the request for direct payments on 24 February 2014 and would usually expect to complete an assessment in four weeks. It said it would backdate payments to 24 March 2014.
55. Ms X advised us that due to difficulties setting up payroll services there was further delay. Direct payments did not start until October 2014.

### **The Council's evidence**

56. We asked the Council why it had limited the care package using the WTR when:
  - a. It was not the employer, Mr Y would be Ms X's employer using direct payments.
  - b. Ms X had said she wished to opt out of WTR.

- c. There was a lack of legal clarity whether the WTR applies to a carer who is a member of the family and lives in the same house; a carer in Ms X's situation might be considered a domestic servant or providing unmeasured work.
  - d. The WTR limit is 48 hours, not 46 or 47 as it had suggested.
57. The Council told us it did not limit Mr Y's direct payments for legal reasons due to WTR (although it accepts the case notes mistakenly refer to it being a legal matter). It says it has used WTR as a *'guide'*.
  58. The Council told us it cannot support Ms X working more than 48 hours. It does not believe that one carer could provide *'74'* hours of support safely, appropriately and to the standard required. The impact of providing such a level of care on the carer would be significant and the Council was not willing to commission such a service.
  59. The Council told us it would consider additional support from other sources (including from other PAs) when Mr Y felt able to accept such support.
  60. The Council confirmed reference to 46 or 47 hours was an error and it would allow 48 hours.
  61. The Council told us it had referred to the Regulations on direct payments in deciding whether it was acceptable for Mr Y to employ a family member. The Council says as there are *'exceptional circumstances'* in Mr Y's case it has agreed a *'short term'* arrangement for Ms X to act as PA. The Council told us it does not regard Ms X being the PA for her son as a sustainable long term support arrangement. It recognises that, at this stage of Mr Y's recovery, it is the only option he will consider.
  62. The Council told us it has no specific guidance or policy about the maximum hours of work for one carer. It has taken as a guide the WTR in making this decision about what constitutes an appropriate support plan and regime for a carer.
  63. The Council told us that as part of the community care assessment and support planning between March and August 2014 it explored several alternatives with Mr Y and Ms X in *'prolonged discussions'*. This included how direct payments could be used flexibly. It says Ms X and Mr Y were *'very focussed on the option of [Ms X] being the Personal Assistant (PA) for her son and other options were discussed but rejected by them'*.

## **Ms X's evidence**

64. Ms X told us she had to give up work when Mr Y was discharged from hospital with one hour support per day. Her financial position as a single parent with a mortgage was very difficult and made worse by the Council's delay. Ms X says she would have taken some leave from work in any event, but would have expected a care package to be in place much earlier.
65. Ms X says while Mr Y does need a high level of care, as this takes place within the home between a parent and a child, it is different than being in formal employment. She can

take regular breaks and get on with other tasks or activities around the home when Mr Y does not need her.

66. Ms X says the Council was not concerned about her ability to manage the care from December 2013 until October 2014 when it left Mr Y with 1 hour of care per day.
67. Ms X says while she would like Mr Y to consider other carers in the longer term, at present he wants her to attend to his personal care needs. Mr Y has had to come to terms with life changing injuries and needs a period to adjust.
68. Ms X says that while the Council has explained why it will fund 47 (now 48) of the 56 hours per week personal care (due to WTR / carer breakdown), it has not explained why it will not fund the 20 social hours. Mr Y was willing to consider other carers (for example his grandfather) for leisure opportunities and told the Council this.
69. Ms X believes the Council has restricted the care package to 47 (now 48) hours to save costs.
70. Ms X says the Council did not explain how direct payments could be used flexibly. It did not explain hours (particularly social hours) could be used for leisure clubs or services, not only to employ a person.

## Conclusions

### Fault

#### *Delay*

71. Due to an absence of records it is not clear when the Council started assessing Mr Y's needs. While the Council says it was fully involved from September 2013 and helped plan Mr Y's discharge, it has provided no evidence to support this.
72. Mr Y was discharged home with one hour care support per day. There is no assessment or care plan to justify this level of support. It is difficult given the severity of Mr Y's injuries, and the later assessment, to conclude this level of support was appropriate.
73. There is no record of Ms X and Mr Y rejecting support above one hour per day. We would expect such a discussion to have been carefully recorded. Failure to do so is fault. In the absence of records we conclude one hour per day care was offered to Mr Y.
74. The Council did not assess whether Mr Y required support during his stay in Oxford. This is fault. Mr Y would have needed the same level of support when having physiotherapy in Oxford as at home.
75. The Council should have sought input from the Oxford physiotherapist before Mr Y returned home in March 2014. Failure to do so is fault.
76. There is no evidence the Council discussed with Ms X her needs as a carer or how her employment could be sustained with one hour's care per day for Mr Y. This is fault.

77. Ms X had no alternative other than to stop work and care for Mr Y on his discharge from hospital and during his physiotherapy placement in Oxford.
78. The Council started its care assessment on 28 February 2014 but did not provide a decision or written agreement until 28 August 2014, and then only after our intervention. This is fault.
79. There was a long delay by the Council in reaching a decision whether Mr Y could employ Ms X as his PA and in reviewing and reversing that decision (March to August 2014).
80. The Council agrees the assessment and decision process took too long and it should have completed it within four weeks.
81. Even when the Council agreed Mr Y could employ Ms X and offered to backdate payments it wrongly put this decision on hold awaiting our investigation. This is fault. An Ombudsman investigation should not delay a Council putting a support plan in place.
82. The Council then wrongly said Mr Y had not returned the direct payment agreement. This is fault and delayed payment until October 2014.
83. It was clear in September 2013 Mr Y had permanent injuries requiring a very high level of care. Mr Y's long hospital stay and extended physiotherapy placement provided ample opportunity for the Council to have carried out an assessment and put in place a care package before Mr Y returned home. This did not happen and is fault. Mr Y would probably have deferred the start of his care package to 6 January 2014, as he did with reablement services.

#### ***Employment of family member***

84. On 19 March 2014 Mr Y requested he be allowed to employ Ms X as his PA using direct payments. The Council rejected Mr Y's request on 13 May 2014. No reasons were given or recorded. This is fault.
85. The decision was made during a verbal discussion on the day Ms X complained about delay. It appears the decision was made in the moment without any detailed consideration of the case. Officer A had felt Mr Y had '*an argument*' for employing his mother. There is no evidence to show Officer B weighed up the views of Officer A and Mr Y in reaching his decision. This is fault.
86. The Council has applied a test of '*exceptional circumstances*' for employing Ms X. This is not the test in the Guidance which is whether employing a family member is '*necessary*'. In considering whether it was '*necessary*' to employ Ms X this must require consideration of how Mr Y's care needs would otherwise be met. There is no evidence the Council considered the risks of Mr Y not receiving the care or Ms X providing the care without pay.
87. After the Council reversed its decision, it told the family it would review whether Mr Y could continue to employ Ms X quarterly. It did not tell Mr Y it considered this to be a short term arrangement, although this is what it told us on 10 September 2014. This is fault and leaves Mr Y and Ms X with continued uncertainty.

**Care plan**

88. Ms X offered to provide the extra care free on 1 July 2014.
89. The Council changed the support plan to 46 hours (as the maximum Ms X could work) on 3 July even though:
- a. Officers had not yet discussed alternatives with Mr Y (as advised by Officer C in June)
  - b. The Council had not decided whether Mr Y could employ Ms X (this decision was not made until 11 August 2014).

This is fault.

90. While the care package was described verbally on 28 May, and the support plan amended on 3 July, the Council did not share a copy with Ms X or Mr Y. The first written confirmation Mr Y received of the hours assessed was when he saw the direct payment agreement on 28 August 2014. This is fault.
91. The direct payment agreement then had the wrong figure of 47 hours. This is fault.

**Refusal of Mr Y's direct payment proposal & WTR**

92. The Regulations say social care direct payments essentially must be offered where a disabled person is capable of managing them. The Guidance indicates grounds on which a Council can refuse.
93. A Council can refuse to allow direct payments to be spent on a particular service on grounds of risk.
94. The WTR is not in itself a legal basis for a Council to refuse direct payments. A carer can work for more than 48 hours per week if they choose to opt out of the WTR. The WTR is a matter between the employer (service user) and the employee (PA / carer).
95. We conclude the Council did limit the care package to 46 / 48 hours per week because of a mistaken belief it could apply the WTR. This is fault. The Council changed its reasoning to grounds of risk only when Ms X said she would opt out of the WTR and when we questioned the Council's position.
96. When Ms X said she would opt out of the WTR on 12 August 2014, the Council said it would provide a formal response for its reliance on WTR. It failed to do so. The Council only provided a formal response when asked by us to do so.

**Choice and risk**

97. The Council has now stated it will not support Mr Y employing Ms X for more than 48 hours per week on grounds of risk.
98. A Council can refuse to allow direct payments to be spent on a particular service on grounds of risk, but only if there has been a detailed assessment and discussion about choice and risk.

99. The Council did not carry out a risk assessment or any detailed discussion about the hours of care Ms X could safely and sustainably provide. This is fault.
100. It remains unclear why the Council has decided Mr Y can employ Ms X for 48 hours per week but not 56 hours. We are not satisfied the Council has properly considered whether the nature of the work (in her own home, an element of choice when and how it is delivered, with regular breaks) means 7 hours care per day is acceptable but 8 hours per day is not.
101. We recognise the exceptional circumstances of this case and the efforts of the Council to achieve the best outcome for the person affected and his family in a very difficult situation. This includes consideration of the best interests of Ms X as primary carer.
102. We would not criticise a Council for considering the risks of employing a family member as carer or of carers working unreasonable hours, however the absence of a risk assessment or detailed discussion in this case casts doubt on the decision the Council has reached.

### **Social hours**

103. The assessment determined Mr Y needed 56 hours of personal care per week and 20 social hours.
104. The direct payment agreement is for 48 hours, as the maximum number of hours the Council is willing for one carer to provide.
105. Mr Y was willing to use his social hours to employ his grandfather or a friend to transport him to leisure activities. Some of his leisure needs could also potentially be met through the purchase of services, clubs or subscriptions. The Council has not responded to Mr Y's proposals for his social hours or explained why it has not included these 20 hours in the direct payment agreement. This is fault.
106. We can see no reason the Council has not included the 20 social hours in the direct payment agreement. It should now do so.

### **Advice about care options**

107. The Council told us there were '*prolonged*' discussions with Mr Y between March and August 2014 when it discussed the options of Mr Y employing a PA other than his mother or employing staff via a care agency. We have seen no evidence to support this.
108. There was mention of alternatives on 19 March, but later discussions were limited to the Council defending its decision that Mr Y could not employ Ms X. The support plan had already been changed / reduced to 46 hours on 3 July before Officers visited Ms X and Mr Y on 7 July.
109. Mr Y was resistant to consider alternatives for his personal care hours but there is no evidence the Council discussed the issue in detail, for example whether it could source carers who were not his age. There is also no evidence it discussed how direct payments could be used flexibly to buy services rather than only to employ a person. This is fault.

## Injustice

110. Mr Y is a young man who in September 2013 suffered life changing injuries. It was clear from the outset Mr Y would need a significant care package. This should have been in place for when Mr Y was discharged from hospital with services starting on 6 January 2014 (the date Mr Y wanted services to start). The support plan was not set up until October 2014. The social hours element of the support plan has still not been implemented.

111. Failure to plan and provide a suitable care package in a timely way has caused:

- a. distress
- b. financial difficulty
- c. uncertainty
- d. Mr Y's assessed eligible needs not being adequately met
- e. Ms X to stop work and provide 76 hours care per week
- f. time and trouble pursuing the complaint.

112. Ms X and Mr Y still have uncertainty because:

- a. the Council has agreed a short term arrangement for Mr Y to employ Ms X
- b. flaws in the decision making process cast doubt on whether the decision on risk is sound.

113. The Council has offered to backdate direct payments for 48 hours of care per week to 24 March 2014. This is not a sufficient remedy for the faults identified.

## Decision

114. There was fault by the Council which caused injustice to Mr Y and Ms X.

115. The Council has accepted the faults in procedure in this case.

116. The Council should take the steps identified below to remedy the injustice.

## Recommendations

117. To remedy the injustice caused the Council should:

- a. Within four weeks from the date of this report apologise to Mr Y and Ms X for the faults identified.
- b. Within eight weeks from the date of this report review its procedures to ensure:



- i. care planning where someone sustains severe injuries takes before their discharge from hospital, not after
  - ii. there is an early and full discussion of care options with service users including about direct payments.
- c. Within three months from the date of this report develop a risk assessment framework for support planning taking into account the guidance in '*Independence, choice and risk: a guide to best practice in supported decision making*', (2007) and provide a copy to the Ombudsman.
- d. Within four months from the date of this report provide training and / or written guidance to staff on:
  - i. risk assessment in support planning;
  - ii. the need to have detailed discussions with service users about choice and risk;
  - iii. the importance of record keeping, particularly where disputes arise between service users wishes and what the Council is willing to support / fund;
  - iv. the Working Time Regulations explaining these are not a legal bar to a person working more than 48 hours per week where the person opts out of the Regulations and a risk assessment supports it.
- e. Within four weeks from the date of this report retake its decision whether Mr Y can employ Ms X for more than 48 hours per week by:
  - i. carrying out a risk assessment;
  - ii. discussing the balance of choice and risk with Ms X and Mr Y;
  - iii. providing a written decision with reasons;
  - iv. explaining clearly any implications arising from its new decision about employing Ms X (for example, whether it is a short term arrangement, or a long term arrangement subject to reviews).
- f. Within four weeks from the date of this report discuss with Mr Y:
  - i. how direct payments can be used flexibly to purchase services or items, not only to employ a person;
  - ii. the options for meeting his social needs;
  - iii. whether he can employ his grandfather or friend to transport him to leisure activities;

- iv. how Mr Y's 76 hours of assessed eligible needs can be met if not by employing Ms X, Mr Y's grandfather or Mr Y's friend;
  - v. if he would find it helpful to involve an independent voluntary agency or advocate to support him in planning his care package.
- g. Within four weeks from the date of this report update Mr Y's support plan and direct payment agreement with his social hours and any other changes and share it with him.
- h. Within eight weeks from the date of this report pay Ms X the equivalent cost of the 76 hours per week care she has provided from 6 January 2014 until the date it retakes its decision about the number of hours Mr Y may employ her. This is £788.88 per week using a direct payment rate of £10.38 per hour. The Council may deduct from this figure:
- i. direct payments already paid during this period;
  - ii. Mr Y's assessed financial contribution.

The Council should not deduct any employee deductions, but pay this sum to Ms X by way of an ex gratia payment. This recommendation is not an indication we consider 76 hours an appropriate number of hours for one carer to work. It is an acknowledgement of the amount of care Ms X has, in practice, provided.

- i. Within eight weeks from the date of this report pay £250 to Mr Y in recognition of the uncertainty and distress caused by the Council.
- j. Within eight weeks from the date of this report pay £250 to Ms X in recognition of the uncertainty and distress caused by the Council.
- k. Within eight weeks from the date of this report pay Ms X £100 for her time and trouble in bringing the complaint.

118. The Council has agreed to carry out these recommendations.