

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

**Investigation into a complaint against
North Tyneside Metropolitan Borough Council
(reference number: 17 002 928)**

27 February 2018

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.

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

Mrs X – the complainant

Mrs Y – the complainant's representative

Report summary

Education and Childrens Services – Family and Friends carers

Mrs X complains the Council has paid her an incorrect allowance as Special Guardian for her two granddaughters. Her representative Mrs Y says the Council has been paying the same incorrect allowance to 171 other Special Guardians.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy injustice caused to Mrs X by the Council's fault calculating Special Guardianship allowance, we recommend within three months of the date of this report the Council:

- implements the new policy for Special Guardianship allowances;
- identifies all existing Special Guardians that might be affected by the change and write to them to explain the new policy;
- calculates and backdates from November 2013, all Special Guardianship allowance payments for which Mrs X is eligible;
- writes to Mrs X to apologise for its delay implementing the new policy and pays her and Mrs Y £200 each to remedy the further time and trouble they have experienced resolving this complaint during the past 12 months;
- identifies all other Special Guardians affected by this fault since November 2013; and
- makes backdated payments to those Special Guardians, calculated using the correct new policy.

The Council has agreed to carry out these recommendations and we welcome its positive response to this report. It 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*)

The complaint

1. Mrs X complains the Council has paid her the incorrect allowance as the Special Guardian for her two granddaughters. She says it wrongly calculated the allowance as a percentage of its fostering allowance. Her representative, Mrs Y, says the Council is paying the same incorrect allowance to 171 other Special Guardians.
2. Mrs X wants the Council to recalculate and correctly pay her allowance, pay her back what it owes and do the same for the other Special Guardians.

Legal and administrative powers

The Ombudsman's role

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*)
4. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)

Special Guardianship – the law, guidance and the Council's policy

5. A Special Guardianship Order (SGO), granted by a Court, gives the Special Guardian parental responsibility for a child who is not their own. It does not entirely remove the parental responsibility of the birth parent but limits it.

Financial support to Special Guardians

6. Councils should normally comply with statutory guidance unless they can show local circumstances justify exceptional reasons not to.
7. Statutory Guidance for Special Guardianship 2005 says financial issues should not be the sole reason a Special Guardianship arrangement fails. The Special Guardianship Regulations 2005 say financial support can be paid to Special Guardians to support continuing the arrangement after an SGO is made.
8. Where a council assesses a Special Guardian's need for financial support, Regulation 13 states councils must take account of:
 - other benefits available to the Special Guardian or child;
 - the Special Guardian's financial resources, including any tax credit or benefit available if the child lived with them;
 - the amount required by the person for reasonable outgoings and commitments (excluding outgoings in respect of the child); and
 - the financial needs and resources of the child.

This is known as means testing.

9. The Guidance says in determining the amount of ongoing financial support (sometimes called a Special Guardianship allowance), a council should “*have regard to*” the amount of fostering allowance that would have been payable if the child were fostered. Any means test should use this maximum payment as a basis for calculation.
10. Case law has further considered this matter. In 2010, the Court (*R v Kirklees Council*) found paying Special Guardianship allowance as a fixed percentage of fostering allowance without any justification did not comply with the Guidance and was unlawful. The Court said councils should pay Special Guardianship allowance at an equivalent rate to foster carers (with the deduction of Child Benefit if appropriate). A second case in 2012, (*R v London Borough of Merton*) found that councils should use the National Fostering Network’s minimum allowances as a starting point for calculation and “*the decision to adopt a level of allowance for special guardians of two thirds of the Fostering Network’s minimum allowances was unlawful*”.
11. An Ombudsman’s report, published in July 2013, ([12006209](#)) found fault by Liverpool Council in calculating its Special Guardianship allowance at a level below the amount it paid foster carers.
12. From time to time we publish focus reports on key issues of local government practice, drawing on lessons from complaints. In November 2013 we published “[Family Values: Council services to family and friends who care for others’ children](#)”. We sent the report to all councils. We expect councils to circulate reports to appropriate departments.
13. The report refers to the 2010 *R v Kirklees Council* case. It states “*the court said the rate a local authority sets for Special Guardianship Allowance should be in line with its Fostering Allowance*”. One of the case studies in the report “*Fiona’s Story*” highlighted fault by a council that paid Special Guardianship allowance at a rate less than the rate it paid its own foster carers. A section in the report on promoting good practice said councils should “*Pay special guardians the same rate as foster carers*”. The report asked councillors on scrutiny committees to ask “*Are the rates to carers being paid in accordance with statutory guidance?*”.

The Council’s policy during the period covered by Mrs X’s complaint

14. The Council’s policy (Financial Support and Initial Information for Special Guardians 2016-2017) implemented in December 2015 was that:

“The Local Authority maximum payment [of financial support to Special Guardians] is a percentage of the Fostering Allowance based on the child’s age, which is at the discretion of the Service Manager”.
15. The Council’s previous policy, operational at the start of this complaint and since 2010, was also that Special Guardianship allowance be calculated as a percentage of the Fostering Allowance.

How we considered this complaint

16. We have produced this report following the examination of relevant files and documents.
17. We gave the complainant and the Council a confidential draft of this report and invited their comments. We took any comments received into account before the report was finalised.

What we found

Events before this complaint

18. Mrs X was Special Guardian to her grandchild when in November 2011 she complained to the Council about payment of Special Guardianship allowance. Mrs X's email to the Council of 26 November 2011 drew attention to her concerns the Council was capping Special Guardianship allowance at or below a percentage of fostering rates. She said she believed the Council was paying Special Guardians an allowance at the rate of "*only 25% of core fostering allowance*" per child.
19. She said she thought this was unlawful. She asked the Council to urgently review its policy. She drew attention to the 2010 (*R v Kirklees Council*) case. The Council dealt with this complaint to Mrs X's satisfaction but it did not review or change its policy on allowances or reimburse other Special Guardians.

Background to this complaint

20. Mrs X became Special Guardian to two more grandchildren in March 2015. The Council again agreed to pay Mrs X a Special Guardianship allowance using its policy. This meant it calculated the allowance as a percentage of its fostering allowance.
21. Mrs X complained to the Council in February 2016 that the allowance was incorrect. Mrs X went through three stages of the Council's complaint procedure, arguing the calculation was incorrect and asking for correct payments to be made and backdated. Mrs Y supported Mrs X to make this complaint.
22. The Council took legal advice on its policy. It got legal advice on 26 April 2016 that its policy was not compliant with statutory guidance because it calculated the Special Guardianship allowance as a fixed percentage of its fostering allowance.
23. In the Council's final response to Mrs X, dated 20 September 2016, it accepted its policy was not fit for purpose and needed to be reviewed. It said it was investigating 171 other Special Guardianship allowance cases that could have been affected by the unfit policy. The Council said it would make correct payments to Mrs X, backdated to March 2015, once it implemented a new policy compliant with statutory guidance.
24. The Council apologised for the time taken to resolve the matter and offered payments of £200 to Mrs X and £200 to Mrs Y who had helped Mrs X make her complaint. These payments were to remedy injustice caused by the time and trouble Mrs X and Mrs Y had gone to.
25. The Council wrote again to Mrs X on 28 September 2016 recalculating her Special Guardianship allowance and offering repayment based on that calculation. It said it was still considering advice on a new financial assessment process and expected to put this in place by 1 December 2016.
26. Mrs Y and the Council continued to correspond about the accuracy of its calculations of Mrs X's allowance. Mrs Y said the Council was still calculating its maximum Special Guardianship allowance payment as a capped percentage of what it would pay as fostering allowance, rather than using this as the starting point for the calculation as the law required. Mrs Y then complained to us on Mrs X's behalf.

Council change in policy

27. In response to our enquiries the Council confirmed its policy for Special Guardianship allowance did not comply with statutory guidance. It had not been able to develop and implement a new policy by December 2016 as it intended. It had still not calculated Mrs X's Special Guardianship allowance using a correct policy.
28. On 11 September 2017, the Council's cabinet considered a report on its Special Guardianship allowance policy. The cabinet report said the Council's policy was not in accordance with legislation, guidance and case law. It said application of the current policy *"results in a failure of the maximum Special Guardianship Allowance paid to eligible Special Guardians to equate in financial terms with the Authority's Fostering Allowance"*.
29. The cabinet report said the Council had reviewed the approach taken by other councils in the region and *"only this Authority and one other calculated the actual Special Guardianship Allowance payments as a percentage of the maximum amount"*.
30. The Council therefore agreed a new policy that:
"The Local Authority maximum payment will be equivalent to the Fostering Allowance based on the child's age, plus any additional enhancement that would be payable to meet any special needs of the child or exceptional circumstances which will require such an enhancement which is at the discretion of the Service Manager."
- It said this would ensure equivalence between the maximum fostering allowance and the maximum Special Guardianship Order allowance. It did not give a timetable for implementation.
31. The Council said it would consider the financial position of all current Special Guardians arising from this change in policy. Its initial view was it should only backdate revised payments to other Special Guardians from 26 April 2016 onwards when it obtained legal advice because of Mrs X's 2016 complaint.
32. It says it only knew its policy was not compliant after reading that advice. Until then it believed its policy fully met statutory requirements.
33. The Council is carrying out detailed work to assess the cost of carrying out the agreed actions from this report. It is also reviewing other policies and procedures relating to the calculation and payment of allowance to carers.

Conclusions

34. The Council's policy of Special Guardianship allowance calculation has been incorrect and at fault since 2010. This was when case law established that allowances should not be calculated as a percentage of fostering allowance. Ideally all councils should be aware of such a significant case, review its implications, and amend practices accordingly.
35. Mrs X drew the Council's attention to concerns about the calculation methodology in November 2011. She cited relevant case law. She asked the Council to review its approach. Although the Council resolved her case it missed the opportunity to put matters right for others at that point. This is failure by the Council to listen to and learn from complaints and represents a significant fault.

36. Our published report in July 2013 and focus report in November 2013 made it clear the Council's approach was flawed and should be reviewed. For the Council to continue to fail to act, even after we alerted the sector to the problem in our reports and made it aware of the view we would take is yet further fault.
37. The Council did not act until Mrs X complained again in 2016. It took another 12 months for it to develop a policy that complies with statutory guidance.
38. In summary, we find fault occurred in 2010 and escalated considerably in 2011 and 2013 when the Council failed to act on clear information it could reasonably have been expected to act upon. This fault has caused injustice to Mrs X and at least 171 other Special Guardians.
39. Turning to an appropriate remedy. We reject the Council's initial view that it should only backdate lawful payments of allowance to 2016 when it eventually sought legal advice. It could and should have acted far sooner.
40. We need to consider what is practical in deciding when is an appropriate time to backdate payments from. The further we go back, the more difficult it is for the Council to draw upon accurate records. We also consider it appropriate to consider what is a proportionate remedy to expect the Council to deliver in these circumstances.
41. Taking all these factors into account, we believe the publication of our Focus Report in November 2013 marks a clear landmark, rooted in our casework beyond which it is incontrovertible that the Council should have known about this issue and should have acted.
42. It is therefore practical, proportionate and reasonable we should ask the Council to remedy injustice to others arising from that time forward.
43. The Council should now promptly implement the new policy, use it to calculate Mrs X's allowance and pay her the correct allowance.
44. The Council has already paid Mrs X and Mrs Y £200 each for their time and trouble in pursuing their complaint. It should pay them both a further £200 each to remedy additional injustice caused by its further 12 month delay resolving this matter.
45. The Council should also identify all other Special Guardians affected by its fault since November 2013. It should calculate and make appropriate backdated payments to those affected by its policy.
46. The Council intends to work with other councils in the area to review policies for Special Guardians to ensure they get the help and support they are entitled to. We will write to the other council mentioned by North Tyneside in its response to our enquiries to alert it to this matter and ask it to consider any implications arising from this report on it.

Recommendations

47. We recommend within three months of the date of this report the Council:
 - implements the new policy for Special Guardianship allowances;
 - identifies all existing Special Guardians that might be affected by the change and writes to them to explain the new policy;
 - calculates and backdates from November 2013, all Special Guardianship allowance payments for which Mrs X is eligible;

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- writes to Mrs X to apologise for its delay implementing the new policy and pay her and Mrs Y £200 each to remedy the further time and trouble they have experienced resolving this complaint during the past 12 months;
 - identifies all other Special Guardians affected by this fault since November 2013; and
 - makes backdated payments to those Special Guardians, calculated using the correct new policy.
48. The Council has agreed to carry out these recommendations and we welcome its positive response to this report. It 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*)

Decision

49. We have completed our investigation into this complaint and found there was fault by the Council which caused injustice to Mrs X and at least 171 other Special Guardians. The Council has agreed to take the action identified in paragraphs 47 and 48 to remedy that injustice.