



Health and Social Care

NEWS AND ADVICE FOR HEALTHCARE PROFESSIONALS
FROM BIRKETT LONG

Local authority underpayment of care homes



The local authority's contribution towards care fees is calculated on a 'usual cost' model, based on the amount the authority assesses to be the normal cost of care services for care home residents.

Statutory guidance on calculating the 'usual cost' is set out in the Department of Health Local Authority Circular LAC (2004) ("the Circular") which provides that "...in setting and reviewing their costs, councils should have due regard to the actual costs of providing care and other local factors...[A] council should also be able to demonstrate that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonably expect to receive if the possibility of resident and third party contributions did not exist". It was these sections of the Circular that were examined in the

recent case of *R (Torbay Quality Care Forum Limited) v. Torbay Council* [2014] EWHC 4321 where the court upheld a challenge by an independent care home operator association against Torbay Council for its decision concerning the 'usual cost' of fees to be paid to care service providers. The claimant challenged Torbay Council on two grounds. The first, that the 'usual cost' model was unreasonable as it was flawed mathematically; the second, that as the council's 'usual cost' model considered top up fees paid by privately paying residents, this was unreasonable, unlawful and contrary to Government guidance.

The court was reluctant to encroach into the area of the decision maker as this is fundamentally the domain of the local authority. However, it reviewed the substantive and procedural lawfulness of the decision and, in doing so, upheld the claimant's grounds of challenge. In their decision the court found that "the merits of [Torbay Council's] decision are... fundamentally flawed by adopting the unnecessary weighting which no one can explain as being necessary". It also considered that Torbay Council had no justification for "departing from the plain wording of the Circular". As well as stating that councils' actions must be lawful and reasonable, the judge said that whilst guidance is just that, and can be deviated from for good reason, a decision maker cannot decide that it will not comply simply because it does not agree with it.



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CCTV in care homes

Implications for insurers

The mistreatment of elderly and vulnerable people in care homes is an issue that sadly continues to rear its ugly head. A Panorama programme aired in April 2014 showed undercover filming of a number of distressing incidents arising in care homes.

Shortly after the programme hit the headlines HC-One, one of the UK's largest residential care providers, announced a consultation on the installation of visible CCTV cameras in all of its care and nursing homes, in order to "prevent abuse and neglect of vulnerable elderly residents".

Although a ComRes poll showed 80% of 2000 adults surveyed supported installation of visible cameras, it makes you wonder what percentage of care home residents support the idea, or if anyone bothered to ask them? Anything involving CCTV immediately raises difficult issues surrounding privacy of both care home residents and staff, and practical aspects of CCTV coverage – will each care home have someone watching every camera 24x7, or will video footage be recorded and only called upon when an issue arises? And how will the dignity of very vulnerable residents be protected?

It also raises questions, and possibly opportunities, for providers of care home insurance, many of whom have left the market

over the last 18 months, or reduced cover offered by care home insurance policies, as rising claims have made the sector unprofitable. Abuse claims from residents, and personal injury claims from staff, can rarely be substantiated, and a high percentage are thought to be fraudulent, or frivolous, or both. As a wide effect, widespread use of CCTV in care homes could reduce fraudulent insurance claims, provided CCTV evidence is made available to insurers. This in turn could bring insurers back into the sector, creating a more competitive market and cheaper policies for care home owners.

Will insurers have the right to view CCTV footage in order to process or reject a claim? An amendment to the Data Protection Act 1998 gives individuals the right to both view, and have a copy of, any CCTV footage in which they are captured. It is hoped that anyone making a claim where CCTV footage is available would be willing to submit footage to help prove their case.

In the meantime, the market for care home insurance remains challenging, but Brents Insurance continues to offer a wide range of care home insurances, working with a panel of specialist insurers to provide affordable policies across Essex. For a quote or call back call Brents Insurance on 01277 223344.



Employee dismissal

and the question of disability

Heritage Homecare Limited ("HHL") has successfully appealed a finding of 'direct disability and discrimination arising from disability' due to the failure of the employment tribunal to properly explain its decision.

The case has been remitted for a complete re-hearing, but it appears the danger signs were missed by HHL at the time. The employee was employed as an office co-ordinator from May 2012 to November 2012 on a fixed term contract. The contract was extended until 13 February 2013 but the employee was then given one month's written notice, to expire on 11 March 2013. This was after she had sent in a further sick note stating "anxiety and depression".

Lesson one is that the non-renewal of a fixed term contract is, in law, a dismissal. The employee had less than two years' service so could not bring a claim of unfair dismissal, but was subsequently held to be "disabled" for the purposes of the Equality Act 2010; such claims do not have a minimum length of service requirement.

One of the successful points of appeal was whether HHL had actual or constructive knowledge of the employee's disability, which is something required for her claim to succeed. As the evidence suggests HHL was provided with more than one sick note stating "anxiety and depression", it may therefore

Professional discipline

Mitigating the impact

Professionals such as doctors, dentists, nurses, pharmacists, psychologists or social workers are regulated by official regulatory bodies whose duty it is to investigate alleged breaches of regulations or legislation. Such regulatory intervention will almost certainly impact on a professional's career and if allegations of professional misconduct are made there is a risk of the professional being struck off and possibly prosecuted. Given these potential outcomes, you must act quickly to seek legal advice if you are a professional who has been informed that you are under investigation.

You should immediately copy any documents that might relate to the allegations or complaints, including notes of meetings, medical notes and copies of any correspondence or documents relating to the complainant. Anyone who was present at the meeting or the examination should be contacted to ask if they can give information about the incident and, if so, they should be asked to make a witness statement so they can give evidence should the matter result in a disciplinary hearing. Generally speaking, the professional body will set

out the allegations in a letter and invite you to respond in writing. When the response is received it will make a decision that there is no case to answer or that the matter requires further investigation, in which case the matter may be set down for a hearing.

It is essential that this written response to the allegations is set out carefully and thoughtfully with a view to persuading the professional body that there is no case to answer. Should disciplinary proceedings result, they are usually conducted by a panel or committee which is advised by a lawyer, known as a legal assessor. Depending on the seriousness of the allegation, you could be suspended from practice, which would obviously have a financial impact on you and, potentially, your practice. An allegation, investigation, suspension or disqualification is likely to damage your reputation so it is very important to take steps to mitigate the impact of any complaints as quickly as possible.

At Birkett Long our specialists take steps to ensure that your case is appropriately defended at every stage.



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struggle at the re-hearing to argue that it did not have constructive knowledge. In circumstances such as this, an employer is on reasonable notice and cannot just claim ignorance.

Lesson two is that in any sickness or sickness-related dismissal, or indeed anything that amounts to detrimental treatment, or which might be inferred or construed as such, employers need to consider the disability angle.

If an employee is disabled then any less favourable treatment or dismissal because of the disability will be discrimination, as will any

discrimination related to it which is not justified. There will also be the need to consider reasonable adjustments. "Disability" requires a 12 month physical or mental impairment and where more than one sick note refers to the same condition or symptoms then the disability alarm bells should ring.

Contact us for advice regarding any employment related matter.



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Energy efficiency

Regulations could affect landlords and tenants of commercial property

Last year the Government consulted on its proposals to enforce a minimum energy requirement for commercial and residential lettings and in April 2015 issued a response to that consultation as well as draft regulations on the topic. Although these regulations are not yet in force, the intention is that a minimum energy efficiency standard of E will apply to both residential and commercial properties. The consequences for commercial landlords are that they will not be able to let out their property if the energy efficiency rating is F or G after the 1 April 2018. Failure to comply with the new regulations will result in a large fine.

Property owners are being encouraged to take action now rather than later so that they are well equipped to deal with the new regulations if they come into force. Review your property portfolio and identify those properties with an E rating or below, then try to establish the main cause of why the property is rated so low. Has the low rating been caused by a tenant alteration which the landlord can reasonably require to be reinstated at the end of the term of the lease? Could the building be modified during a planned refurbishment or re-development to increase the energy efficiency? An assessment should be made to see what improvements can be made to the building(s) to increase energy efficiency. The recommendations in the Energy Performance Certificate ("EPC") should also be considered.

If improvements are to be carried out by the landlord then check the terms of the lease carefully to see if the cost of this can be recovered from the tenant. You could budget for planned works over the period from now to April 2018. Delaying could be

costly for landlords as the costs of works to improve energy ratings will most likely increase in the run up to 2018.

If you are buying or investing in commercial property it is important that you ask to see the EPC, as sellers are now obligated to provide these. You should review the EPC carefully, and if the certificate provides the property with a rating less than E then consider the impact this will have on future resale/letting. It may be worth negotiating a price or rent adjustment to cover the costs of having to carry out energy improvement works in the future.

If you are a tenant about to complete a commercial lease of a property with a poor energy efficiency standard you should think carefully, as ultimately the new regulations could prohibit you from sub-letting any unused space after 1 April 2018.

So, if you own commercial property or you are thinking of acquiring or letting the same, waiting to see what happens may not be the best approach. If the new regulations do come into force a lack of action now could be very costly in the future.



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