

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

**Investigation into a complaint against
Brighton & Hove City Council
(reference number: 19 000 201)**

10 November 2020

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 M	The complainant
Ms C	Her daughter

Report summary

Council assessment

Ms M has been living in a care home, where she had been paying for her own care. When her capital reduced to £23,250 on 1 January 2018, she became eligible for Council funding. However, Ms M complains that when her capital reduced to £23,250, it took a long time for the Council to agree a personal budget that would be enough to continue to meet her needs. Instead, the Council told her she should move to a cheaper care home, even though the care homes offered by the Council were unsuitable and her GP said it would be detrimental for her mental and physical wellbeing to move to another home.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused by the faults, we recommend the Council should, within one month of the date of this report:

- apologise to Ms M and her daughter for the faults identified above and the distress these caused her daughter. It should also pay her daughter, Ms C £200;
- pay the full fees for Ms M's care at the care home, from 1 January 2018 until 1 May 2018, minus Ms M's assessed weekly contribution;
- reimburse any solicitor fees incurred in the days running up to 24 April 2018, subject to evidence provided of such costs by Ms C; and
- share the lessons learned with staff in its adult social care and finance teams.

The Council should within three months of the date of this report, put a mechanism and staff guidance in place to ensure that, when the Council has to consider moving a vulnerable or frail elderly resident to another more affordable residential home, because the resident's capital has reduced to £23,250:

- it carries out an assessment of the risk to the person's wellbeing of such a move, with input from relevant stakeholders. The assessment should decide what impact a move is likely to have on the resident, and therefore whether a move should go ahead. The Council's view should then be discussed with the resident (and their family);
- it immediately looks into any concerns raised by the client (or their family) that the home(s) offered are not suitable, to determine if/that a home offered is suitable and willing to accept the client at the Council's proposed rate (personal budget). Once it has verified this, it should discuss this with the client (or their family); and
- the client (or their family) have enough time to find a home and move to another home, before the resident's capital falls below £23,250.

We welcome that the Council has accepted our recommendations

The complaint

1. Ms C complains that when her mother's capital reduced to £23,250, it took a long time for the Council to agree a personal budget that would be enough to continue to meet her needs. Instead, the Council said her mother should move to a cheaper care home, even though the care homes offered by the Council were unsuitable and her mother's GP said it would be detrimental for her mental and physical wellbeing to move to another home.
2. Ms C says that when the Council finally agreed in April 2018 to increase her personal budget from £571 a week to £900 a week, it failed to:
 - explain on what basis it eventually agreed to this increase; and
 - agree to backdate the increase to 1 January 2018, which was the date she became eligible for Council funding.
3. Ms C says because of this, her mother's placement at her Care Home became at real and imminent risk of being terminated in April 2018. As such, she had no other choice then to immediately involve a solicitor to prevent this from happening. Ms C complains the Council refused to refund part of the money she has had to spend on legal fees.

Legal and administrative background

4. 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*)
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. The Care and Support Statutory Guidance of the Care Act 2014, says in Annex A that:
 - The care and support planning process will identify how best to meet a person's needs. As part of that, a council must provide the person with a personal budget. The budget should be enough to be able to meet the assessed eligible needs.
 - A council must ensure that any care home accommodation it offers is suitable to meet a person's assessed needs and identified outcomes established as part of the care and support planning process.
 - In some cases, a person may actively choose a setting that is more expensive than the amount identified for the provision of the accommodation in the personal budget. Where they have chosen a setting that costs more than this, an arrangement will need to be made as to how the difference will be met. This is known as an additional cost or 'top-up' payment and is the difference between the amount specified in the personal budget and the actual cost. In such cases, the council must arrange for them to be placed there, provided a third party, or in certain circumstances the person in need of care and support, is willing and able to meet the additional cost.

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- A council must ensure that at least one option is available that is affordable within a person's personal budget and should ensure that there is more than one. If no preference has been expressed and no suitable accommodation is available at the amount identified in a personal budget, the council must arrange care in a more expensive setting and adjust the budget accordingly to ensure that needs are met. In such circumstances, the local authority must not ask for the payment of a 'top-up' fee.
 - The personal budget must reflect the amount of a more expensive setting where the council has been unable to make arrangements at the anticipated cost.

How we considered this complaint

7. We have produced this report after examining the relevant files and documents provided by both parties. We sent a draft report to the complainant and the Council and invited comments. We took the comments received into account before we finalised the report.

What we found

8. Ms M has had a diagnosis of dementia for several years. She lived independently but had a fall in July 2016 when she stayed at Ms C's property for a holiday. Ms C says her mother subsequently needed to go into residential care and she moved her mother into a Care Home ('Care Home X') in August 2016. Care Home X is only a 10-minute walk from where Ms C lives. Ms M paid for the placement from her own funds. Ms M moved into the 'residential care' wing of Care Home X. It was the view of Care Home X that a placement in its 'dementia care' wing would not be suitable for Ms M, due to her anxiety. Care Home X says the care and treatment Ms M has received in the residential unit is the same as she could have received in the dementia unit.
9. The Council provided information to Ms C in September 2016 about future financial arrangements about her mother's Care Home placement. The Council explained to Ms C what would happen once her mother's capital fell below the threshold of £23,250. It explained Home X was much more expensive than what the Council would usually pay for a resident it has to place in a home, which meant her mother may have to move to another home once her capital fell below £23,250. It provided Ms C with a list of 11 alternative residential homes that would be willing to accept the Council's rate, eight of which were in the Brighton and Hove area. Ms C told the Council that she would explore alternative homes for her mother. Ms C told us: *"I visited the Homes but none of them were suitable"*.
10. Ms C called the Council in February 2017. Her mother's capital had fallen to £23,250 and Ms C asked the Council for a care assessment as well as help with paying the Care Home fees. The Council's record states that Ms C wanted to enable her mother to remain at Care Home X as it was close to where she lives, and her mother was settled there. The Council advised that its contribution would not be enough to pay for Home X and that Ms C would need to negotiate with the Home around charges. Ms C confirmed the family would not be able to contribute to the cost of the Care Home fees (often referred to as a 'top up').
11. The Council emailed a form to Care Home X to complete and return, along with copies of Ms M's care plans. In April the Council was asked to resend this email

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- to a different address. It received the completed forms one month later. The Council recorded in June 2017 that Ms C had sold her mother's house.
12. Ms C called the Council in September 2017 and said her mother's capital (including funds from the sale of the property) was almost down to £23,250. The Council carried out Ms M's needs assessment at the end of September 2017. Once the Council completed Ms M's needs assessment, it referred her for a financial assessment in November 2017.
 13. The Council told Ms C in early December 2017 that her mother's personal budget would be up to a maximum of £556 a week, and Ms M would have to contribute £180 a week to that. It explained that this amount would be enough to find a suitable home for her mother. This was significantly less than the £1,300 her mother was paying a week. Ms C was upset this would mean her mother would potentially have to move to another cheaper home. Ms C asked if a manager could review this decision.
 14. Once a month Care Home X completes Dependency Charts for every resident. The chart looks at the support a resident needs in 23 areas, and overall. The chart showed in December 2017 that:
 - Ms M had an overall 'low dependency'. She had a low dependency score (a score of 1 or 2 out of 5) in 17 of the 23 areas, including "Mood" ('within appropriate range'), and Sleep ('regular'); and
 - she could not remember most things.
 15. It took until mid-January 2018 before Ms C received a copy of her mother's needs assessment. She only received this after she asked for it. We have not seen any evidence that Ms C subsequently told the Council she was unhappy with the accuracy of the contents of the assessment.
 16. The Council confirmed to Ms C on 4 January 2018, that a manager had reviewed her mother's case and agreed the Council should not pay anything more. It explained that, according to the needs assessment, her mother would need a residential care bed at a maximum cost of £556 a week. The Council and Care Home X told us that Ms M was also occupying this type of residential care bed at her care home. Ms C says the home chose to keep her mother in the residential wing, because she would have become very anxious when confronted with people whom she did not know, wandering into her room.
 17. The Council told Ms C of five alternative homes in the area and said these homes could meet her mother's assessed needs, had a vacancy and would accept the Council's rate of £556 a week. It advised Ms C to consider the Homes.
 18. Ms C told us that: *"It was very important that my mother's Care Home would be close by, because I visit my mother daily. This had a calming effect on my mother. Furthermore, I need to come to the Care Home occasionally at night to help staff with calming my mother down at night"*. Ms C does not drive.
 19. A letter from Ms M's GP, dated 11 January 2018, advised against moving Ms M. The letter said that any move would likely be distressing for Ms M and have a negative impact on her cognitive state. This, in turn, would likely have a damaging effect on her physical health. Furthermore, it said the location of Home X allowed the family to see her regularly, which was important to the patient.
 20. It is widely known that moving a vulnerable elderly resident, especially those who have dementia, to another Care Home where everything (staff, surroundings, residents) is unfamiliar, can have a damaging impact on their physical and mental

wellbeing. As such, this is a risk that a Council should properly assess and record, when proposing such a move. When we asked the Council if it carried out a (risk) assessment of the impact a move could have on Ms M's mental and physical wellbeing, the Council told us that:

- any move for residents with physical and or mental impairment is undesirable. Therefore, the Council advised Ms C in September 2016 to look for an affordable Care Home; and
- it is not usual practice to undertake a written risk assessment of the risk to a person's wellbeing of moving Care Homes. It did however exercise its professional judgement. Based on its needs assessment, and considering information from Ms C and the GP, the Council decided that while Ms M would be affected by a move, there was no evidence to suggest a move would cause her an undue level of distress.

21. Ms C sent an email to the Council on 13 January 2018, in which she said the Homes the Council had proposed were unsuitable. Ms C told the Council that:

- rooms did not have an en-suite bathroom, which was important due to her mother's tendency to go to the toilet at night and her very high risk of falls;
- Care Home 1: "*Unable to meet needs*";
- Care Home 2: "*Unable to meet needs*" and "*Too far away*";
- Care Home 3: "*Unable to meet needs*" and "*Too far away*". It also had two categories where the Care Quality Commission rated it as "requiring improvement"; and
- two of the Homes would mean a journey via two buses and a journey time of one hour.

22. The Council told us that:

- Ms C did not ask any of the Care Homes to carry out an assessment of her mother to decide if it could meet her mother's needs. This would have shown whether the Homes could have met her mother's needs;
- Ms C did not specify why she felt the Homes would not meet her mother's needs. She only said they could not;
- Ms M was in a residential bed in Home X, so it was appropriate for the Council to put Care Homes forward that could provide the same level of care;
- Care Home 1 is registered to provide care for residents, some of whom are living with dementia. It had two suitable en-suite rooms available when the Council made its offer to Ms C. The home consistently has several residents who are experiencing a range of symptoms related to dementia. The Council does not have concerns about their provision of care to these residents;
- Care Home 2 had a suitable en-suite room available on the ground floor. It has accepted and worked well with residents who are experiencing a range of symptoms related to dementia. The Council does not have concerns about their provision of care to these residents;
- Care Home 3 had two en-suite rooms on the ground floor. The Council does not have concerns about their provision of care to these residents; and
- Care Home 1 was only a 26-minute walk away from where Ms C lives. Care Home 2 and 3 were only 15 minutes by car which is a reasonable distance for a family member to travel.

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23. Ms C has since told us that none of the Homes told her that a ground floor/ en-suite room was available at the Council's rate of £556 a week.
 24. The Council contacted Care Home X on 18 January 2018. The record says that:
 - Ms M's regular carer provided an update about Ms M's current care needs. The Council also spoke to the manager of Care Home X, who confirmed that Ms M was in a residential bed; and
 - following the telephone call, the Council sent an email to Care Home X, which said that: *From my assessment of this lady, I believe she is only requiring residential funding; and I have spoken to her care worker who confirms this.*
 25. The Council also asked Care Home X to consider the possibility of reducing Ms M's fees, to enable her to remain at the Home. The Council chased the Home six times for a response, until the Home said on 7 February 2018 that it could not reduce the fee.
 26. The Council went back to Care Home X and said that if the Home could accept its usual rate of £556 a week, the Council could backdate this to 1 January 2018. The Council chased the Home for a response on 6, 7 and 15 March.
 27. Ms C told the Council on 16 March 2018 that she expected Care Home X would soon tell her mother to leave, due to the current non-payment of fees. Ms C said she would be able to pay a maximum third party top up of £100 a week to enable her mother to remain at the Home.
 28. Ms C told the Council on 27 March 2018 there had been a recent worsening in her mother's dementia. Around the same time, Ms C involved a solicitor because she was concerned about the impasse and the fact her mother could soon be told to leave Care Home X.
 29. The Council told Care Home X on 4 April 2018 that it could maybe agree to increase its contribution, if the Care Home could reduce its weekly fee to £1,000. However, the Home said it could not reduce the fee below £1,100 a week. The Council updated Ms C and offered a vacancy in three homes as an alternative, including Home 2.
 30. Ms C told the Council the following week that Home 2 was unsuitable and the other two homes did not take residents with her mother's level of dementia. In the same email, Ms C provided further information about her mother's care needs.
 31. In light of the view expressed by Ms C that her mother's mental and physical health had recently worsened, the Council offered to reassess her mother's needs. The Council did not visit Ms M at Care Home X to review her records or discuss with the Home to what extent Ms M's needs had recently increased. Instead, it only considered the information provided by Ms C. Ms C said she felt her mother had become physically frailer. Her mental health had also worsened, and she was getting more confused than she had been.
 32. The dependency chart completed by Care Home X, states that Ms M's overall dependency had only slightly increased to 'medium dependency' by February 2018. However, her orientation had gone from 'Orientated in familiar surroundings' (a score of 2) to 'Completely lost' (a score of 5). This was noted in January 2018.
 33. The manager of Care Home X told the Council on 17 April 2018 that Ms C had given one month's notice to the Care Home on 3 April 2018, because she would no longer be able to pay the Care Home fees. However, she did not give this in

writing. Ms C later told the social worker there was a misunderstanding and she thought it was the Care Home that needed to give notice. She was very concerned the notice would end on 1 May 2018. The Council asked Care Home X the following day to accommodate Ms M until a re-assessment had been completed.

34. Following the telephone call with Ms C, the Council agreed on 20 April 2018 to fund Ms M to the amount of £900 a week, to try and enable her to remain at Care Home X. The Council's record says:

"Given the reassessment of need which indicated that Ms M's presentation had deteriorated requiring a dementia (rather than 'mainstream') residential placement, the Council decided to fund a dementia residential placement for Ms M at her current home of £900 per week, with an additional top up of £100 per week from her family."

Care Home X accepted the proposed £1,000 weekly fee on 24 April 2018.

35. The Council told us the budget of £900 was agreed because this was based on current cost of available Care Homes who could have met Ms M's needs at the time. As Ms C had made it clear that she wanted her mother to stay at Care Home X and offered to pay a £100 top up to enable this, the assessor did not consider other homes. This was agreed with Ms C.

36. Care Home X has told us that Ms M has remained in the residential wing of the Home, rather than being moved to the dementia care wing.

37. The Council has told us that it believes that its actions were in line with the Care Act Guidance, which says (10.27):

"In determining how to meet needs, the council may also take into reasonable consideration its own finances and budgetary position and must comply with its related public law duties. This includes the importance of ensuring that the funding available to the council is sufficient to meet the needs of the entire local population. The council may reasonably consider how to balance that requirement with the duty to meet the eligible needs of an individual in determining how an individual's needs should be met (but not whether those needs are met). (...) The council may take decisions on a case-by-case basis which weigh up the total costs of different potential options for meeting needs and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs. This does not mean choosing the cheapest option; but the one which delivers the outcomes desired for the best value."

38. Ms C believes the Council should backdate the increase to £900 in her mother's personal budget to 1 January 2018, the date when the Council first became responsible for her mother's care. She believes her mother already needed this level of care support in January 2018 and the Council failed to properly assess her needs at the time.

39. The Council initially told us that Ms C's solicitor only began correspondence with the Council on 22 May 2018, which was almost a month after the Council had already reached an agreement with Ms C and Care Home X to secure Ms M's placement. The Council could therefore see no reason to consider it reasonable to repay the solicitor fees. However, in response to our draft report, the Council has accepted that due to the faults we identified, Ms C may have felt she had no other choice than to instruct a solicitor. As such, it has now agreed to reimburse any solicitor fees up to 24 April 2018, subject to evidence provided by Ms C of these costs.

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40. The Council agreed in an email to Ms C's solicitor on 15 February 2019, that it would pay Ms M's care fees between 1 January 2018 and 30 April 2018. It said it would pay £556 a week until 1 April 2018, and then £571 a week until 30 April 2018.

Conclusions

41. In September 2016, the Council was trying to be helpful in explaining to Ms C that her mother may have to move if she could not afford the fees long-term. The Council did this to avoid the possibility of Ms M having to move in the future (when her own personal funds run out), after being settled in a more expensive Care Home. This was good practice and gave Ms C enough time to pursue an alternative and more affordable home, if she wished to do so. However, Ms C and her mother were entitled to choose to remain at Care Home X, while accepting the risk that Ms M may have to move to another cheaper home once her capital had reduced to £23,250 and the Council would become responsible for Ms M's care.
42. It took a long time between February 2017, when Ms C asked the Council to carry out a needs assessment due to her mother's reducing capital, and September 2017, when the Council carried out the assessment. However, in the end, the assessment took place three months before Ms M's funds actually reached the threshold of £23,250.
43. The Council completed its needs and financial assessments before Ms M's capital reached £23,250 on 1 January 2018. However, the Council did not leave enough time for the process to try and move a client (in this case Ms M) into a suitable home that would accept the Council's personal budget. This was fault. Even if Ms C had accepted one of the Homes offered in January 2018, there would have been a gap between Ms M's funds reaching £23,250 (1 January 2018) and Ms M being able to leave the more expensive Care Home. As such, she would have had to continue to pay £1,300 for a few more weeks, rather than her assessed weekly contribution of £180 a week, as well as a notice period. This would have reduced her capital significantly below £23,250. Therefore, the Council should have agreed to begin funding Ms M's care at the rate charged, for at least such time until it had established she could move to an alternative care home.
44. Furthermore, Ms C only received a copy of her mother's needs assessment in January 2018 (four months after the assessment took place) and only after she asked for a copy. The Council has since told us this was partially due to the social worker being away on sick leave. We have taken this into account but remain of the view the Council could have provided this sooner, and without the need for Ms C to ask for it. This was fault.
45. The Council agreed to increase Ms M's personal budget to £900 on 20 April 2018. It says it increased the personal budget because Ms M's needs had increased since its assessment. However, Ms C says the Council failed to properly assess her mother's needs in January 2018 and her mother already required this enhanced support (and personal budget) then. There was no fault about this aspect of the complaint. The Council carried out a suitable assessment at the end of 2017. When it shared a copy of the assessment with Ms C in January 2018, Ms C did not tell the Council it was inaccurate or wrong or that her mother's condition had since significantly deteriorated. When Ms C told the Council at the end of March 2018 that she believed her mother had further worsened, the Council carried out a review, which resulted in a later increase to £900.

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46. However, we found fault with regards to the following. The Council provided a list of Care Homes to Ms C in January 2018. However, Ms C told the Council that none of those were suitable. As such, the Council should have promptly looked into this, to understand how Ms C had come to this view, but also to assure itself of how it had met its responsibilities, in particular that it had offered an appropriate placement able to meet Ms M's needs, and at a cost of £556 or less. It did not do this, which was fault.
 47. Ms C and her mother's GP told the Council that Ms M should not be moved to another home, because a move to an unfamiliar environment would have a very negative impact on her physical and mental wellbeing. We have not seen any evidence the Council considered this risk, that it recorded its view (and reasons for it) on this matter, and that it explained this to Ms C, at that time. This was fault.
 48. The Council was at fault for not properly engaging with Ms C on the concerns mentioned in paragraph 47 and 48. As a result, we found the Council failed to properly make decisions at the time. Furthermore, Ms C was denied the opportunity to make an informed decision or have a meaningful choice. Under these circumstances, neither Ms C or her mother, should be required to pay any top-up fee between 1 January and 20 April 2018. From 20 April 2018, Ms M should pay her assessed contribution.
 49. However, there has not been fault with Ms C having to pay a top up of £100 a week since May 2018. In May 2018, the Council had agreed to increase Ms M's personal budget to £900 a week and Care Home X had agreed to reduce Ms M's fees to £1,000 a week. It was clear then that Ms M could stay at the more expensive Care Home, if Ms C agreed to pay a top-up fee of £100; which she did. There was therefore no need for the Council, at that stage, to find and offer any other homes that could have met Ms M's increased level of care without a need for a top up.
 50. The faults by the Council identified above resulted in Ms M having to pay more for her care support than she should have, as well as an increased level of distress for Ms C. This is an injustice, which the Council should remedy.
 51. The Council failed to deal with Ms C's concerns properly by looking into them in more detail and discussing them with her within an appropriate forum. As such, Ms C found herself in a situation in which she felt great uncertainty and pressure, particularly during April 2018 when her mother's funds were about to run out, which meant her mother's placement was in imminent danger, and nobody told her otherwise. Under the circumstances, we found it was reasonable for Ms C to come to the view she had no other choice at this point then to involve a solicitor. However, this situation improved on 24 April 2018, when the Council had secured an arrangement about funding with Care Home X. If Ms C has incurred any solicitor fees during the weeks running up to 24 April 2018, the Council should pay back these.

Recommendations

52. 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*)

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53. In addition to the requirements set out above the Council has agreed to take the following action to remedy the injustice identified in this report. The Council should, within one month of the date of this report:
- apologise to Ms M and her daughter for the faults identified above and the distress these caused her daughter. It should also pay her daughter £200;
 - pay the full fees for Ms M's care at Home X, from 1 January 2018 until 1 May 2018, minus Ms M's assessed weekly contribution;
 - reimburse any solicitor fees incurred in the days running up to 24 April 2018, subject to evidence provided of such costs by Ms C; and
 - share the lessons learned with staff in its adult social care and finance teams.
54. The Council should within three months of the date of this report, put in place a mechanism and staff guidance to ensure that, when it needs to consider moving a vulnerable resident to a more affordable home, because the resident's capital is about to fall below the threshold:
- it carries out an assessment of the risk to the person's wellbeing of such a move, with input from relevant stakeholders. The assessment should decide what impact a move is likely to have on the resident, and therefore whether a move should go ahead. The Council's view should then be discussed with the resident (and their family);
 - it immediately looks into any concerns raised by the client (or their family) that the home(s) offered are not suitable, or may not accept a client at the proposed rate, to decide if the concern(s) are valid and discuss this with the client (or their family); and
 - the client (or their family) have enough time to find a home and move to another home, before the resident's capital falls below £23,250, in cases where the client (or their family) have approached the Council in a timely manner.

It should provide us with written evidence of this.

Decision

55. We uphold these complaints. The Council has agreed to our recommendations, so we have completed our investigation.