

Case TH0062_04: The Scottish Commission for the Regulation of Care

Introduction

1. On 2 October 2003 the Ombudsman received a complaint against the Scottish Commission for the Regulation of Care (the Care Commission) from the legal representatives of a Housing Association (the Association). This concerned the Care Commission's handling of a complaint brought by a Mrs A against the Association, and the subsequent issues raised. It also related to the Care Commission's formal advice to the Association that Mr B, a Care Manager for the Association, was not considered to be a 'fit person' to hold a management position under the terms of the Regulation of Care (Requirements as to Care Services)(Scotland) Regulations 2002 (the Regulations) (SSI 2002 114).

2. The complaints from the Association which I have investigated (*and my conclusions*) are:

- (a) that the Care Commission had failed to respond adequately to correspondence and queries from the Association (and their representatives) concerning the issue of Mr B and his status as a 'fit person' to hold a management position as detailed in the Regulations (*partially upheld, see paragraphs 10 to 22*);
- (b) the manner in which the Care Commission investigated complaints from Mrs A about the care provided by the Association for her son, Mr A (*partially upheld, see paragraphs 23 to 47*);
- (c) the criticisms made by the Care Commission regarding Mr A's 'Personal Plan' [*upheld, see paragraph 38*];
- (d) that the Care Commission did not followed their own complaints procedure in investigating the Association's complaint (*partially upheld, see paragraph 46*).

3. The Association were of the view that the investigation carried out by the Care Commission into Mrs A's complaint produced unsatisfactory conclusions. They believed that the investigation process was flawed and they were concerned that the issue of Mr B's status as a 'fit person' opened them up to possible proceedings in an industrial tribunal.

4. Specific recommendations the Ombudsman is making resulting from this investigation are that the Care Commission should:

- i. review its procedures in respect of the initial correspondence in respect of concerns over an individual's fitness (see paragraph 22);
- ii. apologise to the Association for the issues identified within paragraphs 38 to 41 of this report;
- iii. reconsider its requirement that the Association reinvestigate the complaints against Mr B (see paragraph 44);
- iv. reconsider its requirement that the Association review its complaints procedure (see paragraph 45);
- v. review its complaints procedure to ensure that service providers are not overlooked as potential complainants (see paragraph 46);
- vi. apologise to the Association in respect of the inappropriate inclusion of the request for a Personal Plan within the response to the complaint (see paragraph 47).

Background

5. The Regulation of Care (Scotland) Act 2001 sets out the framework by which the Care Commission was established. The Act provides for a complaints procedure to be operated by the Commission to investigate complaints from individuals or their representatives against care service providers. The Care Commission came into being on 1 April 2002.

6. The Regulation of Care (Requirements as to Care Services)(Scotland)

Regulations 2002 detail the requirements for care providers to ensure that persons providing or managing a care service or employed by a provider are 'fit persons' under the terms of the regulations.

7. In particular, Regulation 7 provides details of the requirements as to the fitness of managers.

Regulation 7(1) states:

A person shall not act as a manager in relation to a care service unless the person is fit to do so.

Regulation 7(2) states:

The following persons are not fit to act as a manager in relation to a care service:

(b) any person to whom regulation 6(2)(b) applies.

In addition, Regulation 6(2) states:

The following persons are not fit to provide a care service:

(b) a person who has been convicted whether in the United Kingdom or elsewhere of any offence which is punishable by a period of imprisonment of not less than 3 months and has been sentenced to imprisonment (whether or not suspended or deferred) for any period without the option of a fine).

Findings of fact

8. The Ombudsman's Office has carried out a lengthy investigation of this complaint. In the course of this examination, substantial documentation has been received from both the Association and the Care Commission. In addition, meetings have been held with representatives of both organisations. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. The Association and the Care Commission have been given the opportunity to comment on a draft of this report.

9. I now consider separately the two core issues in this complaint, namely the issue of Mr B's fitness to act as a manager in terms of the Regulations and the

investigations carried out into Mrs A's complaints.

Complaint (a): Mr B's status in respect of the regulations

10. In 1999 an application was considered by the Edinburgh and the Lothians Joint Committee on Registration and Inspection (the Care Commission's predecessors) in respect of Mr B's fitness in terms of Section 62(4) of the Social Work (Scotland) Act 1968 to hold a specified position within the Association. The Committee made the decision that they did not consider that Mr B was fit to be employed in the management of an establishment registered under the 1968 Act. It does not appear that the Association challenged this decision.

11. On 21 March 2002 the then head of Edinburgh and the Lothian's Registration and Inspection Service (Officer C) wrote to the Association to request information relating to Mr B's current position within the Association. This was to ensure that information was up-to-date on transfer of authority for registration from the Registration and Inspection Service to the Care Commission. Further requests for this information were made by the Care Commission on 27 May 2002 and 18 July 2002. In response to the letter of 18 July 2002, the Association sent the Care Commission a copy of Mr B's current job description and organisational chart.

12. On 16 September 2002 Officer C, now the Regional Manager, South East Scotland Region for the Care Commission, wrote to the Director of the Association (Mr D) to advise that the Care Commission considered that Mr B was not fit to hold a management position in registered care services in terms of Regulation 7(1) of The Regulation of Care (Requirements as to Care Services)(Scotland) Regulations 2002 (SSI 2002 114). He explained that this decision was made on the basis of Mr B's history of convictions. Officer C then explained that this decision was not connected with the complaint against the Association involving Mr B which the Care Commission had investigated.

13. On 19 September 2002 the Association wrote to the Care Commission acknowledging receipt of their decision concerning Mr B's status. Mr D advised that Mr B would be removed from all duties related to the management of a registered care service with immediate effect. He also mentioned the Association's concerns regarding their responsibilities to Mr B as an employer, and asked for details regarding any appeal process.

14. On 26 September 2002 the Care Commission responded advising that there was no appeal process in terms of the determination of fitness required by the Regulation of Care legislation and that any issues regarding employer–employee relationships were not matters for the Commission.

15. The Association questioned the Care Commission’s interpretation of the Regulations, and in particular questioned whether Mr B should have been considered a manager under the terms of the Regulations as he managed staff and did not directly manage care services. They were particularly concerned as the Care Commission had advised them that there was no appeals process.

16. The Care Commission have never answered the Association’s questions about whether Mr B should have been considered a manager under the Regulations. Instead they have repeatedly advised the Association that it is the Association's responsibility to comply with the Regulations and not the Care Commission’s responsibility to provide definitions of ‘managers’ in this context.

Complaint (a): Conclusions and recommendations

17. Ultimately, only the Courts can determine which categories of managers are covered by the ‘fit person’ provisions of the Regulations. To that extent I do not question the Care Commission’s statement that they do not have a responsibility to provide definitions of ‘managers’ in this context. Clearly they were correct in their assertion that the Association has a responsibility to comply with the Regulations. However, I also consider that it is incumbent on the Care Commission to do what it can to advise and assist care providers in understanding their obligations under the Regulations. In that context I consider that the Care Commission could and should have been more helpful in their responses to the Association.

18. The Association explained to the Care Commission why they considered Mr B was not in a post to which the ‘fit person’ provisions detailed in Regulation 7(1) applied. The Care Commission took a different view. They advised me that this view was in part based on evidence supplied by the Association including the Job Description for the post Mr B occupied. The Care Commission did not provide this explanation to the Association and I believe they should have done so. I consider

the Care Commission should have explained clearly why they had taken this view (placing whatever caveats they felt were necessary on the explanation). I do not consider it was reasonable for the Commission to take the view that once Mr B was moved from his position, they no longer had any responsibility to expand on their conclusions concerning his role as manager. I agree that the Care Commission is right not to wish to enter into a discussion in respect of interpretation of the Regulations, this does not however preclude them from providing a full and clear explanation of their position.

19. When the Association asked for advice about any appeal process the Care Commission's response, while accurate as far as it went, was less helpful than it might have been. I consider that when a body is informed in writing that the Commission has concerns regarding the 'fitness' of an employee, information about the possibility of having a notice served on the organisation and its subsequent right of appeal should always be given. No such details were given in this case.

20. The Care Commission's current procedures documented in their 'Guidance to Care Providers – Fitness of Managers of Registered Care Services' (revised April 2003) detail that when a dispute arises between service provider and the Care Commission in respect of the fitness of an individual, the Care Commission can, if the dispute continues, impose a formal condition notice on the registration of the service precluding that appointment, or the continuation of it. The registered provider will then be entitled to exercise a right of appeal to the sheriff against this condition. At the time of the initial letter from the Care Commission in respect of Mr B's fitness as a manager, no details concerning the option of having a notice served, and hence an appeal, were provided to the Association.

21. To the extent that the Care Commission failed to provide details of this procedure in their letter of 16 September 2002, I uphold the complaint.

22. I recommend that the Commission should review its procedures and consider if, when writing to a care provider to inform them of concerns over an individual's fitness, they should at the same time provide details of the process which would be followed if they failed to comply with the Care Commission's request. The Care Commission should inform the Ombudsman of their conclusions when this matter

has been considered.

Complaints (b), (c) and (d): The investigations carried out into Mrs A's complaints

Mrs A's complaints

23. Mr A moved into supported accommodation operated by the Association, on 21 January 2002. The level of support to be provided had been agreed between Mr A and the City of Edinburgh Council Social Work Department. The City of Edinburgh Council purchased supported accommodation for Mr A from the Association. Mr A then became a tenant of the Association.

24. On 24 and 25 January 2002 Mrs A (Mr A's mother) raised a number of complaints regarding the care services provided by the Association. In response to this, and in an attempt to resolve outstanding issues, a meeting was held on 28 January 2002. This meeting included Mr B, Mr E, Senior Community Care Worker, Mr F, Social Work Department, Ms G, representative of an advocacy service, Mrs A and Mr H (Mrs A's Partner).

25. Following this meeting, Mrs A made a formal complaint on 1 February 2002 to Mr D, the Director of the Association, concerning the 'obstructive and aggressive manner displayed by Mr B at a meeting held at Norton Park on Monday 28 January 2002.'

The Association's Investigation of Mrs A's complaint

26. The Association operates a formal complaints procedure for service users and their representatives. This is a four step process with the final stage being a request for an investigation by the Scottish Public Services Ombudsman's Office.

27. It is clear that the Association investigated Mrs A's initial complaints about the care provision and about the attitude of Mr E, but they did not do this with the later complaint raised on 1 February 2002 about Mr B. The report prepared for the Association by Mr G, Assistant Director (Care Services), on all of Mrs A's complaints barely mentions Mr B. Indeed, Mr B is not mentioned in the conclusion of the report.

Care Commission's investigation

28. Mrs A complained to the Care Commission on 17 June 2002 about the care being provided for her son by the Association and about the behaviour of Mr B and Mr E. A meeting then took place between the Care Commission, Mrs A and her partner to clarify her complaint.

29. The Care Commission then investigated the complaint. In the course of this investigation they interviewed Mr A, Ms G from the advocacy agency, an officer of the City of Edinburgh Social Work Department and individuals from the Association. They also inspected related documentation including minutes of the meeting of 28 January 2002 taken by Ms G.

30. I have reviewed all the papers prepared during the investigation. These include evidence that some of the Social Work employees and Ms G considered that Mr B's behaviour at the meeting was aggressive.

31. Mr B was not interviewed. The Care Commission said that this was because of the issues regarding his status as a fit manager.

32. The Care Commission wrote to the Association with their findings on 3 October 2002. They did not uphold any of the complaints regarding Mr A's care or the professionalism of Mr E, they did however uphold the complaint against Mr B's behaviour at the meeting of 28 January 2002 and also considered the Association had failed to carry out a proper investigation into Mrs A's complaint.

33. They required that the Association review its complaints procedures and management of the complaints policy. They further stated that the Association should carry out a proper investigation into the behaviour of Mr B at the meeting of 28 January 2002 without delay. They did not provide any details of their concerns regarding the defects in policies or the investigation into the complaint carried out by the Association.

34. The Care Commission also highlighted an issue regarding Personal Plans which they believed had not been prepared for Mr A in accordance with the national care standards and Regulations.

35. The Association was not invited to comment on the report produced into the investigation by the Care Commission.

36. There then followed substantial correspondence between the Association and their representatives and the Care Commission. The Association disagreed with the Care Commission's findings and recommendations.

Complaints (a), (b) and (c): conclusions and recommendations

37. The two required actions detailed by the Care Commission on conclusion of their investigations were not clearly presented and, to some extent at least, were incorrect.

38. On the issue of Personal Plans, Mr A had in fact been consulted on the possibility of drawing up a Personal Plan in regard to his care. He did not want the Association to produce such a document and did not feel it was necessary. This is documented in the Association's files. Had the Care Commission properly investigated this issue and given the Association an opportunity to respond, it would not have been raised in the final report.

39. The other issue was the Care Commissions' request that the Association review the procedures and management of the current complaints policy and carry out a proper investigation into the complaint about Mr B's behaviour.

40. The Care Commission upheld the complaint against the Association relating to Mr B. I am of the view that it was unreasonable to ask for a new investigation when the Care Commission had already stated that they upheld the complaint about Mr B. Nor do I believe it was reasonable for them to ask the Association to carry out a further investigation without giving any reasons for this.

41. The Commission also asked for the procedures to be reviewed. They gave no reasons for this. Again, I consider it unacceptable to ask for procedures to be reviewed without giving reasons.

42. The Commission requested that the Association review its complaints

procedures and reinvestigate the allegations against Mr B. They failed to provide an opportunity for the Association to respond to the Commission's decision and they failed to interview Mr B. To this extent, I uphold the Association's complaint.

43. The Ombudsman recommends that the Care Commission should apologise to the Association for the faults identified above.

44. The Ombudsman recommends that the Care Commission should reconsider its requirement that the Association reinvestigate the complaints against Mr B. In view of the time which has elapsed, it is unlikely that any further investigation of Mr B's behaviour at the meeting on 28 January 2002 could have a satisfactory outcome. The Ombudsman, therefore, suggests to the Care Commission that they do not ask for any further investigation of this complaint.

45. The Ombudsman recommends that the Care Commission should reconsider its requirement that the Association review its complaints procedure. If, having reconsidered the Care Commission makes any further recommendations or requires any further action by the Association, they should clearly state the reasons why they are doing so.

46. When the Association contacted them to complain about their investigation, the Commission did not investigate the Association's complaint in line with their complaints procedure. The Ombudsman, therefore, recommends that the Care Commission review its complaints procedure to ensure that service providers are not overlooked as potential complainants.

47. The Care Commission has already indicated to our office in their letter of 18 October 2004 that an apology in respect of the inappropriate inclusion of the request for a Personal Plan within the response to the complaint is warranted. The Ombudsman recommends that they now provide this apology to the Association.

Other issues: the Care Commission's interview with Mr B

48. After the Commission's report into Mrs A's complaint was issued on 3 October 2002, both the Association and Mr B expressed their concerns. As a result, on 8 September 2003, the Care Commission interviewed Mr B. They decided to take

this action as they agreed that it was not correct to exclude him from being interviewed on account of his 'unfit manager' status.

49. On 31 October 2003 they wrote to Mr B to advise him of the outcome of their considerations. They agreed that the information in paragraph 4(2) of the letter from the Commission to Mr D of 3 October 2002, where the Commission stated: 'it is considered that the complaint against Mr B is upheld' was in fact incorrect. It was stated that the complaint was against the Association and referred to Mr B. They requested Mr B advise them if he agreed to their communicating this change to the Association.

50. The Care Commission said it did not inform the Association of these changes because of issues of confidentiality with Mr B. I disagree with this view. The original complaint was against the Association, not Mr B. If there were to be changes to the decision sent to Mr D on 3 October 2002 concerning the complaint against the Association, then this decision should have been communicated to the Association.

27 June 2004

Explanation of abbreviations used

The Association	The complainant
Mrs A	Complainant to the Care Commission/mother of Association resident
Mr A	Association resident (Mrs A's son)
Mr B	Care Manager
Officer C	Regional Manager, Care Commission
Mr D	Director of the Association
Mr E	Senior Community Care Worker for the Association
Mr F	Social Work Department
Ms G	Advocacy Agency