

Report

on an investigation into

complaint nos 08 020 845 & 09 000 561 against

Eastleigh Borough Council

10 June 2010

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09 000 561 against Eastleigh Borough Council

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The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainants or other individuals. The names used in this report are not real names.

Key to names used

Mr and Mrs Wilson – a couple who complained to the Ombudsman

Report summary

Public transport

Until September 2008, the Council had a concessionary travel scheme which allowed people over the age of 70 and eligible disabled people to choose annually between a bus pass, a train pass or travel tokens. Following the introduction of the National Bus Pass Scheme, the Council decided to stop issuing travel tokens from September 2008 and instead to offer enhancements to the bus pass scheme and some other transport services. Mr and Mrs Wilson and the Eastleigh Southern Parishes Older People's Forum (ESPOPF) complained that the Council decided to withdraw travel tokens without proper consultation or a proper Equality Impact Assessment and also failed to deal properly with their formal complaints.

The Ombudsman found that the Council made its decision without adequate information about the impact that withdrawing travel tokens would have on disabled people. She also found that the Council had failed to consult relevant voluntary groups before making its decision, contrary to its public commitment to consult the voluntary sector about such matters. In addition, the Ombudsman criticised the Council's handling of the complainants' formal complaints. She concluded that there was genuine uncertainty about what the outcome would have been if the Council had reached its decision properly.

Finding

Maladministration causing injustice.

Recommended remedy

The Ombudsman recommended that the Council should;

- a) revisit the decision regarding the discontinuation of travel tokens as soon as possible following appropriate consultation, explanation of the Council's responsibilities under the Disability Discrimination Act and a proper Equality Impact Assessment;
- b) ensure that, in future, the Council has due regard to its duties under the Disability Discrimination Act rather than relying on decision-makers' general awareness of equality matters;
- c) apologise to Mr and Mrs Wilson and pay them £100 for their avoidable uncertainty about the outcome, and their confusion and time and trouble resulting from the poor complaint-handling; and
- d) apologise to ESPOPF for its lost opportunity to be consulted and for the time and trouble that the poor complaint-handling caused.

Introduction

1. Until September 2008, Eastleigh Borough Council ('the Council') had a concessionary travel scheme which allowed people over the age of 70 and eligible disabled people to choose annually between a bus pass, a train pass or travel tokens. The travel tokens, worth £32 or £52 annually depending on recipients' ages, could be used to pay for journeys in taxis, some community transport services, public transport including train journeys and for the purchase of concessionary rail cards. On 1 April 2008, the National Bus Pass Scheme was introduced throughout England for older people and eligible disabled people. Local authorities including the Council must provide the services covered by this scheme. They can also decide whether to offer any enhancements to the national scheme. Councils must fund such enhancements themselves.
2. Following the introduction of the National Bus Pass Scheme, the Council decided to stop issuing travel tokens from September 2008 and instead to offer enhancements to the bus pass scheme and some other transport services.
3. My office received two complaints about the discontinuation of travel tokens. One was from Mr and Mrs Wilson and the other from Eastleigh Southern Parishes Older People's Forum (ESPOPF), a local group which represents the needs of older people to statutory and voluntary organisations. ESPOPF has over 3,000 members.
4. Both the Wilsons and ESPOPF complained that the Council decided to withdraw travel tokens for older and disabled residents without proper consultation or a proper Equality Impact Assessment and also failed to deal properly with their formal complaints. As a result, they argued, older and disabled people in the borough who are unable to use public transport are now disadvantaged.
5. Mr and Mrs Wilson are a couple in their seventies who claimed travel tokens each year. They have a car but Mrs Wilson was unable to drive it because of health problems which also prevented her being able to climb aboard a bus. The nearest bus stop to their home does not have services to any destination that is convenient for them and it is difficult for Mrs Wilson to walk to a bus stop farther away. They consider that the withdrawal of travel tokens restricts their ability to use a taxi for journeys for which taking their own car is not practical and that, when Mrs Wilson found driving difficult, she relied on her husband to take her shopping and to medical appointments. Mrs Wilson's difficulties have lessened somewhat since the Wilsons first contacted my office and they have now purchased a vehicle with easier access. However, they point out that, given their ages, they reasonably anticipate that they may have mobility problems in the future. ESPOPF says that the effect of the Council's changes was to enhance the bus-based concessionary transport arrangements and to disadvantage elderly and disabled people who previously chose to use travel tokens. It argues that enhancements to other concessionary travel arrangements will not make up for this for some people, for example those people who cannot use public or community transport for whatever reason. It says that some people live too far from public transport and have no alternative transport or that their mobility problems prevent them reaching a bus stop, or from waiting at a bus stop, or from boarding a bus or sitting on the bus seats. It argues that some residents cannot find transport that would take them where they need to go so the only option would be a taxi and travel tokens could be used towards paying the fare.

The Council's legal obligations

6. Public authorities, including the Council, have a legal obligation to have due regard to: the need to eliminate disability discrimination; to promote equality of opportunity for disabled people and the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.[1] This is known as the 'general equality duty.' The High Court has held that, when making decisions that could affect disabled people, council members' attention must be drawn to the general equality duty and that there should be a record of this being done. This arose in the case of *Chavda v Harrow London Borough Council* in December 2007, regarding that Council's decision to amend its adult social care policy. The Judge held;

'there is no evidence that the legal duty and its implications were drawn to the attention of the decision takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to 'potential conflict with the DDA' - this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act... It is important that councillors should be aware of the special duties the Council owes to the disabled before they take decisions... these considerations lead me to conclude that if... the duties... imposed by the Act had been adequately drawn to the attention of the decision makers there would have been a written record of it.' [2]

7. More recently, the High Court[3] held that what was required was that the s49A(1) duty was exercised in substance, with rigour and an open mind. Where there was a failure to bring the duty adequately to the attention of the decision-makers, and where the respective decision-makers may have had a general awareness of the duty, such a general awareness did not amount to a substantial, rigorous and open-minded approach. The Judge held;

'Both Barnet and Portsmouth had some regard to such impacts on residents as a group, but neither authority in my judgment had any or sufficient regard to such an impact upon those residents with disabilities as a separate group or the need to recognise that the taking into account of those disabilities may involve treating disabled persons more favourably than others. References in the documentation before the decision makers in each case to disabilities or to rights of equality do not fulfil the requirements of such recognition. Nor does a general awareness amongst officers or decision makers of the duty under s49A(1). In my judgment, it follows in both cases that there has been a failure to comply with that duty and in particular subsection (d) [the need for steps to take account of disabilities even where that involves treating disabled people more favourably than others]. That alone is sufficient to vitiate each of the decisions.' [4]

8. The Disability Rights Commission has issued a statutory Code of Practice on how to interpret the general equality duty.[5] Councils are legally obliged to have regard to this. The Code includes a requirement to assess the impact of policies and practices, or the likely impact of proposed policies and practices, on equality for disabled persons. Paragraph 3.35 says that, where a matter is highly relevant to disabled people, the Council must; 'take particular care to be able to demonstrate that it has given due regard to the general duty in exercising that function. In these circumstances, a full impact assessment would assist in this.' Paragraphs 3.36 and 3.37 advise that, if a policy is likely to have a major impact on disabled people, a full impact assessment is likely to be needed. Impact assessment is not an end in itself but is merely the process which an authority will go through in order to identify and act on the need to modify policies and practices to have better regard to the need to promote disability equality. Paragraph 3.37 says that a full impact assessment is likely to include consideration of the available data and research; an assessment of the effects the policy will have on disabled people and consideration of measures which might mitigate

any adverse impact; and alternative policies which might better achieve the promotion of equality of opportunity for disabled people.

9. The Equalities and Human Rights Commission (EHRC) has also issued advice to public authorities on this subject.^[6] This advice refers to the *Chavda* case and says that, ‘A key requirement of the public sector duties is for public authorities to carry out equality impact assessment for all relevant policies and decisions.’ The EHRC’s advice includes the following:

‘To ensure that they have complied with the equality duties, and to ensure that any decision [sic] made do not unfairly discriminate, public authorities should carry out robust equality impact assessments, and consult and involve relevant stakeholders, as part of the decision-making process.’

10. On 24 September 2009 the Local Government Ombudsman issued a report against seven other councils regarding decisions about concessionary travel schemes.^[7] The complaints concerned seven councils that had decided only to operate the statutory national bus pass scheme. There are some differences between those complaints and the complaints against Eastleigh Borough Council, not least that Eastleigh continues offering concessionary travel measures in addition to the national scheme. However, the Ombudsman’s report in September 2009 made some general points that are potentially relevant to any complaint about travel concessions and decisions affecting disabled people. Among other points, the Ombudsman;

- criticised the seven councils for not considering their duties under the Disability Discrimination Act 1995 when deciding to change their concessionary travel arrangements;
- found that several of the councils failed to comply with their own policies by failing to consult service users about the proposed changes; and
- stated that any policy or arrangement regarding concessionary travel should give the Council scope to exercise some discretion in individual cases.

11. The Ombudsman recommended that the seven councils involved should reconsider their decisions regarding concessionary travel and should additionally pay each complainant £100.

The Council’s decision to stop issuing travel tokens

12. The Council’s Cabinet considered a report on proposed changes to the concessionary travel schemes on 10 July 2008. A copy of that report is attached as Appendix A. The report recommended changes to the Council’s concessionary travel arrangements including: the discontinuation of travel tokens; introducing a ‘companion pass’ so that people whose disabilities mean that they need assistance on public transport can be accompanied when travelling; all-day use of the bus pass in certain circumstances (the national bus pass scheme only entitles pass-holders to travel at certain times of the day); reduced rail fares; and improved ‘dial-a-ride’ and hospital transport services. The Cabinet accepted the report and decided to cease issuing travel tokens from 1 September 2008 although it would still honour tokens issued before then.

13. In response to a draft of this report, the Council said that the Cabinet’s decision of 10 July 2008 did not take effect until the full Council approved the budget for 2009/2010 at a meeting on 23 February 2009. Before then, ESPOPF had campaigned locally against the cessation of travel tokens

and a representative of ESPOPF addressed Council Members at the meeting. The minutes show that the representative said that:

‘Those residents that were frail, elderly or infirm used the tokens for other modes of transport such as taxis as they were unable to use bus services. She [the ESPOPF representative] felt that withdrawing the tokens meant these people were unable [to] get about and the Council was treating these residents less favourably than its able-bodied residents. She concluded by asking Members to restore travel tokens.’

According to the minutes, the Cabinet Member for Transport responded with a statement regarding concessionary travel in the borough;

‘in particular the provision of the National Free Bus Pass and enhancements provided by the Council. This included extension of the Dial-a-Ride Shopping Trips service, an additional Dial-a-Ride minibus, the introduction of a Companion Pass and the proposed expansion of the Hospital Taxi Scheme to include all surgeries within the borough boundary and those up to 3 miles outside of the borough boundary.’

Later in the meeting, most Members voted against an amendment proposing the reinstatement of travel tokens. So the Council believes that, by the time of the budget-setting meeting, Members were in no doubt about what this issue involved.

14. The Council points out that its new arrangements contain significant measures over and above the national bus pass scheme. It believes that, overall, it provides very generous concessionary travel arrangements. ESPOPF argues that most local authorities in Hampshire still provide travel tokens or a similar concession such as a taxi card or voucher, and that the level of such concessions is more generous than Eastleigh’s.

Equality Impact Assessment (EIA)

15. As explained above, the Council must complete an EIA for matters affecting certain groups, including disabled people. The Council accepts that there was no EIA in terms of a separate document when the Cabinet considered the concessionary travel schemes. One of its legal advisers subsequently stated that there is no obligation for an EIA to be a separate document or process, as long as the impact on disabled people is assessed. The Council therefore maintains that the report for the Cabinet meeting on 10 July 2008 met the requirements of an EIA as ‘the whole report was about equality for disabled people and older people.’

16. The Cabinet report stated that any alternative to the national bus pass ‘is purely discretionary.’ It did not refer to the Disability Discrimination Act or to the Council’s general equality duty. The Council accepts that some other councils’ reports for Members give details of legislation that Members must take into account when reaching decisions and adds that ‘this has not been the position in Eastleigh where Members actively participate in both voluntary and mandatory training on issues they have to consider.’ It says that all Cabinet members ‘would have received (or been offered) training on equality related issues’ and that many Cabinet members have ‘jobs or commitments that would be likely to have given them detailed knowledge of the DDA [Disability Discrimination Act] and other equalities legislation.’ The Council held equality and diversity training for Members in November 2006 and February 2007 and further training between July and October 2008. It says that all but seven Council Members attended the 2008 training. A draft of this report said that I had seen no evidence that any training drew Members’ attention appropriately to the general equality duty, the requirements for conducting EIAs and the *Chavda* case. In response, the Council provided the dates of the training but no information about the content.

17. The Audit Commission sends annual letters to local authorities. Its letter covering the year 2007/08 (published in June 2009) said that the Council’s progress in equality and diversity was slow

and that the Council should complete 'equality impact assessments to ensure equality outcomes are achieved in all service areas.' The letter added that, without such EIAs, the Council cannot guarantee that services are delivered in a fair and equitable manner.

Consultation

18. My investigator asked the Council about its procedures for consulting with individuals and groups likely to be affected by such decisions. In reply, the Council said that it has no specific consultation procedures for such issues. The Council has published the Eastleigh Compact (an agreement between it and local voluntary sector organisations) and an associated Code of Good Practice on Consultation. Point 5.2.c of the Eastleigh Compact says, 'The Council will consult the voluntary sector on issues which may affect them or their users/clients.' The Council's Disability Strategy says that it is a 'key priority' of the Council's to assess and consult on the likely impact of new or existing services, policies or strategies on promoting equality for disabled people. Appendix 1 to the Strategy sets out specific actions the Council will undertake. This includes, under the heading 'Transport and Highways,' 'ensure effective consultation with disabled people' and 'consult disabled people at the design stage of developments in highways and transport.' The Council says that, when producing the recommended changes to concessionary travel, it took account of responses received when developing its Disability Strategy and Older People's Strategy generally. There was no specific consultation with ESPOPF or any other voluntary sector organisation before the Cabinet's decision to stop issuing travel tokens.

Complaint-handling

19. Both Mr Wilson and ESPOPF made formal complaints to the Council about the travel token decision. They expressed disagreement with the Council's decision and alleged that the Council had failed to conduct a proper EIA and had failed to consult the voluntary sector. There was some correspondence between Mr Wilson and the Council but the Council accepts that it failed to give a final response to the formal complaint, despite Mr Wilson chasing the matter. The Council has told my office that it is willing to apologise to Mr Wilson and pay him £100 in respect of this fault. The Council believes that it had nevertheless advised Mr Wilson of its position, either by email or through its Customer Complaints Officer and that, had it replied fully to his formal complaint, its answer would have been the same.

20. ESPOPF did not receive a final response to its formal complaint. The Council says that this is because events overtook it in that, before the Council could finish dealing with the matter in its complaints procedure, an ESPOPF representative addressed the Council meeting on 23 February 2009 and the relevant Council Members replied (see paragraph 13). ESPOPF says that it raised the matter at the Council's budget-setting meeting because this appeared to be the only opportunity to ask the full Council to reconsider the decision. It maintains that it regarded this as a separate matter to its complaint of maladministration. The Council says that, as ESPOPF was essentially campaigning against the Council's policy, it could reasonably have known that the complaints procedure was not the appropriate way to pursue this matter. So the Council is not willing to give ESPOPF the same apology or payment in respect of problems with the complaints procedure that it will offer to Mr Wilson. It has, however, reprinted its complaints leaflet, which now states that the complaints procedure is not appropriate for challenging policy decisions. The Council says it will also advise complainants in future if it is not prepared to deal with a matter further in its complaints procedure. ESPOPF says that, if it had received a final reply to its complaint with an acceptable explanation of the Council's decision, it might not have continued with its complaint; the absence of a response led it to conclude that there was no acceptable explanation so it approached my office.

Council's current position

21. The Council does not accept the complaints that its decision to cease issuing travel tokens was undermined, either by the way it considered the impact on people with disabilities or by the absence of consultation with the voluntary sector. In response to a draft of this report, the Council said that even if it were to revisit the decision, as I had suggested, it might still reach the same decision. So the Council is unwilling to incur the expense and uncertainty of reconsidering its decision.

Conclusions

22. The Council is entitled to change its concessionary travel arrangements and I acknowledge that it continues to offer a variety of concessions to its older residents and to those with disabilities. However, the statement in the Cabinet report that any alternative to the national bus pass 'is purely discretionary' overlooked the need for the Council properly to consider its own duty towards disabled people when making changes to its arrangements. While the Council had no choice about participating in the national bus pass scheme, it had a choice regarding its own provision. Decisions about that provision must be properly reached.

Equality Impact Assessment

23. The Council's policy on concessionary travel can clearly have considerable impact on disabled people. So it seems to me that it would have been reasonable in the circumstances to conduct a full EIA. As the Council says, the EIA need not be a separate document so I have considered whether the Cabinet report met the requirements of an EIA. The report did not mention the general equality duty nor the Disability Discrimination Act. This seems inadequate given the subject under consideration and the *Chavda* judgment that the Council's duties regarding disabled people should be made very clear to Members and there should be a clear record of that explanation. I accept that most Members have received training in equality and diversity matters. However the Council remains silent on the content of that training. Any training that the Cabinet Members had received before their decision about travel tokens in July 2008 could not have covered the implications for councils of the *Chavda* case since the training pre-dated the court case. It remains unclear what that training, and the subsequent training in 2008, covered regarding the general equality duty and the requirements regarding EIAs. So I am still not persuaded by the Council's suggestion that there was no need to include such information because Cabinet Members already understood their legal responsibilities completely. Most Members had received some training by the time of the budget-setting meeting and obtained a general awareness of the duties they owed to disabled people. But as the Judge held in the *Boyejo* case, the duty to 'have due regard' in s49A requires more than this. I consider it a basic principle of good administration that reports for Members should include details of any legal responsibilities relevant to the matter that Members are to decide. A general reliance on Members having received training is inadequate. The Council's failure here was maladministration.

24. But even if the Cabinet Members had all known about their legal duties, that would only have covered one part of the decision-making process. When deciding a matter such as this, Members must have a full understanding of the Council's legal duties and must also have an adequate assessment of the impact of the particular policy under discussion. I do not consider that the Cabinet report actually assessed (in the ways described in the Code, see paragraph 8 above) the impact of removing travel tokens from those disabled people who chose tokens rather than other travel concession options. Simply saying that because the Cabinet report was 'about' equality for disabled people it met the EIA requirements is inadequate. So the absence of a proper EIA was also maladministration.

Consultation

25. Although the Council does not have a specific consultation procedure, there is enough evidence that the Council is publicly committed to consultation with the voluntary sector on matters such as this, as set out in paragraph 18. So I consider that there was a reasonable expectation that the Council would consult about these proposed changes that would clearly affect disabled and older people. Yet there was no specific consultation with relevant voluntary groups regarding the discontinuation of travel tokens. While the legal obligation for an EIA only applies to the impact on disabled people, the reasonable expectations of meaningful consultation applied to the impact on older people as well as disabled people. The absence of proper consultation was also maladministration.

Complaint-handling

26. I welcome the changes the Council is making to the information it provides about its complaints procedure. I agree that the Council was at fault for not responding to Mr Wilson. Regarding ESPOPF's complaint, I am not persuaded that ESPOPF should have known that the complaints procedure was not the appropriate way to challenge the Council. ESPOPF's complaint to the Council did not simply express disagreement with the policy decision; it also argued that the Council had not conducted a proper EIA and had not consulted with the voluntary sector. These were complaints of maladministration and were, on the face of it, appropriate for the Council's complaints procedure. I recognise the Council's argument that, in each case, it believed it had already explained its position to the complainants so there was no need for further use of its complaints procedure. However, the Council could reasonably have clarified this to both complainants and referred them to the Ombudsman, given that both had clearly tried to use the complaints procedure. Its failure to do so was maladministration.

Injustice

27. As explained in paragraphs 23 to 25 I consider that the Cabinet report did not meet the requirements to explain the Council's duties to Members or the requirements of an EIA and that there was inadequate consultation. I note that the full Council considered the travel tokens matter at the budget-setting meeting in February 2009. However, the Cabinet had decided to stop issuing travel tokens from 1 September 2008, over four months before the full Council returned to the matter. Additionally, the comments at the budget-setting meeting seem to have set out in general terms why ESPOPF believed that travel tokens should be reinstated and why the Council believed that other arrangements were preferable. While I accept that the minutes of the meeting in February 2009 are not verbatim, I do not consider that they show evidence of adequate consideration of the Council's legal obligations towards disabled people, the need for a proper EIA and the expectation of meaningful consultation with the voluntary sector before making such a decision. This is not in itself a criticism of what happened at that meeting. The budget-setting meeting was not intended to revisit the Cabinet's initial decision-making process in detail. But this means I cannot accept that the full Council's consideration of this matter in February 2009 overcame any shortcomings in the Cabinet's earlier decision-making.

28. So I consider that the Council's decision to stop issuing travel tokens was not properly reached. I cannot say what the decision would have been had there been adequate consultation and had Members had sufficient information before them. So Mr and Mrs Wilson are left with genuine uncertainty about whether, with the benefit of an adequate Cabinet report and EIA and input from the voluntary sector, the Council would still have discontinued the travel tokens. Such uncertainty is in itself an injustice resulting from the Council's maladministration. The Council can only reasonably deal with such uncertainty by revisiting its decision. It is not unusual or unreasonable for

me and my Ombudsman colleagues to ask councils to revisit decisions where the decision-making process was flawed but it is unclear how the outcome was affected. This uncertainty also affects some other elderly and disabled residents who were affected by the discontinuation of travel tokens. In addition to their uncertainty, Mr and Mrs Wilson experienced some confusion and were put to avoidable time and trouble because of the Council's inadequate handling of their complaint.

29. The lack of consultation means that the voluntary sector lost an opportunity to make a meaningful contribution to the decision-making process. So ESPOPF has a legitimate sense of grievance about its lost opportunity. That, too, is an injustice resulting from the Council's fault. In addition, the problems with the complaint-handling caused ESPOPF avoidable time and trouble.

Finding

30. For the reasons given in paragraphs 22 to 26 above I consider that there was maladministration causing the injustice identified in paragraphs 27 to 29.

Recommendations

31. To put matters right, I recommend that the Council should;

- a) revisit the decision regarding the discontinuation of travel tokens as soon as possible following appropriate consultation, giving an explanation of the Council's responsibilities under the Disability Discrimination Act and a proper Equality Impact Assessment (this is to ensure that the Council's decision is properly reached; I am not indicating what the Council's decision should be);
- b) ensure that, in future, the Council has due regard to its duties under the Disability Discrimination Act rather than relying on decision-makers' general awareness of equality matters;
- c) apologise to Mr and Mrs Wilson and pay them £100 for their avoidable uncertainty about the outcome, and their confusion and time and trouble resulting from the poor complaint-handling. I acknowledge with thanks the Council's willingness to do this; and
- d) apologise to ESPOPF for its lost opportunity and for the time and trouble that the poor complaint-handling caused.

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10 June 2010

[1] Disability Discrimination Act 1995, section 49A

[2] Judge Mackie QC R on the application of Chavda v Harrow London Borough Council [2007] EWHC 3064 at [40]

[3] R (on the application of (1) Juliana Boyejo (2) Roger Towler (3) Beryl Rush (4) Joseph Saunders (5) Jean Kemp) v Barnet London Borough Council: R (on the application of Ronald Smith) v Portsmouth City Council (2009) EWHC 3261 (Admin)

[4] Judge Jarman QC on the application of (1) Juliana Boyejo (2) Roger Towler (3) Beryl Rush (4) Joseph Saunders (5) Jean Kemp v Barnet London Borough Council: R (on the application of Ronald Smith) v Portsmouth City Council (2009) EWHC 3261 (Admin) at [63]

[5] Disability Rights Commission: *The Duty to Promote Disability Equality: Statutory Code of Practice*

[6] Equalities and Human Rights Commission, *The Public Sector Equality Duties and Financial Decisions – An Advice Note for Public Authorities*

[7] Local Government Ombudsman report on complaint reference 07/B/15825 and linked complaints