

OFFICER DECISION RECORD

For staff restructures, please also complete an RA1 form to update the HR Portal. This is attached at Annex 2.

Decision Ref. No:
AHWB/050/2017 Contract
Rate uplifts for Supported
Living Services and Extra
Care

Box 1

DIRECTORATE: Adults, Health &
Wellbeing, Commissioning and Contracts
Team.

DATE: 5th July 2017

Contact Name: Ian Campbell (interim
Head of Service, Commissioning)

Tel. No.: 01302 737817

Subject Matter: Contract Rate uplifts for Supported Living Services and Extra Care.

Box 2

DECISION TAKEN:

1. To pay Supported Living and Extra Care providers delivering Supported Living Services and Extra Care an additional [REDACTED] for each hour of care delivered during the day backdated to 3 April 2017, [REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]

2. To pay Supported Living providers the sleep in rate of [REDACTED] per hour back dated to 3 April 2017, [REDACTED].

Box 3

REASON FOR THE DECISION:

Background Information.

1. In 2012, DMBC conducted a complex open tender procurement exercise in relation to a large range of Learning Disability Supported Living Services supporting approximately 300 service users residing in a range of properties provided by a number of landlords throughout the borough.

2. The outcome of the procurement exercise was the letting of four separate contracts in a phased approach whereby the start dates of each contract was staggered by three months due to the size and complexity of the implementation proposals.
3. One significant outcome of the procurement exercise was the transfer of services formerly provided by RDASH resulting in a transfer of staff to Care UK (now Living Ambitions).
4. During the life of all four of the contracts, inflationary uplifts have not been made. [REDACTED]
5. The implementation of the National Living Wage, together with the previous increases in the National Minimum Wage are particularly and potentially disproportionately impacting on the social care sector resulting in significant unavoidable costs at a time when the Council's funding has substantially reduced. The National Living Wage (NLW) was introduced on 1st April 2016 and sets the minimum hourly rate for workers aged 25 and over. NLW increased from £7.20 to £7.50 per hour with effect from 1st April 2017. The National Minimum Wage (NMW) is the minimum pay per hour for most workers aged under 25. The rates from 1 April 2017 are:
 - £7.05 per hour - 21-24 yrs old
 - £5.60 per hour - 18-20 yrs old
 - £4.05 per hour - 16-17 yrs old
 - £3.50 for apprentices under 19 or, 19 or over who are in the first year of apprenticeship.
6. The Council has to respond to requests from the contracted providers for fee uplifts to cover the increases..
7. In addition, case law, statutory guidance and recent HMRC's rulings have sought to clarify the position with regard to payments in relation to staff sleep in provision overnight in residential care settings. This has major financial impacts especially for the supported living sector where sleep in provision is a significant element of the service.
8. All of the Council's contracted Supported Living Services have overnight staff provision in each of the properties. The vast majority of overnight staff provision consists of sleep-ins for which staff have historically been paid a flat sum (typically between £25 - £40) for each sleep in undertaken plus an hourly rate for those infrequent occasions when they are roused in the night to support individuals.
9. In light of this there have been an increasing number of successful legal claims from workers relating to sleep-in payments. In addition guidance

issued by the Department for Business, Energy and Industrial Strategy -
"Calculating the Minimum Wage, April 2017" states:

"A worker, who is found to be working, even though they are asleep, is entitled to the national minimum or NLW for the entire time they are at work..... There can be situations, however, where a worker is only available for work and is permitted to sleep and suitable sleeping facilities are provided at the workplace. In those cases, the individual will not be 'working' and the minimum wage will not be payable..... Example 1 – where the minimum wage is likely to apply A person works in a care home and is required to work overnight shifts where they sleep on the premises. The person's employer is required by statute to have someone on premises for health and safety purposes. The person would be disciplined if they left the premises at any stage during the night. It is likely that the person would be considered to be 'working' for the whole of the overnight shift even when they are sleeping."

10. The current hourly rates paid by the Council for each Extra Care scheme were determined following a mini-competition. There is no sleep in provision within any scheme as all night time cover is waking. Therefore the uplift for Extra Care would be ■■■ per waking hour.

Box 4

OPTIONS CONSIDERED & REASONS FOR RECOMMENDED OPTION:

If other options were considered, please specify and give reasons for recommended option

Not to implement any financial uplift for the effect of National Living Wage uplift. Such an approach is not recommended as this is in contravention of the Council's Care Act duties and would undermine financially fragile and valued social care services.

Recommended Option and reason

Implement a [redacted] per day hour uplift in relation to the National Living Wage increase to the extra care schemes and the supported living providers [redacted]

The [redacted] per day hour uplift to be based upon the 30p per hour April 2017 NLW uplift from £7.20 to £7.50 per hour plus [redacted] on-costs ([redacted]) to include:

- [redacted] Holiday Pay (Statutory Minimum)
- [redacted] Employer National Insurance Contribution
- [redacted] Apprentice levy
- [redacted] Work Placed Pension

Sleep in Payments

Not to implement any financial uplift for the effect of changes to sleep in payments. Such an approach is not recommended as this is in contravention of the Council's Care Act duties and would undermine financially fragile and valued social care services.

[redacted]

The proposed sleep in hourly rate of £ [redacted] being calculated from £7.50 per hour (NLW) plus: [redacted] on-costs to include:

- [redacted] Holiday Pay (Statutory Minimum)
- [redacted] Employer National Insurance Contribution
- [redacted] Apprentice levy
- [redacted] Work Placed Pension

Commissioning have had dialogue with all Supported Living and Extra Care providers and all have agreed with the approach set out in the Option above. Approval is needed so that a payment to backdate to 3rd April 2017 can be processed.

Box 5

LEGAL IMPLICATIONS:

Section 1 of the Localism Act 2011 provides the Council with a general power of

competence, allowing the Council to do anything that individuals generally may do. Section 111 of the Local Government Act 1972 gives the Council the power to purchase goods and services.

The Care Act 2014 places a duty on Councils to meet the care needs of Service Users within its area.

The 'Support Statutory Guidance' issued under the Care Act 2014 require Councils to:

- Reflect a fair cost of care in fee setting and not to set arbitrary or unsustainable fees.
- Enable providers to pay at least the national minimum / living wage.
- Understand the business environment and risks faced by providers.

The "Working with Care Providers to Understand Costs - A guide for adult social care commissioners" (2017) report advocates that fee uplifts should be linked to increases in minimum wages.

In addition, recent cases and guidance from Central Government it had been the general position that during the time an employee is permitted to sleep as part of their job e.g. a sleepover in a care home, only those hours where the employee was undertaking duties attracted the payment of national minimum wage. Recent cases have shaped this so that now:-

1. Where the work consists of physically being there albeit able to sleep, all hours on the premises count as working time
2. Where the sleep-in is part of the core duties, all hours on the premises count as working time

A provider affected by this change is currently pursuing an appeal against this decision. If successful this could mean that any time spent asleep would not attract the National Minimum wage.

The implications for employers whose workers fall into the categories set out above who have been excluding sleep-in hours from their wage calculations are likely, as a result of the recent case law, to face in an increased wage bill. Flat rate allowances for shift work count towards total pay but if the averaged out hourly rate is less than the minimum wage there is potential for unlawful deduction from wages claims and breach of contract claims.

The Government announced in the March 2017 budget, that Councils are required to support their local provider market including help to cover the National Living Wage.

The uplift will require a modification to the current contract's and therefore there are a number of factors to be taken into account in particular the application of the Public Contracts Regulations 2015. To allow the modification to be safely made Regulation 72 must apply and in so doing the modification will not distort the market.

Regulation 72 (1) (c) allows a modification to be made where the need for the modification has been brought about by circumstances which could not have been foreseen by the Council, the modification does not alter the overall nature of the contract and the increase in price does not exceed 50% of the original contract value.

Legal Services should be consulted to allow the modification to be made to each of the Contracts

Name: Nicky Dobson and Helen Wilson Signature: _____ Date: 21st July 2017 _____

Signature of Assistant Director of Legal and Democratic Services (or representative).

Box 6

FINANCIAL IMPLICATIONS:

Supported Living:

The additional costs will be first met from within Supported Living budget underspends with any shortfall being covered by IBCF.

This has already been factored into AH&WB revenue forecasts for Q1.

Extra Care:

The full year cost of the _____ increase will range between _____ the range is between Delivered hours and commissioned hours.

\$ _____
\$ _____

Name: Chris Temperton/Nick Cameron Signature: Chris Temperton / _____

Date: 13/07/2017

Signature of Assistant Director of Finance & Performance (or representative)

Box 7

HUMAN RESOURCE IMPLICATIONS:

There are no Human Resources implications for Council employees in respect of this decision.

Name: D L Dawson **Signature:**  **Date:** 21.07.17

Signature of Assistant Director of Human Resources and Communications (or representative).

Box 8

PROCUREMENT IMPLICATIONS:

This change to the contract is unforeseen and, as per Regulation 72(1)(c) of the Public Contract Regulations 2015 (PCR2015), Procurement will need to publish a Modification Notice on OJEU detailing the changes as they do not exceed 50% of the contract value. As soon as these changes are agreed with the supplier please ensure that SPT are notified so that they can publish the notice in conjunction with the Legal Department.

Name: Holly Wilson, Senior Category Manager **Signature:**  **Signature of Assistant Director of Finance & Performance (or representative)**

Date: 18/07/17

Box 9

ICT IMPLICATIONS:

There are no direct ICT implications in relation to this decision. Rates for Supported Living and Extra Care are not currently recorded in CareFirst, but will be in the future as part of the next phase of Non Residential. As the changes will affect client contributions, the Financial Services team will need to be made aware of the new rates and effective date and will make any required system amendments.

Name: Peter Ward (ICT Strategy Programme Manager)

Signature:  **Date:** 17/07/17

Box 10

ASSET IMPLICATIONS:

There are no implications arising from the recommendations of this report that impact on the use of DMBC assets.

Name: Gillian Fairbrother (Assets Manager, Project Co-ordinator)

Signature: By email **Date:** 13th July, 2017

Box 11

RISK IMPLICATIONS:

To be completed by the report author

Not taking the decision to uplift fees may result in placements being terminated by providers, which would have a severe impact.

Ian Campbell Head of Service: Commissioning

(Explain the impact of not taking this decision and in the case of capital schemes, any risks associated with the delivery of the project)

Box 12

EQUALITY IMPLICATIONS:

To be completed by the report author

There are no equality implications associated with this

Name: _ **Signature:** _Ian Campbell **Date:** _26th July 2017
(Report author)

Box 13

CONSULTATION

Officers

(In addition to Finance, Legal and Human Resource implications and Procurement implications where necessary, please list below any other teams consulted on this decision, together with their comments)

Members

Under the Scheme of delegation, officers are responsible for day to day operational matters as well as implementing decisions that have been taken by Council, Cabinet, Committee or individual Cabinet members. Further consultation with Members is not ordinarily required. However, where an ODR

relates to a matter which has significant policy, service or operational implications or is known to be politically sensitive, the officer shall first consult with the appropriate Cabinet Member before exercising the delegated powers. In appropriate cases, officers will also need to consult with the Chair of Council, Committee Chairs or the Chair of an Overview and Scrutiny Panel as required. Officers shall also ensure that local Members are kept informed of matters affecting their Wards.

Please list any comments from Members below:

Box 14

INFORMATION NOT FOR PUBLICATION:

In accordance with the Freedom of Information Act 2000, it is in the Public's interests for this decision to be published, however section 43 of the Act allows for commercially sensitive information to be redacted. The signatures will also be redacted.

Name: Gillian Parker Signature:  Date: 28/07/2017
Signature of FOI Lead Officer for service area where ODR originates

Box 15

Signed:



Date: 02/08/2017

As  tor
Johnson on Behalf of Damian Allen

Signed:

Additional Signature of Chief Financial Officer or nominated representative for Capital decisions.

Date: _____

Signed:

Signature of Mayor or relevant Cabinet Member consulted on the above decision (if required).

Date: _____

- This decision can be implemented immediately unless it relates to a Capital Scheme that requires the approval of Cabinet. All Cabinet decisions are subject to call in.
- A record of this decision should be kept by the relevant Director's PA for accountability and published on the Council's website.
- A copy of this decision should be sent to the originating Directorate's FOI Lead Officer to consider 'information not for publication' prior to being published on the Council's website.
- A PDF copy of the signed decision record should be e-mailed to the LA Democratic Services mailbox

