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trading standards law explained

Trading fairly: changing your fees for residents who fund their own care

In this section

A potential resident and their representatives must be clear about the agreed price and the services they will receive for that price. As with general variation clauses, it is important that they can foresee any changes in fees and understand the implications for them of any fee variation clause, before deciding whether to enter into a contract with you.

Fee variation terms

Where you have a fee variation term in your contract, it should:

- clearly set out the circumstances in which the resident's fees may change
- link any changes to clear and objective criteria that do not allow you discretion to set the level of the change
- set out how the change of fees will be calculated - that is, the method

The CPRs require you to ensure that any information that a potential resident and their representatives need to make an informed decision is not omitted, hidden or provided in a way that is unclear, unintelligible, ambiguous or untimely.

Increasing fees using a 'cap' or 'floor'

Fee 'caps' that set a limit on the maximum amount you can increase existing residents' fees by, but which still give you a wide discretion to increase your fees or which don't clearly explain the circumstances in which fees might increase, are likely to be unfair - for example: "Your fees will not increase by more than 15 per cent annually, other than in exceptional circumstances."

There are likely to be fairness concerns around terms that 'cap' or 'floor' fee increases, because increases are likely to be an amount based on your judgement or discretion alone, and not reflective of genuine cost increases.

Using wording that is unclear or vague is likely to make your terms unfair, as residents are unlikely to be able to clearly foresee and understand in what circumstances their fees may change. Such terms are also likely to give you a wide discretion to decide when, or by how much, your fees will increase, which is likely to be considered unfair.

Calculating your annual fee increases

The clearer and more transparent your terms are for calculating any fees increases, the more likely they are to be fair. Put yourself in the potential resident's position, or that of their family or representatives, and think about the information they would need to foresee any future increases. It is important that your terms are transparent and clear about how a resident's fee may change during their stay, and that increases reflect genuine cost increases as far as possible.

That is not to say that linking increases to a published price index is the only way to ensure compliance with consumer law. For example, you could, in theory, fix a resident's fees for the duration of their stay, or specify the precise level and timing of any future increases in price, so that they effectively form part of the agreed price. The details would have to be clearly and prominently drawn to the resident's attention before entering into a contract, in a way that allows them to foresee the practical implications and evaluate them.

The CMA considers that care homes are more likely to comply with the law where they review existing residents' fees on an annual basis by referencing a relevant, objective and verifiable published price index. This should be clearly specified and explained in the contract.

The CMA says...

To present a price variation term fairly and transparently in your contract, it is likely to be necessary to show a worked example of how your fees could change in the future, and a description of how they have changed in the past.

More information

An illustration of how to write a worked example can be seen in the practical guidance sheet, entitled 'How to write a variation clause', on page 36 of this booklet.

Using 'objective and verifiable' calculation methods

One example of how to calculate fee increases could be to link your fee increases for existing residents to the Consumer Prices Index including housing costs (CPIH), which can be found on the website of the Office of National Statistics.

The CMA suggests that this index is likely to be more appropriate than using the Consumer Prices Index (without housing costs), as care home fees contain an element of housing provision. The CPIH is published monthly and is one example of a relevant, objective and verifiable pricing index that you could use.

The use of fee 'caps' or 'floors' are likely to be arbitrary and do not reflect your genuine cost increases and may therefore be considered unfair.

Similarly, terms that are too vague, or which do not explain the method of calculating changes in fees, for example, are likely to be unfair. These types of terms do not enable a potential resident to see how the fees may change over time, and so do not give them the information they need to make an informed decision about your care home.

Using the CPIH

For example, you could link your fee increases for existing residents to:

- the percentage increase in the CPIH over the previous year
- the average of (i) the percentage increase in the CPIH over the previous year, and (ii) the percentage increase in the National Living Wage (NLW) rate compared to the previous year. For example, if CPIH increased by two per cent and NLW by four per cent, an average of three per cent could potentially be applied
- a weighted averaging, presented and explained in a way that potential residents and their representatives are likely to understand. For example, where 65 per cent of the cost of a resident's care is attributable to staff costs and 35 per cent is attributable to non-staff costs, 65 per cent of the resident's overall fees could be increased by reference to NLW and the remaining 35 per cent by reference to CPIH. Weightings may vary depending on, for example, whether the home is nursing or residential
- an index developed or required by legislation or sector regulations for the purpose of reflecting the costs of care provision.

Whether you decide to use one of these calculation methods (or any other method) it is important to ensure the calculation method is clearly and transparently explained in your terms. It should enable potential residents to understand the impact a fee variation term is likely to have on them during their stay. If it is too complex for an average resident and their representatives to understand, it may be considered unfair because of its lack of transparency.

The CMA says...

We consider that information about how a resident's fees may increase during their stay should be actively and prominently drawn to the attention of potential residents and their representatives as early as possible - for example, on your website, in written materials you give to a potential resident (such as a 'key facts' sheet in information packs and when they arrive for initial visits) alongside other prominent 'key information'.

More information

To learn more about what details are considered 'key information', see the Care home communications section on this website.

Significant increases in costs

On rare occasions, major changes in the law or sector regulations may significantly increase the costs of providing your service - for example, if the sector regulator changed minimum staffing requirements for specific types of care.

The CMA has said that, where such changes directly result in a significant and demonstrable increase in your costs, it would be less likely to prioritise enforcement action where residents' fees are increased at the time of the annual review to reflect the increase in your costs, to the extent that it is not already covered in any price index you use. In such exceptional circumstances, you should ensure that:

- any price index that you use does not already take into account these cost increases. Where the price index already takes account of these costs, no further increase should be made. For example, if you wish to incorporate increases in NLW into you annual fee reviews, we would expect these increases to be taken into account through your chosen price index.
- your terms clearly set out and explain the limited circumstances in which you may increase fees for this reason

These additional increases should only be made in truly exceptional circumstances and cover only costs that are directly imposed on your care home by a major change to legislation or regulations which are outside of your control. They cannot be used, for example, to address poor planning or the unavoidable risks of running a business, such as local staff shortages. Whether your terms and practices are fair will ultimately be determined by reference to the law.

Guidance on how and when to give a resident, family member or representative information relating to your initial fees, deposits and other financial details can be found in the [Care home communications section on this website]

Residents and their representatives must be given advance written notice of a change in their fees (and given the option to leave without penalty) before the change takes effect. Notice periods of less than 28 days are unlikely to be fair under consumer law. In Northern Ireland, sector regulations expressly require that residents of registered care homes are given at least 28 days' notice before a fee increase comes into effect.

If a resident exercises their right to leave your home before a change in their fees is implemented, they should be given a pro-rata refund of any prepaid residential fees that they may have made.

Terms that allow you an unlimited right to increase the price of a service after it has been agreed are likely to be unfair.

Getting it wrong

It will likely be considered unfair under consumer law if you use the following types of terms to determine future fee increases:

Fees are normally reviewed annually (upward only). Any general review of your fees, including the annual review, will take account of local market conditions, the wider national economic picture and any unforeseen or unexpected costs that have arisen since the time of the previous review.

- *your fees will be subject to review in future and any increase will be notified to you in writing.*
- *fees will be increased from time to time. We will give you advance notice of any change before it*

takes effect.

- *your fees will increase if we are subject to any increased costs in providing this service to you.*
- *fees will increase in line with local market conditions.*
- *fee increases will be limited to a reasonable amount.*
- *an annual fee increase will take place on 1 January every year and will reflect our actual cost increases.*
- *fee increases will only take place where there is an increase in staffing or business costs.*

The following terms using fee 'caps' or 'floors' are likely to be considered unfair:

- *we will review your fees annually. As a result of the review, your fees will not increase by more than 15 per cent, other than in exceptional circumstances.*
- *your fees will be reviewed annually and will be increased by 10 per cent or the Consumer Prices Index, whichever is higher.*
- *fees are normally reviewed annually (upward only). Any general review of your fees, including the annual review, will take account of local market conditions, the wider national economic picture and any unforeseen or unexpected costs that have arisen since the time of the previous review.*

The CMA considers that general fee reviews should be limited to once a year - for example, 1 January.

< Trading fairly: changing your terms

> Trading fairly: other fee changes