

Trading fairly: other unfair terms

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Other areas where terms can be unfair, which are covered in the CMA's guidance to help care home owners and registered managers treat residents fairly, include residents' visiting rights, temporary absences from your home, and terms dealing with situations where the resident breaches their contract with you.

These circumstances are explored here.

Where your terms give you wide discretion to ban visitors, this is likely to be considered unfair under consumer law, because it may dissuade residents from seeking redress or complaining when your service does not meet expected standards, for fear of being denied visits.

Visiting rights

It is important that you do not impose unreasonable restrictions on your residents' rights to have visits from family and friends, as this could infringe consumer law. You may also infringe sector-specific legislation. In England, for example, the Care Quality Commission has given guidance on the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, stating that residents' relationships with friends, family and other relevant people should be respected.

For your terms to be considered fair, you must ensure that:

- circumstances where visitors' access to your home can be restricted are very narrow and do not go beyond what is reasonably required to protect your legitimate interests, or those of your residents - for example, in extreme cases such as where visitors have abused, physically assaulted or posed a real and significant danger to your residents, staff or other visitors
- circumstances in which a resident's visitors may be banned are transparent. This means that they are clearly and unambiguously set out and explained in the contract
- the decision to ban a visitor is made only after a thorough risk assessment and appropriate consultation with the individuals concerned (including the resident, their representatives and the visitor whose access may be restricted) and is subject to an appeal process, whereby the affected parties can dispute your decision
- where the resident lacks mental capacity to make decisions, visits should be allowed, unless there

are compelling reasons to say they are not in the resident's best interests. You must follow national legal requirements - for example, in England and Wales, the Mental Capacity Act 2005

- any restriction or ban is kept under regular review and removed as soon as practicably possible

Using the threat of restricting or banning visitors in response to a resident's complaint is likely to be considered an aggressive practice under the CPRs.

Temporary absences

When a resident is temporarily away from your care home, such as for a planned holiday or unplanned hospital visit, a term that requires residents always to pay full fees is unlikely to be considered fair as it does not take into account whether allowances could be made by you for savings during this time, on things such as food and medication or personal care. A term that is more likely to be fair is one in which the full fees are only payable for a limited amount of time, after which a discount is applied, reflecting a reasonable estimate of the savings you are likely to make during the resident's absence.

Financial penalties when a resident breaches their contract

There will be times when a resident breaches their obligations to you in law and, as a care home owner, you may be entitled to take action against them to compensate you for your losses.

Having terms that are clear and fair is very important, particularly when your residents and their representatives may be vulnerable; in some cases residents may lack full mental capacity. Terms that allow you to charge disproportionately high amounts to residents who may have breached their contract with you are likely to be considered unfair in consumer law - for example, where you require the resident to pay more in compensation than any loss you are likely to suffer as a result of the resident's actions.

The CMA says...

We have particular concerns that terms allowing you to impose disproportionately high charges on residents who breach their contracts may:

- mislead residents into thinking you are entitled to more compensation than you lawfully are
- in this particular context, restrict their ability to make free or informed choices through intimidation or exploitation

Getting it right

Examples of terms explaining your temporary absences that are more likely to be considered fair:

- *if you are away from our care home (for example, because you are on a pre-arranged holiday or because you are in hospital) your room will be reserved for you. During the first full week of absence your fees will continue to be payable in full. After that, your fees will be reduced by 20 per cent.*
- *if you are absent from our home for a continuous period of six weeks, we will consult with you and your nominated representative to seek agreement regarding the further retention of your room.*

Additional advice and guidance on consumer law can be found elsewhere on this website, and the CMA's latest detailed guidance, [UK Care Home Providers for Older People: Advice on Consumer Law - Helping Care Homes Comply with Their Consumer Law Obligations](#).

You can also seek advice from your local authority Trading Standards service.

Getting it right

When your contracts include terms dealing with residents who have breached their responsibilities under the contract with you, you are unlikely to comply with the law where you:

- *require residents to compensate you for losses that are not a direct result of their default*
- *require residents to pay interest on outstanding fees at a rate above your bank's base interest rate, since it makes the resident pay much more than the cost of making up their default - for example, having a term that allows you to charge residents interest at 10 percent above your bank's base rate where they are late paying their fees*
- *allow your home excessive discretion to decide how much is charged when the resident breaches their contract with you*
- *impose a fixed, arbitrary fee for any breach of contract, which is out of all proportion to your expected losses*
- *allow your home to claim 'all costs and expenses' resulting from the resident's breach, instead of just your net costs directly resulting from it*
- *allow you to claim your costs on an 'indemnity' basis (that is, all costs, not just costs reasonably incurred) since it would require the resident to pay more in compensation than your reasonable losses. Such a term is also objectionable because of its use of legal jargon, which a resident is unlikely to understand*
- *make a profit from any breach of contract*

When your contracts include terms dealing with residents who have breached their responsibilities under a contract with you, you are more likely to comply with the law where you:

- *use clear, unambiguous and plain language*
- *explain that you will require the resident to pay a stated sum, which represents a genuine pre-estimate of the limited administrative costs that you are likely to incur as a result of the resident's default*
- *do not make a profit from the resident's breach*
- *alternatively, state in the contract that the resident can be expected to pay reasonable compensation, or compensation according to the law. In this case you should take all reasonable steps to reduce your losses, such as promptly informing a resident and their representatives of any breaches of contract they may have made, consulting with them to find out why it has happened, and discussing ways to prevent it happening again in the future*

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