

24 August 2018

Complaint reference:
17 015 321

Complaint against:
Broxtowe Borough Council

The Ombudsman's final decision

Summary: Ms B complains the Council unreasonably frustrated her attempts to trade from a town centre location. We have upheld the complaint finding several faults in how the Council dealt with this matter. This caused injustice to Ms B in the form of distress and putting her to unnecessary time and trouble pursuing her complaints. The Council has agreed to undertake a series of actions to remedy the complaint, including undertaking a comprehensive review of its existing practice for dealing with requests to trade from its town centres.

The complaint

1. I have called the complainant, 'Ms B'. One of her local Ward Councillors, who I will call 'Councillor X' supports her complaint. They complain the Council has unreasonably frustrated attempts by Ms B to trade from one its town centres.
2. Ms B has a mobile hot food business. In both November 2016 and July 2017, the Council agreed to let Ms B trade, as a trial, at a town centre location. Ms B complains the Council:
 - cancelled the planned trial in November 2016 without explanation;
 - cancelled the second trial in July 2017 after three weeks without explanation;
 - while it later provided reasons for cancelling the second trial these are not satisfactory;
 - handled poorly her complaints about these matters;
 - failed to adequately consider complaints she has about a local Town Council and a Town Councillor.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

4. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

5. Before issuing this draft decision I considered:
- Ms B's complaint to us made by telephone and further information gathered from her by telephone and in a face to face meeting also with Councillor X.
 - Correspondence exchanged between Ms B and the Council about the issues covered by her complaint and pre-dating our investigation.
 - Information provided by the Council in reply to my written enquiries. This included relevant Council policies and its scheme of delegation for officers.
 - Comments and further evidence provided by Ms B, Councillor X, Councillor Y and the Council in response to an initial draft decision statement.

What I found

The key facts

Ms B's first trial

6. The events covered by this complaint began in October 2016 when Ms B approached the Council with a request to trade one day a week from a town centre location. After some preliminary email exchanges covering details such as the site pitch, details of her vehicle and so on, the Council agreed a trial could begin in November 2016.
7. Before the trial began the Council sent an email to the three local Ward Councillors covering the town. I will call them Councillors 'X', 'Y' and 'Z'. It invited their comments. Councillor X said he had no objections. Councillor Y objected. There is no record of Councillor Z responding.
8. Councillor Y objected because of concern about the potential impact of Ms B's business on existing food businesses located in the town centre. The Council's Head of Property Services replied to Councillor Y saying they perceived benefits to the town centre by allowing the trial. They suggested it would continue. However, 24 hours later the Council cancelled the trial.
9. Ms B received an email from the Council the day before she was due to trade telling her this. The officer sending the email apologised for the short notice and said it was for "*unforeseen circumstances*". When Ms B later pressed for an explanation or a review of the decision the officer said they had no further instructions from senior officers
10. I have seen no contemporaneous record of who, how or why the Council took this decision. However, I have seen two explanations given after the event. A draft report for the Council's Jobs and the Economy Committee for September 2017 (not seen by the committee for reasons explained below) said the trial was put "on hold" because "*concerns were raised during consultation about unfair competition with existing businesses*". But a reply to Ms B's complaint given in November 2017 said the Council cancelled the trial "*to allow time for consideration by members of the Council at the appropriate committee meeting.*"

Ms B's second trial

11. Frustrated at the Council's decision and lack of explanation, Ms B approached Councillor X for help. Councillor X arranged a meeting with the Council's Chief Executive to discuss what had happened. He supported Ms B's proposal and wanted to secure a trial for her business.
12. The Chief Executive suggested that a decision on Ms B's trial trading go to the Council's Jobs and the Economy Committee. But before that, in April 2017, the Council's Head of Property Services sent an email to Councillors Y and Z asking if they still had objections to Ms B trading in the Town Centre. Councillor Y replied saying that under Council policy officers decided whether to allow a trial, so this was not a decision for Councillors.
13. So, in June 2017, after liaison between Council officers and Ms B, the Council agreed a second trial for her business. Ms B would trade one day a week. The trial would last for 12 weeks. Either side could cancel it by giving a week's notice.
14. The agreed location was on Council owned land in the town centre. To access the land any trader must cross a pavement which forms part of an adopted highway and so belongs to the County Council. Ms B was not the first trader to use the land. For several years markets traded on the land. Each year there is also a Christmas tree placed on the land. The Council has fitted bollards to help prevent unauthorised access on to its land.
15. On the first day Ms B went to trade she could not do so. She found padlocks fitted to the bollards preventing her access. Council officers arranged to cut off the padlocks. A chronology of events provided by one of its officers suggests that Town Councillors knew about the locks and Councillor Y says they had been there for a long time. While enquiring into the padlocks the Council records receiving an enquiry from a Town Councillor who queried the location of a concrete stone planter. This was nearby, but not on, the location agreed for Ms B to trade.
16. During that first week of the trial the Council says it contacted the local highways authority (the County Council which contracts that service). It says this was to ensure the authority had no objections to Ms B parking her vehicle at the agreed location.
17. On the second week Ms B went to trade she found the stone planter had moved. It was now in the place agreed for her parking. The Council gave consent for Ms B to park nearby, so she could begin trading. Later it moved the planter to give her access to the agreed location for her vehicle.
18. At the beginning of the third week of the trial, Councillor Y sent an email to the Council's former Director of Legal and Planning Services. Councillor Y said that they and Councillor Z had canvassed local businesses to check the impact of Ms B's trading and one business reported a downturn in trade. Councillor Y said that when Ms B's trial ended they wanted to see a "*full report on the benefits to the town centre*" of such trading. They also said the Town Council was unhappy at moving the planter and had concerns for potential damage to decorative tiles at the agreed location. A few days later the Town Council also contacted the Council expressing concern for the decorative tiles.
19. In reply to Councillor Y's email, the Council's Former Director of Legal and Planning Services sent an email saying they would ask for Ms B's vehicle to be re-located '*straight away*'. They also said any decision on future trading would be "*focused heavily*" on the town centre. Over the next few days that officer

exchanged emails with other officers to discuss an alternative trading location for Ms B. However, it would not appear the Council took a final decision to approve this.

20. During that week, the Council had exchanged emails with Ms B about the potential impact of her vehicle on the decorative tiles. Ms B said she could park in a way that her vehicle was not on the tiles. She has photographs which show her vehicle parked close to, but not on the tiles. Ms B also explained she has insurance for her business in case of accidental damage to any person or property.
21. At the end of the third week of the trial, the Council sent an email to Ms B saying that it had cancelled her trial. It gave no reasons.
22. The following week the Council received advice from the County Council's highways contractor. The contractor said it had no objection in principle to Ms B trading. But it wanted this subject to certain conditions. One of these conditions was the Council should extend a dropped kerb at the location, which gives access over the adopted highway.
23. One week after the cancellation the Council sent Ms B an email giving reasons for cancelling the trial. It said there was no agreement with the County Council giving her access over the adopted highway to the agreed trading location. It also said there were concerns for the safety of the decorative tiles. The Chief Executive said the Council would consider what to do next at a meeting of its Jobs and the Economy Committee in September. They noted that both Councillors X and Y sat on the committee and this would be an opportunity for them to air differing views on the perceived benefits of Ms B's trading.
24. As I noted earlier, the Council drafted a report for that committee meeting, although the matter did not proceed. This was because in August 2017 Ms B complained (see below). When making her complaint Ms B said she did not want the committee considering this matter. Ms B says this is because Councillor Y sits on the committee. She feared Councillor Y would influence colleagues to prevent her trading.
25. The draft report intended asking Members for a decision on future trading in the town centre. It said this was to "*ensure the best outcome for the vitality and viability of existing businesses*".
26. The report did not name Ms B but referred to her business and said it had struggled to trade because of "*difficulties with access*". It explained the work needed to extend the dropped kerb. It said the work would cost around £1600. It also mentioned concerns about the decorative tiles, without commenting on whether there was any evidence Ms B's vehicle had damaged those. In comments in reply to my enquiries the Council says its officers had been to the site and did not see any damage to the tiles.
27. The report proposed giving Members a choice about the following:
 - a) Allowing trading from the agreed location subject to carrying out the highway improvements.
 - b) Stopping trading from the location, which could also have implications for the annual Christmas tree and any other use of the land.
 - c) Adjusting trading policy to restrict traders whose businesses competed with those in the Town. The report set out potential difficulties in defining how such

control could work. It also pointed out that planning laws do not restrict competing uses for shops trading in the town centre.

28. While not referred to in the draft report, it would appear officers had also undertaken their own research into the potential impact of Ms B's trading on local food businesses. They canvassed eight businesses. Five reported no impact while three reported trading suffering as a result of the increased competition.

Ms B's complaint

29. After the Council cancelled her second trial, Ms B again approached Councillor X for help. In August 2017, Councillor X met with two senior officers from the Council. Councillor X set out his and Ms B's dissatisfaction with the Council's actions in cancelling Ms B's trials. They understood an investigation would follow and sent an email to those officers the same day saying they would "*await contact*". But there was no further contact from those officers before Ms B decided to make a complaint.
30. Ms B's complaint followed at the end of August 2017. In that, she asked the Council to cancel the proposed agenda item for the Jobs and Economy committee meeting in September. The Council acknowledged receipt of the complaint and promised a reply in 15 working days. But by the end of September 2017 Ms B had received no reply. Both she and Councillor X chased a response.
31. Alongside her complaint Ms B made a subject access request under the Data Protection Act asking the Council disclose all "*emails, file notes and documents [...] that relate to myself and my business*".
32. Ms B also made a separate complaint against the Town Council. In late July she had made a complaint by telephone. She now repeated it in writing. She complained at:
- The padlocks fitted to the bollards.
 - The moving of the planter.
 - The conduct of one Town Councillor who she said had been aggressive in front of her customers and told her to "get lost".
 - That businesses in the town were approached to see if her business impacted their trade.
33. The Council replied to Ms B's complaint in early October 2017. It repeated the explanation that Ms B's trial had cancelled because there was no agreement with the County Council over access. Also, because of concerns her vehicle might damage tiles. It offered an apology for not giving Ms B one week's notice as previously agreed.
34. Unhappy with that reply and on the day of its receipt, Ms B asked for her complaint to go to the second stage of the Council's complaint procedure. Ms B said there was no need to link the dropped kerb issue to the question of whether she should trade as proposed at the Jobs and Economy Committee. She reiterated that she had not damaged decorative tiles and had insurance to cover any damage if she did. Ms B said the Council had not justified cancelling her trial at short notice.
35. In mid-November 2017, the Council replied to Ms B under stage two of its complaint procedure. It reiterated its apology for not giving her one week's notice. It also apologised for not giving reasons at the time. It also addressed why it cancelled the first trial in November 2016, giving the reasons quoted at paragraph

10 above. It said a senior manager had met Councillors Y and Z in November 2016 to discuss business in the town centre. It said this was “*part of a wider project and did not specifically relate to your business*”.

36. As part of its response the author of the letter (a complaints manager) also said they could not comment on why Councillor X had not received further contact after his meeting in early August. The author said that they were “unaware” such a meeting had taken place.
37. Having recognised mistakes, the Council offered Ms B £200 as a goodwill gesture. It said this took account of the four- week rent she paid to the Council to trade (around £100). Also for any loss of earnings for cancelling trading without a week’s notice.
38. It is not clear Ms B received a separate response to her request for information. During this investigation the Council has disclosed several emails relating to her requests to trial her business, which she had not seen previously.
39. The Council says it passed Ms B’s complaint about the Town Council to the County Council’s monitoring officer, as they were the Council’s acting monitoring officer. However, the Council now has its own Monitoring Officer in post, who will consider Ms B’s complaint.

Our findings

On the cancelled trials

40. I considered first what policies the Council has covering street trading in its town centres. The Council says it has a policy but has referred only to the terms and conditions it gives street traders in town centre locations. I do not consider this is the same as having a comprehensive policy. This is because the terms and conditions do not address certain key matters. For example, they do not explain who within the Council decides whether to consent street trading. They do not explain the role (if any) of local Councillors or committees. They do not provide officers with checklists of relevant considerations before approving street trading; such as checking if the trader needs consent from the highways authority or any other body.
41. The lack of clear policy may have led to confusion from the outset in dealing with Ms B’s application to trade from a town centre. First, over the role of Councillors, committees and different officers. When Ms B first sought permission in October 2016 the Council consulted Ward Councillors. It is unclear if it intended this merely as a courtesy or a chance to make objections.
42. Twice the Council has suggested the Council’s Jobs and the Economy Committee decide whether to allow Ms B to trade from the town centre as well as consider the wider question of trading from that location. When I look at the stated brief of that committee I cannot obviously see this covers town centre street trading, although I accept its brief may be wide enough to encompass this. While the Council’s scheme of delegated authority says responsibility for street trading rests with its Head of Property Services who reports to its Director of Housing, Leisure and Property Services. But the decisive intervention which led to Ms B’s second period of trading cancelling appears to have come from its Director of Legal and Planning Services.
43. The Council has since clarified this Directorate took over managing town centres from the Director of Housing. So, the issue here is the scheme of delegation is not up to date. Another issue a comprehensive policy might address is that of record

- keeping. It is fault for the Council not to have a contemporaneous record of why it cancelled either of Ms B's trial trading periods.
44. Another consideration for any policy is that of communication. The Council may want to reserve the right to cancel trial periods of trading but good administrative practice is to provide reasons. In this case, as the Council recognises, it gave Ms B neither satisfactory notice nor any reasons for cancelling her trials.
 45. I consider the lack of clear policy, confusion over roles of Members and Officers, the lack of record keeping and poor communications in this case all justify a finding of fault against the Council.
 46. I have gone on to consider the consequences of these faults. To do so, I have asked if the Council had any justification for cancelling either trial. That leads me to consider the reasons given by the Council to Ms B for the cancellations.
 47. I considered first the circumstances where the first trial cancelled. I dismiss the explanation given to Ms B that this cancelled because of the planned referral to the Jobs and the Economy committee. I find there was no suggestion the committee would look at Ms B's case before February 2017, following her meeting with the Chief Executive. I find the more credible explanation for the cancellation is in the draft report to the Jobs and Economy Committee in September 2017. Which said the Council cancelled the trial because of concerns about the impact on other businesses. This appears to cross-reference Councillor Y's objection to the trial. I can see no basis for a Councillor's objections on this matter to carry more weight than an officer's judgment. So, this could not provide a satisfactory justification for cancellation. Part of Ms B's injustice is therefore the Council should not have cancelled her trading for this reason.
 48. Turning to the Council's cancellation of her second trial, it says it acted on the advice of the highways authority. But I am clear the Council only received that advice *after* it cancelled the trial.
 49. The Council also cited concerns about the decorative tiles. I accept that both Councillor Y and the Town Council raised concerns about these. I also note that photographs show Ms B's vehicle parked close to the tiles. But there is no evidence Ms B damaged them and the Council's officers say there was no evidence for that. It is also reasonable for Ms B to point out other vehicles have parked on the tiles during previous markets or when erecting the Christmas Tree. So, I did not find the reasons the Council advanced for cancelling the second trial convincing either.
 50. Instead I considered the trigger for cancelling the trial arose when Councillor Y contacted the Council's former Head of Legal and Planning Services. I note Councillor Y did not ask for Mrs B's trial to stop, but for consideration of its impact after the event. But still the Council went on to cancel the trial, although the emails sent around that time also suggest it looked for an alternative location for Mrs B's business. It is therefore unclear why the second trial cancelled.
 51. However, while I am doubtful about the reasons given by the Council for cancelling the trial I accept it cannot ignore the highway authority's position. I consider the Council should seek its consent for any trader to cross the adopted highway to the trading location (or to stage any other event or activity there). The Council should have considered this before Ms B ever began trading.
 52. I find therefore the Council should not have cancelled either trial in the way it did. But I also find it should not have consented it until it had considered and resolved the highways considerations. Consequently, I find Ms B's injustice is that of

distress. This arises from the confusion, poor communications and poor decision making leading to uncertainty about why she could not trade. This has also added to her time and trouble pursuing this complaint.

53. The short notice of the cancellations also put Mrs B to unnecessary expense. She prepared for a day's trading and bought supplies accordingly. She also could not trade elsewhere at short notice. She estimates the combination of these expenses and loss of trading cost her something in the region of £100 a day.

The Council's complaint handling

54. The Council compounded the failings in its handling of Ms B's trading requests with poor complaint handling. First, it was not clear what outcome it agreed after the meeting Councillor X had with senior officers in August 2017. Councillor X clearly left under the impression the Council would investigate concerns and emailed to that effect, but the Council did not respond. It should have clarified its intentions. Although I do not find the Council has sought to deny a meeting took place. I consider it credible its complaint officer knew nothing of the meeting. As they were not there and the officers who were evidently did not take further action after meeting with Councillor X.
55. Second, the Council then delayed by around a month in answering Ms B's first stage complaint. Both she and Councillor X had to chase the Council for a reply.
56. Third, there was also some delay, although less significant, in answering Ms B's second-stage complaint.
57. Fourth, I find the Council's replies have not been candid for reasons that should be obvious from the analysis I have provided above. I do not consider it adequately considered the reasons why either trial cancelled. It is also evident it did not disclose all relevant documents in response to Ms B's information request.
58. This combination of faults has led to a further injustice for Ms B. It added to her time and trouble in pursuing this complaint.

The complaint against the Town Council

59. It is not part of our role to investigate complaints about Town Councils or Councillors. However, local authorities have a monitoring role to ensure complaints about Town Councillors are investigated. In this case I can understand Ms B's concerns as she found literal obstacles put in the way of her trading which she understood was due to the actions of the Town Council. Council officers worked with Ms B to overcome these but they appear to have offered her little support or help when she wanted to make a complaint about the Town Council or its members. Not until we investigated this complaint did Ms B receive any acknowledgment the Council knew of her complaint or did it provide any update on how it dealt with it.
60. I find the Council at fault here. It should signpost individuals as appropriate when they wish to complain about Town Councils or Councillors. It should also ensure timely investigation into complaints about standards and keep the complainant updated. It is regrettable the Council was without a monitoring officer for a time. But it still had responsibility to ensure it carried out these duties.
61. This too has caused some injustice to Ms B in adding again to her time and trouble in pursuing her complaint.

Agreed action

62. The Council accepts these findings. To remedy the injustice caused to Ms B identified in paragraphs 51, 52, 57 and 61 it has agreed that within 20 working days of a decision on this complaint it will:
- a) Arrange for Ms B to receive an apology from a senior officer. Ms B has said she would value that apology in person and in all the circumstances of this complaint I consider that reasonable.
 - b) Provide a financial remedy of £600 to Ms B. This is broken down as follows: £200 to reflect the distress caused to Ms B by the Council's actions; £200 for her unnecessary time and trouble and £200 for her costs in cancelling the trials at the last minute.
 - c) Provide her with an update of its investigation into the complaint referred to its Monitoring Officer. The Council should clarify which of the matters referred to in paragraph 32 it is investigating. It should give clear advice on how the investigation will proceed and a clear timescale for how long it foresees the investigation taking.
63. Within three months of a decision on this complaint the Council has also agreed that it will:
- a) Complete a review of its existing practice for town centre trading and introduce a comprehensive policy that will avoid the mistakes identified in this investigation. I will not be prescriptive about all that policy might contain. But it should clearly explain the roles of officers, elected members and committees. It should provide officers with a clear checklist of considerations before granting approval, including highways considerations.
 - b) Decide whether it wishes to continue allowing town centre trading in the location covered by this complaint. The Council should consider first which individual or body should take that decision given its current constitution and scheme of delegation. It should let us know in writing what it decides here. A decision about approving locations for trading maybe incorporated within the policy proposed at a) above. As might be a decision about the cost of necessary highways alterations.
64. When the actions set out in paragraph 64 have completed the Council should write to Ms B to let her know. If applicable, it should also invite her to re-apply for a trading license in the town centre.

Final decision

65. For reasons explained above I have upheld Ms B's complaint finding fault by the Council causing an injustice to her. The Council has accepted this finding and agreed action to remedy that injustice. Consequently, I can now complete my investigation satisfied with its actions.

Investigator's decision on behalf of the Ombudsman