

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Cherwell District Council
(reference number: 18 013 736)**

23 August 2019

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mrs X	The complainant
APCOA	The company operating car parks on behalf of the Council

Report summary

Highways and transport: parking penalties

Mrs X complained APCOA, the operator working on behalf of the Council, unfairly issued her a parking ticket, and about the way APCOA handled the case.

In considering the complaint we have identified APCOA is enforcing parking tickets using the wrong legislation and therefore the wrong process.

Finding

The Council is responsible for the acts and omissions of its operator.

The Council is at fault for:

- not providing a reasonable means for Mrs X to pay the parking charge;
- issuing the wrong type of ticket;
- failing to reset the discount period after refusing the “appeal”;
- not handling an on-line chat appropriately;
- not refunding the excess money paid as promised until our involvement;
- not dealing properly with Mrs X’s complaint about its failure to refund the money; and
- not complying with the law when it enforces Excess Charge Notices (ECNs).

Recommendations

To remedy the injustice caused to Mrs X, we recommend within three months the Council should:

- apologise to Mrs X for:
 - not providing a reasonable means for her to pay the parking charge;
 - issuing the wrong type of ticket;
 - failing to reset the discount period;
 - not handling the on-line chat appropriately and not refunding the excess charge as promised until our involvement; and
 - not dealing properly with Mrs X’s complaint about not refunding this;
- pay her £100 for the avoidable frustration and distress caused by the faults identified; and
- issue guidance to staff dealing with customer enquiries and concerns on how to respond appropriately to questions involving all operators acting on its behalf.

To remedy the service failures identified in this report within three months the Council should:

- review with APCOA the processes for accepting payment when a ticket machine is not working. If APCOA is not able to accept calls from withheld numbers and there is no way for those customers to pay, it should consider not enforcing whilst the machine is not working; and

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- review its processes for enforcing ECNs to ensure it is using the correct processes and is complying with the requirements of the Road Traffic and Regulation Act 1984.

The Council has agreed to our recommendations. It will report to us on the action it has taken and what changes APCOA has made to its processes as a result and provide us with evidence.

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

The Complaint

1. Mrs X parked her car in a council-owned car park. She could not pay for a ticket because the machine was out of order. The car park operator, APCOA, acting on behalf of the Council, issued a 'parking charge notice' requiring her to pay a penalty which Mrs X unsuccessfully challenged. She attempted to pay £40 online but APCOA collected £80. She was not happy with the way her concerns were addressed by APCOA and its delay in refunding the additional £40.

Legal and administrative background

2. We investigate complaints about 'maladministration' and 'service failure'. In this report, we 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. We 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*)
3. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. We investigate complaints about councils and certain other bodies. Where an individual, organisation or private company is providing services on behalf of a council, we can investigate complaints about the actions of these providers. In this case we have decided to name the operator in the public interest because people in other areas may also be affected by the faults identified. (*Local Government Act 1974, section 25(7), as amended*)
5. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)

Parking penalties

6. Most councils carry out parking enforcement using powers under the Traffic Management Act 2004. Where enforcement is needed, they issue a penalty charge notice. This is a civil process and there is a right of appeal to an independent adjudicator. The Council has not adopted powers under the 2004 Act.
7. This Council controls parking using powers under the Road Traffic Regulation Act 1984 and will issue an Excess Charge Notice (ECN) if it believes an offence has been committed. There is no formal appeal process for ECNs, which are enforceable through the magistrates' courts.
8. Private firms who are controlling parking on private land do so under the Protection of Freedoms Act 2012 and issue a parking charge notice. Government guidance says this only applies to private land. Therefore, councils cannot use this legislation to enforce parking infringements.
9. The legislation used for enforcement is important because there are different systems for enforcing the notice and recovering any penalty charges.

How we considered this complaint

10. We produced this report after examining the information and documents provided by Mrs X and the Council.
11. We gave Mrs X and the Council a confidential draft of this report and invited their comments. The Council also asked APCOA for comments on our draft report. The comments received were taken into account before the report was finalised.

What we found

What happened

12. Mrs X parked her car in a council-owned car park on 18 October 2018. She was not able to buy a parking ticket from the machine because it was not working. She tried to call APCOA who was managing the car park on behalf of the Council but kept getting a message telling her to change her settings and call again. Mrs X did not understand what the problem was. She later found out APCOA could not accept her calls because her number was withheld. Mrs X says she left a note on her windscreen and went to her appointment. On her return, she found a parking charge notice.
13. The Council says APCOA was aware of a problem with this ticket machine and was in the process of replacing it. It said there was a notice on the machine that explained how to pay and provided a telephone number for customers to contact APCOA. It says APCOA does not accept calls from withheld numbers so that if it receives abusive calls it can trace them. APCOA is now considering if it should change its policy.
14. APCOA carried out a visual check of the car to see if there was a permit and also checked if payment had been made by telephone. APCOA has provided a photo of the car's windscreen to show there was no note visible when APCOA checked. APCOA followed the correct procedure when issuing the notice. However, it issued a parking charge notice which only applies to private land instead of an ECN.
15. The Council says this happened because the handsets used by APCOA had been updated but for some reason a single handset had not picked up the changes. It has investigated whether there were any other occasions where the wrong type of notice was issued but has only identified one other incident. The Council says *"this was an error and one for which we apologise"*.
16. The parking charge notice states if payment is made within 14 days from the date of issue the discounted sum of £40 will be accepted as payment. If the charge is not paid within 28 days APCOA will apply to the DVLA for registered vehicle keeper details for formal recovery of the unpaid sum.
17. Mrs X tried to appeal using APCOA's online system. She says she was not able to do so because the system could not accept the recordings she wanted to attach. APCOA is not aware of any problems with its system around the date Mrs X tried to appeal. It can accept files up to 2MB in size.

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18. Mrs X wrote to APCOA explaining what had happened on 22 October 2018 and challenging the notice. APCOA considered her request and wrote to Mrs X on 28 November 2018 to say the ECN was correctly issued so it would not be cancelled. It said if she paid by 12 December 2018 it would accept the discounted sum of £40. APCOA has provided us with a copy of its cancellation policy that it used when deciding whether to cancel a parking notice.
 19. Mrs X attempted to pay £40 online on 11 December 2018. She says there was no opportunity to check the details before confirming payment and no confirmation of the amount paid. She rang her credit card provider to check the amount and it told her APCOA had taken £80.
 20. APCOA says the agent who dealt with her challenge should have reset the discount but failed to do so. Therefore, the system registered the amount due as £80. It says this is an isolated incident and it has provided training to relevant staff to avoid a reoccurrence of this error. It has provided a screenshot to show the information available when payment is made; this shows the reference number for the notice and amount at the top of the screen.
 21. Mrs X telephoned the Council. The Council officer told her the Council had no jurisdiction over the car parks because these are managed by APCOA. She advised Mrs X to contact APCOA. The Council says Mrs X was requesting a refund of the additional £40 taken in error so it advised Mrs X to speak to APCOA as it was their operator who had taken the payment and had the relevant information to deal with her request.
 22. Mrs X had an on-line 'chat' with an agent working for APCOA. It took the agent 40 minutes to access relevant information and agree to refund the additional £40. APCOA accepts this fell below its "*usually high standards*" and that its agent had not met the professional standards it would expect in the way she communicated with Mrs X. It has offered to send a written apology to Mrs X. It says it has spoken to the agent and handled the incident using its performance management processes, "*which include training for the agent concerned*".
 23. When she had not received the agreed refund after two weeks, Mrs X wrote to APCOA again. Her letter was treated as an appeal and APCOA sent a letter dated 15 January 2019 to say the notice was issued correctly and would not be cancelled. APCOA says this letter was sent in error and the agent dealing with Mrs X's letter did not realise that there had already been an appeal.

Enforcement processes

24. The Council has provided information about the processes used by APCOA to enforce ECNs. This shows APCOA allows 28 days for payment, following which it obtains details of the vehicle owner from DVLA and issues a reminder letter. The reminder letter explains if the charge is not paid this may be an offence under the Road Traffic Regulation Act 1984. It says this may result in a fine of up to £1,000.
25. The Council has also provided details of its appeal process, which allows drivers to appeal against the ECN within 28 days of it being issued. Appeals are considered by APCOA and we have seen its guidance for deciding whether to allow an appeal.

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26. The Council says if the driver has not paid the sum due, APCOA will decide whether to chase payment using debt recovery agents. APCOA is not authorised by the Council to take action in the magistrates' court. APCOA uses debt recovery agents to encourage payment as a "light touch" alternative to court action.

Fault

27. The ticket machine was not working on the day in question because it had been vandalised. APCOA put a notice on it to explain how to pay whilst the machine was out of order. This in itself is not fault. In this situation, most customers would need to pay by telephone. Those customers whose telephone number was withheld would not be able to do so but they had no way of knowing this as APCOA had not given enough information. Therefore, the Council was prepared to enforce parking charges without giving customers a reasonable means to pay the charge. This is fault.
28. Mrs X had not paid to park in the Council car park and the evidence provided by APCOA does not show a note on the windscreen. Therefore, APCOA's decision to issue a notice for failing to pay was, at the time, correct.
29. APCOA issued the wrong type of ticket using legal powers only available on private land not on council-owned land. It issued a parking charge notice but it should have issued an ECN. APCOA says this was due to a problem with the handset used by the warden. This was fault. Further, because the notice issued was not under the Road Traffic Regulation Act 1984, it had no legal force. However, if it were not for this fault in using the wrong powers, APCOA would still have issued a notice but as an ECN and Mrs X would still have had to pay it or challenge it.
30. We have considered whether these faults caused an injustice to other users of the car park but we are satisfied that it was not a general problem because, according to APCOA's records, there were only two such incidents.
31. Mrs X was not aware the notice was unenforceable and she tried unsuccessfully to challenge it online. It is not clear why she could not do so but it may be because the information she tried to upload, a recording of the phone call, was too large for the system to accept.
32. Mrs X then sent a challenge to the notice by letter. APCOA considered this and decided not to cancel the notice. It followed its policy when deciding this. There is no evidence of fault in the way it made this decision but it failed to notice the ticket had been issued under the wrong powers. When it wrote to Mrs X to confirm its position it described the notice as an ECN. This is because its computer system recorded the correct type of notice and not the parking charge notice it incorrectly issued due to a faulty handset. This caused confusion for Mrs X.
33. APCOA failed to reset the discount so when Mrs X tried to pay online the system registered the amount due as £80 instead of £40. This is fault. This fault led to Mrs X paying too much and being out of pocket for several weeks.
34. Mrs X says the system did not allow her to check the amount before she paid but we are satisfied that it does give this information, albeit not in very large print. This is not fault.

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35. The Council says its officer gave Mrs X the correct information when it advised her to contact APCOA about the refund and we agree. That said, we are concerned the officer told her that the management of car parks was outside the Council's jurisdiction. This is not the case since APCOA is acting on behalf of the Council. This is fault but it has not caused an injustice to Mrs X.
 36. APCOA accepts it did not handle the online 'chat' appropriately. Further, it did not refund the £40 despite agreeing to do so. This is fault. This fault meant Mrs X was out of pocket for longer than she should have been and over the Christmas period. Mrs X says she is on a low income and this caused her financial hardship.
 37. When Mrs X wrote to say she had not received the refund, APCOA treated this as a challenge to the ECN. It did not register that she had already done this. It did not respond to the content of her letter which was about when it would refund the £40 overpayment. This is fault. This fault caused Mrs X frustration and uncertainty because she did not understand its response, and avoidable distress because she thought APCOA was pursuing her for money she had already paid.
 38. Since Mrs X complained to us, the Council arranged for APCOA to refund the £80 Mrs X paid. It has made enquiries with APCOA and has taken action to address some (but not all) of the faults we have identified. We have taken this into account when considering what recommendations are appropriate. We have also taken into account there was no fault in the decision to issue a notice and therefore if the later faults had not occurred Mrs X would still have had to pay £40, challenge it, or risk prosecution if she did not pay.

Enforcement processes

39. The information the Council provided shows APCOA would normally issue an ECN. This is correct. It allows drivers to "appeal" against the ECN within 28 days of it being issued. This terminology is incorrect. Where an ECN is issued the driver should have an opportunity to challenge it through the magistrates' court.
40. If the sum has not been paid within 28 days, APCOA obtains the details of the registered keeper of the vehicle (the owner) and issues a reminder letter. The reminder letter correctly says that failure to pay could be an offence under the Traffic Regulation Act 1984.
41. The Council says if the driver has not paid the sum due, APCOA will decide whether to chase payment. It does this by instructing a debt recovery agent to write to drivers to encourage them to pay rather than face court action.
42. We have seen the letters the agent sends, which use wording that suggests they are enforcing a debt and say further action would be taken in the county court not the magistrates' court. The letters are threatening in tone and we do not consider them a "light touch" alternative to court.
43. We also asked the Council how many cases had been taken to the magistrates' court to enforce ECNs and it told us the last time it did so was 2011.
44. It should be noted the only formal way a driver can challenge an ECN is in the magistrates' court. Therefore, steps to prevent cases going to the magistrates' court are arguably denying drivers the legal right to challenge the ECN.

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45. The Council says it was not its intention to deny any driver the right to challenge an ECN in the magistrates' court. It will make changes to its letters to emphasise the driver can challenge an ECN in the magistrates' court.
46. On balance, it appears APCOA is not complying with the law when it enforces ECNs. This is fault. The Council is responsible for the actions of its operator. Although the Council says it is aware of the correct enforcement process for the powers it uses, the evidence suggests this process is not, in fact, being followed. Therefore, the Council is at fault. This fault has not caused an injustice to Mrs X because no enforcement action was taken against her, but it has wide-reaching consequences for others using car parks in this Council's area.

Recommendations

47. To remedy the injustice caused to Mrs X, we recommended within three months the Council should:
- apologise to Mrs X for:
 - not providing a reasonable means for her to pay the parking charge;
 - issuing the wrong type of ticket;
 - failing to reset the discount period;
 - not handling the on-line 'chat' appropriately and not refunding the excess charge as promised until our involvement; and
 - not dealing properly with Mrs X's complaint about not refunding this;
 - pay her £100 for the avoidable frustration and distress caused by the faults identified; and
 - issue guidance to staff dealing with customer enquiries and concerns on how to respond appropriately to questions involving all operators acting on its behalf.
48. To remedy the service failures identified in this report within three months the Council should:
- review with APCOA the processes for accepting payment when a ticket machine is not working. If APCOA is not able to accept calls from withheld numbers and there is no way for those customers to pay, it should consider not enforcing whilst the machine is not working; and
 - review its processes for enforcing ECNs to ensure it is using the correct processes and is complying with the requirements of the Road Traffic and Regulation Act 1984.
49. The Council should report to the Ombudsman on the action it has taken and what changes APCOA has made to its processes as a result and provide us with evidence.
50. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

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51. We welcome that the Council has agreed our recommendations and is working with APCOA to address our concerns.

Decision

We have completed our investigation. We have found the Council at fault causing personal injustice to Mrs X. We have made recommendations to remedy the injustice and prevent recurrence of the fault. We have also identified fault that did not cause injustice to Mrs X but which has wider implications for those using car parks in the Council's area and we have recommended action to address that.