

Ombudsman's Determination

Applicant	Mr Peter Tutt
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	The London Borough of Redbridge (the Council)

Complaint Summary

Mr Tutt has complained that the Council, the administering authority for the Scheme, have failed to correctly calculate his pension entitlement.

Summary of the Ombudsman's Determination and reasons

The complaint should be partly upheld against the Council, as, although Mr Tutt's pension benefits have been correctly calculated, there were delays in responding to the second stage IDRPs and to our service which did cause Mr Tutt some significant distress and inconvenience and for which he should be compensated.

Detailed Determination

Regulations Governing the Scheme

1. The regulations that apply are the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and the relevant sections to this application are:

“Meaning of “pensionable pay”

4.—(1) An employee’s pensionable pay is the total of—

- (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
- (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

(2) But an employee’s pensionable pay does not include—

- (a) payments for non-contractual overtime;
- (b) any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment;
- (c) any payment in consideration of loss of holidays;
- (d) any payment in lieu of notice to terminate his contract of employment;
- (e) any payment as an inducement not to terminate his employment before the payment is made...

...

Calculation of length of periods of membership

7.—(1) In calculating the length of a period of membership, fractions of years of membership count.

(2) The numerator of such fractions is the number of complete days of membership and the denominator is 365.

(3) Except for the purposes of regulation 5(1)(a), membership in part-time service is counted as the appropriate fraction of the duration of membership.

(4) The numerator of that fraction is the number of contractual hours during the part-time service and its denominator is the number of contractual hours of that employment if it were on a whole-time basis.

...

Final pay: general

8.—

(1) Subject to regulations 9 to 11, on ceasing a period of active membership in an employment, a member's final pay is that member's pensionable pay for as much of the final pay period as the member is entitled to count as active membership, whether this was accrued with the current or a previous employing authority, but excluding pensionable pay from membership in a concurrent employment, or concurrent employments.

(2) A member's final pay period is the year ending with the day on which he stops being an active member or, if that would produce a higher figure, either of the two immediately preceding years.

(3) In the case of part-time employment, the final pay is the pay that would have been paid for a single comparable whole-time employment.

(4) Any reduction or suspension of a member's pensionable pay during the final pay period because of his absence from work owing to illness or injury is disregarded."

Material Facts

2. Mr Tutt had started employment with the Council in 1988 and left employment on 17 September 2013.
3. The contract of employment given to Mr Tutt in April 1988 says that his hours of work will be 20 hours per week. It also said that:

"You will be expected to participate in the sleep in duty rota as directed by the Office in charge".
4. A later version of Mr Tutt's contract again said his contracted hours were 20 hours a week. Details of actual working times, flexi time and patterns/ rotas/shifts would be agreed in consultation with his line manager.
5. Mr Tutt's retirement statement shows a final pay figure of £29,120.37. His pensionable service was given as 13 years and 204 days. When determining the pay to calculate his pension benefits the whole-time equivalent (**WTE**) pay had been used in respect of his basic pay, and the actual pay he received was used in respect of his enhanced pay. Mr Tutt's total annual pension was £5,303.83 a year and his retirement grant was £11,491.58.
6. Prior to leaving employment Mr Tutt had written to the Council on 18 June 2013, with a question over the calculation of his final pay as a part-time employee. A large proportion of his pay is "enhanced" as he worked a lot of "sleep ins, weekends, and night hours". He had been told that the final salary for a part-timer was grossed up to the full-time equivalent and any enhanced pay was added to that figure. It seemed, therefore, that he was losing out as the enhanced pay was not equivalent to what an

employee would earn if full-time. Mr Tutt gave an example of someone who worked half the full-time hours saying that if their final pay award was calculated by simply adding the enhanced pay then this by definition was only half the WTE. To be equitable the enhanced pay needed to be multiplied by two as was done with basic pay. Providing a worked example, he said, that if such an employee earned basic pay of £10,000 a year and an amount of enhanced pay of £5,000 then for their WTE the basic pay would be £20,000. But his enhanced pay would only be another £5,000, and not £10,000, as he thought should be the case. The difference in final pay using these methods (£30,000 versus £25,000) was substantial.

7. A later email from Mr Tutt of 8 August 2013, to the Pensions Advisory Service (**TPAS**) said, that as yet he had not received a response from the Council.
8. Mr Tutt then decided to make an application under the Internal Dispute Resolution Procedure (**IDRP**). (While our service has been provided with a copy of those papers they are undated) He said that he worked 20/36ths of the full-time hours. He had a set pattern of hours. He would work from 2pm until midnight and then have sleep in duty until 8am. He would then work 8am to 3pm. He received enhanced pensionable pay for the night work done between 8pm and midnight. He also got an allowance for the sleep-in, which was also pensionable. He also received enhanced pay for bank holidays and weekends, which again was pensionable. Had he worked full-time he would have been paid more enhanced pay.
9. Mr Tutt also referred to the Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000, saying that part-time workers should be treated equally to full-time employees. However since both full-time and part-time workers simply got enhanced pay amounts added to their final pay, it was actually full-time employees that were getting treated more favourably. So his view was that the LGPS Regulations do not conform to law.
10. The Council acknowledged receipt of Mr Tutt's formal dispute papers on 3 October 2013, and said a response would be sent within two months.
11. The IDRP stage one response was issued on 6 December 2013. The LBR's appointed person said that he was employed on a contract of employment of 20 hours per week. As his job involved working unsocial hours, including sleep over duties and weekend working, it was their policy that "enhanced pay" is paid to employees carrying out these duties. They pointed to Regulation 8 (3) of the Scheme's Regulations and said the calculation of final pay is the responsibility of the employer and it was for them to determine how to apply pay elements that contributions have been deducted from and that are not specifically covered in the Regulations (e.g. whether to include non-contractual overtime). In calculating the final pay the Council had used the same approach they would have used for a comparable whole time employment, i.e. they added on the enhanced pay to the whole time contractual pay. This was in line with the Regulations.

12. In a further response from the appointed person of 30 December 2013, it was said that there were a number of ways to treat additional hours worked by a part-time employee. For example if the part-timer worked an additional five hours a week this could be recorded as overtime or as having worked a 25 hour week. In Mr Tutt's case it was his view that to benefit from final pay from working the unsocial hours, he would physically have to work them. Not all full-time employees will work the maximum number of unsocial hours available to work, and they only received pay for the unsocial hours they did work. So it appeared reasonable to adopt the same approach for part-time employees. He added that it was his view that Regulation 8(3) referred only to the "contractual pensionable pay" that he received, and not the enhanced elements where Mr Tutt would have to physically work the additional hours for it to be treated as pensionable. In relation to the Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000, he felt that these related to Mr Tutt's contractual employment and not how the Scheme's Regulations are interpreted.
13. Mr Tutt appealed the decision and made an application for his issues to be considered under stage two of the IDRP on 13 March 2014. As part of his submissions Mr Tutt referred to a previous determination from our service (reference M00987) against the Scheme by one of my predecessors. Mr Tutt also provided a rota of his work pattern.
14. The Council confirmed receipt of the stage two papers on 19 March 2014. Shortly thereafter they said the rota and determination referred to were not enclosed. These were later provided to the Council on 1 April 2014. It appears that the stage two response was delayed due to a member of staff leaving the Council's employment and staff sickness. It took some time before someone was appointed the task of responding to Mr Tutt's application.
15. The Council issued the IDRP stage two response on 25 June 2014. This again said that Mr Tutt worked 20 contractual hours a week but also "chose" to work additional unsocial hours, including sleep over duties and weekend working for which he got enhanced pay. They referred to the enhanced pay as being for non-contractual additional hours. Again they referred to Regulation 8 (3) and said that they had used the same approach that would have applied if he had he been in comparable whole time employment. They did not think the previous Ombudsman case applied, as that revolved around the applicant's part-time work pattern (regularly working one six day shift out of a six day work pattern) and how this should be grossed up to a full-time equivalent for pensionable pay purposes. His case was seen as fundamentally different as he was not querying the calculation of his grossed up contractual pay. The sleep-in time could be thought of as a form of "voluntary overtime" and not contractual. If he was full-time he may or may not have chosen to work more sleep in duties, if they were available. They were not a fixed or regular requirement of his job and, therefore, there was no applicable full-time equivalent.

Summary of Mr Tutt's position

16. Under the Scheme part-timers have their length of service grossed down but have their pay equivalently grossed up. The Council have said that they will not gross up enhanced pay for unsocial working (Mr Tutt says this includes working evenings, weekends and bank holidays added to which was a sleep-in allowance). The injustice was the unfair calculation of his grossed up pay leading to a lower pension than he was entitled to. Also the complaint responses have been late at each stage and did not address the points raised. His pension should be calculated by including pay for night and weekend work.
17. The hours in question as referred to in his appeals were not "additional" hours or overtime. They were contractual and he was obliged to work them. For over 25 years he worked a set pattern of hours. He had not based his appeal on any non-contractual payments.
18. The Council's payroll team considered enhanced pay for unsocial hours within contracted hours as pensionable pay. Mr Tutt has provided payslips which mark the elements of his pay that are pensionable and non-pensionable.
19. He worked the hours that he did as his journey time was around three hours each way and to work ordinary shifts would double his travelling time. This pattern was also beneficial for the centre as it was always difficult to find people willing to work the sleep in shift. This pattern of work was agreed verbally before he started at the Council. Also according to ACAS this had become part of his contract through "custom and practice" (Mr Tutt has provided our service with a copy of an ACAS publication called "Varying a contract of employment"). He also says that Unison's legal team confirmed that these hours were part of his contract. He says that the enhanced pay is not equivalent to what one would have earned if one was full-time. There was no formal limit on the number of enhanced hours that a full-time employee could work. He adds that in his last year or so many full-time workers were working proportionately as many, or almost as many, unsocial hours as he did due to staff shortages. Mr Tutt has also provided a rota from May 2012 which he says shows that a full-time employee worked 75% of her shifts in this way.
20. They were expected to do these shifts, and this was stated explicitly in his original contract, else the 24/7 service would have collapsed. The residential centre he worked in was for people with severe mental health problems. The nature of the issues meant that 24 hour staff cover was necessary, which in turn meant it was an integral part of an employee's job to work all kinds of unsocial hours. To illustrate he says a staff member who asked to reduce the number of her sleep ins was refused her request.
21. The normal sleep-in duties were regarded as contractual, unless he was doing additional hours. He was not claiming for any additional sleep-ins he may have done – only those that were part of his contract.

22. Sometimes he received less enhanced pay and sometimes he received more, and this varied considerably. As an example he was paid 50% more for working on a Sunday as opposed to a weekday.
23. Mr Tutt also points to the Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000. Part-time workers should be treated equally to full-time employees, but this was not the case here.
24. Under the new 2014 regulations for the Scheme the final pay is not grossed up for part-timers and the actual service is not pro-rated. If this system was used for his own pension benefits the resulting figures would be what he believes his benefits should be. Those regulations were possibly indicative of the intention behind the old regulations.
25. Mr Tutt also says that TPAS had found precedents in a previous Pension Ombudsman determination (M00987) for the approach he describes and that it conforms with the LGPS regulations.

Summary of the Council's position

26. Mr Tutt agreed a working pattern with his line manager as has been detailed above. The Council accepts that Mr Tutt's enhanced payments and sleep in allowance are both contractual and pensionable.
27. Mr Tutt's original contract of employment included the wording (it appears that our service has only been given an extract to date):

“Certain officers, by the nature of their duties, will have special conditions of employment which require them to work different hours, including work at week-ends and special arrangements, subject to the requirements of the department. Such officers should have already been told of these special conditions by their Chief Officers”.
28. Under the provisions of the Scheme pension benefits were calculated with reference to “final pay” which is normally “all the salary, wages, fees and other payments paid to him for his own use in respect of his employment” during the last year of membership of the Scheme.
29. Regulation 8 (3) says that in the case of part-time employment the final pay is that which would have been paid for a comparable whole-time employment. Mr Tutt's final pay was therefore calculated using the WTE for his normal annual pay for the last year of membership plus the enhancements for unsocial hours and sleeping in allowance he was paid during that period. This method was correct in accordance with the Regulations.

30. This approach was also correct in line with the approach taken by Cambridgeshire County Council in the determination that Mr Tutt refers to. Had Mr Tutt been a full-time employee there is no guarantee that he would have done any additional sleep-in duties or received any additional enhanced pay. While if full-time he may have done possibly done more hours this would have been dependent on the duties available and also on the agreement of his line manager. Further the rota information from Mr Tutt's place of work was such that it covered all 28 sleep-in duties over a four week period. In order for him to be able to do additional duties another member of staff would have had to sacrifice their duties.
31. Mr Tutt's stage one appeal was received on 30 September 2013, and passed to the appointed person on 3 October 2013. The decision was issued on 6 December 2013. So this was about one week longer than the two month period specified in their process.
32. The second stage appeal was received on 14 March 2014. The decision was sent on 25 June 2014. This delay was unfortunate but was primarily a result of difficulty in initially allocating a suitable chief officer to review the matter. Unfortunately they were not able to offer any distress payment for this. That could only be done if there was a legal requirement to make such a payment or legislation allowed it.
33. The Council also apologises for providing a late response to the formal response request from our service. The Council had recently moved offices from the one that we wrote to, which meant that there was a delay before they got our letter (an extension to the request from our service to 27 February 2015, was requested and given but this was missed with the response eventually being received on 23 March 2015). Also the member of staff dealing with Mr Tutt's complaint had a period of sick leave and was involved in a redundancy exercise closing on 31 March 2015.

Conclusions

34. Mr Tutt has argued that his pensionable pay should be based not only on the grossed up full time equivalent salary but also the grossing up of the other elements of pay that he receives for unsocial hours, working weekends and bank holidays and for sleep ins.
35. The Council's practice is to calculate pensionable pay as annual pay (grossed up to the whole time equivalent) plus all other elements, for example, sleep in allowance and unsocial hours. The Council also says that these additional elements should not be grossed up as they are based on hours worked.
36. My investigator has confirmed with the Council that the hourly rate paid to Mr Tutt is the same hourly rate that a full time equivalent employee would receive. Mr Tutt had a contract of employment that said his basic hours were 20 hours a week. The hourly basic rate was however increased if the hours that Mr Tutt worked were unsocial or at weekends or bank holidays.

37. Mr Tutt agreed a rota with his line manager for working his basic hours and he says he worked the hours he did because of his travelling time and if he had worked ordinary shifts it would double his travelling time. It is therefore clear that Mr Tutt did have some control over the hours he worked and it appears that the majority of his hours were paid at an enhanced hourly rate because of the pattern of work he engaged upon. If, however, an equivalent full time employee only worked ordinary shifts then they would not be entitled to the same enhancements for unsocial hours.
38. Therefore, I conclude that these unsocial hours enhancements to the basic hourly rate can be classed as a fee for the unsocial hours worked and one would not expect a fee to be grossed up to its full time equivalent. Furthermore, if Mr Tutt were to have these other elements of pay grossed up then he would in effect be receiving a higher level of unsocial hours payments than an equivalent full time employee. This cannot be correct and would be contrary to the principles of the Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000. It would no doubt give rise to a number of claims from equivalent full time employees.
39. Mr Tutt and his advisers have also raised the argument that Mr Tutt has been treated less favourably than full time workers but I do not agree. I conclude that the Council have treated both full time workers and part time workers the same by adding the fee for the unsocial hours to the calculation of their pensionable pay (with the contractual pay of Mr Tutt grossed up to its full time equivalent).
40. The Council has calculated Mr Tutt's pension benefits based on grossing up his basic contractual hours to its full time equivalent and then adding the enhancements he has received for unsocial hours worked to arrive at his pensionable pay. I agree with this approach and, therefore, conclude that Mr Tutt's pension benefits have been calculated correctly.
41. Mr Tutt has also argued that a past determination (M00987), by one of my predecessors, supports his case. I do not agree that this case is relevant to Mr Tutt's complaint as in that case the parties had agreed the final pensionable pay figure before applying to our service for a determination as to the level of compensation that the applicant should receive for distress and inconvenience. The determination did not rule on whether the way in which pensionable pay was calculated was correct or not.
42. The Council has admitted to delays in responding to Mr Tutt's second stage IDRPs and to responding to our service which would have caused Mr Tutt significant distress and inconvenience. I therefore direct that the Council should pay Mr Tutt £500 for this distress and inconvenience.

Directions

43. I direct that within 28 days the Council should pay Mr Tutt £500 for the delays in progressing the second stage IDRP and to responding to our service which would have caused him some distress and inconvenience.

Anthony Arter

Pensions Ombudsman
27 August 2015