

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (the Scheme) West Sussex Pension Fund
Respondent	Arun District Council (the Council)

Outcome

1. Mrs N's complaint against the Council is partly upheld. To put matters right, the Council shall pay Mrs N £2,500 in recognition of the exceptional distress and inconvenience it caused her.

Complaint summary

2. Mrs N's complaint concerns the Council's decision not to backdate her ill health early retirement pension (**IHER**) to the date she left the Council's employment.

Background information, including submissions from the parties

3. In 2002, Mrs N joined the Council as a Revenues Manager. By virtue of her employment, Mrs N was a member of the West Sussex Pension Fund section of the Scheme, a defined benefit occupational pension scheme.
4. On 18 December 2008, Mrs N was diagnosed with a rare tumour in her abdomen. At this time, she also returned to work following maternity leave. Due to her diagnosis, she was referred to occupational health to see how she could be supported in a return to work. For a period, Mrs N worked part-time hours.
5. On 30 June 2010, Mrs N left the service of the Council as the symptoms associated with her condition were not compatible with her role within the Council. Thereafter, her Scheme benefits were deferred.
6. On 8 November 2021, Mrs N contacted the Council about applying for IHER.
7. The relevant regulations are The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) (**the 2007 Regulations**) and The Local Government Pension Scheme (Administration)

Regulations 2008 (SI2008/239) (as amended) (**the Administration Regulations**). Both the 2007 Regulations and the Administration Regulations were revoked by The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014 (SI2014/525). They continue to have effect so far as is necessary to preserve pension rights accrued prior to 1 April 2014.

8. As at the date Mrs N's employment ceased, Regulation 31 of the Benefits Regulations provided:
- “(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits immediately, whatever his age.
 - (2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.
 - (3) In this regulation, “gainful employment”, “permanently incapable” and “qualified in occupational health medicine” have the same meaning as in regulation 20.”
9. Gainful employment is defined as paid employment for not less than 30 hours in each week for a period of not less than 12 months. Permanently incapable is defined as, more likely than not, incapable until, at the earliest, the member's 65th birthday.
10. Regulation 50(4) of the Administration Regulations provided:
- “The first period for which any retirement pension under regulation 31 (early payment of pension: ill-health) of the Benefits Regulations is payable begins on the date when the member became permanently incapable as determined under regulation 31 of those Regulations.”
11. On 10 November 2021, the Council's Human Resources Officer (**the HR Officer**) responded to Mrs N and said:-
- To be eligible for IHER, it needed to be established whether she was permanently incapable of carrying out the job she was formerly employed in.

- It also needed to be established if there was a reduced likelihood that she could undertake alternative gainful employment within three years of applying for IHER, or her normal retirement age (**NRA**).
 - Gainful employment meant work of not less than 30 hours a week for at least a period of 12 months.
 - A brief step-by-step process was provided, explaining the process that needed to be undertaken in order for an IHER application to be made.
12. On 11 November 2021, Mrs N responded to the HR Officer and provided an overview of her condition and the previous/current treatments she underwent, and those that she was undergoing.
13. On 21 December 2021, Mrs N had an appointment with the Scheme appointed medical adviser (**the MA**) to discuss her condition and IHER application.
14. Between December 2021 and April 2022, the MA corresponded with Mrs N's GP to request medical evidence about Mrs N's condition/treatments from her diagnosis, in 2008, up until the present day.
15. On 6 April 2022, Dr Bell, the MA appointed to review Mrs N's IHER application provided his opinion (**the MA's Report**). The MA recommended that Mrs N was eligible for IHER from the date she left the Council's employment and said, in summary:-
- Mrs N had undergone specialist treatments since her diagnosis in 2008, this included multiple surgeries to restrict tumour deposits in her bowel, liver, gallbladder, diaphragm. She underwent chemotherapy on a trial basis; however, this did not prevent the spread of the cancer.
 - She struggles with fatigue, gastrointestinal symptoms, low blood pressure and daily pain. She is able to manage basic level of self-care and can move about unaided, though she avoids physical tasks.
 - Her cognitive function was intact and so she had been able to work on a part-time basis, from home, in a flexible manner to help accommodate her treatments and hospital appointments. Generally, she works about 20-21 hours a week. This had been the case since she left the Council in 2010.
 - The MA said:

"While [Mrs N] can perform tasks of work, she is not able to provide reliable service commensurate with her former contracted role and I feel she meets the criterion of permanent unfitness in that regard.

I have contemplated whether she would be able to perform other work, but I do not think she is likely to be able to reliably manage 30 hours a week in alternative employment before normal retirement age, primarily as a

consequence of fatigue which is going to be progressive as her general physical condition declines.

This point was reached already at the time she left [the Council], based on her account and supported by the evidence I received.”

16. On the same date, the MA provided his certificate of IHER alongside the MA's Report. The MA suggested that the date Mrs N met the criteria for IHER was 30 June 2010, the day she left the Council's employment.
17. The IHER certificate included the following statement:

“the date entered can be earlier than, and need not correspond with, the date of the person's application for early payment of deferred benefits as shown in Part A, and will be used as the date from which the deferred pension benefits will be brought into payment.”
18. Between April 2022 and June 2022, Mrs N corresponded with the Council about what her IHER entitlement was.
19. In June 2022, the Council sent Mrs N an IHER quotation outlining the options available to her, effective from 30 June 2010. This included an unreduced annual pension of £27,026.95 and a tax-free lump sum of £15,057.57. Alternatively, she could claimed a reduced annual pension of £18,181.13, and a maximum tax-free lump sum of £121,207.35.
20. On 17 June 2022, the Council wrote to Mrs N and confirmed that she was eligible for an IHER pension from 30 December 2021, the date of her IHER application. It provided her with a new IHER quotation which provided the following options: an annual pension of £7,858.87, and a tax-free lump sum of £18,287.85; or, a reduced annual pension of £6,031.84, and a maximum lump sum of £40,212.21.
21. Mrs N appointed Gunnercook, a firm of solicitors (**the Solicitor**), to act as her legal representative in appealing the decision not to backdate her IHER pension to 30 June 2010.
22. On 1 December 2022, the Solicitor, on behalf of Mrs N, submitted a complaint under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). The Solicitor provided a brief timeline of events and said that the Council held a duty of care to inform Mrs N about her right to apply for IHER before she made the decision to resign from her role, in 2010. The MA's Report made clear that she would have been eligible for IHER in June 2010, if she was given the opportunity to submit an application. The Council should reconsider the decision not to backdate her IHER pension to June 2010.
23. On 9 March 2023, the Council issued its stage one IDRP response to Mrs N's complaint, and said, in summary:-

- Mrs N was diagnosed with cancer in 2008, once she returned to the Council following a period of sick leave, her hours were adjusted to part-time, as advised by the Council's occupational health department. Due to the severity of her symptoms, she resigned and left the Council thereafter taking up a part-time (21 hours), home based role.
 - Based on the limited information available, the Council believed that it was Mrs N's decision to resign from her Council role. There was no evidence that IHER was recommended to her, at the time.
 - The option to apply for IHER prior to resigning from her Council role was clearly outlined in its "sickness policy". Further, based on the legal advice available to the Council, there was no implied duty for an employer to provide advice to an employee about a pension scheme to prevent economic loss. Even if such a duty did exist, it was likely time barred as the matter being complained about occurred in 2010.
 - As Mrs N left the Council in 2010, and then only applied for IHER in 2021, her application was treated as a request for IHER from deferred status. The MA agreed that she met the IHER criteria and the Council believed that her benefit should be payable from 30 December 2021, not 30 June 2010 as the MA recommended.
 - There was no dispute that within the last 10 years Mrs N's condition had deteriorated and that she was unable to fulfil the duties of her former role and that she had a reduced likelihood of being able to undertake gainful employment within three years of her IHER application, or her NRA. She was permanently incapable of any full-time employment.
 - It did not accept that her IHER pension should be backdated to the date she left employment in 2010. Mrs N left the Council's service and immediately started part-time work, working 21 hours a week. So, she was clearly capable of some form of gainful employment.
 - Mrs N chose not to attend a hearing she was invited to where she could make an additional representation for her appeal, so it was unsure what work she undertook from 2010. There was speculation that she worked 21 hours to help look after her children. It was not unusual for women returning from maternity leave to reduce their hours to look after their children.
 - Mrs N did not accept an invitation to "state her case if her health deteriorated recently". There was no evidence that the IHER criteria was met in June 2010, so it would not backdate her IHER pension any further back than November 2021.
24. On 31 May 2023, the Solicitor asked for Mrs N's complaint to be considered under stage two of the Scheme's IDRP. They said that once Mrs N made it clear that she was diagnosed with terminal cancer, with a life expectancy of between four to five

years, the Council may not have been required to advise her, but it had a duty of care to inform her that she could apply for IHER, but it did not.

25. Upon receipt of Mrs N's stage two IDRP complaint, the Council referred the matter onto West Sussex County Council (**WSCC**) as an independent party separate from the complaint, with no prior involvement.
26. On 5 February 2024, WSCC issued its stage two IDRP complaint response to Mrs N, the Solicitor and the Council. WSCC said:-
 - The Council's consideration that she continued to work part-time (21 hours) after she left its employment, was an irrelevant consideration. Gainful employment, for the purpose of IHER, was defined as employment of not less than 30 hours for more than 12 months.
 - So, the Council had applied the incorrect "permanent incapacity" test in reviewing her IHER application. The MA took this, and the fact that Mrs N worked part-time after 30 June 2010, into account when they said her IHER pension should be backdated to 30 June 2010.
 - The MA also took into account the course of Mrs N's condition and the treatment she received from June 2010.
 - It was not for WSCC to replace the Council's decision; however, it said that it would reconsider the decision not to backdate Mrs N's IHER pension to 30 June 2010 in light of it applying the incorrect IHER test.
27. On 21 March 2024, the Council wrote to Mrs N and the Solicitor, in response to WSCC's recommendation. It explained that:-
 - The evidence available was that, when Mrs N returned from maternity leave, in 2008, with her cancer diagnosis, she continued to work, albeit on a part-time basis. She was in contact with the Council's occupational health team who did not recommend IHER, as it was clear she could work part-time.
 - By the time Mrs N resigned, the occupational health team were not provided with the opportunity to reassess her and her ability to work. Mrs N resigned and chose to pursue alternative gainful employment, with it being her choice of how many hours she worked.
 - The evidence suggested that she did not want to apply for IHER at the time she left the Council in 2010. Mrs N's capability was not assessed in 2010, so the MA's Report was not based on or supported by any evidence.
 - The MA was not required, nor empowered, to give an opinion on backdating an IHER benefit. It would not backdate her pension to June 2010.

28. On 9 October 2024, upon receipt of Mrs N's complaint to the Pensions Ombudsman (**TPO**), the Council reconsidered its decision not to backdate Mrs N's IHER pension to 30 June 2010. It explained that:-
- Having received external advice, it was clear that the correct test for IHER was not carried out when considering Mrs N's IHER application. It was incorrect of the Council to reject the MA's opinion that Mrs N's pension be backdated to 30 June 2010 without providing any prevailing evidence to support such a decision.
 - It was also incorrect to consider her working part-time (21 hours), after leaving the Council, when considering her IHER application. Gainful employment was defined as employment of not less than 30 hours a week for a period of 12 months.
 - The Council used an incorrect definition and arrived at a perverse outcome with insufficient evidence to enable it to ignore the MA's Report. It would act to re-calculate and backdate Mrs N's IHER pension to 30 June 2010.
29. Mrs N accepted the decision to backdate her pension; however, she said that she had incurred significant legal expenses, totalling £15,979.48, which the Council should reimburse her for. It should also consider a payment in recognition of the distress and inconvenience she had suffered. Mrs N has provided copies of the Solicitors invoices for the advice provided which are broken down as follows:
- Legal advice and work on the stage one IDRP application - £2,404.80 (22 December 2022);
 - agreed fees for ongoing legal advice and a letter to the Council - £526.44 (10 February 2023);
 - legal advice and work on the stage two IDRP application - £4,752.00 (2 June 2023);
 - agreed fees for ongoing advice and work complete of stage two IDRP (31 July 2023) - £1,440;
 - ongoing pensions legal advice in relation to stage two IDRP from 1 November 2023 to 23 February 2024 - £3,256.20 (29 February 2024); and
 - agreed fee for ongoing legal advice £3,600 (8 November 2024).

Adjudicator's Opinion

30. Mrs N complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council on the matter of reimbursing the Solicitor fees. However, the Adjudicator recommended that the Council should recognise the distress and inconvenience its errors caused Mrs N by paying her £2,500. The Adjudicator's findings are summarised below:-

- The Council has accepted that errors did occur during its review of Mrs N's IHER application. It applied an incorrect interpretation of "gainful employment". The Council incorrectly placed weight on the fact that Mrs N had undertaken part-time work of 21 hours a week, after she left its employment. The Council also disregarded the opinion of the IRMP, to backdate Mrs N's IHER pension to 30 June 2010, without providing any prevailing evidence to justify its actions.
- Once the Council received external advice, and the correct definition of "gainful employment" was applied, some two years later, the Council agreed to backdate Mrs N's IHER pension to 30 June 2010. In the Adjudicator's view, at that point, any procedural errors encountered under the IHER procedure have been remedied, and Mrs N was in receipt of her entitlement under the Scheme backdated to 30 June 2010.
- In appealing the Council's decision not to backdate her pension, Mrs N appointed the Solicitor to act on her behalf. Between December 2022 and November 2024, Mrs N accrued legal costs totalling £15,979.48, which she believed the Council should reimburse her for given its errors.
- The Adjudicator's view was that the Council's errors, in applying the correct IHER test, would have caused Mrs N considerable distress, during an already difficult time in her life. It was appreciated that, given Mrs N's health, she may not have been in a position to appropriately represent herself. So, it was understandable for Mrs N to appoint a representative; however, this did not necessarily mean that she was required to obtain legal advice, or appoint the Solicitor to act on her behalf. The immediacy of Mrs N's condition was however taken into account.
- The Adjudicator's view was that it was unlikely that the Ombudsman would agree to reimburse the full cost of Mrs N's legal fees. It was explained that TPO offered a free service, and provided an early resolution service that was available to Mrs N, or another nominated representative, to contact prior to undertaking the Scheme's IDRPs. Mrs N was also able to contact Citizens Advice for free advice on the matter. So, there were a number of avenues that Mrs N could have considered before she made the decision to appoint the Solicitor.
- The Adjudicator said that the fees incurred did not match the quality of the IDRPs applications submitted to the Council. Despite the Solicitor's legal analysis, it did not focus on, nor note, the Council's incorrect definition of "gainful employment". The subject matter focused on by the Solicitor's appeals was therefore not intrinsic to Mrs N's IHER pension being backdated to 30 June 2010. The Council made the decision to backdate Mrs N's IHER pension when the complaint was accepted for investigation by TPO, and after reconsidering the matter upon receipt of external advice. There was no requirement for the Council to reimburse Mrs N for the legal fees she accrued, which totalled to £15,979.48.
- The Council's errors were numerous and over an extended period of time. Despite WSCC upholding the stage two IDRPs complaint, recommending that the decision

be revisited, due to an incorrect interpretation of “gainful employment, the Council chose to uphold its original decision in spite of the attention drawn to the correct definition of “gainful employment”. Furthermore, the Council did initially calculate Mrs N’s entitlement based on the IHER pension being backdated to 30 June 2010. Thereafter, without any explanation, at the time, her entitlement was recalculated, with an effective date of 30 December 2021, resulting in a marked reduction in the benefit payable.

- The overall errors in the Council’s IHER decision making would have had a profound effect on Mrs N’s mental health at a time when her physical health was declining. It was recommended that the Council should pay £2,500 to Mrs N in recognition of its errors and the exceptional distress and inconvenience caused to Mrs N.

31. Mrs N did not accept the Adjudicator’s Opinion, and the complaint was passed to me to consider. Mrs N provided her further comments which are summarised below:-

- She contacted Citizens Advice regarding her IHER application and appealing the Council’s decision. She was advised to seek professional legal advice due to the complexity of her appeal and the value of her benefits. Citizen’s Advice were also experiencing a significant backlog. She was also advised by a friend, who worked within the Scheme, to obtain legal advice to challenge the Council’s decision.
- She repeatedly asked the Council to clarify why it decided not to honour the original IHER retirement quote it sent her. That is, the IHER quote that outlined benefits payable from 30 June 2010, not from the date of her IHER application. She took her complaint to the Information Commissioners Office; however, she was informed that the Council could not be compelled to confirm the reason for the reversal of its decision.
- Due to a lack of information, transparency, and confusion she decided to obtain legal advice before she appealed the Council’s decision. This was all at the same time that she was attending multiple hospital appointments, and operations.
- She did not attend the in person hearing that the Council invited her to as part of its appeals process. This was because she was advised not to, and because there was no clear explanation as to how the Council arrived at the outcome that it did. She believed that the Council’s decision not to backdate her IHER pension to June 2010 was down to the cost of doing so.
- She incurred substantial fees totalling to £15,979.48, in having to appoint the Solicitor, though no fault of her own, during a difficult time, due to her health. The incurred fees, and level of distress and inconvenience she suffered could have been avoided if the Council backdated her IHER pension to June 2010, in the first instance.
- At no point during her appeal was she informed by the Council, Citizens Advice, the Information Commissioner’s Office, or the WSCC, that she could directly

approach TPO for assistance. If she was made aware of this option she could have done so to avoid incurring the legal fees that she did.

Ombudsman's decision

32. Mrs N original complaint concerns the Council's decision not to backdate her IHER pension to 30 June 2010. When appealing the matter, she appointed the Solicitor and incurred legal fees totalling to £15,979.48, which she believes the Council should reimburse her for.
33. The original complaint has now been settled to the satisfaction of both Mrs N and the Council – with the IHER pension having been backdated to 30 June 2010. However, her argument that she should be reimbursed for her Solicitor's fees remains.
34. I note the procedural errors that have been identified by the Adjudicator in how the Council arrived at the decision that it did. That is, the Council applied an incorrect definition of "gainful employment" when considering the date in which Mrs N's IHER pension should be payable from. Given that the errors in the Council's decision-making process are accepted, and not in dispute, I will not comment any further on the matter.
35. TPO's service is free to use, and involves the investigation of a complaint as well as its determination. Our service does not have the attendant cost risk of the courts. Accordingly, TPO does not, as a matter of course, make awards for costs charged by professional advisers to the person complaining. This is because it should be possible to bring a complaint to us without professional help. As a result, it will only be in rare and exceptional situations where I would find that a respondent is responsible for the reimbursement of an applicant's legal fees (weighing up factors such as the complexity of the case, the capacity of the applicant and the conduct of the respondent). While I recognise in Mrs N's case that she might wish to appoint an appropriate representative given her health, I do not agree that these are exceptional circumstances where a solicitor was required and I should consider making an award for costs. Indeed, as the Adjudicator has suggested, the involvement of the Solicitor was not intrinsic to the Council eventually reversing its original decision.
36. Overall, in spite of Mrs N's health, I do not find that the matter complained about was overly complex, such that it required legal representation. It was Mrs N's choice to appoint the Solicitor. Therefore, I do not agree that the Council should be responsible for reimbursing the significant legal fees that Mrs N incurred from the Solicitor.
37. In regard to the level of distress and inconvenience Mrs N suffered, I do agree that it was exceptional. This is due to the lack of transparency from the Council on why it decided to disregard the opinion of the IRMP, as well as disregarding the WSCC's IDPR findings, all the while her health was declining. Accordingly, I find that the recommended £2,500, a sum significantly larger than I would award in most circumstances, sufficiently recognises the distress and inconvenience Mrs N suffered

during her interactions with the Council. If Mrs N wishes to, the £2,500 can be used to pay part of the legal fees owed to the Solicitor.

38. I partly uphold Mrs N's complaint.

Directions

39. Within 21 days of the date of this Determination, the Council shall pay £2,500 to Mrs N in recognition of the exceptional distress and inconvenience caused to her.

Dominic Harris

Pensions Ombudsman

28 July 2025