

Ombudsman's Determination

Applicant	Mrs S
Scheme	Local Government Pension Scheme - Derbyshire Pension Fund (LGPS (DPF))
Respondent	Derbyshire County Council (Derbyshire Council)

Outcome

1. I do not uphold Mrs S' complaint and no further action is required by Derbyshire Council.

Complaint summary

2. Mrs S has complained that Derbyshire Council, in its capacity as the administering authority of the LGPS (DPF), did not:
 - provide her with sufficient information regarding the option of transferring pension rights in the LGPS; and
 - make her aware, until November 2017, that the two deferred pensions which she had accrued in the LGPS while working for Sheffield City Council and subsequently Derbyshire Council, were "linked" and that by receiving one meant she could no longer transfer the other.
3. Mrs S has also alleged that Derbyshire Council improperly provided her with advice in its letter dated 3 November 2004, which she relied on, to her detriment, by keeping her two deferred pensions separate. She consequently forfeited an opportunity to transfer her LGPS pensions, once consolidated, to a self-invested personal pension (**SIPP**).

Background information, including submissions from the parties

4. Mrs S worked for Sheffield City Council from June 1974 until June 1995 and was entitled to a deferred pension in the LGPS with South Yorkshire Pension Authority (**SYPA**).
5. She worked for Derbyshire Council from July 1998 until April 2008 during which time she accrued further deferred pension benefits in the LGPS (DPF).

6. Mrs S' two deferred pensions were payable from different funds within the LGPS.
7. In November 2004, Mrs S received a letter from Derbyshire Council which said that:

"I refer to your previous membership of the LGPS with Sheffield City Council.

Your pensionable pay on 30/06/1995 was £15,747.42, which adjusted for inflation is now equivalent to £19,648.05. Your current pay for pension purposes is £14,115.

As you are now a member of the LGPS, you need to decide whether to transfer your pension rights or to keep them preserved with your previous scheme.

If your current pay is lower than your final pay with your previous employer (including inflation) then you may wish to keep your benefits separate. However, if your current pay is higher you may wish to join your benefits together. The calculation for pension benefits uses full time salary and length of service (reduced by part time hours where appropriate).

Please complete and return the enclosed form to indicate your choice. If I do not receive a response within four weeks, then I will assume that you are not interested in transferring your benefits.

If you need any help in deciding, please contact...on the above extension."

8. After studying this letter, Mrs S decided not to transfer. She has said that she did not reply because the letter said no action was required if she was not interested in a transfer.
9. In January 2015, Mrs S enquired about transferring her deferred LGPS pension with SYPA to a SIPP. The Normal Retirement Date (**NRD**) for this period of LGPS service was her 60th birthday on 18 February 2015. SYPA informed her that, as she was within 12 months of her NRD, the transfer option was no longer available to her in accordance with section 95 of the Pensions Schemes Act 1993 (**PSA 93**).
10. Section 95 of the PSA 93 stipulated that an application for a transfer of pension benefits must be made no later than one year before the applicant reaches his/her normal pension age in the transferring scheme.
11. Mrs S complained to my Office that SYPA did not provide her with adequate information concerning the deadline applying to the transfer of pension rights from the LGPS prior to her transfer application. I did not uphold Mrs S' complaint in my Determination dated 25 January 2016 (reference number PO-8433), because, in my view, SYPA had provided sufficient information and the Disclosure Regulations did not impose any duty on SYPA to notify her of the time limit for commencing a transfer. I noted that SYPA had incorrectly provided Mrs S with a cash equivalent transfer value (**CETV**) but then promptly rectified the situation by notifying her of its

error. I did not consider that payment of an award to Mrs S in recognition of the distress and inconvenience which she experienced was warranted in that case.

12. As Mrs S could not transfer her LGPS pension with SYPA, it was put into payment on 2 March 2016, and backdated to her NRD.
13. Mrs S contacted Derbyshire Council in February 2015 to request the CETV of the deferred pension available to her from the LGPS (DPF). Derbyshire Council provided her with the CETV in its letter dated 11 March 2015. This letter did not, however, include any information about the restrictions specified in the PSA 93 which would prevent a transfer from taking place. Mrs S chose not to proceed with a transfer at that time.
14. In February 2017, Mrs S informed Derbyshire Council that she was again considering a transfer of her pension rights from the LGPS (DPF). Derbyshire Council enclosed with its reply dated 12 April 2017 version 1.1 of the "Freedom and Choice" leaflet which had been produced by the Local Government Pensions Committee (**LGPC**) in March 2015. This leaflet showed that, in accordance with section 93 of the PSA 93, members already in receipt of a LGPS pension were not allowed to transfer out other pension(s) accrued in the LGPS. It also incorrectly showed that members with more than one pension in the LGPS could elect to transfer one and not the other(s) elsewhere.
15. Mrs S requested a new CETV from Derbyshire Council in November 2017. She received a reply which included version 1.3 of the "Freedom and Choice" leaflet that correctly showed that members with more than one pension in the LGPS had to transfer out all of them at the same time in accordance with section 96 of the PSA 93. As Mrs S was already receiving her LGPS pension with SYPA, Derbyshire Council informed her that it was no longer possible to transfer her deferred pension rights in the LGPS (DPF) to another scheme.
16. Mrs S made a complaint to Derbyshire Council under the LGPS (DPF) Internal Dispute Resolution Procedure (**IDRP**) in 2018. She said that:-
 - Derbyshire Council improperly gave her advice in its letter dated 3 November 2004 regarding whether transferring her LGPS deferred pension rights with SYPA to the LGPS (DPF) would be in her best interests.
 - Derbyshire Council had misled her into keeping her two LGPS pensions separate instead of consolidating them as one in the LGPS (DPF).
 - The LGPS information provided by Derbyshire Council was insufficient to enable her to properly make a decision regarding a transfer or to help her understand how her two separate deferred pensions were "linked" in the LGPS.
17. Derbyshire Council did not uphold her complaint at both stages of the IDRP in June 2018 and March 2019. It said that:-

- The letter dated 3 November 2004 only provided general information about the options available to Mrs S from the deferred LGPS pension with SYPA and did not contain any specific advice or recommendation.
- The letter dated 11 March 2015 did not cause Mrs S any financial detriment as she had decided not to pursue a transfer at that time and the relevant regulations in the PSA 93 did not permit her to do so.
- Version 1.1 of the “Freedom and Choice” leaflet was sent to Mrs S by mistake with its letter dated 12 April 2017. This was issued after payment of her LGPS pension with SYPA had commenced so the incorrect information in it about being possible to transfer some and not all pensions in the LGPS did not apply to her.
- It is not authorised or permitted by the Financial Conduct Authority (**FCA**) to provide advice and can only give guidance about the regulations applying to the LGPS to its members.
- It has fully complied with the law applying to the transfer of pension rights.
- The non-financial injustice which Mrs S has suffered dealing with this matter has been nominal. It does not therefore consider it appropriate to pay her any award as a gesture of goodwill in recognition of this.

Mrs S’ position

18. Mrs S has said that:

“I accept there is a fine line between advice and guidance and that the 2004 letter may be considered guidance...I consider it advice on which I based my decision...very clearly...it stated that, “If your current pay is lower than your final pay with your previous employer (including inflation) then you may wish to keep your benefits separate. However, if your current pay is higher you may wish to join your benefits together.”

Current was lower than previous pay because they were jobs with different skill levels, so I followed the advice/guidance given in the letter and chose to do nothing and kept them separate. Given the context of this letter then the words separate, join and together cannot be confused...with them being linked and dependent on each other in any way.”

19. In its letter dated 3 November 2004, Derbyshire Council was expecting a decision from her based solely on the content of that letter. It was not a generic letter and invited her to choose one of two options with no explanation of the consequences. It was a simple choice for her to make because:

- her job with Derbyshire Council, as a part time special needs teacher's assistant, was a lower position than her former role as a member of a school leaver's assessment team with Sheffield City Council; and
 - living in a rural area with three children, she would not have chosen to return to full time work and a higher wage.
20. If Derbyshire Council had told her at the time that her deferred LGPS pension with SYPA was "linked" to the pension which she was accruing in the LGPS (DPF), she would have decided to join her benefits together. Derbyshire Council did not give any such information in its 2004 letter. It also did not inform her what the ramifications would be by keeping her two LGPS pensions separate and particularly how decisions about her pension with SYPA could affect the one in the LGPS (DPF) and vice versa.
21. The lack of explanation and guidance in the 2004 letter "actively discouraged" her to aggregate her benefits in the LGPS.
22. If she had transferred her LGPS pension with SYPA into the LGPS (DPF) back in 2004, she would then have been able to subsequently transfer her combined LGPS pension rights to a SIPP in December 2014 because her NRD in the LGPS (DPF) was her 65th birthday on 18 February 2020.
23. She has submitted evidence to demonstrate that:-
- In March 2014, she and her husband began to look at their pension options "as advised...by Pension Wise".
 - They spoke with independent financial advisers about their retirement options. On receipt of their advice, her husband chose to consolidate five of his pensions and she requested CETVs from SYPA and Derbyshire Council.
24. As it had been "their investment principle" since 2014 to consolidate, it was obvious that she would have "made the decision even in 1998, never mind 2004, to formally consolidate her two pensions, which were after all inextricably linked anyway".
25. The lack of information and the provision of misleading advice/guidance by Derbyshire Council regarding the LGPS in November 2004 led her to make decisions which were not in her best financial interests and impacted her choices on how to take her LGPS pension benefits.
26. Derbyshire Council should have told her that automatic aggregation of LGPS memberships ended on 1 April 1998 when she commenced her employment with it on 1 July 1998. She was not given the opportunity by Derbyshire Council on joining it to aggregate her LGPS memberships and it did not provide her with "a welcome pack stating the rules of the scheme". She has submitted evidence of her employment details to corroborate her statement.
27. In its letter dated 3 June 1998, Derbyshire Council informed her that it had enclosed copies of the following documents:

- an employee's guide to the LGPS and a leaflet providing details of the main benefits provided, together with a form to opt out; and
- an employee's statement for completion and return if she wished to join the LGPS.

She disagrees with Derbyshire Council and says that the leaflet was not enclosed with Derbyshire Council's letter.

28. In her view, "a lack of training and knowledge" in Derbyshire Council of the LGPS led to its failure to offer her the option of aggregating her LGPS memberships until some six and a half years later in November 2004. It then failed to explain properly to her why she was being given the chance to do so because again, it did not understand the changes which had been made.
29. She wanted to transfer her LGPS benefits to a SIPP because she suffers from severe ill health and would like to leave the benefits to her children on her death.
30. Mrs S' first complaint against SYPA, arose from the "bad advice/guidance" which Derbyshire Council provided to her in 2004. She believes her current complaint should be "linked" to her previous one which I determined in January 2016.
31. As the evidence supplied by Derbyshire Council was not available at the time of my Determination of her original complaint against SYPA, she believes that it should be re-opened and re-considered.
32. She would like me to uphold her current complaint and reverse my decision in her previous complaint against SYPA. She can then:
 - consolidate her deferred pension rights with SYPA in the LGPS (DPF) before transferring them to a SIPP as intended; and
 - seek appropriate compensation from SYPA for the investment loss which she has suffered for not allowing her to transfer her LGPS pension rights.

The position of Derbyshire Council

33. The LGPS (England and Wales) is a single registered pension scheme for which the regulations apply nationally, and which is administered at a local level by 89 administering authorities.
34. Automatic aggregation of LGPS memberships ended on 1 April 1998, and was only reinstated on 1 April 2014. As Mrs S commenced her employment with Derbyshire Council on 1 July 1998, it was not possible at the time to aggregate her two LGPS memberships without her consent.
35. Originally Mrs S could have chosen at any time during her period of employment with Derbyshire Council from July 1998, until she left in April 2008, or within three months of leaving, to aggregate her two LGPS memberships. This was set out in regulations

32(7) and 32(8) of the Local Government Pension Scheme Regulations 1997 (as amended) (**the LGPS Regulations**).

36. Although, it can no longer find the relevant paperwork, Mrs S should have been informed in July 1998 of the option to consolidate her two LGPS memberships in the LGPS (DPF).
37. If any of the enclosures sent to Mrs S with its letter dated 3 June 1998, were missing, it would have sent her copies if she had brought this to its attention.
38. The LGPS (Amendment) Regulations 2004, which came into force on 1 June 2004, amended regulation 32(8) of the LGPS Regulations.
39. On 1 April 2004, active LGPS members who had not already decided to aggregate LGPS memberships only had until 31 March 2005, or such longer period as the employer may allow, to elect to do so.
40. The letter dated 3 November 2004, was most likely sent to Mrs S to give her an opportunity to aggregate membership in the LGPS before 31 March 2005. The information provided was based on relevant legislation and interpretation of the LGPS Regulations at that time.
41. The generic information shown in this letter was given to all active members in the LGPS (DPF) with more than one pension in the LGPS. The information was not specific advice but guidance on general principles for such members to consider before deciding whether consolidating LGPS memberships in the LGPS (DPF) would be in their best interests.
42. It accepted that the content of the 3 November 2004 letter should perhaps have been more detailed and shown where Mrs S could have found more information to help her decide.
43. However, to aggregate her LGPS memberships, Mrs S had to complete the form enclosed with the letter. She could also have used this form to formally let it know that she did not want to do this. According to its records, Mrs S did not return a completed form.
44. Information about aggregating memberships in the LGPS was readily available in the public domain via workplaces and trade unions.
45. By choosing not to consolidate her LGPS benefits with SYPA and the LGPS (DPF), Mrs S has two pensions held separately in the LGPS which have been calculated using different final pensionable salaries, periods of LGPS membership and versions of the LGPS Regulations.
46. Following the introduction of the Government's "Freedom and Choice" initiative in 2015, numerous changes were made to overriding pension regulations and, particularly, the rules on transferring out detailed in the PSA 93.

47. The National LGPS Technical Group (**the Technical Group**) was responsible for interpreting these changes. In September 2015, in recognition of the LGPS being one scheme, the Technical Group decided that where LGPS members held multiple pensions in the LGPS, it was no longer possible to transfer one and not the other(s). By transferring out one pension this would effectively extinguish all the other pensions in the LGPS and the member technically forfeiting the remaining LGPS memberships.
48. Details of this change were correctly included in versions 1.2 and 1.3 of the “Freedom and Choice” leaflet issued respectively in February 2016 and October 2016.
49. It sent version 1.1, dated 26 March 2015, to Mrs S on 12 April 2017 by mistake. This version contained a statement reflecting the earlier interpretation that it was possible to transfer pensions for different LGPS memberships individually. It has apologised to Mrs S for this error.
50. Version 1.1 did however show that it was not possible to transfer out where a member was already in receipt of LGPS pension benefits. As this applied to Mrs S, the incorrect information provided did not therefore cause her any financial detriment or distress and inconvenience.

Adjudicator’s Opinion

51. Mrs S’ complaint was considered by one of our Adjudicators who concluded that no further action was required by Derbyshire Council. The Adjudicator’s findings are summarised below:-
 - The LGPS is a “public service pension scheme” for local government employees in England and Wales. It operates as a centralised arrangement with each administering authority maintaining its own fund (or funds). It is governed by:
 - the LGPS Regulations which requires each administering authority to maintain and administer its fund(s) within the LGPS; and
 - the LGPS (Management and Investment of Funds) Regulations 1998 (as amended) (**the Investment Regulations**), which requires each administering authority to maintain and invest the fund(s).
 - Derbyshire Council, in its capacity as the administering authority of the LGPS (**DPF**), must act in accordance with the LGPS Regulations, the Investment Regulations and within the framework of the law. It therefore had to follow any procedure laid down in the provisions of the LGPS Regulations, as qualified by overriding pension legislation, when dealing with Mrs S’ request to transfer her pension rights out of the LGPS (DPF) and also for the aggregation of her two LGPS memberships in it.

- It was unfortunate that Mrs S had not joined Derbyshire Council prior to 1 April 1998. If she had, she would have qualified for automatic aggregation of LGPS memberships.
- At the time Mrs S joined Derbyshire Council in July 1998, aggregation was open to her until she left in April 2008, or within three months of leaving, on request.
- However, there was no clear evidence to corroborate Derbyshire Council's statement that it had brought this to Mrs S' attention when she commenced employment.
- It was evident that Derbyshire Council did later inform Mrs S of this consolidation option in its letter dated 3 November 2004. However, the information provided was somewhat brief. It would clearly have been better if Derbyshire Council had explained to Mrs S why it was bringing this option to her attention at this time and also let her know where she could find out more details without her having to first ask for it.
- Mrs S believed that Derbyshire Council improperly provided her with advice in the following paragraph from the letter which said that:

“If your current pay is lower than your final pay with your previous employer (including inflation) then you may wish to keep your benefits separate. However, if your current pay is higher you may wish to join your benefits together.”

- There was, as Mrs S remarked, only a fine line between explaining an option and its benefits and actively discouraging alternatives, whether explicitly or implicitly. In the Adjudicator's opinion, for the above paragraph to be construed as personal advice, “you may wish” would have to be replaced by “you should”. In its current form, it could only be regarded as information to help her decide whether to consolidate her LGPS benefits after seeking further information and independent financial advice, if necessary, before making her decision.
- Mrs S had said that Derbyshire Council should have fully set out what the ramifications would be by keeping her two LGPS pensions separate, and, in particular, how any future decisions about her pension with SYPA could affect the one in the LGPS (DPF) and vice versa.
- Derbyshire Council was obliged to disclose certain documents and information to LGPS members in accordance with the Disclosure Regulations. However, most information only needed to be disclosed at the request of the member.
- The additional information which Mrs S had said should have been shown in the letter of 3 November 2004, did not have to be supplied automatically. It would only need to be provided by Derbyshire Council on receipt of an explicit request for it from Mrs S. Regrettably, she did not make one. Had she done so, and Derbyshire Council failed to provide a satisfactory response, then she might have had a valid case.
- Mrs S had also said that if Derbyshire Council had supplied her with this additional information, she would have consolidated her deferred LGPS pension

with SYPA in the LGPS (DPF) in 2004. However, there is no evidence to corroborate her statement.

- Mrs S clearly could not have foreseen in 2004 that:
 - she would request separate transfers of her LGPS pension rights with SYPA and in the LGPS (DPF) many years later and the unfortunate situation which she would find herself by deciding not to consolidate her pensions; and
 - numerous changes would be made to the rules on transferring out in the PSA 93 resulting in the Technical Group's decision to not allow LGPS members with multiple pensions to transfer them separately from September 2015 onwards.
- In the Adjudicator's view, it was only with the benefit of hindsight that Mrs S is now saying that she would have consolidated her LGPS benefits in 2004 and thus be in a position to transfer her combined LGPS pension rights to a SIPP.
- Although, the Adjudicator sympathised with Mrs S' predicament, it was not, in his opinion, caused by the information given in the letter from Derbyshire Council dated 3 November 2004, but by the legislative changes made in 2015, which had meant that she could no longer transfer her deferred pension rights in the LGPS (DPF) to a SIPP in 2017.
- For essentially the same reasons, this letter was not, in the Adjudicator's view, the root cause for Mrs S' original complaint against SYPA which was determined by me in January 2016.
- In any event, my Determination of her complaint against SYPA was final and binding on all parties and I cannot now change the outcome. If Mrs S wanted to challenge the decision, the only avenue available to her was to make an appeal to the High Court on a point of law.
- Derbyshire Council sent Mrs S details of the CETV available to her from the LGPS (DPF) in March 2015. It could not have known at the time that Mrs S' complaint to me against SYPA would not be upheld and that her LGPS pension would be backdated to 18 February 2015, following my Determination in March 2016. It was therefore reasonable for Derbyshire Council to have provided Mrs S with the CETV at the time, even though it subsequently transpired that she would not have been allowed to transfer in accordance with the PSA 93.
- Derbyshire Council sent Mrs S an obsolete version of the "Freedom and Choice" leaflet by mistake with its letter dated 12 April 2017. The information shown about it still being possible to transfer some and not all pensions in the LGPS was no longer valid. It did, however, also show that it was not possible to transfer out pension rights from the LGPS if a member was already in receipt of pension benefits for one of his/her LGPS memberships. As this applied to Mrs S, the incorrect information could not be said to have caused her any financial detriment.
- This mistake, however, clearly constituted maladministration on the part of Derbyshire Council. Although Mrs S had not suffered any actual financial loss

because of the maladministration identified, she had clearly experienced some distress and inconvenience.

- In the Adjudicator's opinion, the degree of non-financial injustice which Mrs S had suffered was not sufficient to warrant the minimum payment which I could award because it was clear from the other material in the obsolete leaflet that the incorrect information would not apply to her.

52. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mrs S.

Ombudsman's decision

53. There is no duty for employers or scheme trustees to provide scheme members, considering their pension choices, information or advice to prevent economic loss (*Outram v Academy Plastics Limited* [2000] IRLR 499, Court of Appeal). But where advice is given, it must be done competently.

54. Derbyshire Council was under no obligation to advise Mrs S on what she should do, in its letter dated 3 November 2004. Indeed, it has not been authorised or permitted by the FCA to provide advice and could only give her guidance.

55. There is, however, only a fine line between explaining an option and its benefits and actively discouraging alternatives, whether explicitly or implicitly.

56. For the information supplied to Mrs S to be deemed as advice, it had to be a personal recommendation of what she should do based on her specific circumstances and financial objectives. Guidance, on the other hand, is a much broader term and will not recommend a specific course of action or give a personal recommendation.

57. For the same reasons given by the Adjudicator in his Opinion, I find that Derbyshire Council had only provided Mrs S with guidance and not specific advice in its letter.

58. Mrs S has said that if Derbyshire Council had provided her with the extra information which she believes should have been given automatically, she would have consolidated her deferred LGPS pension with SYPA in the LGPS (DPF) back in 2004. I have seen no conclusive evidence to corroborate such a statement. The additional information only had to be disclosed to Mrs S by Derbyshire Council if she had made a specific request for it, but she did not do so.

59. Mrs S has also asserted that as the "investment principle" for both her and Mr S had been to consolidate their pensions since 2014, it was obvious that she would have chosen to amalgamate her LGPS pensions in 1998 or 2004. But, apart from her saying that she would have taken this course of action, there is no evidence to substantiate her assertion.

60. Mrs S clearly could not have foreseen in 1998 or 2004:

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- that she would request separate transfers of her LGPS pension rights with SYPA and in the LGPS (DPF), many years later and the situation in which she would find herself by deciding not to consolidate her pensions; and
- numerous changes would be made to the rules on transferring out in the PSA 93 resulting in the Technical Group's decision to not allow LGPS members with multiple pensions to transfer them separately from September 2015 onwards.

61. Mrs S' inability to transfer her pension benefits has not been caused by the information given in the letter from Derbyshire Council dated 3 November 2004, but by the legislative changes made in 2015, which meant that she could no longer transfer her deferred pension rights in the LGPS (DPF) to a SIPP in 2017.

62. I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
9 December 2020