

Ombudsman's Determination

Applicant	Mr D
Scheme	The Local Government Pension Scheme (the Scheme)
Respondent	South Tyneside Council (the Council) Tyne and Wear Pension Fund (TWPF)

Complaint Summary

1. Mr D's complaint concerns the incorrect information the Council provided to him, over a number of years, in relation to him being able to defer taking his benefits from the Scheme until age 75. He asserts that he will incur a financial loss, in the form of tax penalties, as a result of having to take his benefits now instead of at age 75.

Summary of the Ombudsman's Determination and reasons

2. The complaint is partly upheld against the Council and TWPF because:-
 - The Council, on behalf of TWPF had provided incorrect information to Mr D over several years, which resulted in him having limited options at retirement.
 - This situation has caused Mr D severe distress and inconvenience.

Detailed Determination

Material facts

3. Mr D became a deferred member of the Scheme in August 1985 when he left employment, and his normal retirement date (**NRD**) was his 60th birthday, which was in March 2018. His benefits were initially governed by the Local Government Superannuation Regulations 1974. Those Regulations were revoked and indirectly consolidated by the Local Government Pension Scheme Regulations 1995 (**the Regulations**), which came into force on 2 May 1995.
4. The Council is the Administering Authority (**the Authority**) for TWPF, and TWPF is part of the Scheme. Over the years, up to December 2017, the Council, on behalf of TWPF, sent Mr D deferred benefit statements (**the Statements**), that incorrectly informed him that he could defer claiming his pension from the Scheme until age 75 (excluding his Guaranteed Minimum Pension which under legislation is payable from age 65).
5. Between December 2017 and April 2018, Mr D corresponded with the Council concerning deferring claiming his pension. On 4 April 2018, the Council wrote to Mr D and said:

“I refer to your recent enquiry and our subsequent telephone conversations regarding your LGPS benefits.

On reviewing your case, I can confirm that you do not have the option to defer claiming payment of your LGPS benefits, as was previously stated in our letter to you. Nor can you transfer those benefits to another provider as you are within one year of your Normal Pension Age in the Scheme which is 60.

In fact your only option is to receive payment of your LGPS benefits with effect from your normal retirement date at age 60...

I understand you may be disappointed with this decision; however we must act in accordance with the Scheme Regulations. I am sorry for any distress or inconvenience you may have experienced from our previous correspondence...”

6. Following receipt of this letter, Mr D complained through both stages of TWPF’s Internal Dispute Resolution Procedure (**IDRP**). In summary he said:-
 - As a result of the Council’s repeated error, he made decisions he would not have made had he been aware of the correct position.
 - Had he been aware that he could not defer claiming his pension until age 75, he would have structured his finances differently, and would have given greater consideration to, and possibly exercised, his option to transfer his benefits from the Scheme. He would have structured his personal investments differently, which would have resulted in him not holding such a great amount in cash.

- The Council's letter dated 4 April 2018 failed to adequately address or take responsibility for its error in providing incorrect information, on which he relied and acted upon.
 - He would like the option to transfer his pension from the Scheme or defer claiming his pension until age 75.
7. Both the IDRPs stage one and stage two decisions, sent to Mr D on 30 August 2018 and 15 November 2018 respectively, accepted that the Council had previously provided Mr D with incorrect information in relation to him deferring claiming his pension until age 75. However, both the IDRPs stage one and stage two decision makers found that the Council had acted in accordance with the Regulations and relevant legislation, in informing Mr D that he could not defer claiming his pension to age 75 or transfer his pension from the Scheme.
8. In the IDRPs stage two decision dated 15 November 2018, the Council explained that: Mr D's claim that he had placed reliance on the representations made by the Council, which had influenced his financial planning; and his suggestion that he may have suffered some financial loss as a result of the Council's misstatements, were issues that were outside the scope of the Council's jurisdiction at Stage 2 of the IDRPs. To the extent that Mr D remained dissatisfied with its response, the decision maker suggested that he progress his complaint with my Office, as I have powers in respect of maladministration, and can give full consideration to these issues.
9. However, in a further letter dated 2 April 2019, from the Council to Mr D, the Council acknowledged that misstatements had been made which may have impacted upon Mr D's financial planning. In recognition of this, the Council offered him £500 for the distress and inconvenience this situation may have caused. Mr D accepted the £500, but not in full settlement of his complaint.

Summary of Mr D's position

10. Mr D provided copies of correspondence between him and the Council between December 2017 and 15 November 2018, and copies of correspondence from his independent financial adviser (**IFA**). He also made a number of comments. In summary he said:-
- Believing that he could defer taking his Scheme benefits until age 75, he had originally planned that with the benefit of yearly valuation statements, and the knowledge of how his other investments had performed, he would be able to make a considered choice to feel confident that he could divest himself of his assets to his children.
 - This was in reliance on the knowledge that a certainty existed regarding the funds that would be paid to him when he claimed his pension from the Scheme.
 - Over the many years during which he believed he could defer taking his benefits until age 75, he held the view that: "at any time up until 75 I could either take the

pension or look at drawdown. Obviously, at the time that I was notified that the pension had to be taken at age 60, the trigger for exercising the drawdown option was 12 months prior to that date. I am not aware that I received any information which set out the trigger mechanism for drawdown during deferment, but I have to say that I took the view that between 60-75 the option to take the pension or elect drawdown existed.”

- He has lost the ability to transfer his pension from the Scheme to a drawdown arrangement or an alternative pension vehicle, and to have control over his benefits.
- He will incur tax liabilities every year of 20% or more if he has to claim his pension from the Scheme now.
- In the event of his death, the pension funds in his estate will incur a 40% inheritance tax (**IHT**) liability. His inability to defer his Scheme pension to age 75 means that he is unable to use tax planning advantages of deferment, when arranging his tax affairs.
- Had he pursued the drawdown route, he would have avoided taking any income from his Scheme benefits, with a view to utilising it as an alternative way to reduce his IHT liability.
- Over the years he has structured his assets and investments so as not to access his benefits from the Scheme. Had he known the correct position, he would have structured those assets and investments in a different way. Income tax and capital gains tax may be incurred on his other assets on an ongoing basis.
- This situation has caused him stress and anxiety. More upsettingly, at no point has the Council offered an apology for the situation he is currently in.
- He accepts that he was never legally permitted to defer claiming his pension until age 75, and understands that the Pensions Ombudsman (**TPO**) cannot grant this.
- However, the option to transfer benefits was, among other things, introduced to both enable pension holders to have flexibility to utilise accrued benefits and also to avoid the situation where the total value of funds is at risk to the pension holder, and/or their estate, due to early death.
- The right to transfer his pension from the Scheme has been taken away from him, due to the Council’s misinformation.
- The ability to transfer benefits was considered a celebrated freedom at the time it was introduced and, but for the Council’s misinformation, is an avenue he would have pursued. It is “wholly unfair” that he is now unable to transfer his benefits from the Scheme because of the Council’s misinformation, when that right previously existed.

- It is “counter intuitive” that there is a finding and general agreement that what the Council communicated was wrong, and outside the scope of the Regulations, but that a decision barring him from the justice he seeks is based upon the need to comply with the Regulations.
- The result of this is to ignore a breach of the Regulations leading to misinformation by the Council and therefore damaging his rights, but to rely on the Regulations in order to deprive him of justice. Justice will only be served by restoring his rights.
- While he can point to the fact that if he were to transfer his pension from the Scheme, he would be to some degree ‘ring fencing it’ against his early death and loss of a pension, TWPF could argue that should a drawdown fund drop in value, against him outliving an actuary’s assessment of how long he will draw an annuity, he would gain with the pension option.
- So, much of his case is that he fully understands the relative merits of drawdown against pension and has a clear view on this. He has been misled to the extent that he is potentially deprived of this right.
- He and his wife have a seven-figure investment in various funds, of which over £300,000 is held in his accumulated ISA. He ensured that he was able to take financial steps, relating to his Scheme benefits, including the drawdown option, without prejudicing his and his family’s financial security.
- Relying on the statements on TPO’s website, he believes that in the absence of the ability to defer claiming his pension until age 75, he ought to receive justice and be given the opportunity to pursue the drawdown option.
- He has not focused on the financial award for distress and inconvenience. However, he would say that his circumstances fit the “severe” category of TPO’s guidance on redress for non-financial injustice.
- He considers that the Council’s misrepresentation regarding issuing an apology and a goodwill payment, as part of the appeals process, when it had ended four months before, constitutes “wilful” and/or “reckless” conduct on the Council’s behalf.
- He considers the Council’s attempted payment of £500, after it had concluded the IDRPs without upholding his complaint, was made in light of the fact that he was considering bringing his complaint to TPO. It was a “last-ditch attempt on the Council’s part to stop its maladministration and inadequate response from being adjudicated upon”.
- He does not consider that £500 from the Council is adequate or resolves his complaint. The lack of any apology from the Council, “adds to the sense of injustice and a feeling that they have lacked real reflection and consideration of [his] submissions to them”.

- He noted that TPO has the discretion to award interest. As the matter has now gone on for over two years, he felt that he ought to receive interest in relation to the excessive timescale in order to resolve the matter.
- Due to the amount of his accumulated wealth, any sums paid to him as a pension will be added to his estate and subject to IHT charges of 40% on his death. For that reason, he has been advised, by his IFA, not to draw any of his pension during his lifetime, so he has not yet claimed his benefits from the Scheme.

Summary of the Council and TWPF's position

11. The Council and TWPF provided a copy of the IDRPs stage two decision and a copy of the Council's letter dated 2 April 2019. They also provided some additional comments. In summary they said:-
 - Mr D no longer has the option to transfer his pension out of the Scheme, nor can he defer claiming his pension until age 75.
 - The legal principles for this are set out in full in the IDRPs stage one and stage two decisions, and they find that those principles were applied correctly.
 - In its letter of 2 April 2019, the Council acknowledged that misstatements were made, which may have impacted upon Mr D's financial planning. The Council also sent him £500 for any distress or inconvenience caused by the misinformation it supplied.

Conclusions

12. Mr D asserts that the misinformation provided to him by the Council led him to make decisions that will cause him a financial loss. I have therefore considered whether or not the Council's provision of incorrect information amounted to a negligent misstatement.
13. For a claim of negligent misstatement to succeed in this case, it requires the following:-
 - The Council must have made a clear, unequivocal, incorrect representation that Mr D had the option to defer taking his benefits until after his NRD.
 - The Council must have owed a duty of care to Mr D.
 - The false statement must be one that the Council, owing such a duty of care, could not have made had it exercised a reasonable standard of care.
 - Mr D must have reasonably relied on the incorrect information and, in doing so, experienced a reasonably foreseeable, irreversible loss that he would not have suffered had the Council provided the correct information.
14. It is not in dispute that, on several occasions over a lengthy period, the Council informed Mr D, incorrectly, that he had the option to defer claiming his benefits from

the Scheme until age 75. On each of those occasions, that information was provided as a clear and unequivocal statement and was not expressed as being subject to any conditions.

15. As the Authority for TWPF, the Council is and has been responsible for managing and administering the Scheme, as set out in Regulation 53(2) of The Local Government Pension Scheme Regulations 2013¹. In providing Mr D with the Statements, the Council owed a clear duty of care to Mr D, as a beneficiary of the Scheme, to ensure that the information contained in the Statements was correct. Although, it is to be noted that this duty of care did not extend to providing advice to Mr D. Therefore, if the Council's provision of the incorrect information fell below a reasonable standard of care, it will be responsible for any reasonably foreseeable consequences of it having provided that incorrect information.
16. It is clear from the Regulations that Mr D, being a deferred member of the Scheme, had no option to defer his pension beyond his NRD. As the Authority responsible for administering the Scheme, the Council ought reasonably to have known, or referred to the Regulations to find out, what options were available to Mr D, and ensured that the Statements set out those options correctly. Therefore, I find that the Council issued the Statements, containing the incorrect information, without exercising reasonable care.
17. Further, given the Council's position as the Authority of TWPF and its duty to provide statements containing correct information, I find that it was reasonable for Mr D to have relied upon the information in the Statements, that informed him he could defer claiming his benefits from the Scheme to age 75, in deciding not to claim his benefits at his NRD.
18. Therefore, I have considered whether, as a consequence of the Council's repeated misstatements, Mr D has suffered any reasonably foreseeable, irreversible loss that he would not have suffered, had the Council provided the correct information. The aim of any remedy awarded would be to put Mr D back into the position he would have been in had the misstatements not been made.
19. Mr D's submissions concerning what he would have done had he been able to defer taking his pension are not entirely consistent. When my Office initially queried with Mr D what he had planned to do on reaching age 75, had he been able to defer claiming his benefits from the Scheme until such time, he said that he would have been "obliged to take the pension at whatever accrued lump sum and pension then applied." He said that this would have provided him with an income enabling him to divest himself of assets to his children and reduce his estate's potential IHT liability.
20. However, shortly afterwards, Mr D submitted that he also had in mind that he would be able to "look at drawdown" (by which he seems to have meant that he thought he could transfer out of the Scheme), at any point between ages 60 and 75. Although he

¹ <https://www.legislation.gov.uk/uksi/2013/2356/regulation/53>

admitted that he was not aware that he had received any information setting out “the trigger mechanism for drawdown during deferment”. Further, Mr D submitted a letter from his IFA, stating that it had been agreed that, given his large investment portfolio and the income it provided, he would not require any pension payment during his lifetime and his pension funds should therefore be, “passed over in their entirety to [Mr D’s] beneficiaries following death”.

21. Remaining in the Scheme as a deferred member until age 75, and then claiming his benefits from the Scheme upon reaching age 75, is not consistent with the advice from the IFA. It seems, from the submissions and evidence submitted to my Office, that on the balance of probabilities, Mr D’s decision to remain in the Scheme beyond his NRD was influenced at least in part, by an incorrect assumption that he would later be able to transfer out of the Scheme between his NRD and age 75.
22. The Council did not create, and could not have known, of this mistaken assumption. Its duty to Mr D was to provide correct information, rather than provide any advice as to how information should be used. In fact, a page of the national website for members of the LGPS, entitled, ‘Transferring your LGPS pension to another pension scheme’², states clearly that, “An option to transfer (other than in respect of AVCs) must be made at least 12 months before your Normal Pension Age”. Further, a factsheet entitled, ‘Changes following Freedom and Choice’, which was enclosed with the benefit statement, dated 19 December 2017, sent to Mr D by the Council, contained the following paragraph:

Note: You can only transfer your benefits built up in the LGPS if you are more than one year away from your Normal Pension Age (NPA – this is normally your state pension age with a minimum of age 65), although you can transfer an Additional Voluntary Contribution after this time”.
23. Had Mr D included in his financial planning any enquiries in order to confirm his assumption that he would retain the right to transfer out of the Scheme at any age up to age 75, he would clearly have discovered that the right to transfer would cease 12 months before he reached his NRD. I consider that Mr D’s mistaken assumption that he could transfer out of the Scheme having passed his NRD constituted an act which broke the chain of causation, so the Council should not be held responsible for any financial consequences arising from Mr D’s decision to remain in the Scheme beyond his NRD.
24. Also, if the Council were to be held responsible for any financial loss incurred by Mr D, for the reasons explained below, in paragraphs 25 to 32, I do not consider that Mr D has been able to show that he will incur a financial loss as a consequence of remaining in and claiming his benefits from the Scheme.
25. Mr D has submitted that his inability to transfer out of the Scheme will result in IHT and income tax consequences. However, any disadvantage in relation to IHT would

² <https://www.lgpsmember.org/arl/already-left-tvout.php>

not be incurred by Mr D himself, but by his survivors. As this is a loss that may be incurred by Mr D's estate in the future, I am unable to consider this element of Mr D's claim for financial loss because, if there is any loss it would be to Mr D's survivors, not Mr D.

26. I have considered Mr D's submissions concerning his income tax position, including the evidence he provided to demonstrate that he has structured his finances in such a way as not to be required to claim his Scheme benefits. Mr D has submitted that it should be possible to calculate his financial loss by multiplying the annual income tax at the current basic rate that he will pay on his pension payments, by the number of years he would have lived between attaining his NRD and reaching his estimated life expectancy, which he has submitted is 81.7 years. I am not persuaded by his submission, for the following reasons.
27. Mr D has said that had he transferred out of the Scheme, he would have left the transferred benefits untouched. On that basis, he would have paid no income tax on those benefits. However, this does not take into account that, under current tax legislation, if Mr D were to live beyond age 75 (and I note that he appears not to have ruled out this possibility given that he has based his estimated financial loss on a life expectancy of 81.7 years), the death benefits payable from his pension arrangement would, in some cases, be subject to tax charges other than IHT. For example, if Mr D were to live beyond age 75, death benefits payable from any uncrystallised part of his pension fund would be taxable.
28. Similarly, death benefits paid from a part of his pension fund designated for flexi-access drawdown would also be taxable, either under the income tax regime, or by the application of a special lump sum death benefits charge, if Mr D were to die having reached age 75. So, I am unable to accept that Mr D would have kept his benefits intact for the rest of his life, had he transferred it out of the Scheme, as doing so beyond age 75 could have defeated the object of his careful IHT planning.
29. Further, it should be recognised that, having remained in the Scheme, Mr D should be receiving his pension payments, (although I note that he has declined to accept that pension payment at present), albeit subject to income tax at the basic rate. I do not consider Mr D's calculation of loss regarding income tax to be straightforward or certain (see paragraph 26 above).
30. Mr D's calculation does not take into account: (i) the fact that the income tax bands and rates might change in the future; and (ii) the possibility that he might live beyond age 81.7, in which case the total amount of his pension payments net of any income tax could turn out to be greater than the transfer value, had he transferred out of the Scheme. Also, his life expectancy used in the calculation of his transfer value might have been different from the life expectancy that Mr D has calculated for himself using an online tool.

31. Therefore, were I to hold the Council responsible for any financial loss caused by its misstatements, I do not find that there is any certainty that Mr D will, or is likely to, experience financial loss over the long term.
32. The possibility that Mr D will receive less from the Scheme by way of pension payments than he would otherwise have done had he transferred out is too remote for any hypothetical shortfall to be within the scope of the Council's duty of care to provide accurate benefit statements. So, it would be unreasonable to hold the Council liable for any financial loss.
33. With regard to non-financial injustice, I find that Mr D has experienced a loss of expectation. The Council made repeated misstatements over the course of several years and it was not until he attempted to exercise what he had been led to believe was his option to defer his pension that these errors were identified. This would have been extremely frustrating for Mr D.
34. Mr D has said that the Council's failure to apologise for these errors has compounded his distress and inconvenience brought about by the situation in which he finds himself, and that the Council's offer of £500 was wholly inadequate. Mr D has submitted that his circumstances fit the "severe" category in my guidance on redress for non-financial injustice. I agree that an award for severe distress and inconvenience, which warrants an award of £2,000, is appropriate in this case.
35. I uphold Mr D's complaint in part.

Directions

36. Within 28 days of the date of this Determination, the Council shall pay Mr D a further £1,500 for the severe distress and inconvenience this situation has caused him (noting that Mr D has already accepted a payment of £500 from the Council in relation to his complaint).

Anthony Arter

Pensions Ombudsman
26 November 2021