

Ombudsman's Determination

Applicant	Ms R
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Derbyshire County Council (DCC)

Outcome

1. I do not uphold Ms R's complaint and no further action is required by DCC.

Complaint summary

2. Ms R has complained that DCC will not allow her to defer receiving her Scheme benefits until her State Pension age (**SPA**) and that it refuses to increase them at the rate of the Consumer Price Index (**CPI**). She has also complained that DCC made errors on a number of statements it sent her, and which showed that her Scheme benefits would be lower than those in earlier statements.
3. In her view, the Scheme Regulations contravene UK Equality legislation because they state she has to take her benefits at age 60.

Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
5. On 2 March 1992, Ms R began employment with Local Government and became a contributing member of the Scheme. DCC is the administering authority for the section of the Scheme of which Ms R is a member.
6. In August 1997, Ms R left employment with Local Government and became a deferred member of the Scheme.
7. On 8 July 2017, Ms R contacted DCC and requested information about her Scheme benefits. She wanted to know if she could receive their total value as a lump sum when she reached aged 60, which was in February 2018. She also asked if she could transfer them to a personal pension arrangement, so that she could draw them down. In addition, Ms R queried whether she could defer taking her benefits until age 66, as she was still in employment.

8. On 14 August 2017, DCC replied to Ms R and provided details on how she could exchange part of her Scheme pension for an additional lump sum. It also confirmed that the pension would be paid to her in full at age 60 and that a transfer to a personal pension arrangement was not possible within the last year leading up to the payment date. DCC pointed out that, due to the Regulations in place, it was not possible for Ms R to defer payment of her benefits past age 60.
9. On 23 January 2018, Ms R wrote to DCC and said that, in her view, she was entitled to leave her benefits in the Scheme until she reached age 66, as her SPA had increased to that age. She added that, by not allowing her to defer taking benefits until age 66, DCC was contravening UK Equality legislation. She pointed out that the information on DCC's website said, "Your deferred benefits are normally payable from your normal pension age which is your new state pension age".
10. On 26 January 2018, DCC sent Ms R the relevant Scheme Regulations, together with guidance issued by the Local Government Association (**LGA**). DCC referred to sections C3 and D11 of the Local Government Pension Scheme Regulations 1995 (**the 1995 Regulations**), and confirmed that it was not possible for Ms R to defer her benefits beyond her normal retirement age (**NRA**), which was 60.
11. Section C3 of the 1995 Regulations states that:

"(1) In these regulations, in relation to any member, "normal retirement date" or "NRD", means -

(a) in the case of a member who by his 60th birthday has a total period of membership of at least 25 years, that birthday;

(b) in the case of a member who first has such a total period of membership by a date after his 60th birthday but before his 65th birthday, the day after that date; and

(c) in the case of a member who does not fall within paragraph (a) or (b), his 65th birthday;

and normal retirement age means his age at the commencement of his NRD.

(2) Where for any purpose of the regulations it is necessary to determine a person's NRD or normal retirement age before he attains that age, it shall be assumed that his local government employment and membership of the Scheme will be continuous."

12. Section D11(2) of the 1995 Regulations states that:

"(1) If a member who ceases to hold a local government employment —

(a) is not entitled under regulation D5, D6, D7 or D9 to retirement benefits which are payable immediately on his ceasing to hold that employment ; and

(b) fulfils one of the following requirements, namely—

(i) he has a statutory pension entitlement ; or

(ii) he is treated by virtue of regulation K23(2) as having ceased to hold the employment on becoming subject in it to an approved non-local government scheme;

then, subject to regulation D13, he becomes entitled in relation to that employment to a standard retirement pension and a standard retirement grant payable from the appropriate date; and in these regulations benefits to which a person becomes entitled under this paragraph by virtue of fulfilling one of the requirements mentioned in paragraph (b) and which have not yet become payable are called “preserved benefits” .

(2) For the purposes of paragraph (1) “the appropriate date” , in relation to any person, is his 65th birthday or, if earlier, the earliest of the following—

(a) his NRD;

(b) any date on which he becomes permanently incapable, by reason of ill-health or infirmity of mind or body, of discharging efficiently the duties of the employment he has ceased to hold;

(c) any date after he has attained the age of 50 years from which the employing authority determine on compassionate grounds that the benefits are to become payable;

(d) in the case of a person who has attained the age of 60 years, has ceased to be employed in local government employment and has duly elected to receive payment from the relevant date, that date.

(3) An election under paragraph (2)(d) shall be made by notice in writing to the employing authority given within the period of three months beginning with the relevant date.

(4) In this regulation “relevant date” , in relation to any person, means—

(a) the date on which he attains the age of 60, or

(b) if later, the date of his ceasing to be employed in local government employment.”

13. On 30 January 2018, DCC confirmed to Ms R that she had become a deferred member of the Scheme in August 1997. This meant that the rules regarding the payment of her benefits were determined by the Regulations in force at the time. DCC also said that, while the Regulations had been updated on several occasions, they were not retrospective.

14. On 4 February 2018, Ms R formally complained to DCC, under the Scheme’s Application for Adjudication of Disagreements Procedure (**AADP**). The AADP is a

form of an Internal Dispute Resolution Procedure (**IDRP**) which aims to resolve disputes locally, where possible. In her complaint, Ms R said:-

- She had received pension advice, as she was still in employment and not able to retire at age 60. This was because the Government had changed the SPA for women to 66.
 - By virtue of sections 62 to 66 of the Pensions Act 1995 (**the 1995 Act**), an equal treatment rule was incorporated into every pension scheme. The effect of that rule was to prohibit direct and indirect discrimination in the terms on which employees were given access to pension schemes or the way they were treated under the scheme regulations. The particular piece of legislation was therefore included under the guidelines of Equal Pay and Equality legislation.
 - Various case laws were in place in reference to the 1995 Act, which had been rectified by the European Union (**EU**). Case law also existed and domestic courts in the UK followed the principles laid down in EU case law regarding pensions.
 - In 1990, the European Court of Justice (**ECJ**) was asked to decide whether pensions constituted 'pay', for the purposes of Article 141 of the Maastricht Treaty and the EC Equal Pay Directive (Council Directive 75/117/EEC of 10 February 1975). The ECJ agreed that pension benefits were subject to Article 141 and therefore constituted 'pay'.
 - Following the ECJ's judgment on 17 May 1990, all UK pension schemes were required to equalise pension ages for men and women. It appeared that the 1995 Regulations had not been updated to reflect any of this legislation.
 - She was surprised that DCC had said that in 2013 the Scheme took steps around equality, but those steps could not be applied retrospectively. In her view, they could.
 - The LGA's guidelines for payment of pensions were only guidance to DCC. These guidelines were not statutory instruments and therefore not in UK or EU law either.
 - DCC had not complied with Equality legislation.
15. On 21 June 2018, DCC responded to the complaint under stage one of the Scheme's AADP. It said:-
- The European Equal Pay Directive 75/117 had no bearing on Ms R's complaint.
 - It was satisfied that the 1995 Regulations were the correct regulations to be used, to determine the payment of Ms R's deferred benefits. These were the statutory regulations governing the Scheme when Ms R left active membership. Subsequent statutory regulations did not supersede them.

- The provisions of the 1995 Regulations applied equally to male and female Scheme members. So, the equal treatment amendments provided for in sections 62 to 66 of the 1995 Act were not required to be made to the Scheme.
 - Section D11 of the 1995 Regulations stated that a Scheme member who had deferred benefits was entitled to a pension payable on the 'appropriate date'.
 - Section D11(2) defined 'appropriate date' as the member's 65th birthday or, if earlier, their normal retirement date (**NRD**). For a member who had a total period of Scheme membership of at least 25 years by age 60, section C3 defined NRD as that member's 60th birthday.
 - In Ms R's case, the period between the date she started employment with Local Government and her 60th birthday was 25 years 338 days. So, her NRD was her 60th birthday.
 - The link between the NRD and the SPA did not come into effect until 2014, when changes were introduced regarding the active Scheme members. Because of this, the link did not apply to this case.
 - Section D11 required DCC to pay Ms R's Scheme benefits from her 60th birthday. No discretion was given to DCC to defer payment beyond that date.
16. On 10 December 2018, Ms R requested that her complaint be reconsidered under stage two of the Scheme's AADP. She said:-
- DCC was contravening Equality Law and was in violation of Article 14 of the European Convention on Human Rights (**ECHR**). She had been discriminated against, based on the fact that she was a woman that would not reach her SPA until age 66.
 - She had also been discriminated against because DCC had said that women had to retire at age 60. If she was a man, she could retire at age 65.
17. On 3 January 2019, DCC contacted the LGA and sought clarification on whether it was applying the Regulations correctly on Ms R's case. The LGA agreed with DCC's interpretation of the Regulations and said:-
- The 1995 Regulations defined the NRD for members who left the Scheme before 1 April 1998. The Regulations were not gender specific.
 - The Pensions Schemes Act 1993 (**the 1993 Act**) prescribed the statutory right to a transfer. This required the cash equivalent transfer value to be paid no later than one year before the member attained NRA.
 - Section 95 of the 1993 Act also stated that a member could not exercise their right to a cash equivalent transfer value within one year of their NRA.

- Section C3 of the 1995 Regulations defined NRA as the member's 60th birthday, if by that date the member had a total Scheme membership of at least 25 years.

18. On 11 February 2019, DCC responded to the complaint under stage two of the Scheme's AADP. DCC did not uphold it and said:-

- The Regulations that applied to a member who had left active membership of the Scheme were those that were in force at the time of leaving active membership, unless they had been revoked and superseded by later legislation.
- In Ms R's case, the 1995 Regulations were in place when she left her employment, which was on 31 August 1997. As the relevant paragraphs within those Regulations had not been replaced by later legislation, they remained in force.
- The 1995 Act required any rule that treated one gender less favourably than another to be read as though it did not treat that gender less favourably. The obligations on pension schemes formerly contained in the 1995 Act had since been replaced by equivalent provisions in the Equality Act 2010 (**EC 2010**) and in line with equal pay requirements.
- The equal treatment rules applied only where there was an opposite gender comparator who had been treated less favourably.
- When Ms R started her employment, she was aged 34. So, she would have exceeded 25 years of potential service by her 60th birthday, had she remained in continuous employment. As a result, the 1995 Regulations required DCC to pay her pension benefits from age 60. The Regulations applied equally to both male and female Scheme members.
- In 1990, the ECJ ruled that occupational pensions constituted part of pay and must be equal for men and women in respect of pensionable service. As the provisions of the 1995 Regulations applied equally to all members, as required by the ECJ ruling, the equal treatment rules from the 1995 Act were not required to be incorporated by amendment.
- In conclusion, DCC had correctly applied the law relating to the payment of Ms R's Scheme benefits.

19. On 28 February 2019, Ms R requested an annual benefit statement from DCC. In her request Ms R said that, as her complaint was still under review, she expected her deferred Scheme benefits to increase at the rate of the CPI for the previous 12 months.

20. On 13 March 2019, DCC replied to Ms R that her Scheme benefits were not subject to annual increases. DCC explained that the Scheme Regulations applicable when she became a deferred member meant that there was no link to the SPA and no option to defer her NRA. Instead, arrears and interest would be applied to her

benefits from age 60. Interest would be at the rate of 1% above Bank of England's base rate.

21. On 19 July 2019, DCC sent Ms R a deferred benefit statement (**the 2019 statement**). It showed that her deferred benefits as of 8 April 2019 were a yearly pension of £2,479.39 and a lump sum of £7,438.33. The statement included that year's cost of living increase of 2.4%, which was based on the CPI of September 2018.
22. On 10 June 2020, Ms R wrote to DCC disagreeing with its earlier response that her Scheme benefits would not increase. She said that DCC had confirmed, in writing, that arrears and interest would be applied when her benefits were paid, along with annual increases applied to her ongoing pension.
23. On 15 June 2020, DCC responded and confirmed that Ms R remained entitled to the payment of her Scheme benefits, backdated to February 2018. They would include annual pension increases, once she had decided to request that the benefits were put into payment.
24. On 6 August 2020, DCC issued a deferred benefit statement (**the 2020 statement**). It showed that Ms R's deferred benefits as of 6 April 2020 were a yearly pension of £2,521.54 and a lump sum of £7,052.42. The statement included that year's cost of living increase of 1.7%, which was based on the CPI of September 2019.
25. On 30 August 2020, Ms R complained to DCC about the 2020 statement and the lower lump sum shown in it, compared to the one in the 2019 statement. She also requested a revised statement.
26. On 25 September 2020, DCC responded to the complaint and said:-
 - There was an error in the 2019 statement. Indexation had been included in it, but this had been corrected in the 2020 statement, resulting in the lower figures shown.
 - The Scheme Regulations did not allow members to defer payment of their benefits beyond their NRA. While Ms R's annual pension was due to start from her 60th birthday and would still increase in line with indexation each April, the lump sum was payable at the amount applicable at age 60.
 - Although indexation was not due on Ms R's lump sum from February 2018, it was attracting cumulative daily interest at the rate of 1% above the Bank of England base rate.
 - As DCC included indexation but not interest in the annual statements, interest was not included in the 2020 statement but would be included when Mr R decided to claim her Scheme benefits.
27. On 21 October 2020, DCC issued another deferred benefit statement (**the October statement**). It showed that Ms R's deferred benefits as of 6 April 2020 were a yearly pension of £2,521.54 and a lump sum of £7,564.78.

28. On 31 December 2020, Ms R wrote to DCC. She said that, following its letter of 25 September 2020, the revised statement she had received clearly stated that it replaced all previous statements and showed that the lump sum would be £7,564.78.
29. On 15 February 2021, DCC responded that the 2020 statement had been calculated in accordance with the relevant Regulations. As Ms R had been eligible to receive her Scheme benefits from February 2018, pension increases did not apply from the date when the lump sum became payable as a one-off payment.
30. In its response, DCC also confirmed that the October statement had been generated automatically, resulting in pension increases being added in error. It concluded that Ms R's lump sum would be calculated when she drew her benefits "from the base value", which would have been payable in February 2018, and increased by the addition of cumulative daily interest.

Ms R's position

31. The only reason that the age of 60 was used in the Scheme, back in 1997, was because that was the actual standard retirement age for women only. She did not believe that this age would ever have been entered into the Scheme Regulations otherwise. The retirement age for men at that time was 65.
32. According to the "EU judgement", it was permissible and normal practice for UK pension schemes to have unequal retirement ages between male and female workers. After the judgment, all UK pensions were required to equalise pension ages for men and women. This was clearly not the case for the Scheme.
33. DCC confirmed that it had equalised the Scheme in 2013, but this only applied to the current Scheme in operation. The change had not been applied retrospectively.
34. In her view, this contradicted her rights because DCC subsequently updated the Scheme Regulations, so that currently deferred members could wait to receive their benefits until their SPA.
35. The judgment in the McCloud case¹ (**the McCloud judgment**) sought to remove the age discrimination that was judged to have arisen in public service pension schemes and ensure equal treatment going forward.
36. She had been advised to formally complain to DCC, because the Equality legislation in the UK took precedence over any local government pension scheme.
37. The UK legislation stated that she had to retire at age 66. So, she had to continue working until that age to receive her State Pension. If she received her Scheme pension now, she would be taxed on it.

¹ Lord Chancellor and Secretary of State for Justice versus McCloud, The Secretary of State for the Home Department versus Sargeant [2018] EWCA Civ 2844

38. DCC's decision contravened guidelines under Equality legislation and Article 14 of the ECHR. There had been case law which clearly stated that, as a woman, she had been discriminated against due to the Scheme not being updated to reflect UK legislation.
39. In the event that The Pensions Ombudsman (**TPO**) did not uphold her complaint, she expected her Scheme benefits to be uplifted accordingly.

DCC's position

40. It had applied the Scheme Regulations in accordance with its understanding of the legislation. It understood that the Regulations were also similarly applied by other administering authorities of the Scheme in England and Wales.
41. If TPO determined that the legislation had been applied incorrectly in respect of the mandatory entitlement to pension benefits from Ms R's 60th birthday, it would be expected that the interpretation of Scheme Regulations would need to be reviewed by the Department of Levelling Up, Housing and Communities which governs the Scheme.
42. The relevant Scheme Regulations which govern a member's eligible date for the payment of pension benefits was determined by the Regulations which were in force at the time the member left their active membership of the Scheme.
43. As Ms R's employment and active Scheme membership ended in 1997, the legal context of her complaint was section D11 of the 1995 Regulations. It provided that a Scheme member who left their Local Government employment and was not entitled to immediate payment of pension benefits at the point of leaving, had preserved benefits in the Scheme. So, they became a deferred member of the Scheme.
44. Section D11 confirmed that the person became entitled to a pension in respect of their previous Local Government employment, from "the appropriate date". "Appropriate date" was defined in section D11(2) as the person's 65th birthday, or if earlier, their NRD.
45. The NRD was defined in section C3 as the person's 60th birthday, where they would have a total period of Scheme membership of at least 25 years by that birthday, had they remained in continuous Local Government employment since first joining.
46. The 1995 Regulations did not provide members with the power to defer the commencement of their pension benefits to a later date. In Ms R's case, this date was her NRD. The only exception was when their Local Government employment continued after that date.
47. Ms R was aged 34 when she started her employment and Scheme membership. So, she would have exceeded 25 years of potential membership in the Scheme by her 60th birthday, had she remained in continuous employment. As a result, the 1995 Regulations required DCC to pay her pension benefits from age 60.

48. As the payment of Ms R's Scheme benefits was mandatory from age 60, and expected to have been paid from that point, indexation would only apply to the pension element of the benefits rather than the lump sum.
49. The annual level of indexation was based on the measurement of the "September to September adjustment" in the CPI. It will be applied to Ms R's pension, effective from the following April each year when the payment of her benefits commences.
50. Due to the payment of benefits being delayed, they will be subject to the inclusion of interest calculated at 1% above the Bank of England's base rate.
51. The calculation of the sums due will be completed by DCC upon receipt of details from Ms R, in order to facilitate the payments being made.
52. It had provided annual benefit statements to Ms R, since her 60th birthday, in order to keep her informed of the value of her Scheme benefits.
53. Statements to deferred members included the application of indexation on annual pension and lump sum payments. As Ms R's eligibility for Scheme benefits made payment mandatory from her 60th birthday, DCC's pension administration system was not programmed to prevent the indexation of the lump sum figure.
54. As a result, the 2019 statement was not manually amended before it was sent to Ms R. It incorrectly reflected the indexation of the lump sum figure. The 2020 statement correctly reflected the lump sum.
55. The automatic generation of statements, which ran after the initial issue of the 2020 statement to Ms R, resulted in the October statement being issued which again incorrectly applied indexation to the lump sum value.
56. DCC apologised to Ms R for these errors and provided an explanation of why her lump sum should not have been adjusted by indexation. A statement issued in 2021 provided the correct figures, and the automatic generation of the statement was disabled to avoid the error being repeated.

Adjudicator's Opinion

57. Ms R's complaint was considered by one of our Adjudicators who concluded that no further action was required by DCC. The Adjudicator's findings are summarised below:-
 - The 1995 Regulations were relevant to this complaint, as they were in force when Ms R became a deferred member of the Scheme.
 - Section D11(1)(b)(ii) of the 1995 Regulations stated that the deferred benefits were payable from the 'appropriate date'. Section D11(2) defined 'appropriate date' as the deferred member's 65th birthday or their NRD, if earlier.

- Section C3 explained the meaning of NRD. If a member had a total period of membership in the Scheme of at least 25 years by age 60, then 60 would be their NRD.
- Where it was necessary to determine a member's NRD or NRA before they attained that age, it should be assumed that their Local Government employment and Scheme membership would be continuous.
- As Ms R commenced employment in March 1992, she would have reached 25 years of continuous employment in March 2017, just under a year before she reached age 60. So, her NRD was her 60th birthday and her 'appropriate date' was her NRD. This meant that DCC had applied the Regulations correctly.
- The general requirements for equal treatment in pension schemes were originally introduced by the Social Security Pensions Act 1975, section 118 of the Pensions Schemes Act 1993 and sections 62 to 66 of the 1995 Act. They were incorporated in sections 67 to 69 of the EC 2010.
- Section 67(2) of the EC 2010 provided that, in relation to a term which was less favourable to person A than it was to person B (someone of the opposite sex to A), the term was modified so as not to be less favourable. The requirements were overriding, so pension schemes must comply with them, irrespective of the actual provisions in their governing documentation.
- In Ms R's case, section C3 of the 1995 Regulations applied equally to both male and female members of the Scheme. This meant that a male member with 25 years of employment and membership prior to age 60 would have an NRD of their 60th birthday. On this basis, it was the Adjudicator's opinion that Ms R had not been treated any differently than a male member, so there had been no discrimination caused by the Regulations or by DCC.
- Ms R was entitled to receive yearly increases to her Scheme pension, in line with the rate of the CPI. These increases were shown in her statements. She was not entitled to any increases to her lump sum, because it should have been paid to her at age 60 and would not have received any increases thereafter.
- DCC had accepted that the 2019 and the October statements were incorrect. They included increases to the lump sum, which Ms R was not entitled to. DCC rectified the errors in both statements so that, in the Adjudicator's opinion, Ms R had not suffered a level of distress and inconvenience that would warrant a non-financial injustice award.

58. Ms R did not accept the Adjudicator's Opinion and in response, she provided further comments. In summary she submits:-

- The Adjudicator has done nothing but support DCC's side in her argument about women's pensions in the UK and equality. In support of her argument, Ms R has provided a copy of a newspaper article which refers to a ruling by the

Parliamentary and Health Service Ombudsman. Ms R says, the Ombudsman ruled that the Department for Work and Pensions should have written and given sufficient notice to women close to age 60, whose SPA was changing to age 65. In her view, a precedence was set for a change.

- The Pensions Ombudsman (**the PO**) has the power to change the Scheme Regulations.
- In February 2021, the Government published a response, confirming that the legacy pension schemes would close on 31 March 2022, and that affected members would be given a choice of which benefits they wished to receive and when these benefits were to be paid. This choice of pension benefits when the pension becomes payable is referred to as a 'deferred choice underpin'. The PO must be aware what is legally binding or not, and does not have the ability to change the rules.
- The Human Rights Act 1998 (**the HRA 98**) sets out the principles for how public authorities must treat all people in the UK. The ultimate aim is that all people are treated with dignity, respect, equality, and fairness. She is raising her complaint as part of the HRA 98.
- The issues she has complained about have caused her a great deal of stress. The UK Government changed women's SPA to 66. She has to work until that age and is going to be penalised even further by the archaic Scheme Regulations.
- In her view, the Scheme Regulations should change to include only active members, that is, those still working at DCC. She cannot see how the Regulations should apply for people that actually leave the employment of DCC. She considers this to be detrimental to leavers of the Scheme.
- The Adjudicator has not given her a valid reason as to why the 1995 Regulations cannot be updated in law. If the PO will not change the Regulations, she requires the legal reasons why the PO will not rule on this point.
- She disputes the Adjudicator's Opinion that DCC rectified its error regarding the incorrect statements. She questions how one would feel if they were told they were entitled to a higher pension and then that pension was reduced.
- The 2019 statement showed a lump sum of £7,433.33. The 2020 statement showed a lump sum of £7,052.42. The October statement showed a higher amount and was legally binding. Should she lose her claim, she expects the PO to award her the figures in the October statement. If the PO does not uphold her complaint, she would like a full, up to date breakdown of her Scheme benefits.

59. Ms R's complaint was passed to me to consider. I have noted Ms R's further comments, but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

60. Ms R's position is that she should be allowed to defer the payment of her Scheme benefits until her SPA and that, by not allowing her to do so, DCC and the Scheme Regulations contravene Equality legislation and infringe her human rights.
61. My powers are set out in Part X of the 1993 Act² and subsequent regulations. This legislation sets out what I can and cannot do. In particular, I cannot change or create new legislation. I must apply the law that applies to the applicant at the relevant time and to determine whether it has been applied correctly. I must decide complaints and disputes in accordance with established legal principles rather than by reference to what I may consider fair and reasonable³. For this reason, I do not have the power to change the Scheme Regulations as Ms R suggests.
62. Section 146 of the 1993 Act⁴ limits me to investigate and determine complaints in respect of occupational and personal pensions. This does not include investigating and determining complaints that relate to the State Pension. The changes to the SPA, or the manner in which the SPA is administered, do not fall within my remit, as they relate to the State Pension and not to any occupational or personal pension scheme.
63. In addition, the Scheme Regulations have their own definition of NRD. The SPA is not applicable and does not override regulations, unless specifically referred to in them. For this and the reason set out in paragraph 62 above, I cannot consider the points raised by Ms R regarding the changes to the SPA.
64. Ms R has also referred to the HM Treasury's consultation exercise and the Government's response, which recognises the changes required following the McCloud judgment, which did identify discrimination.
65. The proposed changes to public sector pension schemes only impact on individuals who had service on 31 March 2012, and who were still in service on 31 March 2015.
66. The following is an extract from page five of the HM Treasury document, dated February 2021⁵, that confirms who will be given a choice:

“All individuals who were members or were eligible to be members of a legacy scheme immediately prior to 1 April 2012, and have a period of service after 31 March 2015 during which they were members of a legacy or reformed scheme, will be given such a choice where those periods of service are continuous (including those with a qualifying break in service of less than 5 years).”

² See <https://www.legislation.gov.uk/ukpga/1993/48/part/X/enacted>

³ Henderson v Stephenson Harwood [2005] Pens LR 209 (s12)

⁴ See <https://www.legislation.gov.uk/ukpga/1993/48/section/146/enacted>

⁵ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958635/Public_Sector_Pensions_Consultation_Response.pdf

67. The proposed changes to public sector schemes do not apply to Ms R, as she has accrued no service after 31 March 2015 and, consequently, she has not been discriminated against. Ms R left service in 1997, so it is clear that the proposed option is not available to her.
68. Ms R has also consistently referred to the ECHR and, specifically, to Article 14 though the references she makes are very broad. The principle point she is making is that she has been discriminated against.
69. The ECHR was incorporated into UK Law by the HRA 98, allowing ECHR breaches to be determined in UK courts. Most of the Convention rights are set out in Schedule 1 of the HRA 98⁶.
70. The HRA 98 came into force for most purposes on 2 October 2000. It is capable of applying to primary and subordinate legislation (whenever enacted) (Section 3)⁷, so has potential retrospective effect.
71. It has been held in a pension's context that if a pension entitlement has been crystallised and permanently fixed (for example, if the pension came into payment) before 2 October 2000 and the events alleged to be in breach occurred after that date, the principle of no retroactivity would apply and the complaint could not be brought⁸. In this instance, the value of Ms R's pension became fixed in August 1997 by the Scheme Regulations.
72. Under the HRA 1998, it is unlawful for a public authority to act in a way which is incompatible with the ECHR (Section 6 of the HRA 98). There are two exceptions to this general rule, namely:-
- Where the public body is obliged by primary legislation to do something (section 6(2)(a) of the HRA 98)⁹; and
 - Where the public body is applying or enforcing primary legislation which is itself incompatible with ECHR (section 6(2)(b) of the HRA 98).
73. As the Scheme Regulations are secondary legislation, DCC is not protected by this section. The question is whether DCC acted in a way that is incompatible with the ECHR.
74. Article 14 of the ECHR states:
- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

⁶ See <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

⁷ See <https://www.legislation.gov.uk/ukpga/1998/42/section/3>

⁸ Carter v Chief Constable of Essex Police [2020] 032 PBLR (027)

⁹ See <https://www.legislation.gov.uk/ukpga/1998/42/section/6>

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

75. The expression ‘other status’ has been held to include non-married or co-habiting partners.
76. I am conscious of Ms R’s comments that all people should be treated with dignity, respect, equality and fairness, and these may be overriding principles. But I cannot find this wording in the HRA 98.
77. DCC has carried out the IDRPs and has given Ms R the opportunity to set out her complaint. It has applied the correct Scheme Regulations in a manner that does not breach the HRA 98. I do not find that DCC has acted in a way that is incompatible with Article 14, as set out in schedule 1 of the HRA 98.
78. In *R (Carson) v. Secretary of State for Work & Pensions* [2006] 1 A.C. 173, Lord Nicholls explained, at [3]:

“Article 14 does not apply unless the alleged discrimination is in connection with a convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is the difference in treatment of which complaint is made, can withstand scrutiny.”
79. The fact that Ms R does not agree with the Regulations and the change in the SPA does not necessarily mean that she has not been treated with dignity and respect. The manner in which the 1995 Regulations are drafted is intended to reward any member of the Scheme for long service and enable them to take a pension earlier than age 65. It is unfortunate that the unrelated increase in the SPA means that Ms R needs to continue working, but this is a separate matter.
80. There have been court cases that a claim for a breach of Article 14 has been upheld against public bodies, where discrimination has been shown or cannot be justified. But I have not found any case law in respect of Article 14 that has a direct relevance to Ms R’s complaint.
81. As Ms R left employment in August 1997, the relevant Regulations in respect of her deferred Scheme pension are the 1995 Regulations.
82. Section C3(1)(a) of the 1995 Regulations states that, in the case of a member who by their 60th birthday they had a total period of membership of at least 25 years, that birthday would be their NRD. This applies equally to both male and female members and for this reason Ms R has not been discriminated against.
83. As Ms R commenced employment in March 1992, she reached 25 years of membership in the Scheme in March 2017. This was just under one year before she reached her 60th birthday. I do not consider that there is any ambiguity regarding section C3, so it is clear that Ms R’s NRD is her 60th birthday for the purpose of the 1995 Regulations.

84. As stipulated in section D11(2)(a) of the 1995 Regulations, the appropriate date from which Ms R's pension becomes payable is her NRD, as determined by section C3. This is at her 60th birthday and applies equally to both a male and a female member of the same age.
85. In addition to DCC's decision not to allow her to defer her Scheme benefits, Ms R is also seeking to rely on the October statement, in support of her view that she should receive the higher lump sum quoted in that statement.
86. The basic principle for negligent misstatement is that DCC is not bound to follow incorrect information. Ms R is only entitled to receive the benefits provided for under the Scheme Regulations.
87. As the Scheme Regulations have been correctly applied, it follows that Ms R should have received the lump sum when she reached age 60. After that date, the lump sum would not have received any yearly increases. So, for financial loss to be claimed as a result of misstatement Ms R would need to show direct reliance on the misstatement, that it was reasonable to do so and that it resulted in an irreversible loss.
88. As Ms R has not taken her Scheme benefits yet and since DCC has issued her with a correct benefit statement, I am satisfied that she has not suffered any direct financial loss as a result of the incorrect statements.
89. I have also considered whether the incorrect statements constitute maladministration, which has resulted in non-financial injustice.
90. DCC has accepted that the 2019 and the October statements were incorrect. This amounts to maladministration.
91. However, I do not find that an award for significant non-financial injustice is appropriate because DCC took action to rectify the errors in the statements in a timely manner.
92. I do not uphold Ms R's complaint.

Anthony Arter

Pensions Ombudsman
6 October 2022