

Ombudsman's Determination

Applicant	Ms T
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Greater Manchester Arts Centre Ltd (GMAC) Manchester City Council (the Council)

Outcome

1. I do not uphold Ms T's complaint and no further action is required by GMAC or the Council.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms T complains that the benefits she is receiving from the Scheme are not in line with the benefits she understood she would receive.

Background information, including submissions from the parties

4. From 5 August 1991, Ms T began working full time, (40 hours a week), for the Council and became a member of the Scheme the same day. In 1999, Ms T accepted a different post with reduced hours due to an enforced employment change.. She was informed that she would have her pension protected as a result of the enforced change. This protection was included in her Statement of Written Particulars which states:-

"Your membership of the Greater Manchester Pension Fund will continue and payments will [sic] deducted from your salary at source at the normal rate.

Because you have accepted this post as part of an enforced change of circumstances, your pension will be protected for a period of thirteen years."

5. The covering letter to the Statement of Written Particulars says:

"I ... have included a clause referring to your entitlement to have your pension protected. I have written to the Pay and Pensions Section to confirm this. They will send you a form to complete in order to make the necessary arrangements."

6. On 1 April 2012, Ms T's employment was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) from the Council to GMAC.
7. On 6 March 2015, Ms T began negotiating the terms of her redundancy with GMAC. It was established that her pension was based on full time service up to 1 August 1999, and part time service from that date to present. No enhanced rights had been acquired.
8. Ms T unsuccessfully appealed the way in which her pension was calculated. Ms T says she understood her contract to mean that she would continue to accrue pensionable benefits on the basis that she was on a full time contract for a period of 13 years, or a shorter period in the event that she left before 13 years.
9. GMAC say that the TUPE transfer does not include replicating or continuation rights which offer the same pension that Ms T was entitled to with her previous employer. However, in the event that it is found that GMAC should be responsible for the pension on the same terms, it disputes Ms T's interpretation of her pension entitlement. The TUPE required that transferring employees should be, or remain, eligible for membership of the Scheme subject to the terms of the Scheme Regulations. The Scheme Regulations do not allow for enhancement to pension benefits on a full time basis where the member is part time. Regulation 23 allows a certificate of protection to be issued where there is a permanent reduction in pay. This sets out that pensionable salary can be protected for a period of 10 years following the reduction in pay. Upon retiring or leaving within a period of 10 years, the member had the option to select the best year's pensionable salary going back a maximum of 13 years.
10. The Council say that the Scheme is a statutory scheme and the Regulations set out rules on the permanent reduction of pay under Regulation 23. They do not cover protection in the way which Ms T has understood. If the intention of the contract was to award a pension as though she had been full time, this would have required additional contributions from the Council and possibly Ms T, yet none were made.
11. The Council has supplied this office with a copy of the certificate issued in respect of Ms T which clearly states "Certificate of Reduction in Pensionable Remuneration (Local Government Superannuation Regulation 1997 Reg 23)". The Council takes the position that the annual benefit statements that Ms T received quoted an annual pension which gradually increased each year. The figures quoted in 2014 are in line with the amount that she received upon redundancy in 2015, therefore there has not been a loss of expectation. The Council has acknowledged that, during Ms T's employment with it, these statements were based on part time salary and full time hours, rather than part time hours and full time equivalent salary. However, it maintains that this would have resulted in similar figures to those quoted, meaning no expectation of higher benefits would have arisen.

Adjudicator's Opinion

12. Ms T's complaint was considered by one of our Adjudicators who concluded that no further action was required by GMAC or the Council. The Adjudicator's findings are summarised briefly below:-

- It is clear that an agreement was reached between Ms T and the Council in 1999. The outstanding issues are what that agreement was, in relation to her pension rights, and whether GMAC are now responsible for it following the TUPE.
- The Statement of Written Particulars says, "your pension will be protected for a period of thirteen years." Which, when viewed on its own, is somewhat ambiguous. Ms T says her understanding of this is that she would continue accruing pension benefits as if she was still working full time. However, it does not specify this and the Ombudsman must consider pension matters in conjunction with the Scheme Regulations and any overriding legislation.
- The only "protection" available under the Scheme Regulations is that set out in Regulation 23. However, this cannot be interpreted in the manner in which Ms T understands the protection. Regulation 23 allows for the best pensionable pay to be selected from the 13 year period prior to retirement or leaving the Scheme, within 10 years from the point of the enforced change. A certificate is issued to show that the member holds the protection, should they leave or retire during the protection period.
- Ms T's enforced change of hours took effect on 1 August 1999. Therefore, the certificate of pension protection, under the Regulations, would have expired on 31 July 2009. Ms T did not retire or leave the Scheme within this period so, under the Regulations, the protection expired. The certificate itself says "within 13 years of the date of reduction". However even using this period, the protection would have expired on 31 July 2012. Again Ms T did not retire or leave the Scheme before this date.
- Therefore, the only protection available under the Regulations suitable for an enforced change and a reduction of earnings was that allowed under Regulation 23, so it is reasonable that this was the intended protection. The Adjudicator acknowledged that Ms T's recollection differs, but her understanding of what was agreed is not available under the Regulations. Therefore, the Council is unlikely to have been in a position to make an offer on this basis. There is no evidence that an augmentation was awarded and no additional employer and/or employee contributions were made to the Scheme during the protection period.
- Further, Ms T is receiving the benefits that she accrued in the Scheme in accordance with the Regulations. The annual pension statements that she received from 2000 to 2014 show estimated benefits at age 60 which gradually increase over the years. The benefits shown are in line with the award she received upon her redundancy, in fact the most recent estimates are slightly lower

than what she received; there is no loss of expectation. The benefit statements should not have led Ms T to expect a higher pension. The Adjudicator could not identify the loss Ms T feels she has suffered.

- It is acknowledged that the Council have confirmed that these statements, up until 2012, were based on her part time salary and full time hours, rather than full time salary and part time hours. It is understandable that this might look confusing, nonetheless, it would result in the same benefit. This can be seen by the steady increase in the benefits quoted in the statements, and the similarity between the statements from the most recent years and the final benefit put into payment.
 - The Adjudicator recognised that Ms T's confusion could have been avoided had the Council made the Statement of Particulars clear with respect to the intention of the pension protection. Alternatively it could, and perhaps should, have provided Ms T with a written explanation of exactly what the protection entailed. Ms T has said that, had she received a copy of the certificate, she would have questioned its meaning. While this could have corrected her understanding at a much earlier time it would not have changed the meaning of the protection as the certificate clearly references Regulation 23. Although it may have been prudent, Regulation 23 does not require a copy of the certificate to be provided to the member and there is no maladministration in a copy not being provided to Ms T.
 - As the certificate has expired, and Ms T's understanding of the manner in which protection is provided is not permitted under the Regulations, the Adjudicator did not believe that the TUPE transfer was relevant to this case.
13. Ms T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms T's representative provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Ms T's representative for completeness.

Ombudsman's decision

14. Ms T's representative has submitted that it is not possible to conclude that the intention was to provide for protection under Regulation 23. There is no reference to Regulation 23 in the Statement of Written Particulars, nor does it state that the protection will only be available should Ms T cease to be a member of the Scheme within 10 years. The representative submits that where there is an ambiguity, under the contra proferentem rule the preferred meaning should be the one which works against the party who provided the wording. In addition, the representative says that the Council has not disputed Ms T's understanding or offered an alternative. Further, the representative claims that the Council and GMAC have agreed on Ms T's understanding, and that this can be seen in a number of emails between them.
15. I do not agree that the Council has agreed with Ms T's understanding or not disputed it. The Council has said that a certificate under Regulation 23 was created in 1999,

and provided a copy. It went on to say that the certificate issued under Regulation 23 is not valid, as Regulation 23 only allows for a reduction in rate of pay, not a reduction in hours as in Ms T's case. As payroll records indicate that her rate of pay actually increased slightly after the reduction in hours this should not have been available to her.

16. Nevertheless, the fact that a certificate was created suggests the Council's intention was pension protection under Regulation 23, even if the Council incorrectly interpreted the Regulation at the time. Despite this, as any protection under Regulation 23, valid or not, had expired when Ms T retired, it is not necessary to consider it further.
17. Looking at the emails exchanged between the Council and GMAC, the email trails follow the investigation into the situation and work through possible solutions. The early emails, in May 2014, clearly state that they are based on assumed intent, taking into account Ms T's understanding. As the investigation progressed, the exchange of emails show how the Council's understanding of the situation evolved. By June 2014 the Council had established that the Regulations do not allow for protection by any means other than Regulation 23, but that Regulation 23 was not technically applicable and had expired in any event. The Council apologised for the vague wording in the Statement of Written Particulars. GMAC's interpretation developed in line with the Council's. I do not agree that this exchange of emails constitutes an agreement with Ms T's understanding.
18. The Statement of Written Particulars makes no reference to Regulation 23, or the timescale it imposes. Nonetheless, Ms T has supplied no evidence to support that her understanding is the correct one. There is no written confirmation of what pension protection meant, and no supporting evidence from 1999, or soon afterwards, to confirm her understanding. Ms T has said that had she received a copy of the certificate she would have queried it. Yet, the Statement of Written Particulars is sufficiently unclear to suggest that she should have requested an amendment of it or clarification in writing separately, if the pension protection was as important to Ms T as she submits.
19. The Regulations do not allow for any alternative "protection" to that provided by Regulation 23. Ms T's representative submits that Ms T's understanding could have been actioned under Regulations 67 to 72 (see appendix below), by means of shared cost additional voluntary contributions (**SCAVC's**), at the expense of the Council. However, this is not a form of protection so it is unlikely that the term pension protection in the Statement of Written Particulars is referring to SCAVC's. Further, the Regulations are clear that SCAVC's must be established by the employing authority and a written application by the member is required. There is no evidence to suggest that this was done.
20. In order to enable Ms T's understanding to be effected, whether allowed under the Regulations or not, additional contributions would have needed to be made to the

Scheme to fund the additional pension. It has been confirmed that no additional contributions of any kind have been made, either by the employer or employee.

21. Ultimately, there is no evidence to support Ms T's understanding of the pension protection or the intention of the Statement of Written Particulars. Nor is there any evidence to support any alternative form of protection. While it will be disappointing for Ms T, without evidence of this nature I am unable to uphold Ms T's complaint. The evidence available suggests that, on the balance of probabilities, any protection which was purported to be awarded, possibly incorrectly, would have been intended under Regulation 23, and has now expired. Mrs T's uncorroborated belief in an alternative pension protection being agreed back in 1999 is not enough for me to be able to uphold her complaint.
22. To address the point made concerning loss, I agree with the Adjudicator that Ms T has not suffered a loss of expectation as she received benefit statements which accord with the benefits she received. Without a higher expectation of pension figures, and reasonable reliance on those figures, it is difficult to see how a financial loss can be claimed. I acknowledge that there is a difference between Ms T's understanding of the pension protection, and the manner in which her benefits have been calculated, nevertheless, she has not received any documentation to support her understanding that she is entitled to a higher benefit.
23. Therefore, as no evidence has been provided to persuade me otherwise, I do not uphold Ms T's complaint.

Anthony Arter

Pensions Ombudsman
27 September 2017

Appendix

The Local Government Pension Scheme Regulations 1997

Shared cost schemes (SCAVCs)

67 Establishment of shared cost AVC schemes (SCAVCs)

- (1) An employing authority may resolve to establish and maintain arrangements under this Chapter for the purpose of enabling contributions ("SCAVCs") to be paid by and for active members under this regulation, in addition to the others which may be paid under this Part.
- (2) The resolution must specify whether all active members in employment under the Scheme with the employing authority are eligible to take part in the arrangements and, if not, the conditions for eligibility.
- (3) It must also specify whether SCAVCs may be used to provide benefits payable on the death of active members ("death benefits").
- (4) If they may, it must specify whether the whole or a proportion is to be so used, and, if a proportion, specify it.
- (5) It must also specify the amount of the contributions which the authority will pay under the arrangements for members who are themselves paying contributions under them.

The provision (above) is subject to modification.

68 Applications to pay SCAVCs

- (1) If an active member whose employing authority has established arrangements for SCAVCs under regulation 67 wishes to pay SCAVCs he must apply to them in writing.
- (2) The employing authority must notify the member in writing before the expiry of the period of three months beginning with their receipt of his application whether they have accepted or rejected it.
- (3) A notification of acceptance must specify the percentage of the member's pay which the authority will pay in contributions under the arrangements.
- (4) It must also specify whether any and, if so, what proportion of the contributions is to be used to provide death benefits and the nature of any such benefits.
- (5) A member may elect to stop paying SCAVCs.
- (6) The election must be made by notice in writing to his employing authority.

The provision (above) is subject to modification.

69 Functions of employing and administering authorities

- (1) Where an employing authority accept an application under regulation 68 they must send a copy of the notification of acceptance to the appropriate administering authority.
- (2) The appropriate administering authority must make the arrangements necessary so as to enable a member whose application to pay SCAVCs has been accepted to begin paying them before the expiry of the period of six months beginning with the date he applies to pay them.
- (3) The appropriate administering authority must make the arrangements necessary to enable a member who has elected to stop paying SCAVCs to do so before the expiry of the period of three months beginning with the date he so elects.

The provision (above) is subject to modification.

70 Application and investment of SCAVCs

- (1) Where the arrangements established by an employing authority provide for any of the SCAVCs to be used to provide death benefits, the appropriate administering authority must make such arrangements for the provision of those benefits as are specified in regulation 63(1).
- (2) The administering authority must invest any SCAVCs which are not to be used to provide death benefits with an approved AVC body.
- (3) Regulations 63(2) to (5) and 64(2) to (6) apply as respects SCAVCs as they apply as respects AVCs.

The provision (above) is subject to modification.

71 Changes of employment in which membership is continued

- (1) If a member who is paying SCAVCs leaves his employment and enters a new employment in which he is also a member, he may elect to have the accumulated value of the invested additional contributions specified in regulation 64(2) (as it applies by virtue of regulation 70(3)) used-
 - (a) to make a contribution to the arrangements the new employing authority have made under this Chapter for AVCs, or
 - (b) if-
 - (i) his new employing authority have established arrangements under this Chapter for the payment of SCAVCs, and
 - (ii) he has made an application to contribute under those arrangements which has been accepted,

to make a contribution to the new employer's SCAVCs arrangements.

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- (2) Such an election must be made by notice in writing to the member's new employing authority and may only be made if the member enters the new employment before the expiry of the period of one month and one day beginning with the date he left the former employment.
- (3) The new employing authority must send a copy of any election under this regulation to the appropriate administering authority.
- (4) Where an election is made under paragraph (1)(a), it must specify-
 - (a) whether the member wishes the election to be treated as an election under regulation 60(1) in respect of the member's new employment, and
 - (b) if he does, the matters which require to be specified in such an election.
- (5) Where an election is made under paragraph (1) and different authorities are the member's appropriate administering authority in the two employments, the former appropriate administering authority must transfer to the new authority a sum equal to the accumulated value of the member's invested additional contributions.
- (6) Where the election is made under paragraph (1)(a), the new appropriate administering authority must apply and invest the sum received as mentioned in regulation 64, together with any additional contributions falling to be so invested under that regulation by virtue of contributions made in respect of the new employment by virtue of any election which is treated as made under paragraph (4).
- (7) Where the election is made under paragraph (1)(b)-
 - (a) if the new authority consent, the former authority must assign to them their rights under any pension policy under regulation 70(1) in respect of the member which are assignable; and
 - (b) the new appropriate administering authority must apply and invest the sum received in the same manner as any SCAVCs made in respect of the new employment (other than those used to provide death benefits).

The provision (above) is subject to modification.

72 Termination

- (1) Where a member who is paying SCAVCs-
 - (a) leaves his employment and does not enter new employment in which he is an active member, or
 - (b) stops being an active member without leaving that employment,regulation 66 applies as respects the elections he must or may make for the use of the accumulated value of the invested additional contributions specified in regulation 64(2) (as it applies by virtue of regulation 70(3)) as it would apply to a

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person in his circumstances as respects the accumulated value mentioned in regulation 66.

- (2) Where neither paragraph (1)(a) nor (b) applies and an employing authority or a member stops paying SCAVCs (otherwise than by reason of the member having left his employment and entered new employment in which he is a member), the employing authority must give notice to the appropriate administering authority.

...