

Ombudsman's Determination

Applicant	Mrs R
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Dover District Council (DDC) Kent County Council (KCC)

Outcome

1. Mrs R's complaint is upheld in part to the extent that this matter has caused her significant distress and inconvenience. To put matters right, DDC should pay Mrs R £500 compensation for the non-financial injustice identified.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs R's complaint against DDC and KCC concerns DDC's decision to refuse Mrs R's application for the early payment of her deferred pension benefits under regulation 30(2) of the LGPS Regulations 2007.

Background information, including submissions from the parties

4. The relevant regulations and applicable policy are set out in the Appendix to this Determination.
5. Mrs R was an active member of the LGPS from 16 January 1978 to 4 June 2010. Her employment with DDC ended on the grounds of capability due to poor health and she became a deferred member of the LGPS. Her benefits are payable from Normal Retirement Date which is her 65th birthday (in January 2024).
6. Mrs R was treated for triple negative breast cancer from October 2012 to May 2013.
7. In January 2014, following her 55th birthday, Mrs R applied to KCC for early payment of her deferred pension benefits. KCC forwarded Mrs R's request to DDC in February 2014, together with details of the cost to DDC for waiving the early retirement reduction. KCC informed DDC that as Mrs R would not be eligible for unreduced benefits before age 60, there was a cost to DDC and a reduction would be applied. However, KCC said that DDC was able to exercise its discretion to waive the reduction on compassionate grounds and cost details were provided to DDC should it

choose to do so. KCC said the total cost was obtained by adding together the cost of early payment of the benefits and the cost of waiving the early retirement reduction. The details of the costs involved (if paid by lump sum) were:

- cost of early payment of fund benefits – £66,700
- cost of waiving early retirement reduction – £6,600
- total cost of releasing benefits early and waiving reduction – £73,300

8. DDC wrote to Mrs R on 7 April 2014. It said its policy in relation to the relevant regulation was not to give consent unless there was a demonstrable benefit to the organisation. It said Mrs R's request would be a significant cost to DDC so it was "minded to refuse" her application on the basis that there was no demonstrable benefit to DDC. It invited Mrs R to make a further application on the grounds of ill health.
9. DDC formally confirmed its decision in relation to Mrs R's application on 29 April 2014. It said her circumstances did not meet the terms under which it would allow early payment and consent would not be given.
10. Mrs R informed KCC in May 2014 that she intended to appeal DDC's decision. She then sought the assistance of The Pensions Advisory Service (**TPAS**). In June 2014, she obtained a letter from her consultant and surgeon in support of her application confirming that she had been treated with a mastectomy and sentinel lymph node biopsy, chemotherapy and radiotherapy. TPAS exchanged correspondence with DDC about its policy and whether the 'Rule of 85' applied to Mrs R.
11. Mrs R subsequently appealed DDC's decision under the LGPS internal dispute resolution procedure (**IDRP**) in October 2014. Amongst other things, Mrs R said living with the word cancer had completely put a different perspective on her life. She explained that the rare form of cancer she had been treated for did not have a safety net of medication keeping it at bay, and that the five years following diagnosis were critical. Until that time, she lives her life on a day to day basis.
12. The stage one IDRP decision was made on 23 December 2014. The decision maker decided that the matter should be reconsidered by DDC because the criteria used (demonstrable benefit to the organisation) was for active members and not deferred members like Mrs R.
13. DDC therefore reconsidered Mrs R's application and asked her to provide updated medical evidence. Mrs R's consultant and surgeon wrote again in February 2015. In relation to her current status, he said that her mammogram of August 2014 showed no abnormality and that she remained well to date with no clinical or radiological evidence of cancer reoccurrence; however he remained supportive of her early retirement application.

14. DDC issued its reconsidered decision on 2 April 2015. It said Mrs R's application had been considered on the basis that she was a deferred member and in line with its policy. DDC's decision maker said:

"In coming to my decision, I have taken into account the following:

- Letter from [Mrs R's consultant and surgeon] dated 23 February 2015
- Bundle of documents provided to the IDRP in October 2014 (which includes the letter from [Mrs R's consultant and surgeon] dated 6 June 2014)
- [DDC]'s Early Retirement Policy (Pensions. Redundancy and Efficiency, December 2010)
- Local Government Pension Scheme (Benefits and Contributions) Regulations, reg 30(2)...

I have now considered the case on its merits, taking into account your full circumstances but I am afraid that I do not consider that there is sufficient reason to depart from the policy. It is therefore the Council's decision to refuse your request for early payment of deferred pension benefits. However, if your circumstances change significantly, I would invite you to make a further application."

15. Mrs R contacted DDC on 14 April 2015 to appeal the decision under stage two of the IDRP. However, she was informed that as the recent decision was "essentially made afresh", she was able use the first stage of the IDRP again.
16. Mrs R completed a further stage one IDRP application in June 2015. She received an update in September 2015, followed by the decision letter on 7 October 2015. The adjudicator decided that DDC had exercised its discretion in a proper and reasonable manner and that the decision reached was not perverse.
17. Mrs R appealed the decision, saying, amongst other reasons, she had still not been given a full clear written explanation apart from cost, as to why her application could not be granted. She also asked why the 'Rule of 85' was not being taken into consideration and said she was being discriminated against because of her length of service.
18. A second stage IDRP decision was issued on 7 January 2016, but Mrs R did not receive this letter until June 2016, after a copy was obtained by this organisation during the course of its investigation. The decision maker upheld DDC's decision of 2 April 2015, on the basis that its discretion had been properly exercised. DDC had considered Mrs R's application on an individual basis. It considered her circumstances and the cost of releasing her benefits early, and came to the conclusion that it would not depart from its policy not to agree to early payment. In

relation to the 'Rule of 85', the decision maker said it was not part of the decision making process but was used when calculating benefits to determine whether certain protections were applicable.

19. Mrs R has since provided extensive submissions about her health and her reasons for applying for the early payment of her pension. She believes that she is being discriminated against because of the length of her service, and that she has not been given a full written explanation apart from cost, as to why her application was refused.
20. She believes the medical evidence submitted supports her application and does not know what other evidence she can submit. Mrs R does not accept that she should have to wait for her circumstances to "change significantly" before she reapplies for her benefits. If she does so, her quality of life would be severely hampered and she would not be able to fully enjoy the pension benefits she has paid into throughout her entire working career.
21. In its formal response to this organisation, DDC confirmed the evidence submitted by Mrs R (in the form of the letters from her consultant and surgeon), was taken into account prior to the decision of 2 April 2015. It does not accept that consideration for the application for early payment of deferred benefits should not be based on costs. Although, it accepts that the decision should not be based on costs *alone*. DDC accepts it originally considered the matter in line with the wrong section of its policy and that it had misdirected itself.
22. In assessing Mrs R's application on its merits (as the correct section of the policy required), DDC balanced the cost to it and the compassionate aspect of the application, namely Mrs R's previous ill health. The decision maker took particular account of the consultant's February 2015 letter. Whilst sympathetic to Mrs R's previous condition, the decision maker did not consider that the compassionate grounds were (as at that date), such to outweigh the cost to be borne by DDC. Accordingly, there was insufficient reason to depart from DDC's policy not to give consent under regulation 30(2). It followed that DDC did not go on to consider whether to waive the early retirement reduction on compassionate grounds under regulation 30(5).
23. When DDC formulated its discretion policy, it took account of regulation 66(5) of the LGPS Administration Regulations 2007, which says it must have regard to the extent to which the exercise of its functions could lead to a serious loss of confidence in the public service.
24. DDC asserts that its second decision of 2 April 2015 was in line with the well-established principles that a decision must have regard to when exercising discretion. Its decision letter to Mrs R set out all the matters that were taken into account when making its decision; it addressed the question of consent under regulation 30(2) and took account of its own policy; it directed itself correctly in law by adopting a two stage approach to the question of consent under regulation 30(2), had it consented, it would have then moved on to consider whether to waive the actuarial reduction under

regulation 30(5); it did not arrive at a perverse decision because the second decision was made in accordance with the correct regulations and in line with the correct part of the policy. Further, DDC asserts that as the employer, it is entitled to have regard to its own interests when exercising discretion, including its own financial interests.

25. DDC maintains that there is no cost neutral situation that would enable it to grant consent as the cost of at least £66,700 is unavoidable.

Adjudicator's Opinion

26. Mrs R's complaint was considered by one of our Adjudicators who concluded further action was required by DDC, but only to the extent that Mrs R should receive compensation for her distress and inconvenience. The Adjudicator's findings are summarised briefly below.
- From the evidence provided, DDC took into account all relevant matters including the medical evidence submitted by Mrs R; it asked the correct questions by considering regulation 30(2) and its policy; it directed itself correctly in law; and did not arrive at perverse decision.
 - DDC's decision to refuse Mrs R's application is within the range of decisions that a reasonable decision-maker could have reached. Accordingly, DDC do not need to reconsider the matter afresh.
 - In relation to the issue of what consideration was given to the medical evidence submitted by Mrs R, it is not the role of an Ombudsman to weigh the evidence. There is no evidence that DDC did not consider the letters from Mrs R's consultant and surgeon. In view of this, as DDC considered the medical evidence, we cannot tell DDC what weight it should have attached to it. Consequently, DDC's decision did not need to be set aside.
 - Although DDC exercised its discretion properly, its second decision letter could have expanded on the reasons for its refusal. When considered with its failure to consider Mrs R's application under the correct policy in April 2014, £500 compensation for distress and inconvenience was warranted.
27. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs R for completeness.

Ombudsman's decision

28. Mrs R did not accept the findings in the Opinion. Her disagreement can be summarised as follows.

- Apart from stating the cost involved, DDC has not provided a clear explanation as to why her application was refused and the Adjudicator's findings support this. One has to assume its reasoning which Mrs R thought was "totally unacceptable". DDC should set out its reasons in writing, and not just depend on cost being a significant factor.
- Mrs R asserts that she has asked on several occasions what constitutes a discretion, or compassionate grounds, but as she has been refused purely on the basis of a discretion, she would again question what this is.
- DDC's Chief Executive made the decision to refuse her application. He is someone that she knows personally because she worked with him at points during her employment with DDC. Consequently, the decision maker should have been someone impartial.
- A decision by the then Deputy Ombudsman in the case of Miss A (PO-8729) supports her own case. Miss A applied for the early release of her deferred pension on compassionate grounds and her complaint was partially upheld against her employer because it failed to make its decision in a proper manner.
- DDC's decision was issued after 1 April 2014, when the new pension changes came into force, even though her application was made before the changes. It is significant for Mrs R to ascertain what the conditions were prior to this date for deferred members of the LGPS.
- Even though KCC provided DDC with the options for paying the employer costs in instalments, DDC only stated the total lump sum cost. There was never any indication that DDC had considered paying by instalments even though this was an option available to it.
- DDC's constant references to the cost involved is unfair and leads her to believe that she is being discriminated against because of her length of service. DDC is one of the richest authorities in the country as it does not spend any money and is generating income from its completion of housing developments.
- Mrs R assumes, because it has never been stated by DDC, that her critical remission period from cancer has not been deemed worthy of a discretion or compassion. There has been no consideration to the psychological position it has left her in. Mrs R asserts that she is living day to day with the word cancer, a savage disease, which in her case can appear again at any time. Should it reoccur, due to its rare form, the prognosis is very poor. Consequently, her application is fully supported by her consultant and surgeon.

29. Dealing first with Mrs R's point about the impartiality of DDC's decision maker, I cannot make a finding on this. It is for DDC to determine who it appoints as the most appropriate person for assessing applications on early retirement. In this instance, the decision was made by the Chief Executive of DDC and it would seem to me that this level of seniority was appropriate for the application concerned. The informal address in one of DDC's letters to Mrs R does not equate to any bias in my view and could simply be the result of the decision maker's knowledge of Mrs R, by virtue of her former role at DDC.
30. The regulations that were considered, namely the 2007 Regulations, were those in force at the time of Mrs R's deferment. I do not find the issuing of DDC's decision after the 1 April 2014, had any bearing on this. Her application was considered under the regulations that were still in force at the time of her application.
31. I will now address Mrs R's points in relation to DDC's decision. Regulation 30(2) gives DDC as the employer, the discretion to decide whether Mrs R can access her benefits early, and whether she can do so unreduced. Discretion in this sense, using its ordinary meaning, means DDC have a power to decide or act according to its own judgment or choice.
32. As required by the LGPS Regulations, DDC have a policy in place on how it exercises its discretion for applications under the regulation in question. In respect of deferred members such as Mrs R, DDC's policy is not generally to give consent. But it will consider each case on its individual merits, and in doing so, will take "full account of any costs to be borne by [DDC]". Accordingly, the main condition that DDC is required to consider is what cost it will incur if consent is granted. The policy does not rigidly set out what factors would lead to the granting or refusal of consent.
33. DDC considered Mrs R's application and it considered that there was insufficient reason to depart from its policy not to grant consent. Mrs R does not accept that DDC have provided adequate reasons for its refusal to grant her consent.
34. Guided by its policy, DDC informed Mrs R from an early stage (7 April 2014) that granting her application would involve a significant cost of over £73,000. It is evident that paying the cost in instalments would have been more expensive to DDC, so I do not agree with Mrs R that this option should have been considered separately.
35. DDC's reconsidered decision of 2 April 2015 said "there is insufficient reason to depart from the policy" and did not expressly mention the cost to DDC. I accept that it would have been helpful and provided more transparency if DDC had provided more information concerning the factors it had taken into account in reaching its decision, but I do not make a finding that it needed to provide an extensive list of reasons why it had decided to refuse the application. Mrs R had already been informed of the cost involved and had been given the opportunity to provide evidence in support of her application. There is evidence that this information was considered before the final reconsidered decision was made.

36. Despite Mrs R's assertions, I do not find that she has been discriminated against because of her length of service.
37. Whilst I am sympathetic to the underlying reasons behind Mrs R's application, and fully understand the point she is making, I cannot substitute DDC's decision for my own. As explained by the Adjudicator, I cannot prescribe the weight that DDC should have applied to the medical evidence supplied by Mrs R. It is only sufficient that DDC considered that medical evidence before reaching its final decision.
38. I will now turn to the previous case of Miss A that Mrs R referred to in support of her own application. Whilst previous determinations are informative and give an indication of how similar cases have been concluded, they do not have a binding effect. Complaints that reach my organisation are considered individually, on their own merits, and by taking into consideration the relevant rules and policies that apply to that specific applicant. In Miss A's case, the policy on the exercise of discretion was more detailed than DDC's policy. That policy had a specific criteria that had to be applied and specific information that must be supplied in support of a request for early payment. Amongst other things, it was found that Miss A had not been given the opportunity to provide any information about her personal circumstances. As a result, it was found that all the relevant factors had not been taken into consideration by the decision maker. In view of this, I do not attach any weight to the previous determination of Miss A for the purposes of my decision on Mrs R's complaint.
39. Finally, I agree with the Adjudicator's finding that DDC's failure in April 2014, to consider Mrs R's application under the correct section of its policy caused Mrs R significant distress and inconvenience. DDC's failure at that time amounts to maladministration. DDC had previously indicated to the Adjudicator that it would not oppose a direction to make this payment and I now make the relevant direction below.
40. Therefore, I uphold Mrs R's complaint in part, to the extent that she has suffered distress and inconvenience as a result of DDC's initial maladministration.

Direction

41. Within 28 days of the date of this determination, DDC should pay Mrs R £500 compensation for the significant distress and inconvenience it caused.

Anthony Arter

Pensions Ombudsman

2 December 2016

Appendix

Scheme Regulations

The Local Government Pension Scheme (Benefits, Membership and Contributions) 2007 (SI2007/1166)

“Regulation 30 – Choice of early payment of pension

- (1) If a member leaves a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he has attained the age of 55 he may choose to receive payment of them immediately.
- (2) A choice made by a member aged less than 60 is ineffective without the consent of his employing authority or former employing authority.
- (3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29.
- (4) His pension must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary.
- (5) A member's employing authority may determine on compassionate grounds that his retirement pension should not be reduced under paragraph (4).

...”

The Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239)

“Regulation 66 – Statements of policy about exercise of discretionary functions

- (1) Each employing authority must prepare a written statement of its policy in relation to the exercise of its functions under regulations 12 (power of employing authority to increase total membership of active members), 13 (power of employing authority to award additional pension), 18 (flexible retirement) and 30 (choice of early payment of pension) of the Benefits Regulations.

...

- (5) In preparing, or reviewing and making revisions to, its statement, an employing authority must have regard to the extent to which the exercise of any of the functions mentioned in paragraph (1) in accordance with its policy could lead to a serious loss of confidence in the public service.”

Dover District Council's Early Retirement Policy

Regulation 30(2):

"It is not the policy of Dover District Council to give consent under this regulation to the immediate payment of benefits to a scheme member who voluntarily retires unless there is a demonstrable benefit to the organisation which would take full account of any extra costs to be borne by the authority. Any such consent shall be agreed by the Head of East Kent HR, Director of Finance and the relevant Head of Service.

Where a scheme member has previously been awarded a preserved benefit, it is not generally the policy of Dover District Council to give consent under this regulation to the early payment of benefit, however each case could be considered upon its merits, however, each request will be considered and full account taken of any costs to be borne by the authority. Any consent shall be agreed by the Head of East Kent HR, Director of Finance and the relevant Head of Service."

Regulation 30(5):

"Where a request has been made for the early payment of benefits for compassionate reasons, full consideration must be given to the Kent County Council guidelines*. Payment may only be made after agreement between the Head of East Kent HR, Director of Finance and the relevant Head of Service. Dover District Council will be responsible for any additional costs deriving from the decision to release benefits prematurely in compassionate circumstances.

* These guidelines state that the circumstances must be exceptional and would not reasonably be expected to prevail, i.e. the occurrence of a disaster or accident etc. financial hardship alone would not normally be deemed sufficient ".