

## Ombudsman's Determination

Applicant	Mr Y
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondents	London Borough of Redbridge ( <b>LBRC</b> ) Suffolk County Council ( <b>SCC</b> )

## Outcome

1. Mr Y's complaint against SCC and LBRC is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) LBRC should pay Mr Y £100 to recognise the distress and inconvenience caused to him.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. There are two parts to Mr Y's complaint, which are:
  - he says he was led to believe that he could take a refund of contributions from the LGPS at any time and is unhappy that, now he needs to access his funds, LBRC and SCC have told him that he cannot; and
  - he is unhappy with the way LBRC handled his complaint and that this has caused him distress, inconvenience and upset.

## Background information, including submissions from the parties

4. Mr Y joined the LBRC section of the LGPS in 2003. The relevant regulations<sup>1</sup> provided that a member was only entitled to a benefit following at least two years' service. It was practice for members with less than two years' service to be offered a refund of the member contributions or a transfer to another pension scheme.
5. Mr L says at the time he joined LBRC he was advised that he could receive a refund of contributions at any time. LBRC have said that it would be "... inherently unlikely that they would have given advice that is clearly incorrect."

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<sup>1</sup> The LGPS Regulations 1997, regulation 19(1)

6. In 2004, Mr Y transferred to another section of the LGPS and in 2008 to SCC's section of the scheme. While Mr Y is still employed by SCC, he made the decision recently to become a deferred member of the LGPS.
7. For personal reasons, including the diagnosis of a medical condition in 2015, Mr Y contacted SCC asking for a refund of his contributions based on what he says he was told when joining the LGPS. He provided a copy of his medical report and explained that his medical condition makes it difficult for him to understand matters fully and that he can become confused.
8. SCC wrote to Mr Y informing him that there is no discretion to allow a refund of contributions and the regulations do not support a refund to a member with more than two years membership. Mr Y proceeded through both stages of SCC's internal dispute resolution procedure (**IDRP**) and his complaint was not upheld.
9. SCC's IDRP Stage 2 response (dated 5 February 2016) was very sympathetic when considering Mr Y's position. They considered in detail whether Mr Y's medical condition would have made him incapable of making an informed decision and therefore, whether or not the original contract would have been invalid. They said:

"Perhaps surprisingly, a contract made by a person who is unable to appreciate the nature of the transaction they are entering into will be enforceable against them unless it can be proved that the other party was aware of the incapacity... The case law supports the proposition that for an agreement to be set aside on the basis of the mental disability of a party, it must be shown that this disability was apparent to the other party at the time of the contract."
10. SCC again did not uphold the complaint on the basis that the regulations do not allow a refund, nor is there any discretion to allow them to make such a refund. Their view was that there was no evidence that LBRC knew or suspected that Mr Y had a medical condition which would make the original agreement to join the LGPS void.
11. At about the same time as Mr Y was pursuing a complaint with SCC, he was also in contact with LBRC. He initially contacted them on 29 October 2015. He provided details relating to the background to his membership and his medical condition. He said:

"Despite the response, I have received from the pensions team at Suffolk County Council, I still believe I am entitled to claim back everything I had paid into the scheme, as I appear to have been mislead [sic] in the first place. It is also clear, that I wasn't mentally capable of making such an important decision in the first place.

I look forward to your prompt reply and I would be grateful, if you could confirm receipt of this email ..."

12. LBRC telephoned Mr Y on 12 November 2015 and informed him that it is not possible to provide a refund. LBRC say they considered Mr Y's contact as a query and, following their telephone call, considered that the query had been answered.
13. Mr Y emailed LBRC on 2 and 3 December 2015 and clearly raised a complaint about how his initial contact was dealt with. Mr Y received an automated response and not until after his contact with my office in February 2016 did LBRC respond to the complaint and provide details of the IDRP.
14. Mr Y raised two complaints through two different complaints procedures with LBRC. First, he complained about the level of service he had received in relation to the response to his complaint. Second, the IDRP considered his pensions related complaint.
15. In response to his service complaint, LBRC apologised for the stress, upset and anxiety caused to Mr Y and assured him that actions were being taken to make sure that this situation does not arise again. Following contact with the Adjudicator, LBRC offered Mr Y £100 to recognise the non-financial loss he had suffered.
16. Under the IDRP, LBRC did not uphold Mr Y's complaint on the basis that the regulations do not allow a refund of contributions as he has more than two years' membership in the LGPS.
17. Mr Y remained dissatisfied with the responses from both parties and proceeded with a complaint to my office.

### **Adjudicator's Opinion**

18. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by SCC, but agreed that LBRC's offer of £100 was reasonable. The Adjudicator's findings are summarised briefly below:
  - Both SCC and LBRC are correct that they cannot take into account a medical condition if the condition was undiagnosed at the time he joined the LGPS. Mr Y has no evidence that LBRC were aware of his medical condition in 2003 and therefore they could not take it into account when he first joined the LGPS.
  - Neither SCC nor LBRC are able to provide a benefit outside of the LGPS regulations, nor can the Ombudsman direct them to do so.
  - In relation to Mr Y's service complaint, the Adjudicator felt that LBRC's apology, promise to change their processes and offer of £100 was sufficient to recognise the non-financial loss caused by the delay between December 2015 and February 2016.
19. Mr Y did not accept the Adjudicator's Opinion and further submitted:
  - Under the Disability Discrimination Act 1995, LBRC should have provided him with additional support when he joined the LGPS;

- He disagrees with LBRC's offer of £100 and believes £250 to £500 should be considered;
- LBRC ought to have responded to his October 2015 email in writing and offered him the option of to make a complaint via the IDRP. He still feels that the telephone call was designed to "fob" him off;
- He says that if he had not made a formal complaint to LBRC, he never would have received a response to his December 2015 emails;
- He says he clearly remembers being told he could request a refund of contributions at any time;
- He asks once more to relinquish his pension rights and extenuating circumstances must be taken into account; and
- SCC found him mentally incapable of making the decision in 2003 and therefore the contract should be considered null and void.

20. I have considered these points along with those previously made. I have also read all of the evidence submitted, including the medical evidence, and I agree with the Adjudicator's Opinion, summarised above. I will therefore only respond to the key points made by Mr Y for completeness.

### **Ombudsman's decision**

21. I am extremely sympathetic to the situation Mr Y finds himself in, but I am unable to direct SCC or LBRC to act outside of the LGPS regulations. There is nothing within the LGPS regulations that allow for the payment Mr Y is asking for, nor any clause that allows for his circumstances to be taken into account. The purpose of any pension scheme is to provide a benefit at retirement and help members with an income once they stop work. It is not designed to allow members to withdraw funds, no matter how serious the circumstances are, for any reason other than retirement or permanent ill health. This is why HMRC would apply such hefty tax charges on the full value of Mr Y's fund, if it was paid to him in the way in which he asks.
22. Mr Y has argued that his medical condition rendered him incapable of making an informed decision at the time he joined the LGPS. I do not doubt Mr Y's statement that his condition is one that would be prominent from birth and he will have to cope with throughout his life. But I cannot agree that LBRC should retrospectively apply his 2015 diagnosis to the situation in 2003 so as to reverse his pension scheme membership. There is no evidence to show that Mr Y was aware of his condition in 2003 (although it is recognised that he would have presented symptoms), nor that he made LBRC aware of it or that they could have been aware of it. I do not consider that LBRC can be considered in breach of any disability or equality legislation when they did not and could not have known that Mr Y had a disability. . I therefore do not agree with Mr Y's assumption that he should have been treated differently in 2003 or that he entered into a contract which is invalid. It is only with hindsight that we know

that Mr Y's condition would have impacted his ability to make decisions,.There is nothing to show that by enrolling him into the pension scheme LBRC treated Mr Y unfairly or discriminately.

23. Mr Y remains unhappy with the offer of £100 LBRC have made to recognise the distress caused to him due specifically to the way they handled his complaint. Looking at the correspondence Mr Y had with LBRC, it is reasonable that his first contact with them was considered as a query and there is nothing unreasonable or unusual in that LBRC decided to contact him by telephone.
24. I agree that LBRC ought to have acted on his emails in December 2015 and that they failed to do this until February 2016. To that limited extent I find there was maladministration. However, once they realised the initial oversight, they then considered all aspects of the service and pensions complaints within a reasonable time frame. (The Pensions Regulator guidance on responding to IDRPs complaints is four months and Mr Y received a full response in three). In my view, the fact that LBRC have looked into their practices, apologised and offered £100 is fair, even if Mr Y feels differently.
25. Therefore, I partly uphold Mr Y's complaint.

## **Directions**

26. Within 21 days of the date of this Determination, LBRC are to arrange payment of £100 to Mr Y.

**Karen Johnston**

Deputy Pensions Ombudsman  
10 October 2016