

Ombudsman's Determination

Applicant	Ms N
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Royal Borough of Greenwich (the Council)

Outcome

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

Complaint summary

3. Ms N has complained that she has suffered a loss of expectation due to the Council incorrectly including a retention payment in her pensionable pay. As a result, her annual pension statements were overinflated leading her to expect a higher pension. Ms N says this means she will now receive a much lower pension when she retires, and she does not have the time or ability to make up the difference.
4. Ms N feels that the compensation that she received from the Council is not adequate, especially as the Council took so long to inform those affected by the error, and no explanation has been given as to why affected employees were not informed earlier. She would like to receive further compensation for the distress and inconvenience that she has suffered, and would like the higher level of pension honoured.

Background information, including submissions from the parties

5. As relevant, Regulation 4(2), of 'The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007', says:

“... an employee's pensionable pay does not include –

...

(e) any payment as an inducement not to terminate his employment before the payment is made.”
6. Ms N worked as a Social Worker for the Royal Borough of Greenwich from 1973 and became a member of the Scheme on 8 September 1975. In 2005, retention payments

at 10% of salary were introduced for Social workers. These retention payments were incorrectly treated as pensionable. Employee and employer contributions were made to the Scheme in respect of these retention payments.

7. In November 2011, a social worker queried whether the retention payment should be pensionable, and it was concluded that they should not be under the Local Government Pension Scheme Regulations 2007. Further retention payments were treated as non-pensionable and the contribution deductions in respect of them ceased on 31 March 2012, however none of the affected employees were informed.
8. Ms N received annual benefit statements between 2005 and 2012, which detailed benefits calculated including the 10% retention payment in pensionable salary. Therefore, the pension benefits shown were overinflated by 10%.
9. In September 2013, Ms N received her 2013 benefit statement for the year ending 31 March 2013, this was calculated using the correct pensionable salary not including the retention payment. This meant that the figures quoted were lower than those quoted in previous years.
10. In June 2014, Ms N queried the reduction in her benefits and was advised that the 10% retention payment was not pensionable. She raised a complaint which progressed through the Internal Dispute Resolution Procedure (**IDRP**).
11. The Council agreed that an error had occurred which had led to a loss of expectation for Ms N. The Council also acknowledged that it should have informed those affected at a much earlier stage, however no explanation as to why it did not was provided. To redress these errors the Council refunded Ms N's contributions in respect of the 10% retainer payment for the relevant period, including interest at 1% above base rate making a total refund of £979.94. It also paid Ms N a distress and inconvenience payment of £500 along with £3,100.51, which is equivalent to the employer contributions paid over the relevant period.
12. The Council considered using its discretion under Regulation 31 of the Local Government Pension Scheme Regulations 2013, which allows for an active member to be awarded an additional pension. The Council decided that use of this discretion was not appropriate in Ms N's case, as she has not suffered a financial loss. The Council acknowledged her loss of expectation, but said she has been put back into the position she would have been in had the error not occurred, and has received compensation for the distress and inconvenience this error has caused. The Council believes this is adequate in the circumstances.

Adjudicator's Opinion

13. Ms N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below:-

- There is no disagreement that the Council incorrectly included the retention payments in pensionable pay, and that this is maladministration. The outstanding dispute is in regards to how the Council have tried to put matters right. Ms N feels that the compensation she has received is not sufficient to cover the distress and inconvenience that the matter has caused to her, that discretion under Regulation 31 has not been granted to award her the higher benefit and she is also unhappy that no explanation has been provided for why it took the Council so long to inform those affected of the error.
- During the course of this investigation the Adjudicator asked the Council why those affected were not informed earlier. The Council has said that it cannot find a reason for the delay based on the information available now. It has concluded that, “the members were not contacted sooner due to a miss communication [sic] between internal departments at that time albeit we do not have any evidence to show this was the reason.” However, the Council has acknowledged that it should have informed affected employees earlier.
- The Ombudsman can make two kinds of award where there has been maladministration, one for financial loss, and one for non-financial loss. There is no dispute that the Council’s actions amount to maladministration. However, Ms N has not suffered a financial loss. The Scheme is only bound to pay the correct benefits calculated according to the Scheme Regulations. The Adjudicator agreed with the Council that Ms N had only suffered a loss of expectation. In her complaint to this office she also refers to her loss as a loss of expectation.
- Nevertheless, Ms N can still be entitled to an award for non-financial loss. Awards of this nature made by the Ombudsman are only made where the distress and inconvenience caused by the maladministration is considered significant. The amount of the award would start at £500. Where the distress and inconvenience is not considered significant, no award will be made. The Council have paid Ms N £500 in respect of the distress and inconvenience that she has suffered.
- In addition to this, where contributions have been overpaid, the Ombudsman would expect the employee to receive a refund of the employee contributions which they had overpaid, plus interest. The Council have refunded the contributions Ms N paid with interest at 1% above base rate, which is reasonable in the circumstances.
- As well as refunding Ms N’s own contributions the Council also paid her £3,100.51, which is equivalent to the employer contributions it paid over the relevant period. Had the error not occurred, Ms N would not have been entitled to the contributions that the Council paid. Therefore, this is not an award that the Ombudsman would be in a position to direct. Since Ms N has already received this payment it must be viewed as a further award for non-financial redress. This is in line with a previous determination made by the Deputy Pensions Ombudsman on a similar case, also against the Council, which can be obtained on our website

using reference number PO-7667. This additional award brings the total non-financial redress to £3,600.51, which is well in excess of awards made by the Ombudsman in similar circumstances.

- The exercise of Regulation 31 is at the employer's discretion. The Council considered using its discretion under this regulation to award Ms N an augmentation. However, it concluded that this was not appropriate as Ms N has not suffered a financial loss. When making a discretionary decision the Ombudsman would expect that the decision maker takes account of all relevant factors and ignores any irrelevant factors. The exercise of discretion is expected to be genuine and rational and it must not produce a perverse decision. The Council may take its own interests into account (and indeed, favour those). There is no evidence to suggest that the Council did not properly exercise its discretion in this matter. The Adjudicator is satisfied that the decision was reached appropriately and that it was not perverse.

14. Ms N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms N provided her 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 N for completeness.

Ombudsman's decision

15. Ms N has said that her loss of expectation is likely to become a reality in the near future due to her age. She feels that the monies received do not adequately compensate her and have not taken into account age or service. She makes the point that she does not have time to make up the difference between what she expected and what is due to her, however she does not say that she would have made different decisions had she known about the mistake earlier.
16. I sympathise with Ms N's loss of expectation, the Council's actions amount to maladministration and I agree that the errors would have caused Ms N significant distress and inconvenience. However, Ms N has not suffered a financial loss, therefore I cannot award redress in this respect.
17. The Council has paid her £3,600.51 in respect of the errors and significant distress and inconvenience that it caused. The redress I direct for non-financial loss such as this is modest and starts at £500. The payment that the Council has made is reasonable and exceeds any award for non-financial loss that I would make in these circumstances.
18. Ms N has also said that the Council's response, as to why it took so long to inform affected employees, is not credible and lacks evidence.
19. I understand that the Council's response will be disappointing to Ms N. Nevertheless, the Council has acknowledged that it should have informed those affected at a much earlier stage and apologised. Even if the reason for the delay in notifying affected

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employees could be identified, this would not impact the redress I would direct. The non-financial redress paid by the Council takes this delay in notification of the error into account. I am satisfied that the Council has provided adequate redress in Ms N's case.

20. Therefore, I do not uphold Ms N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
27 September 2017