

Ombudsman's Determination

Applicant	Mr E, on behalf of the Estate of the late Mrs E
Scheme	Local Government Pension Scheme (LGPS)
Respondent	East Sussex County Council (ESCC)

Outcome

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

Complaint summary

3. Mr E's complaint against ESCC is about its decision not to process a retrospective application by him, for the payment of the late Mrs E's pension benefits on ill-health retirement grounds.

Background information, including submissions from the parties

4. Mrs E worked with ESCC from October 1994 to August 2003. When she left, she became a deferred member of the LGPS.
5. Mrs E became ill and entered residential care in 2011. At this time, no request was made by Mrs E, or a person entitled to make a request on her behalf, for the early release of her deferred pension on ill-health grounds.
6. Mrs E passed away on 5 November 2015. Mr E subsequently notified East Sussex Pension Fund (the administrator) of Mrs E's death, and he made a retrospective application for the early payment of Mrs E's deferred pension on ill-health grounds. Mr E was subsequently informed that his request could not be processed.
7. Mr E complained under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He asserted that a retrospective ill-health application should be considered and accepted, and the Scheme should pay him a lump sum which would have been paid to Mrs E from the date of her illness in 2011 until the date of her death in 2015. The stage one decision was issued on 7 June 2016 not upholding his complaint. It was concluded that there was no provision in the LGPS regulations allowing for a retrospective application for early release of deferred benefits on ill-health grounds.

Accordingly, it was correct for the administrator to inform Mr E that it could not process his request.

8. Mr E appealed. He said his application was “as current as possible” because Mrs E lacked the capacity to be aware of the terms of the LGPS, or to make such an application. Mr E’s position was that there is no provision which forbids his retrospective application, and that in refusing to accept it, the regulations have been interpreted to the detriment of the principles of the LGPS and his late wife, who was a member of the LGPS. Further, Mr E said it was his understanding that the provision of deferred benefits on ill-health grounds was dependant on the payment of the appropriate subscription, and that Mrs E had paid this and, as a result, he was entitled to those benefits.
9. On 8 September 2016 the decision maker upheld the stage one conclusion and said, the question for determination was whether such an application can be made retrospectively, and whether the administrator had acted correctly in rejecting Mr E’s application. It was noted that Mr E accepted that there was no provision within the regulations governing the LGPS which would provide for a retrospective application for deferred benefits on ill-health grounds. The decision maker concluded that in the absence of such provision, a retrospective application could not be accepted. In addition, the regulations of the LGPS had not been interpreted as not permitting acceptance, there was simply no provision which permitted such acceptance. As to Mr E’s contention that Mrs E had paid the appropriate subscription, the decision maker said entitlement to deferred benefits was subject to the appropriate application being made. Therefore, this falls back to the same point that, namely that a retrospective application could not be permitted.

Adjudicator’s Opinion

10. Mr E’s complaint was considered by one of our Adjudicators who concluded that no further action was required by ESCC. The Adjudicator’s findings are summarised briefly below:-
 - The LGPS Regulations govern benefits which are payable to members and in what circumstances. Certain benefits are payable only if certain criteria is met, but all will usually require an application, or notification in the prescribed manner to the administrator.
 - In administering the LGPS, ESCC must follow the LGPS Regulations and apply the correct interpretation to its provisions. Areas where discretion can be exercised are expressly stated in the Regulations, and if a situation is not governed by the provisions, ESCC does not have the power to act or provide benefits where benefits cannot be provided.

- As granting Mr E's application would require ESCC to pay benefits in a manner that is not covered by the LGPS Regulations, it is correct in its interpretation of the regulations and in its decision to refuse to process the retrospective application.
 - Although Mrs E would have been entitled to apply for her deferred benefits to be paid early on ill-health grounds, such an application could only be made during her lifetime. The regulations do not allow a retrospective application to be made. The practical effect of this is that the member can no longer benefit from any pension they were entitled to receive beyond death, and the administrator must then consider benefits that are payable to a beneficiary in the event of the member's death.
 - There are also practical implications to Mr E's request which further make it impossible for ESCC to process a retrospective application. A registered pension scheme is authorised to provide pension benefits to a member only (or to his/her dependant(s) on the member's death), if those benefits comply with the pension rules or regulations. If a pension benefit does not comply with the rules or regulations, various tax charges can apply on the payment, and the recipient and scheme would be liable for penal tax charges as an unauthorised payment.
11. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E provided his 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 Mr E for completeness.
12. Mr E made additional points which can be summarised as follows:-
- His application for the payment of Mrs E's pension on ill-health grounds was made in the appropriate format and manner as prescribed by ESCC.
 - The Adjudicator did not state which regulations of the LGPS did not apply, and which regulations stated that the application had to be made during Mrs E's lifetime, given that it can be made by others authorised to act on her behalf.
 - Surely, the Estate of a member is similarly entitled to "enjoy the benefit of the pension" in the same way as the member, if not, the regulation that specifically says this is not possible should be provided.
 - In relation to the possible tax consequences of making such a payment, it has been confirmed to him that there would be no tax liability for ESCC as the executor of Mrs E's estate would be liable.
 - When Mrs E joined ESCC and was invited to join the LGPS, he does not know whether she was advised of the governing regulations. He said that guidance from the Financial Services Authority (**FSA**) [now Financial Conduct Authority (FCA)] on 'Financial Promotions' makes it clear that potential investors are warned that the 'benefits' offered are not necessarily guaranteed, or ensured, and that losses may occur. In Mrs E's case, the offer to grant sickness protection was the benefit

offered for the investment of the required monthly premiums. The correspondence Mrs E received did not provide any indication of potential losses so the regulations are contrary to the FSA [FCA] guidance.

- ESCC appear to be relying on its inability to pay the pension through the 'Pay As You Earn' (**PAYE**) arrangement as its sole reason for refusing his retrospective application. This is without reference to a specific regulation.
- His Grant of Probate authorises him to act for Mrs E, in all matters including PAYE. However, ESCC has chosen to ignore this.
- As he is already receiving a spouse's pension through ESCC's PAYE system, the additional amount that would have been due to Mrs E, is capable of being paid to him through the same system, and is due to him as her legal representative.

Ombudsman's decision

13. As Mrs E became a deferred member in August 2003, the LGPS regulations that apply are the Local Government Pension Scheme Regulations 1997 (as amended) (**the Regulations**). The relevant provisions are in the Appendix to this Determination.
14. For the purposes of the LGPS, the Regulations say a "member" has the same meaning as in section 124(1) of the Pensions Act 1995. This provides that a member of the LGPS, an occupational pension scheme, means someone who is an active member, deferred member, or pensioner member (or pension credit member) of the Scheme. At the outset, it is important to note that it was Mrs E, and not Mr E, who satisfied the meaning of a "member" for the purposes of eligibility within the LGPS. At the time of her death, Mrs E was a "deferred member" of the LGPS.
15. Regulation 31 deals with benefits that are exclusively payable to deferred members. Regulation 31(6) makes it clear that in the event of permanent incapacity before the member's normal retirement date, it is for the deferred member, to "elect" to receive the pension benefits immediately. This ability to "elect" would also extend to someone who had the authority to make decisions on the deferred member's behalf.
16. However, it does not need to be explicitly stated within the provision that the election can only be made during the lifetime of the member, for that to be the application of this provision. There is no dispute as to Mr E's status as a widower and executor of Mrs E's estate. This gave him the power to deal with Mrs E's financial affairs following her death. However, it does not create a legal right for him to assume the deferred member status of Mrs E as the "member" of the LGPS, enabling him to make an application for Mrs E's ill-health pension following her death.
17. The only circumstance in which Mr E would have been able to request ill-health early retirement from deferred member status, on behalf of his wife, would have been between 2011 and 2015, after Mrs E became ill, but before she died, and only if he held Power of Attorney for her.

18. Mr E must recognise that he is not legally entitled to Mrs E's deferred member benefits on ill-health. Only Mrs E, the member, could be assessed for ill-health and meet the criteria for incapacity. Mr E said himself that benefits were dependant on the "payment of the appropriate subscription, and that Mrs E had paid this". He is correct that Mrs E paid member contributions during her period of ESCC employment between 1994 and 2003. But, that means only ill-health benefits can be paid to the member who made the pension contributions, not her spouse. Spouse's benefits are of course paid from the LGPS but they generally reflect a reduced 50% entitlement.
19. Regulation 97(9) sets out the process that must be followed before a decision can be made on the member's entitlement to the early payment of their deferred pension on ill-health grounds. Certification is required from an independent registered medical practitioner (**IRMP**), giving his or her opinion on whether "the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body". As this is the prescribed process that must be carried out before benefits become payable, a retrospective application would not enable this process to be followed. This assessment would have to have been carried out when Mrs E was alive, and unfortunately the evidence submitted by Mr E from the consultants will not constitute an assessment of Mrs E for the purposes of this regulation.
20. Mr E is only entitled to a spouse's pension in accordance with regulation 41. He has acknowledged that he is in receipt of this so it is evident that this provision has been complied with.
21. Mr E's spouse's pension is treated as 'income' so it will be taxable under PAYE. Mr E made the point that as his pension was payable under PAYE then ESCC could also pay Mrs E's ill-health pension through PAYE. PAYE is only the mechanism in which the pension is paid, it does not mean he is entitled to his late wife's pension for the period between 2011 and 2015.
22. As an application under regulation 31(6) was not made by Mrs E before she died, it cannot be made now. In view of this, Mr E's recent comments do not change the position.
23. I agree with the Adjudicator's findings summarised above.
24. Therefore, I do not uphold Mr E's complaint.

Anthony Arter

Pensions Ombudsman
22 March 2017

Appendix

Local Government Pension Scheme Regulations 1997 (as amended)

Regulation 19 General qualification for benefits

(1) Membership of the Scheme only entitles the member to benefits under this Chapter if -

(a) his total membership is at least two years...

(2) But paragraph (1) does not apply -

(a) to a benefit under regulation 25 (normal retirement) in a case where the member's normal retirement date is his 65th birthday or under regulation 27(3) (ill-health grants); or

(b) to benefits in respect of a member under regulation 38 (death grants), regulation 40 (surviving spouse's or civil partner's short-term pension), regulation 45 (children's short-term pensions) or regulation 46 (children's long-term pensions).

Regulation 31 Other early leavers: deferred retirement benefits and elections for early payment

(6) If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body-

(a) he may elect to receive payment of the retirement benefits immediately, whatever his age, ...

Regulation 38 Death grants

(1) If a member dies, the administering authority at their absolute discretion may make payments to or for the benefit of the member's nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.

(2) The aggregate amount paid under paragraph (1) must not exceed the member's death grant.

...

(4) The multiplier for a deferred member's death grant is the same as for his retirement grant.

...

(6) If the administering authority have not made payments under paragraph (1) equalling in aggregate the member's death grant before the expiry of the period of 2 years beginning with his death, they must pay an amount equal to the shortfall to the member's personal representatives.

(7) For these Regulations, any payments made under paragraph (1) must be treated as payments made by way of death grant.

Regulation 41 Surviving spouse's or civil partner's long-term pension

(1) If a member dies leaving a surviving spouse or civil partner, the spouse or civil partner is entitled to a spouse's or civil partner's long-term pension.

...

(3) The long-term pension payable on a deferred member's death is payable from the death.

...

(5A) But where the deceased was a deferred member and a pension debit member, the long-term pension is equal to half the pension to which the deceased would have been entitled under regulation 25 if he had become entitled to a pension under that regulation on the date that he died (but see regulation 42).

(6) If the deceased was a pensioner member, the long-term pension is equal to half his retirement pension immediately before the date of death (but see regulation 42)...

Regulation 97 First instance decisions

(1) Any question concerning the rights or liabilities under the Scheme of any person other than a Scheme employer must be decided in the first instance by the person specified in this regulation.

(2) Any question whether a person is entitled to a benefit under the Scheme must be decided -

...

(b) in any other case by the Scheme employer who last employed him.

...

(9) Before making a decision as to whether a member may be entitled under regulation 27 or under regulation 31 on the ground of ill-health or infirmity of mind or body, the Scheme employer must obtain a certificate from an independent registered medical practitioner who is qualified in occupational health medicine as to whether in his opinion the member is

permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.

(9A) The independent registered medical practitioner must be in a position to certify, and must include in his certification a statement, that-

- (a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and
- (b) he is not acting, and has not at any time acted, as the representative of the member, the Scheme employer or any other party in relation to the same case.

Pensions Act 1995

Section 124 Interpretation of Part I

(1) In this Part—

- “active member”, in relation to an occupational pension scheme, means a person who is in pensionable service under the scheme,
- “deferred member”, in relation to an occupational pension scheme, means a person (other than an active or pensioner member) who has accrued rights under the scheme
- “pensioner member”, in relation to an occupational pension scheme, means a person who in respect of his pensionable service under the scheme or by reason of transfer credits, is entitled to the present payment of pension or other benefits,
- “pensionable service”, in relation to a member of an occupational pension scheme, means service in any description or category of employment to which the scheme relates which qualifies the member (on the assumption that it continues for the appropriate period) for pension or other benefits under the scheme,

(2) For the purposes of this Part—

- (a) the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme, and
- (b) at any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service;

and references to accrued pension or accrued benefits are to be interpreted accordingly.