PO-14629

Ombudsman's Determination

Applicant:	Mr N
Scheme:	Local Government Pension Scheme (the **Scheme**)
Respondent:	City of Bradford Metropolitan District Council (**WYPF**)

Complaint Summary

1. Mr N has made the following complaints:-

- WYPF used the incorrect salary in the earnings test it performed in 2003 to determine if abatement would apply to his pension due to his re-employment. He was told that, because he was re-employed by an admitted body to the Scheme, the re-employment rules would not apply to him provided he did not join the Scheme. Mr N considers that, if his correct salary had been used in the 2003 calculations, he would not have been subject to an abatement and, if he had been told as much, he would have remained a member of the Scheme from 2003 up to his second retirement in 2015. He says his loss is membership of the Scheme between September 2003 and November 2014 and the pension he would have accrued during that period. He would like this membership re-instated to put the matter right (the **2003 complaint**).

- If it is found that abatement should have applied from 2003, Mr N complains that WYPF did not inform him when the abatement policy was altered in 2005 with the effect that no abatement applied to re-employments. Mr N says that, had he been made aware, he would have re-joined the Scheme from this point. His loss is membership of the Scheme from 2005 up to the date of his auto-enrolment on 1 November 2014 (the **2005 complaint**).

- If it is found that abatement should have applied from 2003 and the 2005 change is not applicable to Mr N, he complains that WYPF did not inform him when the abatement policy was altered in 2008 so that no abatement applied to all re-employments. Mr N says that, had he been made aware, he would have re-joined the Scheme from this point. His loss is membership of the Scheme from 2008 up to his auto-enrolment in the Scheme on 1 November 2014 (the **2008 complaint**).

Summary of the Ombudsman's Determination and reasons

2. The 2003 and 2005 complaints are not upheld, but the 2008 complaint is upheld. This is because:-

   - The 2003 and 2005 complaints fall outside my jurisdiction because they were made outside of the time limits within which legislation requires that a complaint should be brought to me to investigate and determine. The 2003 and 2005 complaints are also affected by the limitation periods imposed by the Limitation Act 1980 (the **Limitation Act**) and, as a result, I would be unable to provide Mr N with a remedy in respect of those complaints. Even if it could be argued that all of Mr N's complaints were made within the time limits, thereby falling within my jurisdiction, I do not consider that the 2003 and 2005 complaints could be upheld on the merits. I find no acts of maladministration in respect of the 2003 and 2005 complaints.

   - The 2008 complaint is upheld because WYPF did not inform Mr N about the change to the 2008 abatement policy. This failing amounts to a breach of WYPF's duty of care to keep Mr N informed of a change which affected his pension entitlement, causing Mr N to miss out on active membership of the Scheme from 2008 to 2014.

Detailed Determination

Material facts

3. The Scheme consists of a number of Funds. Mr N was a member of the West Yorkshire Pension Fund section of the Scheme due to his employment with Kirklees Council (**Kirklees**) from 1984 to 27 September 1998. City of Bradford Metropolitan District Council is the administering authority. The parties use the acronym "WYPF" to refer to both the section of the Scheme and the administering authority. For simplicity, I have followed this convention in my Determination.

4. During the latter part of Mr N's employment with Kirklees, he worked some periods of reduced hours. Mr N said that this was due to ill health. Kirklees notified WYPF of each change in hours on a form titled "Record Amendment Form (Change in Contractual Hours)" (the **Forms**). The first form is dated 20 December 1996 and reduces Mr N's hours from full time at 37 hours per week to 20 hours per week with effect from 6 January 1997. The second form is dated 18 March 1997 and increases Mr N's hours from 20 hours per week to 30 hours per week. The third form is dated 14 January 1998 and reduces Mr N's hours from 30 hours per week to 18.5 hours per week with effect from 6 January 1998.

5. On 28 September 1998, Mr N retired from the Scheme on the grounds of ill health. Mr N was provided with a statement titled "Notification of ill health benefits". Under the subsection "Details of calculation", final pay is stated as "£20,612.00". This was Mr N's full contractual or full time equivalent salary. His actual final pay from 28

September 1997 to 27 September 1998 was £12,036.39; as reported to WYPF by Kirklees on a form titled "Financial Information" dated 16 October 1998. The period of membership used in Mr N's pension calculation was adjusted to take into account his period of part time membership. WYPF awarded an ill health enhancement in accordance with Regulation 28 of the Local Government Pension Scheme Regulations 1997 (the **1997 Regulations**), which were in force when Mr N retired. Mr N was informed when he retired that, if he were to be employed again by a Scheme employer, his pension could potentially be subject to abatement.

6. Prior to 1 April 1998, when the 1997 Regulations came into force, the relevant Regulations had been the Local Government Pension Scheme Regulations 1995 (the **1995 Regulations**). Paragraph 2 in Part I of Schedule D5 required an earnings test to be carried out when a pensioner was re-employed by a Scheme employer and re-joined the Scheme as follows:

> "Subject to paragraphs 3, 7 and 9, while the person holds the new employment the annual rate of the retirement pension is reduced —
>
> (a) if the annual rate of remuneration of the new employment, equals or exceeds the indexed annual rate of remuneration of the former employment, to zero; and
>
> (b) otherwise, by the amount (if any) which is necessary to secure that the potential receipts during the new employment do not exceed the indexed annual rate of remuneration of the former employment."

7. The 1997 Regulations came into force on 1 April 1998. Regulation 109 required Funds to create, and keep under review, a policy concerning abatement (see Appendix 1). This included deciding whether abatement might apply upon re-employment. WYPF's policy (the **1998 abatement policy**) was:

> "That, on the re-employment of an existing LGPS pensioner by a scheme employer, the WYPF will abate pensions whereby pay in the new job plus the pension in payment should not be greater than the current value, with inflation proofing, of the pay on which the pension was calculated."

8. On 1 September 2003, Mr N was re-employed by Leeds Citizens Advice Bureau (**Leeds CAB**), a Scheme and WYPF employer. He started on an annual part-time salary of £10,166 and his annual pension at the time was £6,560.

9. Clause 5 of Mr N's contract of employment with Leeds CAB stated that Leeds CAB was a member of WYPF and that:

> "5.4 On appointment, all eligible employees will be asked whether or not they wish to join the scheme [*sic*], and will be provided with information published by [WYPF].
>
> 5.5 At any time, employees may change their pension status and join or leave the scheme [*sic*], by giving notice in writing to the Finance Office."

10. Mr N was provisionally re-entered into the Scheme with effect from 1 October 2003 as a result of his re-employment and, shortly afterwards, he was informed that abatement would apply in his case. In a letter dated 24 November 2003, Mr N disputed the calculation of the earnings test. He said the full-time equivalent should be used, not the actual part-time figure he was paid, because the reduction in his hours was temporary due to a phased return to work after a period of poor health. However, he was not provided with a copy of the abatement policy or its wording, which WYPF has confirmed, and he did not pursue the matter further at that time. Instead, he was informed that he would only be subject to abatement if he joined the Scheme on re-employment. As a result, Mr N opted out of the Scheme to avoid abatement. As he did this within three months, he was treated as never having been a member of the Scheme for the period of employment commencing 1 October 2003.

11. On 7 March 2005, the WYPF's abatement policy was reviewed and amended as follows:

> "That WYPF's policy on abatement of pensions on re-employment be amended so that abatement will only apply for the compensatory years element of a pension. The amended policy will come into effect from 1 April 2005 and apply only to new employments from that date."

12. On 18 July 2008, WYPF's policy was reviewed again and amended as follows:

> "That, with effect from 1 April 2008, all re-employments will not have an effect on a pensioner's pension, with the exception of the compensatory added years element."

13. On 1 November 2014, due to auto-enrolment requirements, Leeds CAB re-enrolled Mr N into the Scheme. Mr N said he was not aware that he had been auto-enrolled into the Scheme at this time.

14. On 24 July 2015, Mr N left employment with Leeds CAB and was subsequently contacted by WYPF offering him the option to retire from the second period of service in the Scheme. Mr N said he became concerned at this point that an abatement should have applied to his pension while he was a member of the Scheme for the period 1 November 2014 to 24 July 2015. Mr N made enquires with WYPF.

15. Mr N subsequently complained to WYPF, and it dealt with Mr N's complaint under stages 1 and 2 of its Internal Dispute Resolution Procedure (**IDRP**). WYPF dismissed Mr N's complaint on the basis that, broadly, it was not unreasonable for it to use Mr N's actual pay when determining whether his pension should be abated. It said it had no reason to believe that the reduction in Mr N's hours was as a result of a phased return to work programme. It said, at the date of his retirement, the Scheme Regulations did not contain any provisions to ignore changes to Mr N's hours for the purposes of calculating benefits on ill health retirement. The Scheme Regulations also did not make any special arrangement for abatement cases where a member had previously retired due to ill health. WYPF said it had communicated policy changes to pensioners via newsletters but, because Mr N was not participating in the

Scheme, it had no way of knowing that he was still employed when the policy changed. It said, when it became aware that Mr N was employed with Leeds CAB, it asked Leeds CAB whether it would be willing to backdate Mr N's membership to 2008. WYPF said, as membership is at the employer's discretion and Leeds CAB would not provide its consent to backdate, it could not backdate Mr N's membership.

Summary of Mr N's position

16. Mr N submits:-

- He became aware of the wording of the abatement policy which had applied in 2003, when he was originally re-employed, together with the changes to the abatement policy since 2003, as a result of the enquiries he made in 2015.
- He understands the wording: "of the pay on which the pension was calculated", used in the 1998 abatement policy, to mean his full time equivalent or full time contractual salary because this is what his pension calculation was based on.
- Had the earnings test been calculated on the basis of the £20,612.00 figure, shown on his ill health retirement statement, his benefits would not have been subject to abatement.
- In any event, his reduction to part time hours and reduction in pay was only temporary, due to his ill health and part of a return to work strategy, rather than a contractual change; there was no change to his contract. It would be discrimination to use his part time salary due to his ill health.
- In any case, he thought that there was good reason for WYPF to believe that his reduced hours were due to ill health. He had been in receipt of contractual sick pay, statutory sick pay and Employment and Support Allowance (**ESA**) during his illness coinciding with his reduced hours.
- WYPF would also have been fully aware that his retirement was due to ill health because all of their pension calculations were headlined 'Ill Health Benefits'. Its own calculations took into account that the reduction in his hours, due to illness, should be disregarded and his full time pay was used to calculate the pension entitlement.
- WYPF was negligent in not identifying that ill health was the reason for his reduced hours. If WYPF had communicated with Kirklees at the time of his re-employment with Leeds CAB, it would have confirmed that his reduced hours were due to ill health and that he had never asked for or agreed to a change in his contract of employment. He should not have needed to raise this with WYPF but, for the record, he did do so in a telephone call when abatement and pension suspension were threatened at the start of his employment with Leeds CAB.
- He had understood, in 2003, that the abatement rules were based on the pay on which his pension had been calculated; not the actual pay which he received at

the point of his retirement. WYPF advised him that his understanding was incorrect and he accepted that advice, having no knowledge of the regulations and policy guidelines that WYPF was governed by at that time. It had not occurred to him that a pension fund would administer its fund incorrectly. He had no reason to question the accuracy of WYPF's advice.

- If he had suspected that he was subject to such maladministration he would have challenged it. He does not understand how the Ombudsman could conclude that he had sufficient knowledge of all the necessary facts to challenge WYFP's statement that his benefits would be subject to abatement back in 2003. The legal rules were exceedingly complex and he was reliant on the advice given to him by the pension fund.

- It was a time of great stress on re-entering employment after a long period of illness. Having his pension suspended added to the stress. It would have been reckless of him to join the Scheme and challenge the abatement with the threat of further suspension to his pension. He thought WYPF was trying to help with the reinstatement of his pension[1] Therefore, there is strong justification for the Ombudsman to use his discretion to investigate the 2003 complaint.

- Maladministration occurred [in 2003] because WYPF quite clearly did not use its own 1998 abatement policy. The policy gave WYPF no discretion but to use the pay on which the pension was calculated in an abatement calculation. Therefore, his complaint should not be time-barred under the Limitation Act.

- Had he been informed his benefits would not be subject to abatement, he would not have opted out of the Scheme in 2003 and would have accrued service and benefits until his second retirement date in 2015.

- In any case, he could have re-joined the Scheme, without abatement being a concern, from at least 1 April 2005, and would have done so had he been made aware of the change in policy. He feels that WYPF should have informed him of the change, but it did not.

- He cannot say for certain whether he received or read the Spring 2008 and Autumn 2008 newsletters from WYPF, but he has certainly received newsletters from WYPF in the past. He would do no more than skim through the documents reading anything which caught his attention before disposing of the documents in the recycling bin. A sub-heading, such as "working again", would not have caught his attention because he was confident, mistakenly, that he knew what the abatement rules allowed. His attention would, however, have been drawn to the text if it had been headed by "changes to rules when working again".

- He has no doubt at all that, had he been aware of the change to the abatement policy which meant that abatement would no longer apply to members in re-

[1] Mr N has provided copies of letters, dated 16 October and 2 December 2003, from WYPF relating to the suspension/reduction of his pension on re-employment.

employment from 2008, he would have immediately requested Leeds CAB to enroll him into the Scheme. The fact that he has made the complaint, that he was wrongly prevented from re-joining the Scheme in 2003, is very strong evidence that he would have joined the Scheme in 2008.

- There would have been no discretion at all on the part of Leeds CAB because his contract of employment specifically allowed him to change his pension status, to join the Scheme, at any time.

- He was completely unaware that WYPF had contacted Leeds CAB while he was still an employee to ask it to make backdated contributions to the Scheme. It would have been helpful if WYPF had contacted him to give him the opportunity to raise this with his employer. It is likely that Leeds CAB did have discretion as to whether it made backdated contributions or not, otherwise he would have hoped that WYPF would have advised him of his rights.

- While he was employed by Leeds CAB, his contract of employment allowed him to join the Scheme at any time but did not provide for the right to make backdated contributions. Any contractual rights would have ceased after his employment terminated. WYPF should provide the remedy for its maladministration.

- There was no change to his employment contract to facilitate a reduction in his work hours. Any reduction in hours was temporary so that he could regain health and eventually return to full time hours. If his employer had insisted on changes to his employment contract, he would have sought advice from his trade union. In the unlikely event that he had signed a new contract, he would have been given a copy which he would have kept.

- He understands entirely that he could be required to make pension contributions if his pensionable service were to be backdated to 2008.

Summary of WYPF's position

17. WYPF submits:-

- It has correctly applied the 1998 abatement policy to Mr N at all times and it has applied its abatement policies consistently across the WYPF membership.

- It has provided the Forms completed by Kirklees showing changes in hours prior to Mr N's retirement, as well as submitting information regarding his actual part-time earnings and full-time equivalent for the purpose of calculating his pension. While the forms do not specify the reasons for the reduction in hours or if the reduction is permanent or temporary, it would treat any reduction of hours the same, regardless of whether it was temporary or not.

- "Although it does not specify in the policy, WYPF decided that it would have to apply the actual pay in this test rather than full time equivalent pay. There is no specific wording in the regulations, which suggests one approach to the

determination of pay is more appropriate than the other. However, it would seem only fair to compare like with like when applying that test."

- "The policy that WYPF introduced on 1 April 1998 was meant to replicate the provisions of Schedule D5 of the Local Government Pension Scheme Regulations 1995. Whilst I accept that the word pay can be interpreted in a number of different [ways] I feel that how WYPF applied its policy [is] fair, as the main purpose of the re-employment policy was so that a pensioner was to not be 'better off' re-employed again in Local Government, than they were when they last worked in Local Government." [2]

- It does not hold any documentation to support its position and confirms its intention was to mirror the 1995 Regulations. It has supplied a number of factsheets produced by other Funds within the Scheme to show that it is common practice to use actual pay for abatement calculations.

- Paragraph 2 in Part I of Schedule D5 of the 1995 Regulations stated:

  "Subject to paragraphs 3, 7 and 9, while the person holds the new employment the annual rate of the retirement pension is reduced—

  (a) if the annual rate of remuneration of the new employment, equals or exceeds the indexed annual rate of remuneration of the former employment, to zero; and

  (b) otherwise, by the amount (if any) which is necessary to secure that the potential receipts during the new employment do not exceed the indexed annual rate of remuneration of the former employment.",

  and the definition of "remuneration" in Regulation C2 stated:

  "(1) Subject to paragraphs (2) and (3) and Schedule C5 (limitations on contributions and benefits), in these regulations "remuneration", in relation to an employee, means the total of—

  (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment, and

  and [*sic*] any other payment or benefit specified in his contract of employment as being a pensionable emolument."

- It was unable to communicate policy changes individually, but these were communicated via pensioner newsletters and as information to employers. As Mr N was not an active member in the Scheme while employed by Leeds CAB, it was unaware that he was employed and could not anticipate his benefiting from the changes.

[2] Quote contained random spacing throughout and has been copied accordingly.

- In any event, the policy introduced in 2005 only applied to new employments after the policy came into effect, so it would not have had an impact on Mr N's situation. Abatement only ceased to apply for those members who were already in re-employment, and whose benefits were being abated, upon introduction of the 2008 policy.

- It stated in its Spring 2008 and Autumn 2008 newsletters that only compensatory added years were affected by re-employment. As Mr N retired on ill health grounds he received ill health enhancement; he did not receive any compensatory added years.

- As Mr N was re-employed by an Admission Body, his pension would have only been affected by abatement if he re-joined the Scheme. The number of pensioners in the Scheme who were re-employed by Admission Bodies would have been in single figures. However, because Mr N opted not to join the Scheme, his pension was not affected by abatement and there were no indicators on his record which would have enabled it to contact him. For pensioners who were re-employed and whose pension was affected by their re-employment and/or pensioners who had re-joined the Scheme, it had indicators on their records and was able to identify these cases.

- Mr N chose not to re-join the Scheme so that his benefits were not abated. When he received the 2008 newsletters, he could have asked if he would now be able to join the Scheme as he was not in receipt of compensatory added years.

- Mr N has not suffered any detriment as a result of abatement because he was not a member of the Scheme and, therefore, the abatement was not applied.

18. WYPF has calculated that the arrears of employee contributions due for the period April 2008 to October 2014 amount to £5,397.77. It has pointed out that the Scheme Regulations allow for arrears of member contributions to be deducted from arrears of pension.

Conclusions

The 2003 complaint

19. I find that the 2003 complaint has been made outside of both the time limits for making complaints to my office, and the time limits stipulated in the Limitation Act. I deal with each of these in turn.

20. My jurisdiction for investigating and determining complaints is governed by legislation. Of particular relevance to this case is the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (the **Ombudsman Regulations**). While my office carries out an initial jurisdiction assessment before a complaint is accepted for investigation, it is necessary to continue to consider my

jurisdiction throughout the investigation process because additional information may become available which could alter the initial jurisdiction decision.

21. Regulation 5 of the Ombudsman Regulations (see Appendix 3) deals with the time limits for making complaints and referring disputes to me. Under Regulations 5(1) and 5(2), a complaint to my office must be made no later than three years from the date the events complained about occurred, or within three years of when the applicant knew or ought reasonably to have known of those events. I also have the discretion under Regulation 5(3) to consider a complaint made outside the three year time period. However, in order for me to consider a complaint under Regulation 5(3), it has to be considered reasonable that an application was not made within the three year period following the occurrence (or awareness) of what is being complained about; and if the complaint was not brought within three years, it has to be brought within a further period that can be considered reasonable.

22. Mr N made his complaint to my office on 7 October 2016, which is the date my office received his complaint form dated 30 September 2016. Mr N's complaint, that the earnings test and abatement calculation were performed incorrectly in 2003, was initially accepted for investigation under Regulation 5(2). This was on the basis that provision of the abatement policies in "August/September 2015", as Mr N indicated in his complaint form, provided information that Mr N was not previously aware of and that this new information caused him to question the salary used in the calculation. As a result, September 2015 was taken as the point at which he reasonably became aware of the issue.

23. However, after further investigation, it is now clear that Mr N was aware in 2003 of the issue that he now wishes to complain about and, in fact, challenged the use of his part time salary instead of his full time salary. However, he did not pursue the matter further at that time and instead accepted WYPF's explanation, assuming it to be correct. While I accept that the 1998 abatement policy was not disclosed to Mr N in 2003, when it was disclosed it did not provide any new information that Mr N was not already aware of.

24. The fact that the 1998 abatement policy was not produced to Mr N in 2003 does not mean that he was unaware of the issue and unable to raise a complaint about it. Mr N was aware in 2003 that his part time salary was used in the earnings test rather than his full time salary; this was the key fact relevant for the purposes of making a complaint.

25. I find that Mr N had sufficient knowledge in 2003 of the facts he is now complaining about. Mr N's complaint concerning the events that occurred in 2003 is out of time under Regulation 5(1) and Regulation 5(2) because he did not bring it to me within three years of the event or within three years of when he knew, or ought to have reasonably known, about the event. Regulation 5(3) allows for the exercise of discretion where the delay in making the complaint is reasonable. However, I do not consider that there are reasonable grounds for the delay in this case, and I find no basis for the exercise of discretion.

26. Even if I were to accept jurisdiction, I do not consider that I could provide the remedy which Mr N seeks because, on the facts as set out, the 2003 complaint is also time barred under the Limitation Act.

27. The matter of limitation periods was considered in the case of *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch). In this case, the court held that the powers available to the Ombudsman when investigating a complaint which is time-barred are the same as those which are available under the Limitation Act, except in cases of pure maladministration, and the remedy must not go beyond what a court could order.

28. Mr N's complaint is that WYPF incorrectly informed him that the abatement rules would apply to his pension if he re-joined the Scheme. As the complaint is one which a court would recognise as a claim made in negligence, the relevant period within which a claim has to be made is six years of the negligent act or omission (section 2 Limitation Act); or (if later) within three years from the date of knowledge (section 14A Limitation Act). This is subject to an overriding time limit (long stop) of 15 years from the date when the negligent act or omission occurred (section 14B Limitation Act).

29. Having considered all of the evidence which has been provided, I find that the relevant start date for the purposes of the Limitation Act (taking the latest possible date) is 2003, because it was in 2003 that Mr N has said that he received the misinformation and challenged it. If Mr N had pursued this matter through the courts he would have needed to have brought the claim within six years of 2003; that is, by 2009. Therefore, following the principles laid down by the court in *Arjo Wiggins*, I would be unable to provide a remedy.

30. Even if it could be said that the 2003 complaint was made within the time limits stipulated under the Ombudsman Regulations and the Limitation Act, and assuming for the time being that knowledge of the 1998 abatement policy was necessary for Mr N to raise this complaint, it is unlikely that Mr N's complaint would be upheld on its merits. I say this for the following reasons.

31. There are two substantive issues arising under the 2003 complaint. First, whether, in 2003, WYPF (as alleged) incorrectly interpreted the 1998 abatement policy and used the incorrect salary in the earnings test. Second, whether WYPF misinformed Mr N, in 2003, when it informed him that his pension would be abated if he re-joined the Scheme.

32. In respect of the first issue, I consider that WYPF correctly interpreted the 1998 abatement policy and used the correct salary in the earnings test.

33. The Regulations in force at the date Mr N retired in September 1998 were the 1997 Regulations. Regulation 109(1) of the 1997 Regulations imposed the following requirements on WYPF:

> "Each administering authority must formulate and keep under review their policy concerning abatement (that is, the extent, if any, to which the amount of

> retirement pension payable to a member from any pension fund maintained by them under the Scheme should be reduced (or whether it should be extinguished) where the member has entered a new employment with a Scheme employer, other than one in which he is eligible to belong to a teachers scheme)."

34. Regulation 110(4) of the 1997 Regulations required that:

> "(4) The authority which is the member's appropriate administering authority as respects the retirement pension to which he is entitled –
>
> (a) must apply the policy published by them under regulation 109 to the member, and
>
> (b) they may reduce the annual rate of that pension or, as the case may be, may cease to pay it, during the period while he holds the new employment, in accordance with that policy."

35. WYPF agreed the 1998 abatement policy in compliance with Regulation 109(1).

36. The 1998 abatement policy was WYPF's published policy in respect of the Scheme at the time that Mr N was re-employed in 2003 and WYPF was required, under Regulation 110(4), to apply its policy to Mr N. Regulation 110(4), in using the word "must", imposes an obligation on WYPF to apply its published policy. While Regulation 109(1) gives administering authorities the discretion to decide what the abatement policy to be applied to their Funds will be, once they have exercised that discretion by reaching a decision and publishing their abatement policy, they are bound by Regulation 110(4) to give effect to the policy they have agreed.

37. The policy imposes an obligation on WYPF regarding the salary of reference and does not grant any discretion. The policy states that on re-employment, "the WYPF **will** [my emphasis] abate pensions whereby pay in the new job plus the pension in payment should not be greater than the current value, with inflation proofing, **of the pay on which the pension was calculated** [my emphasis]." On a plain reading of this policy, I do not see that WYPF has any discretion regarding what pay to use in the calculation, as "will" imposes an obligation to use the pay figure as referenced in the policy. So, were the complaint within my jurisdiction, it would turn on the interpretation of "pay on which the pension was calculated".

38. Regulation 109(5) of the 1997 Regulations required that:

> "(5) In formulating their policy concerning abatement, an administering authority must have regard –
>
> (a) to the level of potential financial gain at which they wish abatement to apply,
>
> …

> (6) In paragraph (5)(a) the reference to financial gain is a reference to the financial gain which it appears to the administering authority may be obtained by a member as a result of his entitlement both to a pension and to pay under the new employment."

39. WYPF has said that it used Mr N's actual part time salary instead of the whole time equivalent as it was fairer to do so. It has explained that the intention of abatement is to ensure that the member is not better off after retirement and re-employment than when they were previously employed. I consider that this approach accords with Regulation 109(5) of the 1997 Regulations. For this to work in practice and in order for the policy to be applied fairly to former part-time employees compared with former full-time employees, members' actual pay prior to their retirement would need to be used in the abatement calculation, rather than their whole time equivalent pay.

40. In calculating the pension of a member who had worked part-time, Regulation 21(3) of the 1997 Regulations provided that:

> "(3) In the case of part-time employment, the final pay is the pay which would have been paid for a single comparable whole-time employment."

41. A member who had worked part-time would, however, receive pension benefits, on retirement, of a smaller amount than a member whose active membership of the Scheme had spanned the same period but who had worked full-time as, under Regulation 11 of the 1997 Regulations, the length of a part-time employee's membership was calculated as follows:

> "(3) Membership in part-time service is counted as the appropriate fraction of the duration of membership.
>
> (4) The numerator of that fraction is the number of contractual hours during the part-time service and its denominator is the number of contractual hours of that employment as if it were on a whole-time basis."

42. If these two members retired and then were re-employed, if the point at which abatement was to apply was the full-time salary on which each member's pension had been calculated, the member who had worked part-time would be able to earn more on re-employment before abatement was applied than the member who had worked full-time. The part-time member would also have the potential to receive a greater amount of total income (taking into account their pension together with their earnings in their new employment) than they had been earning before their retirement, if abatement was not applied until their total income on re-employment exceeded the full-time equivalent salary used for their pension calculation.

43. Against that context, WYPF has explained, and I accept, that its intention in formulating the 1998 abatement policy was to replicate the 1995 Regulations.

44. The method for abating a member's pension was set out in Schedule D5 of the 1995 Regulations. Paragraph 2 of Part I to Schedule D5 provided that, while the person

who has retired and later becomes employed again is in his new employment, the annual rate of the retirement pension is reduced either: to zero (where the annual rate of remuneration of the new employment equals or exceeds the indexed annual rate of remuneration of the former employment); or by the amount necessary to secure that the "potential receipts during the new employment" do not exceed **the indexed annual rate of remuneration** of the former employment [my emphasis]. Paragraph 5(1)(b) of Schedule D5 defined the annual rate of remuneration of an employment as **the annual rate of fixed rate emoluments at the rate of any such emoluments on the last day of employment** [my emphasis].

45. WYPF has referred to the definition of "remuneration" under Regulation C2 of the 1995 Regulations. This definition is not relevant for the purposes of the abatement rules under Part I of Schedule D5, as the "annual rate of remuneration of an employment" is defined instead, for those purposes, in paragraph 5(1)(b) of Schedule D5, as I have explained above. However, applying the correct definition, under paragraph 5(1)(b) of Schedule D5 of the 1995 Regulations still would have required Mr N's actual salary immediately prior to his retirement to be used, rather than his previous, full-time salary.

46. I am satisfied that WYPF was correct to conclude that the actual salary (that is, in Mr N's case, his part-time salary before his retirement in 1998) is the pay on which the pension was calculated for the purposes of interpreting its abatement policy.

47. In respect of the second issue, I consider that WYPF did not misinform Mr N, in 2003, that his pension would be subject to abatement if he re-joined the Scheme. Under the policy as WYPF applied it at the time, that statement was factually correct.

48. Mr N considers that WYPF should have concluded and told him something different because his hours had been reduced due to ill health. I do not agree. In the event that Mr N's hours (and, consequently, his remuneration) were reduced by reason of his absence from duty due to ill health, the 1995 Regulations provided that such reduction was to be disregarded for the purposes of abatement. The relevant legislative background is as follows:-

- Regulation 110(5) of the 1997 Regulations states:

  "(5) But no reduction under paragraph (4) of the pension of a person who was a member immediately before the commencement date may exceed the reduction which would have applied under the 1995 regulations if those regulations had applied when the member entered his new employment."

- Under paragraph 5(2)(b) of Schedule D5 of the 1995 Regulations, where a member's remuneration was at any material time reduced by reason of his absence from duty and that absence was due to illness or injury, then any reduction of fixed rate emoluments is to be disregarded.

49. I note that, prior to his ill health retirement, Mr N's hours had been contractually reduced, and that he claims this was due to his ill health. However, there is no

definitive evidence available that details the reasons behind the reduction in hours and there is no evidence that ill health was ever raised with WYPF as an issue which it needed to consider. The Forms that WYPF received from Kirklees do not specify a reason for the contractual change in hours. WYPF has confirmed that it was not informed nor aware of the reason for the change and said that, whether the change was temporary or not, it would have taken the same course of action. Mr N has provided his contract of employment, which details his contractual hours as full-time with corresponding full-time pay. However, this pre-dates the reductions in his hours. Because the Forms Mr N's employer provided to WYPF stated that his hours had been reduced as a matter of contract, I conclude that WYPF was correct to inform Mr N that, under the abatement policy, his pension had to be abated if his earnings and pension exceeded his earnings on his last day of employment.

50. In my view, the "safety net" provided for by Regulation 110(5) of the 1997 Regulations, does not assist Mr N on the facts, because the Forms provided by Kirklees indicate that the reduction in hours was provided for by variation of his employment contract. At least, so far as WYPF could see that was the case and the statement that WYPF made to Mr N was in accordance with the facts as it perceived them. Mr N has submitted that he was in receipt of various forms of sickness pay and allowances, coinciding with his reduced hours. However, I am required to consider this matter in light of the evidence that WYPF had available to it at the relevant time, which did not include details of that pay or those allowances. I have reviewed the Forms sent to WYPF and these clearly state what Mr N's contracted hours were. I can see no reason why WYPF should have considered that Mr N was "absent from duty due to illness or injury" for the purposes of paragraph 5(2) of Schedule D5 of the 1995 Regulations, and that this had caused a relevant reduction in his pay.

51. I can, therefore, see no statement by WYPF that was incorrect or that could lead me to conclude that it was negligent in making the statements that it did. I should add that the issue of what Mr N's contractual terms were is a matter of employment law as between Mr N and his employer. I can only look at whether he can prove that what WYPF told him was incorrect. On the evidence that has been put forward by Mr N and WYPF, I am not persuaded that Mr N can prove that.

52. Finally, in respect of the 2003 complaint, Mr N has suggested that, if the reason WYPF used his part-time salary was due to his ill health, such conduct by WYPF would amount to discrimination. On these facts, I am not persuaded that ill health was the reason WYPF used Mr N's part-time salary in the abatement calculation. WYPF used Mr N's part-time salary because Mr N's employer had notified it that he was contracted to work part-time hours in the lead up to his retirement. There is no reference to Mr N's ill health in the Forms.

The 2005 complaint

53. The 2005 complaint concerns WYPF's alleged failure to inform Mr N about changes made to the abatement policy in 2005. I find that this complaint falls outside my jurisdiction under Regulation 5 of the Ombudsman Regulations. This is because Mr N

brought the complaint to me more than three years after the event and I do not consider that there are reasonable grounds for the delay in bringing the complaint.

54. WYPF has said that it was not feasible for it to contact all potential members individually about changes to its abatement policy or to provide details of how the changes might affect members on a case-by-case basis. Therefore, it chose to highlight these changes by media such as via pensioner newsletters. WYPF has said that it notified pensioners of the change to its abatement policy within the 2005 Autumn pensioner newsletter, which was supplied to Mr N by virtue of his retirement in 1998. The newsletter states:

> "Because of a change to our policy on re-employment from 1 April 2005, if you decide to start working again, your [LGPS] Pension from WYPF will now not be affected."

55. Given the size of the Scheme and the potential number of pensioners likely to be affected by the policy change, I agree that it was reasonable for WYPF to communicate the changes via the media rather than individually to pensioners. Looking then at the wording of the 2005 newsletter, while it does not give the full details of the amended 2005 abatement policy, I find that it provided Mr N with sufficient information that there had been a change. Mr N ought reasonably to have been aware of the change in the Autumn of 2005 and he had until Autumn 2008 to make his complaint to this office. He did not do so, and this complaint is out of time under Regulations 5(1) and 5(2). I see no reasonable grounds for the delay in bringing this complaint to allow exercise of discretion under Regulation 5(3), the complaint is out of my jurisdiction.

56. I also find, in line with the decision in *Arjo Wiggins* (see paragraph 27 above), that I would not be able to provide a remedy in respect of the 2005 complaint. This finding is on the basis that the 2005 complaint concerns WYPF's alleged failure to exercise reasonable care and skill in notifying Mr N of changes made to the abatement policy in 2005. The negligent act complained of occurred in 2005, therefore, even if I had not found that Mr N ought reasonably to have been aware of the change in 2005, he would have had to have commenced court proceedings by 2010, at the latest, in order for any court to have been able to provide him with a remedy[3]. There is no evidence that Mr N has done so and, because of the limitation period imposed by the Limitation Act, I would be unable to provide Mr N with a remedy.

57. Even if the 2005 complaint was not subject to the limitation periods, I do not see that it would succeed on the merits. Specifically, I do not consider that being unaware of the policy caused Mr N to forego a period of Scheme membership which he could have accessed without causing his pension to be abated. This is because I agree with WYPF's position on the effect of the 2005 abatement policy. The 2005 policy only removed the abatement provision for new re-employments. As Mr N had been re-employed in 2003 and his employment was ongoing when the 2005 policy change

[3] Under Section 14B of the Limitation Act, the limitation period for claims of negligence is subject to a 'longstop' of 15 years after the negligent act or omission occurred.

was introduced, even if he had become a member of the Scheme in 2005, the change in policy would not have assisted him.

The 2008 complaint

58. The position in 2008 is different. WYPF agrees that abatement ceased to apply for those members who were already in re-employment, and whose benefits were being abated, upon introduction of the 2008 policy. This change did therefore have the capacity to assist Mr N. Mr N did not find out that the change had occurred until he retired in 2015 and I cannot see any reason to conclude that he should have known about it any earlier. WYPF has said that the 2008 policy change was shared in the pensioner newsletters. Having reviewed the newsletters circulated to pensioners in 2008, I do not agree that the 2008 newsletters provided any details of the policy change which had occurred since 2005. Specifically, the 2008 newsletters did not address pensioners in Mr N's situation who were already re-employed in 2008.

59. The relevant section of the Spring 2008 newsletter stated:

> **"Working again?**
>
> Getting a WYPF pension doesn't necessarily mean that you've reached the end of your working life. In fact, every year quite a number of you find a new job and go on working. But does it affect your WYPF pension?
>
> If you started getting your pension as soon as you retired, and you were awarded compensation for early retirement, the compensation part of your pension might need adjusting if you get another job with a local authority or another employer who uses the LGPS.
>
> The rules are complicated, so our advice is to always get in touch with us if you are about to start another job and we'll tell you if it affects your pension."

60. The relevant section of the Autumn 2008 newsletter stated:

> **"Working again?**
>
> If you return to work after you've retired it doesn't usually affect your pension, so we rarely need to know.
>
> But if your employer gave you some extra membership called Compensatory Added Years when you retired, we might need to adjust part of your pension if you get another job with a local authority or another employer that uses the Local Government Pension Scheme."

61. The Spring 2008 newsletter referred to the potential for abatement where compensation was awarded for early retirement. This category did not apply to Mr N. It did not explain that this category was the only one which was now affected by abatement. The newsletter referred generally to pensioners when it explained that quite a number of pensioners return to work, when it asked whether a return to work affected the pension, and when it invited pensioners to get in touch for confirmation of

whether a new job would affect the pension. Mr N had already done that. There was nothing in the 2008 newsletter which indicated that the policy had changed since 2005, such that pensioners with existing employments were affected by the change.

62. The Autumn 2008 newsletter was similarly unclear. It did not explain that abatement now only applied to pensioners who had retired with compensatory added years, neither did it indicate that pensioners, like Mr N, with existing employments were affected by the policy change.

63. The question is whether WYPF, as administering authority, had a duty to tell pensioners in Mr N's position about changes to its abatement policy. WYPF has explained that, because Mr N was not participating in the Scheme until 2014, it had no way of knowing that he was still employed when the 2008 abatement policy was introduced. It could not therefore anticipate that Mr N was eligible to participate in the Scheme and would benefit from the changes.

64. I accept that WYPF could not have contacted Mr N personally to inform him about the policy change, because he had opted out of the Scheme and there were no indicators on his record to trigger such action by WYPF. However, the fact that Mr N had opted out of the Scheme does not, in my view, discharge WYPF of its duty to inform Mr N about the policy change via another means, in this case via the newsletters. It seems to me that Mr N's lack of active participation in the Scheme was relevant to the method by which WYPF communicated the information to him, rather than to the question of whether it had a duty to inform him and the foreseeability of harm to Mr N.

65. I find that WYPF had a duty to ensure that the policy was sufficiently communicated to pensioners affected by the change; that is, pensioners who were in employment at the time the policy was introduced and pensioners who took up re-employment after the policy came into force. WYPF owed this duty to both groups of pensioners because it is, in my view, reasonably foreseeable that a failure to inform members of either group would likely cause harm to those members.

66. I disagree that WYPF could not have foreseen that Mr N would benefit from the policy change because he was no longer participating in the Scheme. I do not consider that the potential for a pensioner to opt out of the Scheme under the old abatement rules to avoid abatement was so remote that WYPF could not have foreseen the possibility that there were re-employed pensioners who had opted out of the Scheme and in respect of whom there would be no indicators on its records. This is particularly so in view of the December 2003 letter WYPF sent Mr N, in which it informed Mr N that the re-employment rules would not apply to him "provided he did not join the Scheme". It is my view that the foreseeability of his opting out was implicit in this statement made to Mr N.

67. WYPF has said that the number of pensioners in the Scheme who were re-employed by admission bodies would have been in single figures. However, WYPF has also said there were no indicators for it to identify Mr N because he had opted out of the Scheme. I am not persuaded that WYPF would have been able to ascertain the

accurate number of pensioners who were re-employed if it was unable to identify pensioners like Mr N who were re-employed but who had opted out of the Scheme. I do not consider that WYPF has shown that the number of re-employed pensioners and those who had opted out of the Scheme were so few that it could not have foreseen the risk to these pensioners.

68. WYPF ought, therefore, to have foreseen the possibility that there were eligible pensioners who had opted out of the Scheme prior to the policy change to avoid abatement to whom it had a duty to clearly communicate the policy change via its 2008 newsletters.

69. I find that WYPF breached the duty of care owed to keep Mr N informed of a change that affected people in his situation because there was nothing in the 2008 newsletters that indicated that pensioners, like Mr N, who had existing employments were affected by the policy change. I find that this failing by WYPF amounts to negligence.

70. I now need to consider whether this negligence caused Mr N any loss. Mr N considers that he lost membership as a result. On any view, he can only have been affected up to the date he was re-enrolled in 2014. Mr N has said that, if the change had been communicated to him in 2008, he would have been able to ask his employer to enrol him into the Scheme in advance of this date. I have to consider whether he was likely to have done that, without the benefit of hindsight.

71. I have already accepted WYPF's submissions that it could not have written to Mr N personally as there were no indicators on his records, also that it was reasonable for it to communicate the policy changes to pensioners via newsletters. If WYPF had explained the position to pensioners in Mr N's situation, it would probably have been through the 2008 newsletter. Mr N's argument, that he would have asked to re-join the Scheme, has to take into account whether he was likely to have read the newsletter containing the relevant information. Mr N has said that he cannot recall whether he received or read the 2008 newsletter specifically, due to the passage of time. However, Mr N does recall reviewing Scheme newsletters over the years and skim-reading them. Mr N has submitted that he is certain that he would have asked Leeds CAB to re-enrol him into the Scheme immediately had he been aware of the change in 2008. He argues that the fact that he had complained about not being able to join the Scheme in 2003 is very strong evidence that he would have joined the Scheme in 2008. I consider this to be a valid argument and I find, on the balance of probabilities, that Mr N would have asked his employer to enable him to re-join the Scheme in 2008 had he known that he could do so without abatement being applied. I find, therefore, that WYPF's negligence caused Mr N loss of membership of the Scheme between 2008 and 2014.

72. Further, while WYPF has confirmed that enrolment in the Scheme at the time would have been subject to any conditions imposed by the employer, it seems that Leeds CAB decided not to impose any conditions. It would have been obliged, under Clause 5.5 of Mr N's employment contract, to have allowed Mr N to join the Scheme at any

time; had he decided to do so. On that basis, I find that Mr N was prevented from joining the Scheme in 2008 as a consequence of WYPF's breach of its duty of care to keep Mr N informed of a change that affected people in his situation.

73. Backdating Mr N's membership, in order to provide him with a remedy for WYPF's breach of its duty of care, would be contingent upon him paying the requisite employee's contributions. Mr N has confirmed that he accepts this. WYPF has calculated that the arrears of employee's contributions amount to £5,397.77. It has pointed out that the Scheme Regulations allow for arrears of member contributions to be deducted from arrears of pension paid[4].

74. In the normal course of events, Leeds CAB would have been liable for employer contributions for any period between 2008 and 2014 when Mr N opted to join the Scheme. However, the reason Mr N did not opt to join the Scheme in 2008 was the breach of its duty of care by WYPF. WYPF, rather than Leeds CAB, is liable to provide redress for that. The redress should, so far as is possible, put Mr N in the position he would have been in but for the breach of duty. If Mr N is willing and able to pay the necessary employee's contributions for the period 2008 to 2014, WYPF would be responsible for ensuring that the Scheme receives the concomitant employer's contributions; regardless of any agreement it might be able to come to with Leeds CAB. First and foremost, it must ensure that Mr N is credited with the appropriate service on receipt of his contributions. Responsibility for paying the associated employer's contributions must, in the first instance, fall on WYPF.

75. Finally, I shall consider the extent to which Mr N has suffered distress and inconvenience as a consequence of WYPF's maladministration in having taken so long to inform Mr N about the policy change following its failure to communicate the change properly. Rather than being informed in 2008, it was in 2015 when Mr N found out about the policy change and its implications for him. There was a lengthy period of delay between 2008 and 2015 before WYPF informed Mr N (following enquiries from Mr N) about the change to the abatement rules. I find, on the balance of probabilities, that this prolonged delay caused Mr N severe distress. He has also had to pursue this matter through a complaints procedure which would most likely have caused him inconvenience. I consider that Mr N has suffered severe distress and inconvenience as a consequence of WYPF's maladministration.

76. For all of these reasons, I uphold the 2008 complaint.

Directions

77. I direct that, on receipt of any necessary employee's contributions from Mr N, WYPF shall pay the concomitant employer's contribution, together with any interest due, to the Scheme in order that Mr N's service shall be treated as reckonable for the purposes of calculating his benefits.

[4] Regulation 85(3)(b) The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended). A similar provision was included in The Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (revoked).

78. I acknowledge WYPF's reference to the authority for it to deduct the employee contributions from any arrears of pension payable to Mr N. In the circumstances, however, I find that it shall not make any such deduction without prior agreement from Mr N. That being said, I recognise that the pension is not payable until Mr N has paid his contributions and he may consider this the most convenient way in which to settle his side of the matter.

79. Within the same 28 days, WYPF shall pay Mr N £2,000 in recognition of the severe distress and inconvenience its maladministration caused Mr N.

Anthony Arter
Pensions Ombudsman

12 January 2022

Appendix 1

The Local Government Pension Scheme Regulations 1997

13 Meaning of “pay”

(1) An employee's pay is the total of—

(a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment;

(b) the money value of any benefits provided for him by reason of his employment; and

(c) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

(2) But an employee's pay does not include—

(a) payments for non-contractual overtime;

(b) any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment;

(c) any payment in consideration of loss of holidays;

(d) any payment in lieu of notice to terminate his contract of employment;

(e) any payment as an inducement not to terminate his employment before the payment is made;

(f) any amount representing the money value of the provision of a motor vehicle (but see paragraphs (8) and (9)); or

(g) in the case of an employee or former employee of the Commission for the New Towns, any payment made under any scheme relating to the termination of the employment of employees by the Commission in respect of the completion before a specified date of specified functions.

(3) For regulation 12 (Members’ contributions), the pay of a part-time employee for any period is the pay he would have received if during that period he had worked the contractual hours.

(4) But paragraph (3) does not apply to periods during which the employee was away from work by reason of illness or injury with reduced or no pay.

(5) If a Scheme employer agrees with the bodies or persons representative of any description of employees the method for determining the whole or a specified part of the pay of employees of that description for the period during which the agreement applies, the pay of a member who is such an employee is the amount so determined.

(6) A Scheme employer must notify in writing every member affected by such an agreement.

(7) That notification must include a conspicuous statement as to the place where he may obtain information about details of the agreement.

(8) Where—

(a) a member's contribution under regulation C2 or C3 of the 1986 regulations for a period including 31st December 1992 was based on pay which for the 1986 regulations as then in force included an amount representing the money value to him of the provision of a motor vehicle, and

(b) immediately before the commencement date his remuneration for the 1995 regulations included such an amount,

then his pay includes such an amount.

(9) But paragraph (8) shall cease to apply if—

(a) he leaves employment with the employing authority who were employing him on 31st December 1992 (otherwise than as a result of a transfer to another Scheme employer which is beyond his control); or

(b) he is neither provided with a motor vehicle nor receives an amount representing the money value to him of the provision of such a vehicle.

(10) No sum may be taken into account in calculating pay unless income tax liability has been determined on it.

20 Calculations

(1) The amount of any benefit payable as a result of a person's membership is generally calculated by multiplying his by the appropriate multiplier.

(2) Unless another multiplier is indicated, the appropriate multiplier for a pension is—

$$\frac{\text{the member's total membership.}}{80}$$

21 Final pay

(1) A member's final pay for an employment is his pay for as much of the final pay period as he is entitled to count as active membership in local government employment (but see paragraphs (3) to (10), regulations 22 and 23(2) and Schedule 4).

(2) A member's final pay period is the year ending with the day on which he stops being an member (but see paragraph (9) and regulations 22 and 23).

(3) In the case of part-time employment , the final pay is the pay which would have been paid for a single comparable whole-time employment.

(4) But in calculating death grant or the rate of surviving spouse's, civil partner's or children's short-term pension payable on the death of an active member, actual pay in part-time employment is to be used or, in calculating death grant, three eightieths of final pay multiplied by total membership if greater.

(5) Any reduction or suspension of a member's pay during the final pay period because of his absence from work owing to illness or injury must be disregarded for this Chapter.

(6) If a member's final pay period includes reserve forces service leave, his final pay is—

(a) in a case where he has paid contributions by virtue of regulation 17(4), the amount it would have been if his reserve forces pay were pay received in his former local government employment, or

(b) otherwise, the amount it would have been if he had continued to be employed in his former employment during the period of that leave.

(6A) For the purposes of this Chapter, a member's pay for any period of maternity absence during the final pay period in respect of which she pays or is treated as paying contributions is the pay she would have received had she not been absent.

(7) If a member is absent from work for any other reason during his final pay period, he is only to be treated for this Chapter as having received the pay he would otherwise have received if he has made the appropriate contributions under Chapter III for the period he is absent.

(8) If in any case where regulation 13(5) (collective pay agreements) applies to a member's pay during any part of the final pay period—

(a) his average weekly earnings from his local government employment in that period (other than payments for overtime and bonuses)—

(i) exceed by more than 50 per cent. the lower earnings limit at the end of that period, and

(ii) do not exceed the upper earnings limit at the end of that period, and

(b) his final pay would be greater if determined using those earnings,

it is to be determined using them.

(9) If a member is only entitled to count part of the year specified in paragraph (2) as a period of active membership in relation to the employment which he ceases to hold, his final pay is his pay during that part multiplied by 365 and divided by the number of days in that part.

(10) Final pay does not include any pension in payment.

Chapter V Special Adjustments

109 Statements of policy concerning abatement of retirement pensions in new employment

(1) Each administering authority must formulate and keep under review their policy concerning abatement (that is, the extent, if any, to which the amount of retirement pension payable to a member from any pension fund maintained by them under the Scheme should be reduced (or whether it should be extinguished) where the member has entered a new employment with a Scheme the employer, other than one in which he is eligible to belong to a teachers scheme).

(2) Before formulating that policy an administering authority must consult with the authorities who employ active members for whom they are the appropriate administering authority.

(3) Before the expiry of the period of three months beginning with the commencement date, each administering authority shall publish a statement as to the policy which is being applied by them where a member who is so entitled enters such a new employment on or after that date.

(4) Where, as a result of reviewing their policy concerning abatement, an administering authority determine to amend it, they must publish a statement of the amended policy before the expiry of the period of one month beginning with the date they determine to do so.

(5) In formulating their policy concerning abatement, an administering authority must have regard—

(a) to the level of potential financial gain at which they wish abatement to apply,

(b) to the administrative costs which are likely to be incurred as a result of abatement in the different circumstances in which it may occur, and

(c) to the extent to which a policy not to apply abatement could lead to a serious loss of confidence in the public service.

(6) In paragraph (5)(a) the reference to financial gain is a reference to the financial gain which it appears to the administering authority may be obtained by a member as a result of his entitlement both to a pension and to pay under the new employment.

110 Application of abatement policy in individual cases

(1) Where a member who is entitled to the payment of a retirement pension proposes to enter a new employment with a Scheme employer, he must inform the employer about that entitlement.

(2) If such a member enters such a new employment he must immediately notify in writing the body from whom he has become entitled to receive the pension.

(3) Paragraphs (1) and (2) do not apply where the new employment is employment in which the person is eligible to belong to a teachers scheme.

(4) The authority which is the member's appropriate administering authority as respects the retirement pension to which he is entitled—

(a) must apply the policy published by them under regulation 109 to the member, and

(b) they may reduce the annual rate of that pension or, as the case may be, may cease to pay it, during the period while he holds the new employment, in accordance with that policy.

(5) But no reduction under paragraph (4) of the pension of a person who was a member immediately before the commencement date may exceed the reduction

which would have applied under the 1995 regulations if those regulations had applied when the member entered his new employment.

Appendix 2

The Local Government Pension Scheme Regulations 1995

C2 Meaning of "remuneration"

(1) Subject to paragraphs (2) and (3) and Schedule C5 (limitations on contributions and benefits), in these regulations **"remuneration"** , in relation to an employee , means the total of—

(a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment, and

and any other payment or benefit specified in his contract of employment as being a pensionable emolument.

(2) **"Remuneration"** does not include—

(a) payments for non-contractual overtime;

(b) any travelling or subsistence allowance or any other allowance paid to an employee in respect of expenses incurred in relation to the employment;

(c) any payment made to an employee in consideration of loss of holidays;

(d) any payment accepted by an employee in lieu of notice to terminate his contract of employment;

(e) subject to paragraph 11 of Schedule D1 any payment made to an employee as an inducement not to terminate his employment before the payment is made;

(f) subject to paragraph 7 of Schedule C2, the money value to the employee of the provision of a motor vehicle or any payment accepted by him in lieu of such provision; or

(g) in the case of an employee or former employee of the Commission for the New Towns, any payment made to him, under any scheme relating to the termination of the employment of employees by the Commission, in respect of the completion before a specified date of specified functions.

(h) any compensation payable to an employee under the Local Government Reorganisation (Compensation for Loss of Remuneration) Regulations 1995.

(3) Schedule C2 shall have effect for the purpose of making further provision as to the meaning of **"remuneration"**(including provision for the amount of notional remuneration to be agreed collectively).

Schedule C2

Further Provisions Concerning Meaning of "Remuneration"

Part-timers

1 For the purpose of calculating a member's standard contributions under regulation C4, the remuneration of a part-time employee for any period (other than a period during which he was absent from duty by reason of illness or injury with reduced or no remuneration) is to be taken to be the remuneration he would have received if during that period he had worked no more and no less than the contractual hours.

Schedule D5

Re-employed Pensioners

General reduction rule

2 Subject to paragraphs 3, 7 and 9, while the person holds the new employment the annual rate of the retirement pension is reduced—

(a) if the annual rate of remuneration of the new employment, equals or exceeds the indexed annual rate of remuneration of the former employment, to zero; and

(b) otherwise, by the amount (if any) which is necessary to secure that the potential receipts during the new employment do not exceed the indexed annual rate of remuneration of the former employment.

3 Where within the last 12 months of the former employment the person held another concurrent employment with any LGPS employer , former local authority or local Act authority, which he has ceased to hold without becoming entitled to a retirement pension in relation to it, and either—

(a) he has ceased to hold the concurrent employment after ceasing to hold the former employment; or

(b) he has ceased to hold the concurrent employment first, and entered the new employment within 12 months after ceasing to hold the concurrent employment,

then—

(i) if he does not devote substantially more of his time to the new employment than he devoted to the concurrent employment during the 12 months before he ceased to hold it, the annual rate of the retirement pension is not reduced; and

(ii) in any other case, paragraph 2 applies as if the indexed annual rate of remuneration of the former employment included the indexed annual rate of remuneration of the concurrent employment.

…

5(1) For the purposes of this Part of this Schedule, subject to sub-paragraph (2), the annual rate of remuneration of an employment is—

(a) if it is a former employment in respect of which the person is entitled to a retirement pension under these regulations, the 1974 regulations or the 1986 regulations—

(i) in the case of fixed-rate emoluments, the rate of any such emoluments on the last day of the period which is the relevant period for the purposes of regulation D1; and

(ii) in the case of fees, the average rate of any fees during the period by reference to which pensionable remuneration fell to be calculated under paragraph 9 of Schedule D1;

(b) if it is a former employment in respect of which the person is entitled to a retirement pension otherwise than as mentioned in paragraph (a)—

(i) in the case of fixed-rate emoluments, the rate of any such emoluments on the last day of employment; and

(ii) in the case of fees, the average rate of any fees during the period, within the last three years of employment, during which fees were receivable;

(c) in the case of the new employment —

(i) in the case of fixed-rate emoluments, the annual rate of such emoluments on the first day of employment;

(ii) in the case where fees are receivable but were not receivable in the former employment, a rate agreed by the person and the body employing him or, in default of agreement, a rate determined by the Secretary of State;

(iii) in the case where fees are receivable and were receivable in the former employment, subject to sub-paragraph (3), the annual rate of those fees, ascertained in accordance with paragraphs (a)(ii) and (b)(ii).

5(2) For the purposes of sub-paragraph (1)(a) and (b), where—

(a) the person's remuneration in the former employment was at any material time reduced or discontinued by reason of his absence from duty; and

(b) the absence was due to illness or injury or he made contributions or payments under section 6(5) of the Act of 1937 or regulation C3 or C4 of the 1986 regulations or regulation C5, C6 or C7 of these regulations,

then—

(i) any reduction or discontinuance of fixed-rate emoluments is to be disregarded, and

(ii) any fees are to be averaged over a period of the same length as the period mentioned in paragraph (1)(a) or (b), but ending immediately before the reduction or discontinuance.

5(3) If the annual rate of remuneration of the new employment ascertained in accordance with this paragraph is less than that of the former employment, the annual rate of any fees ascertained in accordance with paragraph (1)(c)(iii) is to be reduced proportionately.

Appendix 3

The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996

Time limit for making complaints and referring disputes

5.— (1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable.