

PO-1474

Ombudsman's Determination

Applicant	Miss Jacqueline Elliott
Scheme	Local Government Pension Scheme
Respondent	The Department of Health

Complaint summary

Miss Elliott complains that North East Lincolnshire NHS Care Trust Plus (**Care Trust Plus**), her former employer, have wrongly rejected her request for an early unreduced pension under the “rule of 85”.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against the Department of Health (now responsible for Care Trust Plus) because, although Miss Elliott does not have an automatic entitlement to unreduced early retirement benefits, Care Trust Plus did not properly consider her application in turning it down.

DETAILED DETERMINATION

Regulations

1. What is known as the “rule of 85” was set out in Regulation 31 of the Local Government Pension Scheme Regulations 1997 (**the 1997 regulations**). If the age at which a member of the LGPS wants to take their benefits (subject to the minimum retirement age of 55), added to their membership, is a minimum of 85 years, then the rule of 85 is satisfied. It is material to this case that a person under the age of 60 could only elect to receive immediate benefits with the consent of their employer or former employer. The rule of 85 does not come into play in the absence of that consent, but then, if the rule was applied, the benefits would not be reduced for early payment. Regulation 31 is set out fully below.

“31.- (1) If a member leaves a local government employment (or is treated for these regulations as if he had done so) before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he is aged 50 or more he may elect to receive payment of them immediately.

- (2) An election made by a member aged less than 60 is ineffective without the consent of his employing authority or former employing authority (but see paragraph (6)).
- (3) If the member elects, he is entitled to a pension and retirement grant payable immediately.
- (4) If the sum-
 - (a) of the member's age in whole years on the date his local government employment ends or the date he elects, if later,
 - (b) of his total membership in whole years, and
 - (c) in a case where he elects after his local government employment ends, of the period beginning with the end of that employment and ending with the date he elects

is less than 85 years, his retirement pension and grant must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary (but see paragraphs (5) and (6) and regulation 36(5) (GMPs).

...

- (5) A member's appropriate employing authority may determine on compassionate grounds that his retirement pension and grant should not be reduced under paragraph (4).
 - (6) [relates to permanent incapacity.]
 - (7) If a member does not elect for immediate payment under this regulation, he is entitled to receive a pension and grant payable from his NRD without reduction.
 - (8) An election under paragraph (1) must be made by notice in writing to the member's Scheme employer.
- 2. With effect from 1 October 2006, the regulation containing the rule of 85 was revoked by the Local Government Pension Scheme (Amendment) Regulations 2006. However, it remained in place for service before that date. In 2008, the LGPS was substantially changed and the 1997 regulations were revoked, but subject to a retained right in relation to the rule of 85 for those members in Miss Elliott's position.
- 3. From April 2010, if benefits were payable before age 55 they would be subject to a significant tax charge, but the minimum age of 50 was unchanged.
- 4. Section 106(1) of the 1997 regulations said:
 - "(1) Each administering authority and Scheme employer must formulate and keep under review their policy concerning the exercise of their functions under regulation 31 (early leavers) and under Part III."
- 5. The Local Government Pension Scheme (Administration) Regulations 2008, which replaced the relevant part of the 1997 regulations, contained a requirement equivalent to section 106 in relation to early payment of pensions.

Material Facts

- 6. Miss Elliott was employed by the NHS from August 1974 to 1990, and was a member of the LGPS. In 1990, she commenced employment as a Care Officer with North East Lincolnshire Council from July 1990 to August 2007.
- 7. In September 2007, Miss Elliott's employment was transferred to Care Trust Plus subject to the Transfer of Undertakings (Protection of Employment) Regulations (**TUPE**). Having been given the option of remaining in the LGPS or moving to the NHS Pension Scheme, she elected to remain in the LGPS.

8. Miss Elliott was subject to another TUPE transfer to NHS Social Enterprise Care Plus Group (**Care Plus Group**) which was to take place on 1 July 2011.
9. On 3 May 2011, in anticipation of the transfer, North East Lincolnshire Council wrote to Miss Elliott saying that she could not remain in the LGPS after 30 June 2011 as a Care Plus Group employee. They offered her the opportunity to join NHS Pension Scheme.
10. Pension workshops were arranged for staff to provide information about the change. After attending the workshops and having one to one sessions with a pension adviser, Miss Elliott decided not to join the NHS Scheme – she says because it did not have an equivalent to the rule of 85. She became a deferred member of LGPS from 30 June 2011.
11. At that time she was 54. She had just under 35 years' membership so, numerically, she met the rule of 85 (her age and service added up to more than 85).
12. Mrs Elliott reached age 55 in August 2011. On 16 September 2011, she wrote to East Riding Pension Fund (**ERPF**), the Scheme's administering authority, invoking the rule of 85 and asking to draw her pension. ERPF replied on 26 September 2011, saying that the consent of Care Trust Plus (as her former employer) was required; the rule of 85 was not a reason for access to benefits, it only applied in determining whether reductions would apply to the pension.
13. Miss Elliott had also asked Care Plus Group for information regarding her transfer to them on 1 July. They wrote to her on 19 October 2011, saying that the rule of 85 did not apply to her until August 2011. They said that by this time, she had opted out of the LGPS.
14. Miss Elliott referred her case to the Pensions Advisory Service (**TPAS**). She said that she met the rule of 85 in 2008. On TPAS' advice she wrote further to ERPF and Care Plus Group.
15. On 19 January 2012, Care Plus Group replied to her saying that they had not declined a request to retire under the rule of 85; they were merely reiterating information previously provided to her. They said that she was employed by Care Trust Plus whilst in the LGPS, so they were not in a position to agree to a request.

16. The writer went on:

“I have had a discussion with the East Riding Pension Fund (ERPF) and I can confirm there is no right for an employer to agree for an employee to access their pension under age 60. This can only be progressed i.e. if the 85 year rule is met if the employer has discretions in place to agree to this. However I can confirm that Care Trust Plus do not have any discretions in place and would therefore have been unable to action any requests even if the 85 year rule had been met and a formal request made. I can also advise that there are significant strain costs to employers to consider before agreeing to any such requests even if there were discretions in place and this would impact on any decision made.”

17. ERPF wrote to Miss Elliott on 15 February 2012, saying that the rule of 85 did not automatically entitle a member of the LGPS to receive payment of their pension.
18. Miss Elliott sent an email to Care Trust Plus on 26 March 2012, asking to be considered for early release of her pension. Care Trust Plus replied on 13 April 2012. The letter said:

“As explained, an employee has no automatic right to access their pension under the age of 60 and there are significant costs associated with this it must be with the approval of their employer. Formal approval by the employer can only be progressed i.e. if the 85 year rule is met and there is a ‘trigger event’ of which a TUPE transfer is. At the date of the TUPE transfer, you did not meet the 85 year rule. In your specific circumstances, the fact that the Care Trust Plus does not have a Discretions Policy in place would not change this decision”.

19. ERPF confirmed to TPAS on 24 May 2012, that if Miss Elliott had remained in the LGPS, she would have become eligible to request early payment of her benefits without reduction i.e. the rule of 85, when she turned 55 on 18 August 2011. However, Miss Elliott was no longer a member of the LGPS at the time due to the TUPE transfer on 1 July 2011.
20. With effect from 31 March 2013, the Department of Health inherited responsibility for Care Trust Plus, which had ceased to exist. They said:

“Under NHS Governance, requests for early release of pension would be considered by the employers Remuneration Committee would consider any departures and as the TUPE exercise was not linked to staff reduction exercise then approval for funding early access of LGPS pension under the 85 year rule would not have been granted. The rationale for this decision would have been the

employer has a responsibility to protect the public purse and the employee had on-going employment as part of the TUPE transfer”.

21. We issued an opinion on 20 February 2014, in which we did not uphold Miss Elliott’s complaint. Miss Elliott was unhappy and initially considered withdrawing her complaint. More recently, in June 2014, the Department of Health provided documentation showing that a discretions policy regarding early retirement was only in place from 1 July 2012.

Department of Health’s position

22. The rule of 85 is not a reason for Miss Elliott to access her benefits. It is only used to determine whether or not to apply reductions in the event of a member’s early retirement.
23. The earliest that Miss Elliott can voluntarily access her benefits is from the age of 60. She can request early payment of her benefits between the ages of 55 and 60; however this is only allowed with her employer’s consent. If consent is given then the rule of 85 may be applied.
24. Miss Elliott became a deferred member of the LGPS from 1 July 2011, and could no longer contribute into the Scheme. According to the ERPF, until 1 July 2012, Care Trust Plus did not have a discretionary policy regarding early retirement benefits for members between the ages of 55 and 60. Accordingly, no one would have been granted employer consent to take early payment of their benefits before 60.

Miss Elliott’s position

25. Miss Elliott says that she was eligible under the rule of 85 before 1 July 2011.
26. She has obtained information under the Freedom of Information Act confirming that early retirement was granted to some people under the rule of 85 following the TUPE transfer. She acknowledges that she does not have an automatic right to receive her benefits early under the rule of 85. However, she says that she has been treated unfairly compared to others that have received their benefits early under the Rule.
27. She says that Care Trust Plus’ discretionary policy was written after she applied for her benefits and it is unfair for it to be used against her.

28. She mentions the cases of *Beckmann v Dynamco Whicheloe Macfarlane Limited* [2002] 64 PBLR and *Martin v South Bank University* [2004] IRLR 774. These cases refer to the early retirement rights which have been held to transfer across to a new employer under TUPE regulations. Miss Elliott has also said that ERPF have refused to consider her complaint against them as the decision not to grant consent for early retirement is not for them to make because they were not her former employer.

Conclusions

29. There are certain well-established principles which Care Trust Plus (as the original decision maker) were expected to follow in the decision making process and it is against these that their decision must be assessed. Briefly, they must
- take into account all relevant matters and no irrelevant ones;
 - must direct themselves correctly in law (in particular, they must adopt a correct construction of the Rules/Regulations;
 - must ask themselves the correct questions;
 - must not arrive at a perverse decision.
30. A perverse decision is taken to mean a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
31. Miss Elliott has been given different reasons for the rejection of her application. She has been told that:
- there was no policy for the exercise of discretion;
 - she did not meet the rule of 85 when her membership of the Scheme ended;
 - consent could only be considered at a “trigger point” (meaning when she left the Scheme and not when she applied later);
 - the costs associated with approving her application ruled it out.
32. My role is to review the process by which Care Trust Plus reached their decision and, if it was flawed, I can set the decision aside and ask them to make a fresh one. The decision is one for them to make and I will not usually substitute my decision for theirs. So, for example, I will not direct the Department of Health to grant the application and pay unreduced benefits.

33. The rule of 85 is simply used to calculate if pension benefits would be reduced in the event of retirement before 60 – it does not itself entitle Miss Elliott to early retirement without reduction. If the age at which a member of the LGPS wants to take their benefits (subject to the minimum retirement age of 55), added to their membership, is up to 85, then the rule of 85 is satisfied.
34. In Miss Elliott's case, she reached 55 years of age in August 2011. That is the earliest that she could have requested early retirement and be eligible under the rule of 85. However, Miss Elliott was also right in thinking that, numerically speaking, she had already met the rule of 85 when her membership ended in June 2011. Nonetheless, if her benefits had become payable then, they would have been subject to a significant tax charge. This is why, even though her combined age and service added up to 85 prior to August 2011, she did not use the rule of 85 to claim her unreduced benefits before then.
35. Miss Elliott asked to commence her pension in September 2011 and ERPF told her that she would need the consent of Care Trust Plus, as she was aged under 60. It would appear that Miss Elliott then approached Care Trust Plus Group instead of her previous employer Care Trust Plus. As Miss Elliott was not a member of the LGPS while employed by Care Trust Plus Group, it was not their decision to make and they correctly informed her of this. Also, Miss Elliott did not join the Care Plus Group, pension scheme (the NHS Scheme) so no pension rights transferred under the TUPE regulations. The cases of Beckmann and Martin do not apply.
36. In March 2012, Miss Elliott asked Care Trust Plus to consider her for early retirement without reduction. The reply from Care Trust Plus correctly identified that there was no automatic right to early retirement (before 60) and employer consent was necessary. However, after carefully considering the letter, it is my view that Care Trust Plus did not consider all relevant matters (and no irrelevant ones), and did not direct themselves correctly in accordance with the Regulations.
37. Care Trust Plus mentioned that there would be significant costs associated with consenting to Miss Elliott's early retirement but did not specifically say that they were not prepared to meet those costs. Care Trust Plus also said that they would only progress formal approval if the rule of 85 was met at the same time as the TUPE transfer. Accordingly, Care Trust Plus implied that they were not prepared

to give their consent. However, they did not actually say so in the letter and, strictly speaking, they haven't made a decision; or, if they did, they did not clearly communicate it to Miss Elliott.

38. Irrespective of the TUPE transfer, Care Trust Plus were still obliged to consider Miss Elliott's request properly and give reasons for any decision. It does not seem right that discretion could only be considered at the time that Miss Elliott's employment was transferred to Care Plus Group i.e. what Care Trust Plus call a "trigger event". I appreciate that such an event may help an application succeed (on efficiency grounds etc.). But due consideration should still be given to applications outside of such events, even though the chances of success may be vastly reduced. The Regulations do not indicate that an application for early payment of benefits under the rule of 85 can only be made alongside a "trigger event".
39. The Department of Health may consider that my interpretation of the letter from Care Trust Plus is unnecessarily strict, but Care Trust Plus could have avoided this by being clear in the first place. I appreciate that Department of Health subsequently considered Miss Elliott's request and have said that it would have been turned down on grounds of cost. However, that does not remedy the earlier injustice caused to her by the improper consideration of her request by Care Trust Plus.
40. Miss Elliott disagrees that cost was a valid reason for the rejection of her application. She points out that other applications to take unreduced early retirement benefits were accepted at the TUPE date. Each case has to be considered on its own merits. Without knowing the circumstances of such applications, there is no evidence to support Miss Elliott's allegation that she has been treated unfairly. I have not needed to consider whether cost would be a valid reason for turning down Miss Elliott's application.
41. The lack of a discretions policy in March 2012 was immaterial to Miss Elliott's application; it just meant that each case would have to have been considered on its own merits. I note that there is now a discretions policy in place but Miss Elliott is right to say that it would be unfair if her application was considered under a discretions policy which was not in place when she made her application.

42. I also note that ERPF have refused to consider Miss Elliott's complaint on the basis that the decision is one that falls to her former employer (Care Trust Plus). To me, that seems to be the right approach. The discretionary power to award her early retirement benefits cannot be made by EPRF; that is the role for Care Trust Plus (now under the Department of Health).
43. I uphold the complaint and make the following directions.

Directions

44. I direct that within 28 days of this determination, Department of Health (as the decision maker in place of Care Trust Plus) should decide afresh whether to grant consent to Miss Elliott's request for early payment of her unreduced benefits under the rule of 85. They are to consider her application under the conditions in place in March 2012, without the benefit of the subsequently issued discretions policy. If the application is granted then they should pay her benefits (plus interest) backdated to the date of her original application in March 2012. Interest referred to above shall be calculated on the base rate for the time being quoted by the reference banks, from the due dates up to the date payment is made.
45. Within 28 days of this determination, the Department of Health should also pay Miss Elliott £200 as compensation for the additional stress and inconvenience caused to her by the maladministration of her original application.

Anthony Arter

Pensions Ombudsman
12 August 2015