

Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme (LGPS)
Respondents	The London Borough of Hillingdon (LBH) Capita

Outcome

1. I uphold Mrs T's complaint and direct that LBH pay her £500 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T has complained that LBH is unwilling to honour an arrangement agreed in 2010, for her to defer payment of her retirement benefits for five years after her Normal Retirement Date (**NRD**), in exchange for enhanced benefits.

Background information, including submissions from the parties

4. Mrs T was a member of the LGPS from 1975 until she left service on 28 July 1982. After she left LGPS employment, LBH wrote to her with a statement of deferred entitlement and confirmed her NRD was 6 December 2010.
5. On 1 October 2010, LBH sent Mrs T a retirement options pack outlining her entitlement at NRD, and providing the necessary documentation to commence payment. It told her what amounts she was entitled from 6 December 2010, then said 'alternatively you may wait until your 65th birthday to receive these benefits.'
6. This retirement pack gave Mrs T the following options:

"You are entitled to claim payment of your Local Government pension benefits from 6 December 2010, as long as you are no longer in Local Government employment. Please complete this form, by ticking your chosen time of payment, and return to the address below.

- I confirm that I am no longer in Local government employment and I elect to receive payment of my benefits from 06/12/2010 at the rate as quoted.
- I confirm that I will no longer be in Local Government employment with effect from..... I elect to receive my benefits from this date.
- I do not wish to receive payment of my benefits at present. I understand that I will not be able to claim these benefits until my 65th birthday.”

Mrs T was not in Local Government employment at this time.

7. Mrs T called LBH following receipt of this retirement pack and while discussing her options, says she was informed that by agreeing to delay payment of her benefits, “her lump sum and pension would be increased to compensate”.
8. She and her husband were in full time employment at the time. Mrs T elected to defer payment until her 65th birthday (6 December 2015). She returned the necessary documentation to defer payment, on 26 October 2010.
9. Each year thereafter, Mrs T received a yearly pension statement that showed an escalating pension. Consequently, Mrs T says she believed her annual benefit entitlement was increasing each year.
10. Mrs T contacted the then administrator Capita, on 3 November 2015, requesting details of the benefits payable as at 6 December 2015.
11. Capita responded on 11 November 2015, restating the figures provided by LBH on 1 October 2010. Namely, the benefits payable at age 60, with no late retirement enhancement applied.
12. Mrs T felt this was not what she had agreed to and challenged the figures provided to her as she believed they were lower than she had been led to believe. It was not until 5 January 2016, that she received a substantive response from Capita who said:

“Due to your date of birth and when you joined the local government pension scheme your pension benefits would have been payable from your 60th birthday. This is because the 1995 and earlier regulations did not include the facility to allow members to defer payment of their pension benefits beyond their normal retirement date.

This would mean that there would be no late retirement factor applied to your pension for taking it after your normal retirement date at age 60.”
13. LBH emailed Capita on 8 January 2016 asking for confirmation on the situation as LBH believed members could defer to age 65, but that if this was not the case, interest for late payment of Mrs T’s benefits would need to be made.

14. On 14 January 2016, Capita's technical team confirmed to the Capita pension administration team that:

"...it seems clear that the pension should have been paid at age 60. The regulations do not provide any opportunity for the member to defer payment (D11 (1) says the pension and retirement grant are payable from appropriate date). Also, there would be no increases added to the pension from age 60 to 65 other than PI which would be paid if the benefits were in payment.

We should therefore pay the benefits from 2010 with interest and arrears."

15. On the basis of this response, Capita wrote to Mrs T on 15 January 2016, with her full retirement options and the paperwork necessary to commence payment. These figures had been index linked under the Pensions Increases Review Order 2009 but were some way short of the benefits Mrs T felt she was entitled to.
16. In order to ensure she was receiving some pension, and even though she disputed the figures Mrs T returned the necessary paperwork shortly thereafter.
17. On 19 January 2016, having received Mrs T's complete retirement information forms Capita wrote to confirm when payment would be made and included details of the arrears payable from 2010.
18. Not satisfied with Capita's responses, Mrs T complained under the internal dispute resolution procedure (**IDRP**). Mrs T received the stage one response on 22 April 2016, issued by Capita. The stage two response was subsequently issued by LBH on 12 October 2016. Both responses, acknowledged that an error regarding interpretation of the regulations had occurred and apologised for this. However, Mrs T's complaint was not upheld as the regulations had now been correctly enforced.

Adjudicator's Opinion

19. Mrs T's complaint was considered by one of our Adjudicators who concluded that no further action was required by LBH. The Adjudicator's findings are summarised briefly below.
- The regulations of the LGPS do not allow members to defer past their NRD. Therefore, Mrs T should not have been offered this option.
 - Having deferred payment past her NRD, Mrs T should not have been offered late retirement enhancements to her pension benefits.
 - Mrs T's pension and lump sum have now both been paid with the relevant increases, arrears and interest for late payment was applied.

- The increases that have been applied to Mrs T pension in payment match those that would have been paid had she been receiving her benefits from her NRD.
- Mrs T's lump sum and arrears of pension have been paid, including the interest for late payment allowed under the 1995 Regulations of the LGPS.
- LBH and Capita have apologised for the error and offered Mrs T £500 compensation.
- The compensation of £500 is reasonable in these circumstances because Mrs T is now in receipt of the payments she would have received had the error not occurred. The £500 is in addition to this and is in respect of the distress and inconvenience this matter has caused her.
- Compensation is not designed to be penal nor is it to be used to overcome or offset a prospective investment return or an expected pension.
- The benefits quoted in Mrs T's annual statements post age 60, were incorrect because they had been calculated assuming Mrs T was allowed to defer payment and so a different rate of revaluation was applied.
- Pensions in payment are subject to separate revaluation orders, stipulated by the LGPS regulations.

20. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above. Mrs T's reasons for disputing the Opinion are summarised below.

- The interest payment of 1.5% on the pension and lump sum does not offer sufficient redress for the loss of "buying power" that the delay has had on her benefits.
- She disputes that the 1995 Regulations do not allow payment to be deferred past NRD.
- The late payment of her benefits should be treated as a non-payment and therefore should attract a different rate of interest than is catered for in the 1995 Regulations.
- Mrs T believes that estoppel applies in this case.
- The benefits statements provided between 2010 and 2015 accurately chart cost of living increases and show the current day value of her benefits.
- Utility bills have risen 30%, travel fares have risen 30% and Sky TV subscriptions have risen 35% between 2010 and 2015/6.

- The money, if paid at NRD would have been invested in a “5 year cash ISA” which Mrs T believed to be a “sure fire proven investment”.
- Redress can only be said to be reasonable if the payments made now have the same purchasing power as the equivalent that should have been paid in 2010.
- The decision to defer was based solely on the promise of enhanced benefits.
- Had she died between age 60 and 65, she would have had no time to enjoy her benefits.
- Due to her age and her overall health, she is now not able to enjoy her benefits in the same way.
- Finally, in a similar situation, the “Financial Ombudsman expects interest to be paid at 8% which is 2.8% above the inflation rate in 2011”.

Ombudsman’s decision

21. Mrs T is subject to the 1995 regulations of the LGPS. The applicable regulations have been included in the Appendix to this Determination.
22. Regulation D11 deals with “Entitlement to deferred retirement benefits”. As long as certain criteria are met, a member would qualify for a “standard retirement pension and a standard retirement grant payable from the appropriate date”. In general, the appropriate date is said to be age 65. That is, unless a member’s NRD is earlier than age 65. In Mrs T’s case, LBH and Capita agree it is in fact 60. Regulation C3 provides clarification on what is meant by an NRD and how it can be ascertained.
23. LBH and Capita contend that Mrs T should not have been given the option to defer past her NRD as there is no provision for her to do so. I agree. Accordingly, the regulations make no provision for the enhancement of Mrs T’s pension benefits by means of the application of a late retirement factor. As such, Mrs T’s pension benefits should have been paid from her NRD, with no enhancement.
24. Regulation H(1) provides guidance on how late payments are to be treated and makes reference to 1% in excess of the base rate of inflation.
25. I find that the provision of incorrect and misleading information in this case amounts to maladministration, but does not confer on Mrs T an automatic right to receive the benefits to which she believes she is entitled. Capita can only pay the correct benefits, calculated according to the regulations governing the LGPS.
26. My usual approach in cases where maladministration is identified is to try to put the parties, so far as possible, back into the position they would have been in had the maladministration not occurred. To do so in this case, I would direct Capita to pay Mrs T’s standard retirement pension and standard retirement grant, with arrears, effective from the appropriate date, which is 6 December 2010. Any arrears payment

would also have to include interest in which case regulation H(1) applies. I would further direct that the pension in payment should be increased according to the scheme's revaluation orders for each year it should have been in payment.

27. In this case Capita has already taken these steps and so I am satisfied that Mrs T is in receipt of the correct benefits, calculated according to the LGPS regulations.
28. Mrs T has argued that this measure of redress is inadequate because the "buying power" of the lump sum has decreased over time. She has also said that she had no immediate need of the money because she was still in work at the time, made a comparison with return on investment in an ISA and considered that she might have spent it earlier.
29. Mrs T has not been able to prove that she would have taken specific different steps had she known the correct position. I conclude that these arguments demonstrate that she has suffered a loss of amenity, in the sense that she has been deprived of choices, but do not prove additional financial loss has occurred as a consequence.
30. Mrs T has asked whether estoppel applies in this case. In cases involving misinformation there may be circumstances where it would be unconscionable not to allow a claimant to rely on incorrect information provided to him. Estoppel is an equitable remedy applied by the courts where the particular circumstances would make it unfair (unconscionable) to allow a party to go back on their representation. I do not consider that is so in this case.
31. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment. These requirements were elaborated in the case of *Steria v Hutchison* [2006] 64 PBLR. In that case Neuberger LJ said as follows:

"When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."
32. LBH made a clear representation to Mrs T that she could defer past her NRD. This statement was made in writing. It was clear and it was incorrect. It was reasonably foreseeable that Mrs would act on it and she did so when deciding not to claim her benefits in 2010.

33. However, I do not find a clear and unequivocal representation about enhancement. Mrs T said she had a telephone conversation with LBH in which she was told the value of the benefits 'would be increased to compensate' but not at what rate. There is no evidence of that phone call now in existence so it is not possible for Mrs T to prove what she was told at a detailed level. She says that she relied on that information when deciding to leave her lump sum in the scheme, rather than take it and invest it in an ISA which would have provided a higher rate of return. I accept that she would have made an assessment of her options at the time, and those options may have included taking an ISA, however she cannot prove that she was given a clear and unequivocal offer of enhancement at a specific rate. I do not think it would have been reasonable to rely on a non-specific rate of return when making an investment decision. Nor do I consider that the scheme could have foreseen that an informal discussion would be relied upon to make a particular comparison unless they were told so. I therefore do not make a finding of maladministration about this element of the complaint.
34. I find that Capita then issued erroneous benefit statements over a number of years which showed increases in the pension as if it were still in deferment. While those statements created no freestanding entitlement to benefits at the higher level, I accept that their contents will have lulled Mrs T into a false sense of security and perpetuated the incorrect understanding created in 2010.
35. However, in my view Mrs T cannot show that she will suffer detriment if LBH are not held to their incorrect statements. She has not made irreversible decisions which cannot be undone. It is enough in this case that she should be returned as nearly as possible to the situation she would have been in had the maladministration not occurred.
36. Although she now has the benefits to which she is entitled with interest, I bear in mind that Mrs T was deprived of the choice of what to do with a lump sum and a monthly income for over five years. She might have invested it. She might have spent it. She has been honest in saying she had no immediate pressing need for it. Nevertheless I find that the deprivation of choice has caused Mrs T significant distress and inconvenience over and above the direct financial loss for which she has already been compensated.
37. Therefore, I uphold Mrs T's complaint and direct that LBH pay £500 compensation for distress and inconvenience.

Karen Johnston
Deputy Pensions Ombudsman
28 February 2017

Appendix

The Local Government Pension Scheme Regulations 1995

C3 Meaning of "normal retirement age" and "NRD"

(1) In these regulations, in relation to any member, "normal retirement date" or "NRD", means -

(a) in the case of a member who by his 60th birthday has a total period of membership of at least 25 years, that birthday;

(b) in the case of a member who first has such a total period of membership by a date after his 60th birthday but before his 65th birthday, the day after that date; and

(c) in the case of a member who does not fall within paragraph (a) or (b), his 65th birthday;

and normal retirement age means his age at the commencement of his NRD.

(2) Where for any purpose of the regulations it is necessary to determine a person's NRD or normal retirement age before he attains that age, it shall be assumed that his local government employment and membership of the Scheme will be continuous.

D11 Entitlement to deferred retirement benefits ("preserved benefits")

(1) If a member who ceases to hold a local government employment -

(a) is not entitled under regulation D5, D6, D7 or D9 to retirement benefits which are payable immediately on his ceasing to hold that employment; and

(b) fulfils one of the following requirements, namely -

(i) he has a statutory pension entitlement; or

(ii) he is treated by virtue of regulation K23(2) as having ceased to hold the employment on becoming subject in it to an approved non-local government scheme;

then, subject to regulation D13, he becomes entitled in relation to that employment to a standard retirement pension and a standard retirement grant payable from the appropriate date; and in these regulations benefits to which a person becomes entitled under this paragraph by virtue of fulfilling one of the requirements mentioned in paragraph (b) and which have not yet become payable are called "preserved benefits".

(2) For the purposes of paragraph (1) "the appropriate date", in relation to any person, is his 65th birthday or, if earlier, the earliest of the following -

(a) his NRD;

(b) any date on which he becomes permanently incapable, by reason of ill-health or infirmity of mind or body, of discharging efficiently the duties of the employment he has ceased to hold;

(c) any date after he has attained the age of 50 years from which the employing authority determine on compassionate grounds that the benefits are to become payable;

(d) in the case of a person who has attained the age of 60 years, has ceased to be employed in local government employment and has duly elected to receive payment from the relevant date, that date.

(3) An election under paragraph (2)(d) shall be made by notice in writing to the employing authority given within the period of three months beginning with the relevant date.

(4) In this regulation "relevant date", in relation to any person, means -

(a) the date on which he attains the age of 60, or

(b) if later, the date of his ceasing to be employed in local government employment.

H1 Interest on late payment of certain benefits.

(1) Where all or part of -

(a) a pension payable under Part D, F or G (other than a pension payable to a surviving spouse under regulations F1 in a case where the surviving spouse is not entitled to a pension under regulation F2),

(b) a retirement grant,

(c) an ill-health retirement grant payable under regulation D8,

(d) a death grant, or

(e) a payment under regulation H6,

is not paid within the relevant period after the due date, the appropriate administering authority shall pay the person to whom the pension or grant is payable interest on the amount remaining unpaid, calculated at one per cent above base rate on a day to day basis from the due date to the date of payment, and compounded with three-monthly rests.

(2) For the purposes of paragraph (1) the due date is -

(a) in the case of a retirement pension which becomes payable by virtue of an election under regulation D9(2)(b) or D11(2)(d), one month after the date on which the notice of election is duly given;

(b) in the case of part of a pension which becomes payable by virtue of payments of contributions (other than an increase in contributions made following a decision under regulation J1 or J5) made after the date on which the remainder of the pension became payable, one month after those payments or contributions were paid;

(c) in the case of a pension or part of a pension which becomes payable by virtue of contributions made following such a decision, the date on which that pension or part of a pension would have become payable had those contributions been made on the first date which would otherwise have applied;

(d) in the case of any other pension or part of a pension, the date on which it becomes payable;

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(e) in the case of a retirement grant or part of a retirement grant (other than one to which paragraph (3) applies), the date on which that grant or part becomes payable;

(f) in the case of an ill-health retirement grant, the day after the person who is entitled to the grant ceased to hold his employment;

(g) in the case of a death grant, the date on which -

(i) probate or letters of administration are produced to the administering authority, or

(ii) the authority become satisfied that the grant may be paid as provided in regulation H7; and

(h) in the case of a payment under regulation H6, the day after the person to whom the payment is made would otherwise become entitled to payment of his pension.

(3) Where -

(a) a retirement grant becomes payable by virtue of an election under regulation D9(2)(b) or D11(2)(d) made by a notice given on or after the date on which the grant becomes payable, or

(b) a part of a retirement grant becomes payable by virtue of payments or contributions made after the date on which the remainder of the grant became payable;

Then, the due date is -

(i) in the case mentioned in paragraph (a), one month after the notice was given, and

(ii) in the case mentioned in paragraph (b) -

(I) where an increase in contributions is made following a decision under regulations J1 or J5, the date on which the grant or the part of the grant would have become payable had those contributions been made at the first opportunity which these regulations would otherwise have provided, and

(II) otherwise, one month after the increase in contributions was paid.

(4) For the purposes of paragraph (1) the relevant period means -

(a) in the case of a pension within paragraph (a) of that paragraph, one year, and

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(b) in the case of a grant within paragraph (b), (c) or (d) of that paragraph or a payment within paragraph (e) of that paragraph, one month.