

Ombudsman's Determination

Applicant	Mrs R
Scheme	Local Government Pension Scheme (LGPS)
Respondents	London Pension Fund Authority (LPFA) University Association for Contemporary European Studies (UACES)

Outcome

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

Complaint summary

3. Mrs R brought the complaint to this Office on behalf of the late Mr R's estate. Mrs R's complaint against LPFA and UACES is the following:-
 - They failed to provide access to an ill health retirement pension (IHRP) following Mr R's terminal diagnosis in October 2014.
 - They failed to provide Mr R with the relevant information on the implications on becoming a deferred member of the LGPS.
 - They failed to intervene and reverse the decision to withdraw admission from the LGPS when it became clear that Mr R was terminally ill.

Background information, including submissions from the parties

4. Mr R's IHRP falls under Regulation 35 of the LGPS Regulations 2013, the relevant section is cited in the Appendix.
5. Mr R worked as an Executive Director for UACES and was a member of the LGPS until 31 December 2014. UACES was a member of the LPFA and Mr R was the only member admitted under the relevant agreement.
6. UACES entered into an Admission Agreement with LPFA in 1994, which formed part of the LGPS. However in 2013, Mr R was informed by LPFA that UACES was in a

financially vulnerable situation due to the high deficit. He confirmed by LPFA that UACES was able to meet the liability by him leaving LGPS. Mr R noted that as at March 2010 the cessation deficit UACES was liable for, had been estimated at £150,259.00, whereas in February 2014, LPFA had estimated it at £266,000.00.

7. At the Committee meeting, on 7 June 2014, Mr R made it clear that UACES should withdraw from the LPFA and crystallise the deficit. As a result, the withdrawal from LPFA was approved by the Committee.
8. Mr R was aware that crystallising the deficit meant both UACES leaving LPFA as an employer and himself leaving as a member. This is evident in the emails to the Treasurer, that said:

“When UACES leaves the LPFA, I’ll need to sort out my pension/ salary arrangements and find a new pension (which may take a month or so to sort out). I am proposing to reduce my pension contributions to 10% employer and 5% employee...Reducing the contributions however will leave me out of pocket. I am proposing that this is offset by a matching salary increase”.
9. At the Committee meeting, dated 2 September 2014 that Mr R attended, it was confirmed that a letter of intention to leave has now been drafted.
10. On 19 September 2014, Mr R sent an email to LPFA that said:

“I have decided to leave the LPFA scheme- I no longer wish to make contributions beyond the end of this year, i.e. 31/12/2014”.
11. Mr R suffered a seizure in October 2014. There had been no indication that he was unwell prior to that and Mr R was working as normal.
12. On 27 October 2014, Mr R sent an email to his colleagues notifying them that he had undergone a brain biopsy and would receive the results shortly. He also said that:

“I have not been diagnosed with brain cancer yet, but I do have a physical problem with my right arm. I’m left-handed so it’s a nuisance rather than a serious problem. If they can cure the problem in my brain, there is every expectation that my physical capacity can also be restored...I’m hoping that I should have news for you on the implications for UACES and my capacity for work / not work, so that you can make plans”.
13. On 3 November 2014, one of his colleagues had a telephone call with Mr R, during which Mr R informed her that he was diagnosed with a brain tumour that was malignant and inoperable, but he had been prescribed treatment and was planning to continue with his work. He did not advise whether his condition was terminal and did not provide any information in regards to his life expectancy.
14. On 5 December 2014, Mr R had a meeting with another colleague for the first time since his diagnosis. He asked Mr R whether, in light of his diagnosis, he would like him to go back to the Committee with a proposal to reverse his decision to leave

LPFA. However, Mr R was adamant that he did not want his colleague to approach the Committee to reconsider its decision to leave LPFA.

15. Around the 14 January 2015, Mr R submitted an online form to LPFA advising that he was opting out of the LGPS from 31 December 2014.
16. In July 2015, Mr R suffered his second seizure and stopped working. In September 2015, Mr R's brother-in-law, Mr Cook, contacted UACES to advise that Mr R wishes to apply for ill health pension. He was also advised that the deferred benefits are less favourable than those awarded from active status. In light of this, he requested that UACES reverses Mr R's exit from the LGPS as well as UACES' exit from LPFA. However, UACES informed Mr Cook that it was not possible.
17. LPFA subsequently processed Mr R's IHRP application and he received ill health benefits calculated out of deferred status. Unfortunately, Mr R passed away in October 2015.
18. Mr Cook raised a complaint with UACES by invoking the two-stage internal dispute resolution procedure (IDRP).
19. On 18 January 2016, UACES' legal representative, Shepherd and Weddeburn, sent Mr Cook a response under stage one of the IDRP that said:

"The responsibility for monitoring and managing sickness absence lies with the Head of Department and with those to whom the day-to-day supervision of staff is delegated. Mr R was therefore responsible for monitoring and managing sickness absence among staff. Mr R, as ExD [Executive Director], would have been fully aware that he could apply for ill-health retirement and of the applicable tests. Mr R did not advise the Officers of UACES that he wished to apply for ill-health retirement. He made it very clear that he wished to continue to work...Only after his seizure in July 2015 was it the case that Mr R was permanently incapable of discharging his duties, and he was not able to return to work. Following his diagnosis Mr R made it clear that he did wish to revisit the decision to leave the Scheme. Indeed he was adamant that he still wished to leave, contacted the LPFA to notify them and then completed an online form opting out of the scheme...the staff and officers of UACES are not qualified to give pension or financial advice, which is a regulated activity. Mr R would have been aware of that".

20. On 12 April 2016, Mr Cook received a response from LPFA under stage two of the IDRP, that said:

"...although I have great sympathy for the overall situation and the fact that reduced benefits are payable under the LGPS, I do not believe that UACES could reasonably have acted any differently in dealing with this matter and that the benefits awarded are the correct ones in line with the Scheme requirements".

21. In January 2017, Mrs R's solicitor, Brabners, brought the complaint to this Office. In its submission, Brabners referred to the relevant case law, in regards to the duty of the employer; *Scallly v Southern Health and Social Services Board [1992]* and *Mrs Oona Perrett v RBS Pension Trustee Limited and Royal Bank of Scotland*.

Mr R's position:

- In no way did Mr R understand the effects of leaving LPFA and being heavily medicated he could not be reasonably expected to investigate his ill health pension.
- The onus was on an employer (UACES) to request updates on Mr R's condition, not the employee to provide them.
- The Officers should have realised the seriousness of Mr R's condition and acted on it.

LPFA's position:

- At the time of joining the LGPS, Mr R would have been provided with a summary of his entitlements.
- Regular correspondence was sent to LGPS members on an annual basis, in particular annual benefit statements which provided information on the value of benefits and referred to the relevant website for further information.

UACES's position:

- Mr R was being very private about his illness, sharing only general information about his treatment and no details about the seriousness of his illness.
- After Mr R has been diagnosed with brain cancer, his position in terms of withdrawal from the LGPS did not change.
- There was no indication that Mr R was not capable of performing his role as an Executive Director.
- At no point did any member of Mr R's family advise UACES that his condition was terminal.
- Witness statements provided by Mr R's colleagues confirm that they were unaware of the seriousness of his condition.
- Case law referred to by Brabners is not relevant to Mr R's case. The relevant case *Mrs J Webb v South Central Ambulance Service (SCAS)*, is more on point. It shows that it is not the employer's duty to explore ill-health pension provision on behalf of the ill member.

Adjudicator's Opinion

22. Mrs R's complaint was considered by one of our Adjudicators who concluded that no further action was required by LPFA and UACES. The Adjudicator's findings are summarised briefly below:-
- UACES was not aware that Mr R was suffering from a terminal illness until after his deferred pension was put into payment. As UACES was not informed of Mr R's deteriorating health, it could not provide information to Mr R regarding his available retirement options, including ill health.
 - LPFA has a duty to provide information/ make information available to members to explore their retirement options. I understand that Mr R was in a position to be fully aware of his options as he was the main contact for his office to discuss them. I also note that information explaining pension benefits payable on ill health were readily accessible on the LPFA website. The Adjudicator has seen no evidence that LPFA acted with maladministration in this instance.
 - Mr R made a conscious decision to opt out of the LGPS following meetings in regards to the fact that LPFA was in deficit. Even after Mr R's diagnosis, his stance did not change. The Adjudicator understood that Mr R had a discussion with one of his colleagues about a possible request to the Committee to reverse a decision to exit LPFA and for Mr R to remain in the LGPS. However, Mr R did not follow up this request.
 - While the Adjudicator had great sympathy for Mrs R, It is unfortunate that Mr R kept the details of his condition private and did not disclose the seriousness of it to UACES. In addition, he did not request for his decision to leave LPFA to be reversed. Under Regulation 35 of the LGPS Regulations 2013, in order to be eligible for an ill health pension, an active member's employment must be terminated on the grounds of ill health. As a deferred member of the LGPS, Mr R was not eligible to apply for an IHRP from active status. These are two different processes to follow.
 - UACES does not have any involvement in advising employees of the benefits held in the LGPS. Mr R did not ask for UACES's assistance regarding exploring his different pension options, and UACES is not obliged to supply this information automatically. The Adjudicator did not believe that the Ombudsman would make a finding of maladministration against UACES in this instance and therefore did not uphold the complaint.
23. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. In her submission, Mrs R did not provide any new material evidence but maintained her assertion that UACES, knowing that Mr R's tumour was inoperable and malignant, should have acted on this information by providing options to Mr R.

Ombudsman's decision

24. Whilst I empathise with Mrs R's position, I do not think she is right in saying that UACES should have acted on the fact that Mr R's tumour was inoperable and malignant. UACES was not aware that Mr R's illness was terminal until his deferred pension was put in place. I have seen no evidence that Mr R discussed with UACES, how serious his condition was except that it was inoperable but there were treatments available to him. Neither is there any evidence that he expressed a wish to stop working on the grounds of his ill health any earlier than he in fact did. I find that UACES acted reasonably on the information that Mr R provided to it at the time. More importantly, Mr R made a decision to opt out of the Scheme and continued with the decision even after he found out about his illness. He was not giving up any special contractual entitlement which he could only understand if UACES pointed it out to him. He was giving up the standard active service benefits offered by the scheme which are explained to all members by the Scheme when they join it.
25. UACES had no duty to prevent Mr R from terminating his Scheme membership, or to provide him with additional information or advice about the active service ill health benefits which he was giving up by so doing.
26. Therefore, I do not uphold Mrs R's complaint.

Karen Johnston

Deputy Pensions Ombudsman
21 February 2018

Appendix

“Early payment of retirement pension on ill health grounds: active members

35. – (1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.”