

Ombudsman's Determination

Applicant	Mr E
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	City of Bradford Metropolitan District Council (City of Bradford), Leeds City Council (the Council)

Outcome

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

Complaint summary

3. Mr E's complaint to this office was that the Council did not realise his pension from 55 on grounds of compassion.

Background information, including submissions from the parties

4. On 11 April 2016, Mr E applied to the Council for the early release of his deferred pension benefits. At this point, Mr E did not specify that he wanted to retire on grounds of compassion. The council assumed Mr E's request was on grounds on compassion and provided information regarding such.
5. On 27 February 2017, Mr E re-applied to the Council to have his deferred benefits paid unreduced on compassionate grounds due to special extenuating circumstances. He said that "his wife and business partner has recently been diagnosed with Fibromyalgia and Pernicious Anaemia condition".
6. On 28 February 2017, the Council emailed Mr E stating that, in order for his application to be assessed, it required further information from him. It confirmed that the Council's assessment criteria for releasing pensions benefits early are:
 - whether the former employees' circumstances prevent them from taking any kind of paid employment;
 - whether any alternative arrangements may be made to overcome these circumstances; and

- whether there will be personal hardship if the benefits are not released.

The email confirmed that all three must be satisfied in order for the pension benefits to be paid early.

7. On 8 March 2017, Mr E responded to the Council, stating that he was self-employed and other than reducing his workload there were no alternatives to overcome his circumstances, and that he will suffer hardship if his pension benefits are not released.
8. On 24 March 2017, the Council emailed Mr E and said that his deferred pension benefits could not be released early as it felt he did not meet all the eligibility criteria outlined in the email dated 28 February 2017. In particular, it was felt that his circumstances did not prevent him from taking paid employment as Mr E had confirmed that he was in receipt of an income from his self-employment.
9. On 27 March 2017, Mr E appealed the decision by the Council under stage 1 of the Scheme's internal dispute resolution procedure (**IDRP**). He said that the Council did not deal with his application correctly because the terms applicable during his period of active Scheme membership did not state that his employer's consent for payment through extenuating circumstances would require means testing.
10. On 19 May 2017, the Council issued its stage 1 IDRP response to Mr E. The decision maker said that the Council requires all three of the criteria mentioned in the email dated 28 February 2017 to be met to ensure that every case is considered in the same manner. The decision maker took into consideration all the information Mr E provided and decided that his personal circumstances did not prevent him from taking any kind of paid employment. She held that, as Mr E did not satisfy the criteria, the Council's decision to not allow the early release of his deferred pension benefits and waive any reductions on compassionate grounds was a reasonable one.
11. On 30 May 2017, Mr E appealed under stage 2 of the IDRP. He said that, as he left the Council before 1 April 2014, he was being subjected to means testing when no other officers have had to undergo this process.
12. On 1 August 2017, City of Bradford Metropolitan District Council sent its stage 2 IDRP decision. The decision maker held that after looking at all the evidence, she was satisfied that the Council had exercised its discretion in a proper and reasonable manner and turned down Mr E's appeal.

Adjudicator's Opinion

13. Mr E's complaint was considered by one of our Adjudicators who concluded that no further action was required by City of Bradford and the Council. The Adjudicator's findings are summarised briefly below: -
 - The Ombudsman's role is not to decide whether Mr E is eligible for his deferred benefits; that is a matter for the Council to decide. The Ombudsman's role is to

decide whether the Council has abided by the Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there are flaws in the decision making process the Ombudsman can require the Council to look at Mr E's case again.

- The Local Government Pension Scheme (**LGPS**) Regulations were amended with effect from 1 April 2014, and from this date all employees aged 55 or over can retire without their employer's consent and elect to take fully actuarially reduced pension benefits. However, if the employee left their employment prior to 1 April 2014 the former employer must provide consent before the benefits can be released. The Adjudicator appreciated that Mr E has said had he remained in the employment of the Council he would be paid his pension early, however in June 2004 the West Yorkshire Fund did send him information detailing his deferred pension benefits. This would have included confirmation that he would need to request his former employers consent if he wished to claim his pension benefits before his normal payment date. Further, this information is also included on the deferred pension benefit statement that Mr E receives each year. As such it was her opinion that the Council reasonably provided all the relevant information to Mr E.
 - Under Regulations 30 (2) and 30 (5) of the LGPS Benefits Regulations 2007 and Regulations 31 (2) and 31 (5) of the LGPS Regulations 1997 the Council will consider applications made having regard to the individual circumstances surrounding each case. Decisions will be made on the merits of each case having particular regard to the Council's ability to meet the cost of granting such a request, and the member's personal circumstances. Mr E in his email to the Council on 8 March 2017 confirmed that he is receiving an income from his self-employment, this demonstrates that he does not fulfil the criteria under the Scheme.
 - The Adjudicator appreciated that Mr E has said he is finding it difficult to continue working at his current level, however she agreed with the Council's view that his personal circumstances do not prevent him from taking any kind of paid employment and as such he does not satisfy all of the eligibility criteria for releasing his pension benefits early.
14. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr E for completeness.

Ombudsman's decision

15. Where the decision maker is an employer exercising a discretionary power, they have an implied duty of good faith to their employees; that is, there is an implied duty of trust and confidence between an employer and its employees. In *Bradbury v BBC*

[2012] EWHC 1369 (Ch), and *Prudential Staff Pensions v Prudential Assurance* [2011] EWHC 960 (Ch), the relevant principles were stated as follows:

- The implied duty is not a fiduciary duty, meaning, an employer may take its own interests into account.
- The implied duty is not to be assessed by reference to the concept of reasonableness; for what seems reasonable to an employer may seem unreasonable to an employee and vice versa.
- A decision by an employer might be irrational or perverse, if it overrode members' expectations or interests and thereby offended the obligation of good faith. There is no duty to take correct considerations into account and exclude from consideration matters which are irrelevant. However, the court will look at whether, overall, a decision was irrational or perverse. The manner in which an employer arrived at a decision could be material when deciding whether there has been a breach of the obligation of good faith.
- An employer must not exercise its powers under a pension scheme so as seriously to damage the relationship of confidence between the employer and the employee.

It is clear therefore that the employer is entitled to have regard to its own interests when exercising discretion, which includes their own financial interests.

16. The Council has cited cost as a factor together with Mr E's personal circumstances not warranting release of his pension on grounds of compassion.
17. Mr E has said that he was never informed during his contribution period that consent for early payment of accrued pension benefits would be declined from age 55, nor that this consent would require means testing. It appears from the evidence that Mr E initially applied for release of his pension from 55, which the Council interpreted to mean on grounds of compassion, but his initial request does not specify this.
18. However, as explained by the Adjudicator in the Opinion, under the LGPS if an employee left their employment prior to 1 April 2014 the former employer must provide consent before the benefits can be realised on grounds of compassion. The Council has made its decision in accordance with the Scheme Regulations, and such I do not find that the Council has acted wrongly.
19. I find that, based on the application Mr E made to the Council, it has considered the relevant factors in arriving at its decision not to grant Mr E release of his deferred benefits on grounds of compassion.
20. Whilst the matter brought to me relates to the release of unreduced benefits on compassionate grounds, Mr E may want to consider whether early release of his deferred pension with actuarial reduction would be suitable for him and his current circumstances. The Council should consider the impact of 85 Rule if Mr E wants to

investigate his options in regard to a reduced early pension. As the release of actuarially reduced early benefits has not been considered by the Council, and Mr E has not complained about it, I cannot make a direction on this point. Nevertheless, it may be something that Mr E will want to consider and make an application for, with the Council then providing an explanation as to why Mr E does or does not meet the criteria for actuarially reduced early release of his deferred benefits and, if any, the implications of Rule 85. At which point, if Mr E remains dissatisfied with the response received, he can bring a fresh application to this office after the Council has considered the matter under IDRP.

21. Therefore, I do not uphold Mr E's complaint that he brought to this office.

Karen Johnston

Deputy Pensions Ombudsman
23 March 2018