

Ombudsman's Determination

Applicant	Mrs N
Scheme	Social Housing Pension Scheme (the Scheme)
Respondent	Yarrow Housing Limited (YHL)

Outcome

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

Complaint summary

3. Mrs N's complaint against YHL is that her ill health retirement benefits under the Scheme are lower than the benefits she would have received under the Local Government Pension Scheme. She says this is contrary to what she was told at the time of the transfer in 2007 and YHL should fund the difference as it promised.

Background information, including submissions from the parties

4. Originally, Mrs N was an employee of the Peter Pan Trust (**the Trust**), a small charity with admitted body status in the Hammersmith & Fulham Local Government Pension Scheme (**LGPS**). She was also a member of the LGPS.
5. Later, the Trust made plans to transfer Mrs N's employment from the Trust to YHL. The transfer took place under the Transfer of Undertakings (Protection of Employment) Regulations (**TUPE**). YHL did not wish to become an admitted body in the LGPS so Mrs N's benefits in the LGPS became deferred.
6. In January 2007, as part of discussions about the transfer, a meeting was held which Mrs N attended. The content of the meeting is described in a document "Consultation Meeting Notes" (**the Notes**), which states: -

"PENSION: [Mrs N] explained that she had got advice which indicated that staff within an admitted body of a local government pension scheme should have the same rights as local authority staff; this would mean that the pension they were offered would have to be comparable to their current one/GAD certified. Diana explained that the legal advice they had had to date had not

indicated this. She agreed to explore this further and come back to staff soon... Diana agreed to clarify the question about offering a comparable pension...”

7. In around March 2007, Mrs N corresponded via email with the Government Actuary’s Department (**GAD**). It stated: -

“The government policy of ‘Fair Deal’ recommended that employees transferring from the public sector to the private sector should be offered a pension scheme which is broadly comparable to the public sector pension scheme they will be leaving. This also applies in admitted body status cases so your new scheme needs to be broadly comparable to the LGPS. However this is not a requirement of the law and has only been issued as guidance for employers... Normally it is the ceding employer’s decision... to demand a GAD certificate within the terms of the transfer agreement between the 2 employers involved. To me it sounds that your current employer may not have taken this into account during the transfer negotiations...”

8. On 30 March 2007, Mrs N’s employment was transferred to YHL, she became a deferred member of the LGPS for past service and a member of the Scheme for future service. YHL sent a letter to Mrs N (**the 2007 letter**), which stated: -

“...Under [the Scheme] you may be entitled to pension benefits on early retirement or redundancy, however at the relevant time of your retirement these benefits could be different to those you would have received under the LGPS.

“If:

- by law you qualify for certain benefits payable on retirement or redundancy under the LGPS and your entitlement to those benefits automatically transfers to [YHL] as your new employer; and
- your entitlement to such benefits under [the Scheme] rules at the relevant time of your entitlement is different, such that the benefits you would have been entitled to on early retirement or redundancy under the LGPS are greater,

then [YHL] as your employer will ensure that you receive compensation to cover any difference... Please contact Diana Cadogan if you have any questions in relation to this letter.”

9. Around February 2017, Mrs N applied for ill health retirement (**IHR**) benefits under the deferred LGPS, which was accepted and confirmed in September 2017. She applied for IHR benefits under the Scheme too and enquired about the protection mentioned in the 2007 letter.

10. On 3 February 2017, YHL emailed Mrs N and stated: -

“The 2007 letter relates to early retirement and redundancy so is not relevant to your request for ill health retirement...”

11. On 31 May 2017, Mrs N’s employment with YHL ended.
12. On 13 September 2017, the Scheme wrote to Mrs N, confirming her application for IHR benefits under the Scheme had been accepted. Around the same time, she became aware that she was suffering a loss of IHR benefits.
13. On 21 September 2017, she emailed YHL and stated: -

“After taking advice I am making a formal complaint regarding the response I received in February 2017 in relation to the TUPE Pension letter I received in 2007 and my subsequent early ill health retirement...”

I was given, along with other staff members subject to TUPE, [the 2007 letter]. This details early retirement and redundancy pensions and [YHL] making up the difference between the LGPS and the [Scheme] should this situation arise. This situation has now occurred, there is a shortfall between the pension I would have received if I had remained a LGPS member and the pensions now calculated...”

14. In October 2017, YHL’s solicitors wrote to YHL, copying Mrs N and stated: -

“It is our view that the terms of the Letter do not entitle [Mrs N] to compensation as claimed...”

Our view is that... [IHR] benefits are properly classified as ‘invalidity’ benefits and remain within the TUPE exception and rights to those benefits do not transfer pursuant to TUPE...

it is clear that those rights do not automatically transfer and accordingly [YHL] is under no obligation to ensure that [Mrs N] receives compensation to cover the difference between the LGPS and the [Scheme] [IHR] benefits.”

15. Unhappy with YHL’s response, Mrs N referred her complaint to this Office.
16. In January 2018, YHL sent its formal response to this Office. The key points were: -
 - Mrs N’s assertion, that she was told by her employer that she would be no worse off under the Scheme than the LGPS, was not founded on any evidence supplied to YHL. [The 2007 letter] did not state Mrs N would be offered the same protection under the Scheme as the LGPS. Nor did it state she would be no worse off under the Scheme.
 - The letter did state the benefits payable upon early retirement or redundancy might be different under the Scheme. But the letter only proposed to compensate staff who met two conditions. Firstly, the member must qualify, “by operation of law”, for certain benefits payable on early retirement or redundancy under the LGPS.

- Secondly, the member's entitlement to those benefits must automatically transfer to YHL, such that YHL was "responsible or legally obliged" to meet the cost of providing the benefits.
- Mrs N had supplied no evidence to support her assertion that YHL had sought advice from GAD; the Pensions Ombudsman should obtain this.
- Ill-health retirement benefits were "invalidity" benefits which formed part of the pensions exception under regulation 10 of TUPE. Therefore, by law (i.e. through the application of TUPE), they were not rights that transferred to the transferee.
- Two relevant court cases, in the name of Beckmann and Martin, concluded redundancy benefits were not "old age benefits". And another relevant case, brought by Proctor & Gamble, decided that provisions made for early retirement through disability were "invalidity" benefits within the meaning of TUPE, and therefore "expressly excluded from its operation". So, in YHL's view, IHR benefits fell within the "pensions exception" and did not transfer under TUPE.
- Mrs N had cited two further court cases to support her position, Hagen v ICI & Whitney v Monster Worldwide Ltd. However, the facts of both were different from Mrs N's case. In Hagen, a negligent misstatement was made; in Mrs N's case, no written or verbal assurances were given that transferring staff's pensions would be comparable or no worse off. Moreover, YHL said there was "clear blue water" between the level of protection offered in Whitney, and the level of protection offered in Mrs N's case.

17. In February 2018, Mrs N provided her further comments. The key points were: -

- In her view, it was the intention of the 2007 letter to provide assurances that YHL would meet the cost of any differences between the benefits under the LGPS and the benefits under the Scheme.
- The 2007 letter meant what it stated, and what was agreed and implemented during the merger process and deemed best practice in accordance with the GAD guidance. The two circumstances required for compensation to be paid had been "triggered and met".
- It was because of the "pensions exemption" that the 2007 letter made no mention of specific exclusions. No legal cases were discussed at the point of transfer as it was agreed that the transfer would take place in line with GAD best practice.
- YHL assumed the Trust only intended to agree to the "bare minimum for its employees during the [TUPE] transfer". But she went into some detail outlining how the Trust had always gone beyond the minimum standards required, including in the various benefits it paid its staff. In this context, the 2007 letter "gave assurance that the benefits of such a scheme would be met upon early retirement or redundancy, without exception".

18. In March 2018, the Adjudicator forwarded the supporting documents from Mrs N to YHL and asked for its comments.

19. In April 2018, Trowers & Hamlins LLP provided further comments on behalf of YHL. The key points were: -

- YHL had taken legal advice that it would not have to offer staff pension benefits post-transfer that were comparable to the LGPS. Notes were circulated to all transferring staff advising them they could not expect their pension position to be “no worse off”.
- The GAD guidance was flawed as it was based on an incorrect understanding of the proposed transaction. It failed to draw Mrs N’s attention to the fact that the Fair Deal covers public sector outsourcing bodies, not private sector firms or transfers between charities. GAD’s failure to expand on the Fair Deal meant Mrs N assumed a greater level of protection than in fact existed.
- The Fair Deal did not apply to Mrs N’s transfer. So, YHL was not required to ensure the pension offered to transferring staff would be comparable to their previous one or “GAD certified” in the way she had argued. In any case, the Fair Deal was only guidance, was not binding and, even if it had applied, YHL could have disregarded it.
- If the Trust and YHL had intended to formalise protection for transferring staff in the way Mrs N argued, they would have recorded that arrangement in transfer documents. GAD itself had said this appeared not to have happened. Nor was there any further evidence that it had happened.

Adjudicator’s Opinion

20. Mrs N’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by YHL. The Adjudicator’s findings are summarised briefly below: -

- Neither the Beckmann, Martin nor Proctor & Gamble cases related specifically to an ill-health situation. But the “invalidity” carve out in TUPE was generally considered to mean ill-health.
- Therefore, the correct position in Mrs N’s case was that by default IHR benefits did not transfer. In the Adjudicator’s view, Mrs N accepted that position generally. But she had been provided with other information which was potentially relevant.
- The Notes did not provide a clear and unambiguous representation that benefits under the Scheme would be comparable to, or no worse than, under the LGPS. Indeed, the Notes recorded that YHL had received advice this was not the case, and told Mrs N so.
- The notes also recorded that YHL agreed to clarify this then contact members again. But there was insufficient evidence that YHL later said that transferring members would be no worse off under the Scheme.
- Mrs N argued that GAD’s advice to her was that transferring staff should be offered the same level of benefits under the Scheme as under the LGPS. But that advice was in

part flawed because Mrs N's transfer was from a charity, not a public-sector body. In any case, the Fair Deal was not binding so YHL could have disregarded it.

- Mrs N could not have remained a member of the LGPS following the transfer because YHL did not wish to become an admitted body. Therefore, it was more likely than not she would always have transferred to YHL, become a deferred member of the LGPS for past service and joined the Scheme for future service. So, she had incurred no financial loss as a result of her decision to transfer to YHL.
 - The 2007 letter was not overriding. Mrs N was never automatically entitled to the same level of ill-health benefits under the Scheme and the 2007 letter did not change that. It specifically mentioned "benefits on early retirement or redundancy" and explained that these might be different under the Scheme. Also, Mrs N did not meet the conditions in the 2007 letter because IHR benefits were neither redundancy related nor related to the pensions exemption. Accordingly, they did not automatically transfer to YHL so they did not form part of the compensation offer.
21. YHL accepted the Adjudicator's Opinion, but Mrs N did not, and the complaint was passed to me to consider. Mrs N provided her 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 Mrs N for completeness.

Ombudsman's decision

22. Mrs N says, contrary to what YHL has claimed, there is no evidence of notes being circulated to all transferring staff that they could not expect their benefits to be no worse under the Scheme compared to the LGPS. However, the Notes state: -
- "[Mrs N] explained that she had got advice which indicated that staff within an admitted body of a local government pension scheme should have the same rights as local authority staff; this would mean that the pension they were offered would have to be comparable to their current one/GAD certified. Diana explained that the legal advice they had had to date had not indicated this. She agreed to explore this further and come back to staff soon... Diana agreed to clarify the question about offering a comparable pension..."
23. The advice Mrs N received from the GAD related to admitted body status situations; YHL did not wish to become an admitted body of the LGPS. So, even if the Fair Deal was binding, which is not the case, the GAD's advice did not apply to YHL and the Scheme. In any case, the Notes clearly state YHL had sought advice and that, as a result of that advice, it did not believe that transferring members should be offered benefits that were "comparable", or indeed "no worse off".
24. There is no evidence that YHL followed up on the Notes and clarified that its previous understanding was incorrect (and that members should, in fact, be no worse off). Nor is there documentary evidence that YHL confirmed, outside of the 2007 letter, that transferring members would be no worse off under the Scheme. The 2007 letter only

referred to two specific situations, namely early retirement and redundancy, and neither applied in Mrs N's case.

25. Mrs N states the intention at the point of transfer was clear; that is, the transfer would be carried out in accordance with GAD best practice, and transferring members would be offered comparable benefits. She says this was confirmed verbally as well as in the 2007 letter. She further states that, as part of the team responsible for negotiating the agreement and briefing affected personnel, she is in a strong position to say what was agreed and what the intention was.
26. However, I find that if it had been YHL's intention to compensate transferring members for any shortfall in IHR benefits, it would have been documented formally. Moreover, the 2007 letter ended by inviting further questions about the terms of the compensation being offered. As someone with specific knowledge about the transfer agreement, it would have been reasonable for Mrs N to have questioned why the 2007 letter was silent on IHR benefits in particular.
27. Mrs N states the 2007 letter is clear and there is no evidence that YHL later clarified or contradicted what it said therein. But this does not support Mrs N's case; rather, it supports YHL's. There is no other documentary evidence that YHL intended to compensate transferring members for any shortfall in IHR benefits.
28. Mrs N states that the Fair Deal was applied in spirit as it was deemed best practice; as a TUPE representative, she would have challenged going against best practice and knowingly putting herself in a worse position. However, I find that, as a TUPE representative, Mrs N ought reasonably to have known that IHR benefits would not automatically transfer; and, that the compensation mentioned in the 2007 letter did not apply to IHR benefits, as such benefits do not automatically transfer.
29. Mrs N further states, if she had been aware that IHR benefits were not covered by the compensation offer in the 2007 letter, she would have returned to the NHS or a local authority where she would have been eligible for the same level of IHR benefits. She says this can be evidenced by the fact she transferred her student nurse and early registered nurse years in the NHS Pension Scheme into the LGPS. However, I find the important question is not whether Mrs N genuinely believed she would receive compensation for any shortfall in IHR benefits; rather, the important question is to what extent YHL made a promise or guarantee that this would be the case. I find that there is no evidence, aside from Mrs N's testimony, that YHL made such a promise.
30. Mrs N also states she disclosed a back problem to YHL as part of an occupational health questionnaire in October 2017. She has provided documentary evidence of this. She says she was verbally assured by YHL, after completing the questionnaire, that the 2007 letter would cover any shortfall in IHR benefits between the schemes. But there is no further evidence that this assurance was given. And in any case, Mrs N's employment was transferred to YHL in March 2017, several months before that. So, any assurance at that time cannot have influenced her decision to transfer.

31. Mrs N states she is an intelligent and financially astute professional. She says that, having previously transferred her NHS Pension Scheme benefits into the LGPS, she was always careful to ensure her own working rights, and those of her staff, were not jeopardised by the TUPE process. Moreover, she says she made it clear to the Chief Executive of the transferring organisation what would and would not be acceptable in the way of transfer terms.
32. However, Mrs N has brought to us a complaint about YHL, not the transferring organisation. So, I can only consider acts and omissions by YHL. In any case, there is no documentary evidence that Mrs N told YHL a transfer excluding compensation for any shortfall in IHR benefits would be unacceptable. Nor is there evidence that YHL subsequently told her that IHR benefits would be covered by any compensatory offer.
33. In summary, IHR benefits do not automatically transfer under TUPE. And, there is insufficient evidence that YHL intended compensating transferring members for any shortfall in IHR benefits, or that it told Mrs N that was its intention.
34. I have considered carefully Mrs N's request for a hearing in relation to her complaint, it is for me to decide whether to hold such a hearing. In this case, I am satisfied I am able to make a decision without hearing oral evidence from both parties.
35. I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
15 June 2018