

Ombudsman's Determination

Applicant	Mr N
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Essex County Council (the Council) West Yorkshire Pension Fund (WYPF)

Outcome

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

Complaint summary

3. Mr N is concerned that the actuarial factor applying to his late retirement has decreased. He is also unhappy that the Council failed to communicate this change to him.

Background information, including submissions from the parties

4. On 27 August 2017, Mr N wrote to the Council saying that he had received an annual benefit statement for 2017 and it appeared that the final salary part of his pension had reduced from £3,259.42 the previous year, to £3,250.86. Further, his retirement grant had been reduced from £5,813.42 to £5,336.33. He said in all previous years since age 65, there had been a year on year increase to his benefits.
5. On 13 October 2017, the Council replied saying:-
 - The Department for Communities and Local Government (**DCLG**) periodically asked the Government Actuary's Department (**GAD**) to review actuarial factors which applied to benefits from the Scheme.
 - On 4 October 2016, it was informed, without prior warning, that factors relating to retirement after normal pension age would change with effect from 4 January 2017. This reduced the value of an actuarial adjustment applied to scheme benefits for members retiring after 3 January 2017.

- Members who were in the process of retiring, or who it knew were considering retirement, were informed of the change.
 - A member must leave employment or reduce their hours to be eligible for payment of their benefits. It had received no such instruction from Mr N's employer, nor any indication that he was considering retirement.
 - Pages 2 and 7 of the benefit statements explained that these were for illustrative purposes only, based on the regulations in force at the time.
6. On 25 October 2017, Mr N asked the Council to consider the matter under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). Specifically, he said his complaint concerned the retrospective actuarial factor reduction and the Scheme administrator's failure to notify him before these changes were implemented.
7. On 29 January 2018, WYPF responded to the complaint under stage one of the IDRP. The key points were:-
- Mr N's application was directed against the Council in its role as the administering authority for the Essex Pension Fund (**EPF**) and concerned late retirement increase factors being reduced without his knowledge.
 - The late retirement factors were substantially reduced compared with previous guidance and applied to all membership, regardless of when that membership had accrued, if benefits were taken after 3 January 2017.
 - Regulation 2 of the LGPS Regulations 2013 (**the Regulations**) gave the Secretary of State at DCLG the power to issue relevant guidance.
 - The Regulations allowed the Secretary of State to amend the accompanying guidance from time to time, including any actuarial factors to be applied to reflect changes such as life expectancy, market conditions and the length of time members were expected to be in receipt of benefits. The Regulations also gave the Secretary of State power to make these changes retrospective.
 - Mr N had not suffered any material loss as he remained in employment and had not elected to take his benefits. Any benefit statements issued had been provided for information purposes only and they were not a guarantee of the benefits ultimately payable.
8. On 14 February 2018, Mr N appealed. He added that the failure to warn him of the change meant that he was not given the opportunity to take his pension when it would have been at a higher level.
9. On 6 April 2018, the Council sent Mr N a stage two IDRP response. The substantive points were:-
- There was nothing in the Regulations which required EPF or the Council to inform members of the change.

- Mr N could not challenge the late retirement enhancement to his pension because no such decision had been made by EPF. It would make a decision on this when he retired and, by that time, the law might have changed from what it currently was or the actuarial guidance might be different.
 - Although the increase in pension for late retirement was lower than previously, this had been outweighed by the increase in pension arising from Mr N's longer service.
 - In terms of notifying scheme members of the change, EPF did tell those members who had been in contact with the Scheme about retiring. There were 1,500 scheme members entitled to late retirement enhancements. It would have taken three weeks to work through the impact of the changes, draft communications and arrange for them to be posted.
 - Any communications would have given members a short period to plan their retirement. This meant that those working would need to give notice of termination or leave in agreement with their employer. This would have been difficult for employees to do in practice.
10. On 10 April 2018, Mr N sent a brief response to the Council saying that the figures it had provided in its stage two response did not distinguish between his final salary and career average revalued earnings pension. It was the former which had decreased. He did not accept that it would have been too difficult to forewarn him of this change; the Council had three months' notice and if it was clearly able to identify the 1,500 members potentially affected, it would have had their contact details. If this was too difficult, the Council could have posted the information on the intranet or included it in a newsletter.
11. Mr N subsequently referred the matter to this Office. In a letter to us, he said:-
- He turned 65 in 2010 and had to make a decision on whether to take his pension at that point, which he could have done either by leaving employment or continuing to work on a 25% reduction of his contracted hours. His other option was to not draw his pension and remain in work.
 - He decided to remain in full time work and, in making this decision, he gave regard to the rate of increase which would apply.
 - Even if there was no requirement under the Rules to inform members of this change, there must have been some other obligation on EPF to do so, because it was clear that the change would have an adverse effect on members' benefits.

Adjudicator's Opinion

12. Mr N's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Council or WYPF. The Adjudicator's findings are summarised below:-

- In respect of the Council applying a different actuarial factor, this was permitted under the Regulations. Regulation 2 stated: "The Secretary of State may, after consultation with the Government Actuary's Department, issue actuarial guidance to administering authorities."
- Mr N also believed the changes should not apply retrospectively. However, despite what might have been projected in his statements, the increases were in practice applied at his date of retirement. Therefore, although Mr N considered that the increases or values cited in his statement were effectively the amount owed to him, the final calculation, at the point of taking benefits, would be when increases were actually applied, in line with prevailing guidance.
- Mr N believed that he ought to have been notified of the change before it was implemented. Whilst this would have been helpful to members, there was no legislative requirement or overriding obligation to do so. Hence, there was no identifiable failure that amounted to an administrative error.
- Furthermore, the decision to not individually notify all members, or include this information in a mass communication, was a policy decision taken by the Council, which was not within the Pensions Ombudsman's remit.
- Whilst it would have been good practice for the Council to send Mr N this information, the Council's failure to do so did not constitute an administrative error, therefore, the matter could not be upheld.

13. The Council and WYPF accepted the Adjudicator's Opinion. Mr N did not accept the Adjudicator's Opinion and provided the following further comments:-

- He understood that the rules of the Scheme did not expressly say that members should be informed of these changes, however, there was presumably a general duty of care to act in the best interests of members.
- When the Council said it informed members who were considering retirement, it was unclear how it would know who fell into this category. The consideration of retirement would have been done personally and not in conjunction with the Council.
- It had been suggested that he had not suffered any material loss, however, had he taken his pension before the decrease came into effect, it would be greater than it was now and he would have benefitted from an extra year's pension.

- The Pensions Advisory Service's (**TPAS**) website explained that members should be informed of important changes to a pension scheme affecting their benefits. This applied in his case.
14. The Adjudicator subsequently considered Mr N's further points but explained that, in her view, the TPAS guidance which Mr N had referred to concerned fixed elements of a pension scheme, such as the accrual rate, as opposed to actuarial factors.
 15. Mr N noted the Adjudicator's comment but said he felt that anyone who read the TPAS guidance would come to the conclusion that that members should be informed of a forthcoming change to their pension scheme. He also asked whether administrators needed to act in the best interests of their members.
 16. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

17. I agree that the Regulations allow the Council to change the actuarial factor which applies to members' benefits, in accordance with guidance from the Secretary of State. Whilst Mr N accepts this, he considers that the Council ought to have notified him of this change in advance of its coming into effect. He highlights that it would have been apparent to the Council that the change in question had the potential to adversely affect some members.
18. I appreciate Mr N's frustration but I do not find that the Council had a specific obligation or overriding duty to notify him of this change.
19. Mr N has referred to guidance on TPAS's website, which sets out the circumstances in which a member must be told of changes to their pension. The guidance is partly based on The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 legislation. In this, the change of an actuarial factor is not deemed a "listed change." Therefore, the guidance which Mr N has referred to does not support his position as it does not apply to the actuarial change in dispute here.
20. Mr N has also made reference to his understanding that the Scheme ought to act in the best interests of its members. The correct position is that those responsible for a pension scheme have a duty to act in the best financial interests of their members. I do not consider that the Council's adjustment of an actuarial factor, to more closely align itself with life expectancy, market conditions and the length of time members are expected to be in receipt of benefits, is at odds with this principle.
21. Hence, whilst I am sympathetic to the position Mr N is in and his feelings of having lost the opportunity to take his pension when the actuarial rate was more favourable, the Council has not made an administrative error in the process it followed.

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22. Therefore, I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman

20 November 2018