

Ombudsman's Determination

Applicant	Ms R
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Aberdeenshire Council (the Council)

Outcome

1. Ms R's complaint against the Council is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) the Council shall award Ms R £500 in recognition of the significant distress and inconvenience which she has suffered dealing with this matter.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms R complains that the Council, her former employer, wrongly refused her request for Tier 1 benefits in the LGPS, payable from 2 February 2015, and only reversed its incorrect decision in April 2017 following the intervention of the Pensions Advisory Service (**TPAS**). She is unhappy that the Council is now refusing to award interest for late payment of her pension and tax free lump sum benefits, from 2 February 2015 at 8% pa simple, she also believes that she should receive compensation commensurate with the considerable distress and inconvenience she has suffered during the ongoing dispute. She has calculated that the Council should award her approximately £22K compensation to put matters right.

Background information, including submissions from the parties

4. Ms R was employed by the Council as a Homecare Supervisor/Coordinator.
5. She has been diagnosed with "right sided pleural mass with symptoms of fatigue, breathlessness and ankle oedema". She also has "several cystic lesions in her body" and a history of both "connective tissue disease" and "stress related symptoms".
6. She had several periods of sick leave for her various medical problems and unsuccessfully attempted a phased return to work in September 2014.

7. Ms R applied for ill health early retirement (**IHER**) benefits in the LGPS from active member status. The Council informed her, in its letter dated 6 January 2015, that her application had been declined based on the available medical evidence and advice received from its Medical Adviser which was:
 - if Ms R's pleural tumour was removed by surgery, the prognosis was very good but she had decided not to pursue this option; and
 - there was no evidence showing that any of her conditions would cause permanent incapacity for discharging the duties of her employment or any other duties.
8. The Council also informed her that:
 - if she was unhappy with its decision, she had the right to appeal it and should refer to the "appeals process information" for further details (relevant paragraphs have been reproduced in the Appendix below);
 - she would be invited to a "stage 1 capability meeting" in accordance with its "attendance management procedure";
 - the purpose of this meeting was "to discuss the information in the occupational health report" and her capability to return to work;
 - she had told the Council that she was unable to meet in the following week and was considering ending her employment on 15 January 2015, when her current "GP note" expired; and
 - if this was the case, she should complete and return the "stage 1 capability form" (**the Form**).
9. Ms R says that she did not challenge the Council's decision under its Internal Dispute Resolution Procedure (**IDRP**) within the specified timescale. She ended her employment on the grounds of capability on 15 January 2015, by returning the completed Form because:
 - she was very sick both physically and emotionally at the time of the decision;
 - she did not think anything could be done to change the Council's decision; and
 - it was only when she had recovered sufficiently that she contacted TPAS in 2016 for assistance, and first became aware that she could have challenged the decision-making process used by the Council for her IHER application.
10. TPAS informed the Council, in December 2016, of its opinion that the decision-making process used to decline Ms R's IHER application in January 2015, was flawed and it should consequently review its decision under IDRP.
11. In January 2017, the Council agreed to consider, at its discretion, Ms R's appeal of its decision under its IDRP, despite Ms R having missed the six-month deadline.
12. In its letter dated 5 April 2017, the Council informed Ms R that:

- having reviewed all of the available evidence including a new medical report* from a Medical Adviser who supported Ms R's IHER application, it had decided to award her Tier 1 IHER benefits in the LGPS;
- in making its decision, it had considered that the long term prognosis for her condition was uncertain;
- there was sufficient evidence to conclude that it was unlikely that she would regain the necessary physical resilience to resume gainful employment before her Normal Pension Age (**NPA**); and
- her IHER award would be backdated to 2 February 2015.

*in the Medical Adviser's opinion, it was reasonable for Ms R to have declined surgery due to the risks involved which could have left her more disabled than she already was.

13. In its e-mail dated 13 November 2017, to the Council, TPAS said that:

"Although Ms R is in receipt of her Tier 1 ill health benefit, she is upset that she has not been offered anything by way of compensation for both the delay in payment of her ill health pension and...for the extreme distress and inconvenience this matter has caused her...

I am aware that the North-East Scotland Pension Fund* is required by LGPS to pay interest on lump sum benefits that are paid more than one month after they should have been paid. Furthermore, interest should also be awarded on pensions that are paid late...

The delay in payment of Ms R's ill health benefits has caused her severe distress and inconvenience during a period in her life where she has been faced with the daily struggle of poor health. Over the last few years a lack of income has meant she has often not been able to afford...even basic necessities such as heating her home and buying groceries...

Ms R's financial circumstances have also meant that she had to forgo some medical appointments as she has simply not been able to afford to travel...

On a social level, having insufficient money to travel has left Ms R feeling isolated and alone...

Although Ms R's Tier 1 ill health benefit is not a large income, it is undeniable that this money would have made a big difference to her quality of life if she had been granted the pension on leaving the Council back in January 2015.

...it is not unreasonable for Ms R to expect compensation..."

*North-East Scotland Pension Fund is the Council's LGPS provider

14. The Council responded in December 2017, as follows:

“...Whilst Ms R was granted Tier 1 following her appeal, this is in no way an admission that the previous decision was incorrect. The Independent Medical Practitioner who reviewed the case at the appeal stage provided a differing opinion regarding treatment from the first medical practitioner which the Council as decision maker considered.

In terms of the delay in payment and hardship...As you are aware the Council agreed to consider Ms R's appeal despite being out with the timescale for replying. Ms R was advised in January 2015 of the initial decision...which included information on the appeals process. In line with the appeals procedure, Ms R had six months from the notification of the decision to appeal however an appeal was not submitted until November 2016. As a result, Ms R, herself, contributed significantly to the delay in the appeal being considered.

Having reviewed the case, it is considered that the Council has acted reasonably and fairly and will not be offering any compensation.”

15. In January 2018, North-East Scotland Pension Fund notified Ms R that:

“Further to the payment of your additional pension benefits due to ill health retiral being awarded we have realised that interest should have been payable on the amounts.

Therefore, an additional payment of £1,280.45 will be paid along with your January 2018 payment being interest due on the lump sum of £1,126.47 and interest due on the pension of £153.98...

I can confirm that the interest payments were calculated for the following periods:

Pension: from 1/2/15 to 15/7/17 compounded every 3 months at 1% above the base rate.

Lump Sum: from 1/2/15 to 10/7/17 at 1% above the base rate.

Please note that the interest was calculated on the part of the pension that was backdated and not on the pension that was already in payment.”

16. In March 2018, the Council told Ms R that:

“If you were dissatisfied at how you felt you were being treated at any point during your employment, there was the opportunity to make use of internal procedures and ultimately the Employment Tribunal system...

In respect of the specific compensation amounts you are requesting. Payment of interest that would have been payable based on Tier 1 from 2015 has been calculated...in line with the appropriate regulation.”

17. Ms R rejects the Council's view that she was chiefly responsible for the delay in payment of her Tier 1 IHER benefits in the LGPS. She considers that it was wholly

the Council's failure to make the correct decision on her IHER application in January 2015, which has led to the unfortunate circumstances which she now finds herself. In her view, the Council should have ensured that its Medical Adviser obtained the medical report from her consultant surgeon clearly stating that there were serious risks involved with surgical removal of the tumour to her health before forming a medical opinion upon which the Council based its original flawed decision.

18. Ms R says that:

- her working relationship with the Council was very poor;
- she suffered "abuse and discrimination" whilst working for the Council that left her "with additional disabilities" which prevented her from disputing the Council's original decision under the IDRPs on a timely basis; and
- the £500 which the Council is now prepared to pay her, in recognition of the considerable distress and inconvenience which she has experienced, is derisory

Adjudicator's Opinion

19. Ms R's complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised below:-

- It is not the role of the Pensions Ombudsman to review the medical evidence and come to a decision of his own as to Ms R's eligibility for payment of IHER benefits under the LGPS Regulations. The Ombudsman is primarily concerned with the decision-making process. Medical (and other) evidence is reviewed to determine whether it supported the decision made. The issues considered include: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. However, the weight which is attached to any of the evidence is for the Council to decide (including giving some of it little or no weight). It is open to the Council to prefer evidence from its own advisers; unless there is a cogent reason why it should, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision-making process is found to be flawed, the appropriate course of action is for the decision to be remitted for the Council to reconsider.
- The Council failed to consider all the relevant evidence when making its original decision to decline Ms R's IHER application in January 2015, because it had disregarded the fact that it was reasonable for Ms R to have declined surgery in view of the risks involved to her health. The Council had therefore overlooked a relevant factor and consequently not reached its decision correctly in accordance

with the principles outlined above. This clearly constitutes maladministration on its part.

- To comply with section 50 of the Pensions Act 1995, the Council established a two stage IDRPs, enabling any person with an interest in the LGPS, such as Ms R, to appeal a decision on a matter in dispute. The law does not, in the main, prescribe the detail of the IDRPs which is for the Council to decide. But according to section 50 B (3) of the Pensions Act 1995, and the Pensions Regulator's Code of Practice No 11 "Dispute Resolution – Reasonable Periods" (**the Code of Practice**), the specified reasonable period within which an application, from certain persons with an interest in the LGPS, must be made is the end of the period of six months beginning immediately after the date on which he ceased to be, or claims he ceased to be, a person with an interest in the LGPS.
- The Code of Practice also states that the Council may:
 - include in its IDRPs a reasonable time limit of its choosing within which applications for the resolution of a dispute should normally be made by members of the LGPS; and
 - agree to accept a request for a review outside the specified reasonable period for exceptional reasons.
- The Council made it clear to Ms R, in the "appeals process information", of the availability of the IDRPs allowing it to review its decision on her IHER application if she disagreed with it. It was therefore reasonable to expect Ms R to have complied with the specified timescales for making an appeal under IDRPs. It is regrettable that she did not exercise her right to appeal the original decision, with the assistance of TPAS, within six months of receiving the letter of 6 January 2015.
- There was no dispute that Ms R was ill at the time the Council made its original decision on her IHER application in January 2015. Ms R's reasons for choosing not to challenge it within the prescribed timescales was noted. However, the fact that the Council had in place the appropriate procedure to enable it to put matters right for her as soon as possible if she had appealed the original decision on a timely basis, could not be disregarded.
- Ms R had been invited to a "stage 1 capability meeting" to discuss the Medical Adviser's report and her capability to return to work. She regrettably declined attendance of this meeting which would have given her another opportunity to: (a) challenge the findings of the Medical Adviser; (b) submit any additional evidence in support of her IHER application; and (c) obtain further information about the IDRPs, if necessary.
- The Council subsequently reversed its original decision after reviewing Ms R's IHER application at Stage One IDRPs, in April 2017. It then took appropriate remedial action to put her back in the position she would have been in had the

maladministration identified not occurred, by awarding her backdated tier 1 IHER benefits payable from 2 February 2015.

- If Ms R had appealed in 2015, with the assistance of TPAS, and the outcome was the same as the one reached in April 2017, then she would not have suffered the considerable distress and financial hardship for which she was now seeking compensation from the Council. It was chiefly Ms R's reluctance to appeal the original decision as soon as possible which has resulted in her current predicament.
- Mistakes regrettably do occasionally occur whenever difficult decisions are made, as in Ms R's case. The Council should not however be held responsible for the financial hardship which Ms R has experienced through her decision not to make her appeal earlier.
- The basis upon which the Pensions Ombudsman awards interest in respect of late payment of benefits is specified in section 151(A) of the Pensions Act 1993 (which has been reproduced in the Appendix below). If the Ombudsman decides to award interest, the basis is therefore the base rate as set out in regulation 6 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (No 2475) (**the 1996 Regulations**), there is no discretion about the rate applying.
- Furthermore, although the regulations are silent on the point it is considered that it is implicit that the interest basis applying is simple. The Ombudsman takes this view because he is looking to be consistent in the application of statutory power and the Courts have historically applied simple interest.
- The Ombudsman can only award interest at a higher rate than base rate under section 151(2) of the Pensions Act 1993 (also reproduced in the Appendix below). It is a general power enabling the Ombudsman to make any direction he thinks fit and that can include the payment of interest. For the courts, section 17 of the Judgments Act 1838, states that every judgment carries interest of 8% pa until the judgment is satisfied. In exceptional circumstances, the Ombudsman might look to apply a rate along those lines as applied by the courts. This does not apply in Ms R's case because it was her decision not to appeal under IDRP as soon as possible which has resulted in the late payment of the Tier 1 IHER benefits available her.
- The interest which Ms R received for late payment of her benefits has been calculated correctly using interest rates specified in the appropriate regulations. These rates, in fact, are more generous than the base rate which the Pensions Ombudsman can ask to be applied.
- If someone suspects that he/she may have suffered a financial loss, he/she has a responsibility to take reasonable steps to mitigate his/her loss. Any loss which Ms R believes that she has suffered because of the delay in payment of her Tier 1

IHER benefits was regrettably self-inflicted because she did not appeal the Council's original decision under IDRP as soon as possible. Ms R cannot claim for a loss that she could have mitigated, whether she in fact did so or not.

- Although Ms R had not suffered any actual financial loss, it was clear that she had experienced significant distress and inconvenience because of the maladministration identified above. The Pensions Ombudsman's awards for non-financial injustice are modest though and not intended to punish a respondent.
- The non-financial injustice which Ms R has suffered was significant enough to warrant a compensation award of £500 from the Council.

20. Ms R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms R 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 Ms R for completeness.

Ombudsman's decision

21. Ms R alleges that she suffered "abuse and discrimination" whilst working for the Council, which discouraged her from disputing the Council's original IHER decision under the IDRP, within the prescribed timescales.
22. Her allegations of maltreatment by the Council at work fall into the realms of pure employment law which is outside my jurisdiction. If Ms R felt that she was being treated poorly by the Council at any time during her employment, it had been open to her to use the Council's internal dispute procedures, and ultimately the Employment Tribunal system to address her grievances.
23. The evidence is clear that the Council had given Ms R every opportunity to challenge its decision on a timely basis at a "stage 1 capability meeting", which she unfortunately declined to attend, and subsequently during its IDRP, which was made clear to her in the "appeals process information" which she received.
24. Whilst I have some sympathy for the reasons given by Ms R for not appealing the original IHER decision made by the Council without undue delay, I cannot disregard the fact that the Council had in place the appropriate procedure to enable it to put matters right for her as soon as possible. I therefore consider it reasonable to expect Ms R to have made her appeal under IDRP within six months of receiving the letter of 6 January 2015, with the assistance of TPAS if necessary, to comply with the specified timescales and it is regrettable that she did not do so.
25. I agree with the Adjudicator that any financial loss which Ms R believes that she has suffered, because of the delay in payment of her Tier 1 IHER benefits, was regrettably self-inflicted and she cannot claim for a loss that she could have mitigated..

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26. Although I consider that Ms R has not suffered any actual financial loss, the evidence is clear that she has suffered significant distress and inconvenience because of the maladministration identified. My awards for non-financial injustice are modest though, typically £500 and not intended to punish the respondent. In my opinion, the distress and inconvenience which Ms R has experienced warrants such an award from the Council.
27. Therefore, I partly uphold Ms R's complaint and make an appropriate direction below.

Directions

28. Within 21 days of the date of this Determination, the Council shall pay £500 in recognition of the significant distress and inconvenience which she has suffered in dealing with this matter.

Anthony Arter

Pensions Ombudsman
5 April 2019

APPENDIX

The Council's Appeals Process

"In order for your appeal to be considered...complete and return the enclosed form...together with any additional information (such as specialist reports/medical information) which you believe should be taken into account. Please note that the medical information must relate to your condition at the date of your ill health retiral.

Please return this to the Council's "Appointed Person" who is the HR manager...within six months of the notification of the decision that you should be retired on the grounds of ill health.

The "Appointed Person" will either uphold or dismiss the appeal...The "Appointed Person" must respond to your complaint within two months of receiving it or if there is likely to be a delay in the decision being made you will be advised of the reason for any delay and advised when you are likely to be notified of the decision...

If you are not satisfied with the decision of the "Appointed Person" you have a further right of appeal under Stage 2 of the IDRP to the Scottish Ministers which must be made in writing within six months of the Stage 1 determination by the Council's Appointed Person being notified to you. If you do not agree with the decision of the Scottish Ministers you have the right of further appeal to the Pensions Ombudsman.

For your reference, I also enclose a "Guide to the IDRP" which outlines on page 5 the procedure which should be followed."

Section 151A of Pension Schemes Act 1993

"Where ...the Pensions Ombudsman directs a person responsible for the management of [a] scheme to make any payment in respect of benefit under the scheme which, in his opinion, ought to have been paid earlier, his direction may also require the payment of interest at the prescribed rate" which is set out in regulation 6 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (No 2475) (the 1996 Regulations) which states:

"Payment of interest on late paid benefit

For the purposes of section 151A of the 1993 Act (interest on late payment of benefit), the prescribed rate of interest shall be the *base rate* for the time being quoted by the reference banks..."

Section 151(2) of the Pensions Act 1993

“Determinations of the Pensions Ombudsman

Where the Pensions Ombudsman makes a determination...he may direct any person responsible for the management of the scheme ... to take, or refrain from taking, such steps as he may specify ...”
