

Ombudsman's Determination

Applicant	Estate of the late Mrs N (the Estate)
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Derbyshire County Council (the Council)

Complaint summary

The Estate's complaint against the Council is brought by the late Mrs N's husband, Dr Y. Mrs N had been approved for ill health retirement benefits, however she passed away as an active member of the Scheme shortly before her employment with the Council was terminated. Consequently, a lesser death grant was paid to Dr Y. The complaint concerns the leaving date set by the Council after it awarded Mrs N ill health retirement benefits.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against the Council on the basis that it ought to have set her retirement date on the same date that her ill health retirement had been approved.

Detailed Determination

Material facts

1. The Scheme Regulations define the Council as both the Scheme Employer and the Administering Authority. For the purpose of this complaint, the Scheme Employer is defined as the Council, and the Administering Authority is defined as the Authority.
2. Mrs N was employed by the Council as a librarian. In June 2014, she was diagnosed with breast cancer, and began a period of sick leave.
3. On 15 October 2015, Mrs N met with the Council's HR representatives (**the HR department**) and management to discuss her absence. In respect of returning to work, the minutes state:

“[Mrs N] had been advised that it was for her and her manager to determine. [Mrs N's manager] explained that we will explore [Mrs N] returning to work as she knew [Mrs N] was keen to get back and [HR] will explain the process for ill health retirement but it was entirely [Mrs N's] decision as to what she felt she wanted to do and we would not force her down any route. [Mrs N] had been thinking about her options following the last meeting and had rung pensions for her figures if she was to leave on 31 March 2016. Having considered her forecast, [Mrs N] said it was not an option for her to retire earlier, due to the penalties and reductions in her pension.”
4. In respect of ill health retirement, the minutes state:

“[HR] did provide [Mrs N] with a copy of the procedure for employees to enable her to read through and consider her options as we stressed that we did not want her to make a decision today. The benefit of ill health retirement would be that [Mrs N] would receive her full pension enhanced to her retirement age and that this is why it is rarely granted due to cost implications. [HR] explained that there is only one opportunity to be considered for ill health retirement although you do have a right of appeal if it is turned down. [Mrs N] would be entitled to 12 weeks' notice plus annual leave if it was granted.”
5. The next meeting between Mrs N and the Council was scheduled for 19 November 2015. Prior to this date, Mrs N underwent an MRI scan. The results of the scan showed that Mrs N's cancer had spread to her brain, and she would have to undergo radiotherapy.
6. On 19 November 2015, Mrs N informed the HR department and management of the results of the scan, and it was agreed that an application for ill health retirement benefits would be made. Mrs N was presented with the following options in respect of her ill health retirement pension and death in service figures:-

- Option 1 - An annual pension of £17,672.86 and a lump sum of £21,993.72. Following death, a survivor's pension of £7,027.08 and a death grant of £172,274.36.
 - Option 2 - An annual pension of £12,539.38 and a lump sum of £83,595.84. Following death, a survivor's pension of £7,027.08 and a death grant of £117,882.68.
 - Death in service - A survivor's pension of £7,027.08 and a death grant of £85,686.
7. On 20 November 2015, Mrs N provided the signed consent forms for her ill health retirement application to progress. Mrs N also emailed the HR department to say she had decided to take Option 2 as outlined above.
 8. On 23 November 2015, the Council's occupational health department wrote to Mrs N's oncologist and GP requesting a medical report.
 9. On 15 December 2015, Mrs N asked the HR department for an update. It replied to Mrs N the following day saying that the Council's occupational health department was still waiting for a report from her oncologist.
 10. On 19 December 2015, Mrs N informed the HR department that her regular oncologist was on sick leave for six weeks, so she had asked for someone else to write to the Council's occupational health department on their behalf.
 11. On 23 December 2015, the Council received a medical report on behalf of Mrs N's oncologist. The report stated that Mrs N's life expectancy was "months rather than years" and supported Mrs N's application for ill health retirement.
 12. On 31 December 2015, the Council received a medical report from Mrs N's GP, which stated that her life expectancy was "to be in the region of three to six months", and also supported her application for ill health retirement.
 13. On 6 January 2016, Mrs N asked the HR department for an update. It responded on the same day and said that Mrs N's medical report had been received and was with an independent registered medical practitioner (**IRMP**).
 14. On 12 January 2016, the Council received the IRMP's certified report which supported her application for ill health retirement based on all the medical evidence received. The IRMP mentioned that Mrs N's life expectancy was "considered to be very limited, probably less than one year". The Council approved the application the same day and informed Mrs N. The 31 January 2016 was set as her last day of employment.
 15. On 13 January 2016, the Council wrote to Mrs N confirming that it agreed to award tier 1 ill health benefits, having terminated her employment on the grounds of permanent ill health.

16. On 14 January 2016, the HR department responded to Mrs N to clarify that she did not need to return any paperwork unless she intended to appeal the decision to grant her ill health retirement.
17. On 19 January 2016, Mrs N emailed the HR department to confirm that she would not appeal the decision. The HR department responded to Mrs N on the same day and said that she would receive her January salary, a payment in lieu of her 12 weeks' notice period, plus any outstanding annual leave. Mrs N acknowledged the email the following day.
18. On 25 January 2016, Mrs N was admitted to hospital.
19. On 30 January 2016, sadly, Mrs N passed away.
20. After Mrs N's passing, Dr Y asked what would happen to her ill health retirement benefits, as she died in active service. The HR department explored the possibility of retrospectively amending Mrs N's last date of employment to before her date of death. The HR department was told by the Council's legal and pensions team that rescinding Mrs N's leaving date and setting a new one was not possible, and due to Mrs N dying as an active member of the Scheme, Dr Y was only entitled to receive lesser death in service benefits.
21. In April 2016, Dr Y complained to the Authority under the Scheme's Internal Dispute Resolution Procedure (**IDRP**) in regard to Mrs N passing away as an active member of the Scheme. The complaint was not upheld at either stage of the IDRP. Whilst the Authority was sympathetic with Dr Y's circumstances, it said the Scheme Regulations did not allow it to set an earlier leaving date. As Mrs N died in active service, the Authority could only pay an in-service death grant to Dr Y, in accordance with the Scheme Regulations.
22. In November 2017, Dr Y, on behalf of the Estate, brought the complaint to this Office. Further submissions by both parties were made in regard to the Council's decision to set a leaving date of 31 January 2016.

Summary of the Estate's position

23. Mrs N passed away on 30 January 2016 as an active member of the Scheme, meaning that a death in service grant of £85,686, along with a survivor's pension of £7,027.08, is payable to Dr Y. Had Mrs N had passed away on or after her leaving date of 31 January 2016, a retirement lump sum of £83,595.84 along with a pro rata pension would have been payable. In addition, Dr Y would have been entitled to a larger death grant of £117,882.68.
24. Dr Y accepts that in order to grant Mrs N ill health retirement benefits, the Council had to follow the correct procedure, which included requesting medical reports from Mrs N's GP and oncologist.

25. However, Dr Y highlighted that it was never explained to Mrs N that her ill health retirement benefits would not be payable if she passed away before her leaving date of 31 January 2016. Dr Y has said that Mrs N was only an active member of the Scheme on the date of her passing because of the “flawed actions of her employer”.
26. In Dr Y’s view, the length of time which the Council took to process Mrs N’s ill health retirement claim is irrelevant. Dr Y believes that there should be a policy in place for terminally ill employees that “effectively insulates them from the vagaries of the bureaucratic process” of applying for ill health retirement, by setting a retirement date as soon as it becomes clear that the employee’s ill health retirement claim is approved.
27. Dr Y says that it is unacceptable a dying employee could be put in a position where they have to decide to prolong their final medical care, in order to avoid a lower level of benefits being paid to their dependents.
28. The Council had set Mrs N’s leaving date as 31 January 2016 because it was unaware how little time she had left to live, which implies that even on 14 January 2016, when it set Mrs N’s leaving date, it had discretion but chose not to exercise it. It is Dr Y’s view that it is not within the remit of the employer to make a prediction as to how many days left a terminally ill employee has. In Mrs N’s case, her life expectancy could not be calculated with any precision. The Council should have assumed the worst case scenario and set her leaving date as soon as possible.
29. As a consequence of the Council’s decision to set a leaving date later than the date Mrs N’s ill health retirement application was approved, she passed away as an active member, thus she did not receive her ill health retirement benefits she would have been entitled to had the Council chosen to end her employment on the same day as approving her application.

Summary of the Authority’s/Council’s position

30. The 2013 Scheme Regulations (**the Scheme Regulations**) places a statutory duty on the Authority in respect of the calculation of pensions benefits to Scheme members and their beneficiaries. Regulation 40 states that the Authority must pay a death grant following the death of an active member of the Scheme. Regulation 41 states that a surviving spouse or partner is entitled to a pension and sets out how that shall be calculated. The framework for complaints made under the Scheme Regulations do not allow for a determination to be made outside them, which the Authority must act strictly in accordance with.
31. As Mrs N died an active member, the Scheme Regulations do not provide any discretionary provision which would allow the Authority to amend Mrs N’s leaving date so she passed away in retirement.
32. There was no further contact with Mrs N after 20 January 2016, so neither the Authority nor the Council were not aware that her health had deteriorated until Dr Y

informed her line manager on 1 February 2016 that she had passed away. Had the Council been advised that Mrs N's health had deteriorated prior to 30 January 2016, her leaving date could have been brought forward to ensure her ill health retirement.

33. Any adjustment to the payment of the death grant Dr Y received would be a payment being made over two years after Mrs N passed away and would therefore be subject to Special Lump Sum Death Benefits tax, which currently stands at 25%.

Conclusions

34. Mrs N passed away as an active member only a day before her retirement date of 31 January 2016, meaning that she did not receive ill health retirement benefits, despite this being previously approved on 13 January 2016. The Authority has said its hands only an in-service death grant is payable to Dr Y as the Scheme Regulations do not give it the power to posthumously amend Mrs N's leaving date. I make no criticism of that position. My conclusions bear on the conduct of the Council as Scheme Employer.
35. The Council became aware of the severity of Mrs N's condition on 19 November 2015, when Mrs N met with the HR department and informed it that her cancer had spread to her brain. From this point, I would expect it to act with urgency to make Mrs N aware of what benefits she could be entitled to, and to act swiftly in processing an application for these benefits. Initially, I am satisfied that it did; Mrs N's ill health retirement application was in the hands of the Council for a total of 12 working days before it was approved on 13 January 2016. Yet the HR department chose to delay Mrs N's retirement date to 31 January 2016.
36. When the Council approved Mrs N's ill health retirement, it had agreed that she was permanently incapacitated, meaning that she is no longer able to continue employment. This is seemingly at odds with its decision to keep her employed (albeit on sick leave), and therefore an active member, until 31 January 2016. I accept there was no suggestion in the prevailing medical evidence submitted to the IRMP, and in the IRMP's certification, that Mrs N's death was imminent, however it still stands that the Council was aware that she was terminally ill and should therefore have given Mrs N the opportunity to retire immediately. I appreciate that the Council could not predict that Mrs N would not survive her leaving date. But, its decision not to put Mrs N's benefits into payment from the day her ill health retirement was approved clearly placed her at risk of her benefits not coming into payment before she passed away.
37. I note the Council gave Mrs N the opportunity to appeal the ill health retirement decision, and her retirement date. But, that cannot affect the outcome of her complaint. The fact that Mrs N did not realise the risk or perceive a reason to appeal does not affect whether the Council's decision-making process was correct. The Council has said that it would have brought her retirement date forward had it been aware that her health had deteriorated prior to 30 January 2016. I note that and do not doubt it, but I disagree that she was therefore under a duty to tell the Council

more than they already knew. Mrs N could not know when she would die any more than the Council. Moreover, the HR department had already reassured her that everything was fine and her retirement benefits had been signed off. It did not ask her to let it know if her condition deteriorated.

38. It is clear from the correspondence between Mrs N and the HR Department that she was concerned about her ill health retirement being approved as soon as possible. She satisfied the criteria as at the date of decision and I can see no reason why the Council should have delayed bringing her benefit into payment past the date on which it was approved. Had it not delayed, she would have died in retirement rather than in active service.
39. Taking into account the above, what remains for me to consider is how to put the Estate back into the position it would have been in had Mrs N died in retirement. I accept that the Scheme Regulations do not grant the Authority the ability to posthumously amend Mrs N's leaving date. Moreover, it was the conduct of the Council, not the Authority, which resulted in Mrs N passing away in active service due to its decision not to end her employment on the date her ill health retirement was approved. Therefore, I find that the required redress should be paid by the Council, in its capacity as a Scheme employer.
40. I am also conscious that any further death benefit would be subject to a tax charge, as it is paid 2 years after Mrs N passed away. It would be inequitable for the tax charge to be borne by the Estate, so the required redress is to be paid by the Council in respect of this.
41. For the reasons above, I uphold the complaint.

Directions

42. Within 21 days of this determination, the Council, as Employing Authority, shall pay the Estate compensation equal to the difference between:
 - a) the sum of the ill health benefits and pensioner death grant that would have been payable to Mrs N if she had retired on ill health tier 1 on 12 January 2016 and elected for maximum pension commencement lump sum and then subsequently died in retirement; and
 - b) the in-service death grant Dr Y received plus any income Mrs N received in respect of her employment after 12 January 2016.
43. The Council shall add simple interest to the amount payable under paragraph 42 from the date the benefits became payable, using the base rate for the time being quoted by the Bank of England and calculated up to the date of settlement.

44. Any tax liability which may be incurred as a result of compliance with these directions is to be accounted for by the pension administering Authority to HMRC and paid by the Council as Employing Authority.

Karen Johnston
Deputy Pensions Ombudsman
26 March 2019

Appendix

The Local Government Pension Scheme Regulations 2013

45. 35 Early payment of retirement pension on ill-health grounds: active members

(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.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.

(4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member—

(a) is not entitled to Tier 1 benefits; and

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but

(c) is likely to be able to undertake gainful employment before reaching normal pension age.

(7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment.

46. 40 Death grants: active members

(1) If an active member dies before attaining the age of 75, an administering authority shall pay a death grant.

(2) The appropriate administering authority may, at its absolute discretion, pay the death grant to or for the benefit of the member's nominee, personal representatives or any person appearing to the authority to have been a relative or dependent of the member.

(3) The death grant is three times the member's annual assumed pensionable pay calculated in accordance with regulation 21(4) as at the date of the member's death, but where in the opinion of an IRMP the member was at the date of death in part time service wholly or partly as a result of the condition that caused or contributed to the member's death, no account is to be taken of any reduction in pensionable pay due to such reduction in service as is attributable to that condition.

(4) If the administering authority has not made payments under paragraph (1) equalling in aggregate the member's death grant before the expiry of two years beginning with the date of the member's death or, where the administering authority did not know about the member's death within that period, beginning with the date on which the administering authority could reasonably be expected to have become aware of the member's death, they must pay an amount equal to the shortfall to the member's personal representatives.

(5) In the case of an active member who is also a deferred member, pensioner member or deferred pensioner member of the Scheme, no death grant is payable under regulations 43 (death grants: deferred members) or 46 (death grants: pensioner members) but if the amount that would be payable under any of those regulations would be higher than the amount payable under this regulation, the amount payable under this regulation is that higher amount.

44. 41 Survivor benefits: partners of active members

(1) If an active member dies leaving a surviving spouse, civil partner or cohabiting partner, that person is entitled to a pension which shall come into payment on the day following the member's death.

(2) The appropriate administering authority shall close the active member's pension account and shall open a survivor member's pension account from the day following the member's death.

(3) The opening balance of the survivor member's pension account is the amount of pension payable to the survivor calculated in accordance with paragraph (4).

(4) The amount of a pension payable under paragraph (3) is calculated by adding together the amounts in sub-paragraphs (a) and (b)—

(a) the pension that the member would have been entitled to draw if—

(i) the member had been entitled to draw a pension on the date of the member's death,

(ii) the pension the member would have been able to draw on that date had not been subject to any restriction on the age at which it could be drawn, or actuarial adjustment either relating to the age at which it was drawn or following a Scheme pays election,

(iii) the pension excluded additional pension purchased under regulation 16 (additional pension contributions) and any additional pension awarded under regulation 31 (award of additional pension),

(iv) the member's earned pension had accrued at a rate of 1/160th of pensionable pay, and

(v) the amount of any earned pension credited under regulation 101(1) (effect of acceptance of transfer value) had been multiplied by 49/160;

(b) a sum equivalent to 1/160th of the member's annual assumed pensionable pay calculated in accordance with regulation 21(4) as at the date of the member's death, for each year or fraction of a year between the date of the member's death and the member's normal pension age, but where in the opinion of an IRMP the member was at the date of death in part time service wholly or partly as a result of the condition that caused or contributed to the member's death, no account is to be taken of any reduction in pensionable pay due to such reduction in service as is attributable to that condition.

(5) The balance in the survivor member's pension account at the end of the Scheme year in which the survivor member's account was opened is adjusted at the beginning of the following Scheme year by the revaluation adjustment applicable to the Scheme year in which the survivor member's account was opened, in accordance with actuarial guidance issued by the Secretary of State.

(6) The revalued balance calculated under paragraph (5) is the opening balance of the survivor member's pension account for the following Scheme year and, thereafter, the balance in the account is adjusted each year by the index rate adjustment from the date that an increase would apply if that balance were a pension in payment to which the Pensions (Increase) Act 1971 applied.

(7) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1).