

Ombudsman's Determination

Applicant	Mr S
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Northamptonshire County Council (the Council)

Outcome

1. Mr S' complaint is upheld and to put matters right the Council shall pay Mr S £1,000 in respect of the serious non-financial injustice it has caused; give Mr S the opportunity to pay a lump sum of £10,000 to his Additional Voluntary Contributions (**AVCs**) fund; perform a profit and loss calculation in respect of the £10,000, as though it had been invested in the Pension Managed Fund on 2 January 2003; and pay any investment growth thus calculated into Mr S' AVC fund.

Complaint summary

2. Mr S' complaint about the Council is that he was incorrectly informed, on a consistent basis, that he could use his transferred in AVCs to purchase additional pension within the LGPS when he retired. In reliance of this information he transferred his AVCs into the LGPS in 2002. In 2017 he was informed that the information he had been given was incorrect. His loss is that he is now unable to obtain a benefit of equivalent value, either within the LGPS or on the open market. He says that had he been aware of the correct position he would have made additional contributions and managed the investment of his AVC fund more carefully.

Background information, including submissions from the parties

3. Mr S was employed by Corby Borough Council and was a member of the Northamptonshire Pension Fund (**the Fund**) during this employment, which is part of the LGPS. The Council is the administering authority for the Fund.
4. On 31 July 2002, Mr S was made redundant. Before this he was informed that his entitlement was either, a deferred pension within the LGPS, or a transfer of his benefits to another registered pension scheme, as he was under the age of 50.
5. On 9 July 2002, Mr S contacted the Council to discuss options relating to AVCs and transferring his free standing additional voluntary contribution (**FSAVC**) arrangement

into the LGPS. Mr S maintains that he was informed, in this telephone call, that he would be able to use any AVCs held within the LGPS to purchase additional pension when he retired. There is no longer a call recording available to confirm or deny this.

6. Mr S held a FSAVC arrangement with AXA Sun Life. On 11 July 2002, the Council received a letter from Mr S requesting that a transfer quotation be obtained to transfer his FSAVCs into the LGPS, to one of the Fund's available AVC providers.
7. On 21 August 2002, the Council wrote to Mr S quoting a transfer value of £14,433.25 it had obtained from AXA Sun Life in respect of the FSAVC. It also enclosed two booklets giving information on the Funds' two AVC providers, Standard Life and Nationwide.
8. On 1 October 2002, the Council received the completed paperwork from Mr S opting to transfer his FSAVCs to the Standard Life AVC fund. He selected that 100% be invested in the Standard Life Pension Managed Fund.
9. On 22 October 2002, a payment of £13,458.47 was received by the Council from AXA Sun Life. Following a telephone conversation between the Council and AXA Sun Life it was agreed that there should be a further payment due from AXA Sun Life.
10. On 24 October 2002, the Council forwarded the payment of £13,458.47 to Standard Life to be invested in accordance with Mr S' instruction.
11. On 3 November 2002, the Council received, for information purposes, a copy of the complaint letter Mr S had sent to AXA Sun Life. The letter refers to delays experienced and the further payment.
12. On 5 November 2002, the Council received a further payment from AXA Sun Life of £3,179.74. This was forwarded to Standard Life the same day for investment.
13. On 27 November 2002, the Council received leaver details in respect of Mr S from Corby Borough Council. It issued Mr S with his formal award for deferred benefits on the same day.
14. On 3 December 2002, the Council received a letter from Mr S requesting confirmation of what options were available to him at retirement age in respect of the AVCs. He referred to the original conversation on 9 July 2002, in which he said purchasing additional years in the LGPS was discussed as one of the options available. The same day the Council responded stating that Mr S could either purchase an annuity with an insurance company or use the AVCs to buy additional pension within the LGPS.
15. On 17 December 2002, Mr S requested an estimate of the additional pension he would be able to purchase at age 60 based on his accumulated fund to date.
16. On 20 December 2002, the Council provided Mr S with an estimate for purchasing additional pension in the LGPS. For every £100 of AVCs, this would purchase an

annual pension of £5.63 at age 60. Therefore, an additional pension of £934.58 per annum was quoted.

17. In 2016, Mr S requested an estimate of his pension at age 60 using the AVC fund value as at 21 July 2016.
18. On 7 September 2016, a projection of AVCs was sent to Mr S. This showed the current value of his AVC fund as well as projections of the fund value to age 60 based on lower, mid and higher rate investment returns and an estimate of the pension the AVC fund could purchase at age 60 based on each return rate. The estimate of pension does not specify that this is an estimate of the pension available within the LGPS and appears to be an estimate of the annuity that may be available to him, although, it does not explicitly state this.
19. On 12 June 2017, Mr S requested an estimate of how much service would be purchased in the LGPS using his AVCs.
20. On 15 June 2017, the Council confirmed that his AVCs could be used to purchase an annuity, an additional pension or a tax free lump sum. Mr S responded the same day requesting the formula to work out the additional pension that could be purchased from his AVCs.
21. On 16 June 2017, the Council informed Mr S that due to changes in the LGPS Regulations 1997 (**the Regulations**), he could not convert his AVCs into additional LGPS pension. On the same day Mr S requested sight of the Regulations and expressed concern and irritation.
22. On 23 June 2017, the Council responded providing a link to the Regulations and apologised that incorrect information had been provided previously.
23. On 4 July 2017, Mr S raised a complaint which was eventually dealt with under the Internal Dispute Resolution Procedure. The Council partially upheld the complaint, admitting that Mr S had been provided with incorrect information, however it explained it was bound by the Regulations and could not provide the incorrect benefit previously quoted.

Mr S' position

24. When Mr S was made redundant, he decided to review his pension position and made enquiries about transferring his FSAVCs into the LGPS. Mr S was told that if he did this he would be able to utilise them to purchase additional pension at retirement.
25. Following the transfer of his FSAVCs, he requested an estimate of how much additional pension he could receive at age 60 using the current fund value. It was confirmed that he could use the AVCs to purchase additional pension and he was provided with an estimate.

26. 15 years later, following another enquiry for an estimate, he was informed that this option was not available and had never been available; he had been given incorrect information.
27. He has suffered a financial loss as he will not be able to purchase equivalent benefits on the open market.
28. He also maintains that, had he been aware in 2002, that he would not be able to purchase additional pension, in late 2002 or early 2003, he would have made a lump sum payment of £10,000 into his AVC fund from his redundancy pay to ensure he had sufficient funds at retirement to provide the benefits he needed. Mr S has provided evidence to show that he was in a financial position to have done this.
29. He also says that he would have considered the option of transferring the FSAVC to another provider in order to ensure that he was getting the best performance possible from it, but that he did not because he was intending to use it to purchase additional pension. He has been unable to provide evidence to support this claim as he did not consider it necessary to pursue it at the time because of the information the Council gave him.

The Council's position

30. Under the LGPS Regulations Mr S can either transfer the accumulated value of his AVCs or purchase an annuity at retirement.
31. Regulation 60(8) does not apply as Mr S did not subscribe to an in house AVC arrangement before 13 November 2001. Contributions to a FSAVC do not relate to this provision.
32. Mr S has never been informed that he could purchase additional service. He seems to have confused this with purchasing additional pension which are different provisions.
33. It is acknowledged that Mr S was issued an estimate showing that he could purchase additional pension and provided with figures. This was an error as Mr S was already a deferred member and this was not an option available to him. An offer of £100 in recognition of this was offered.
34. There is no evidence that Mr S was mis-sold a financial product. The Council is not and never has been regulated to provide financial advice. Mr S was provided with two booklets setting out the two AVC providers available and he chose to transfer his FSAVCs to the Funds' AVC provider, Standard Life.

Adjudicator's Opinion

35. Mr S' complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of the Council. The Adjudicator's findings are summarised below:-

- The Council is only able to provide benefits in line with the Regulations. Regulation 60(8) does not apply to Mr S as his AVCs were not accrued “in house”. Therefore, Mr S is not entitled to use his AVCs to purchase additional pension within the LGPS under proper application of the Regulations. However, Mr S has complained that he was informed that he could purchase additional pension from the LGPS with his AVCs and that this is the only reason he transferred his FSAVCs into the LGPS.
- The Council has accepted that Mr S was provided with incorrect information in the letters issued on 3 December 2002, 20 December 2002, and an email dated 15 June 2017. But states that this information was provided after Mr S’ transfer had been completed and therefore he could not have relied upon it when making the decision to transfer his FSAVCs to the LGPS.
- Reliance cannot be proved from these letters alone due to the date that they were provided, but they do show that Mr S was provided with incorrect information in writing. It was reasonable for him to have accepted that the information he was given was correct, especially as it was consistent. He did not have knowledge of the Regulations applicable to AVCs and could not have been expected to be aware that an error had been made.
- The Council accepts that a telephone call took place on 9 July 2002 but has no record of the call or the conversation that took place. It is reasonable to conclude, on the balance of probabilities, that Mr S was given incorrect information in this telephone call, and that he reasonably relied upon it and chose to transfer his FSAVCs into the LGPS. The Council was consistent in the misinformation given, so it is likely that it gave the same information over the telephone that it gave in writing. It was this mis-information given in the telephone call that caused Mr S to transfer his FSAVCs to the LGPS.
- In reaching this view it is acknowledged that Mr S had not been given any quotations of the benefits that his AVCs could potentially purchase in the LGPS at this point. But, it is generally accepted that defined benefit schemes, such as the LGPS, provide better benefits than can be purchased on the open market. It would not have been unreasonable for Mr S to make the transfer on this basis, as in the event that the quotations he received at a later date, for example, the one provided on 20 December 2002, did not provide the pension he was expecting.
- However, he still had the opportunity to take an annuity on the open market or transfer the benefits to another provider if he felt this was a better option. Also, there is no record of what was discussed in the telephone call of 9 July 2002, so this could have been a point that may have been discussed.
- The Council has commented that Mr S said he was told he could purchase additional service in the LGPS with his AVCs, but this would never have been an option even had Regulation 60(8) been applicable. However, from reviewing the correspondence provided, it appears that Mr S is using the term ‘additional

service' as though it is interchangeable with 'additional pension'. These are different ways in which benefits may be accrued and it is not possible under the Regulations to use AVCs to purchase additional service in the LGPS, however, the term used by Mr S does not have any bearing on the outcome of the complaint. Mr S was incorrectly informed, that he would be able to purchase additional benefits within the LGPS, and he has now been informed that this is incorrect. Whether those additional benefits come about by the purchase of additional service or additional pension is irrelevant.

- It is disputed whether Mr S has suffered an actual financial loss. Mr S says he lost out financially as he is now unable to purchase an additional pension within the LGPS and any annuity available is likely to be significantly lower than the benefit from additional LGPS pension. He has been denied the opportunity to mitigate his loss by managing the investment of his AVCs more closely within the LGPS, or by transferring them to another provider where he could have, potentially, received higher returns. Also, he has not had the opportunity to make any additional contributions/savings to meet the difference, in what he understood he would receive, and the pension he is now likely to receive.
- The Council has said that Mr S has not suffered an actual financial loss. It has taken the view that the misinformation does not change what is permitted under the Regulations and that Mr S has not received less than his entitlement; the AVCs are still available for Mr S to use in one of the permitted ways when he retires; and the AVCs have grown through investment from £16,638.21 in 2002 to £54,697.94 in July 2018.
- Mr S has suffered a loss of expectation in that he expected to be able to use his AVCs to purchase additional pension within the LGPS, but is now unable to do so. This is a non-financial injustice, in addition to the distress and inconvenience which Mr S may have suffered. However, if a financial loss is established because of a misstatement made, the Ombudsman can direct that the respondent responsible recompenses the complainant for the loss.
- The difference between the benefit that would have been available within the LGPS had Mr S been entitled to it, and the equivalent benefit available on the open market is not, on its own, sufficient to show a financial loss. Mr S has provided evidence to show a difference in the outcome of the investment made, but this only shows a loss of expectation caused by a difference in the level of benefits thought to be available and those actually available. For any redress to be directed by the Ombudsman Mr S would need to demonstrate that he has, as a direct result of the incorrect information, acted in good faith to his detriment and where possible taken steps to mitigate any loss.
- Mr S would not have known that the information he was given was incorrect, so the good faith criteria is met. Mr S relied on the incorrect information given to him and this initially caused him, to transfer his FSAVCs into the LGPS, and then for them to remain invested in Standard Life's Pension Managed Fund. Mr S has

demonstrated that this has caused him financial detriment. It is clear that Mr S has taken a proactive approach to his retirement benefits. He made enquires with the Council about transferring his FSAVCs into the LGPS when he became aware of his redundancy and made an informed decision based on the information he received. This was again demonstrated when he challenged the value of the transfer of his FSAVCs with AXA Sun Life, which was promptly corrected. Then in June 2017, when he was informed of the correct position, he immediately questioned it and submitted a formal complaint to the Council.

- The burden is on Mr S to demonstrate what he would have done had he not been provided with the incorrect information. It is noted that Mr S was not aware that there was anything for him to mitigate until he was informed that he could not use his AVCs to purchase additional pension on 16 June 2017.
- Mr S said that if he had known he would not be able to use his AVCs to purchase additional pension within the LGPS he would have transferred his benefits elsewhere, and made additional contributions in the form of one or multiple lump sums; this had been his approach whenever able to do so. I am satisfied that Mr S has shown that he had the resource to enable him to fund a lump sum contribution of £10,000 when he received his redundancy payment in 2002. He has said that had he been given the correct information in 2002, he would have paid the £10,000 into his AVCs within the LGPS, in late 2002 or early 2003.
- Mr S has also demonstrated that he has considered the options available to him to mitigate his loss and acted on the one he found to be most appropriate to his and his wife's circumstances. Mr S identified that the payment of National Insurance (NI) contributions into his and his wife's State Pension's would increase the amount payable to them by the State. In April 2019 he made a NI payment and he has set out his plans to make further payments in the future.
- In summary, Mr S has shown that, as a direct result of the incorrect information, he acted to his detriment and relied in good faith on the incorrect information he received. He has taken steps, where possible, to mitigate this loss.
- The Adjudicator was of the view that the complaint should be upheld against the Council as it was reasonable that Mr S would, on the balance of probabilities, have invested £10,000 of his redundancy payment into his AVC fund. The Adjudicator also thought, it was reasonable to use a date of 2 January 2003, midway between the timeframe Mr S has suggested, as the date that the lump sum would have been paid into LGPS and invested by Standard Life in the Pension Managed Fund.
- The Adjudicator said that to put matters right, Mr S should be given the opportunity to pay a lump sum of up to £10,000 into his AVCs within the LGPS. The Council should then perform a profit and loss calculation to determine the growth that the lump sum would have attracted had it in been invested in the

Pension Managed Fund on 2 January 2003. The Council should then pay any investment growth due into Mr S' AVC fund.

- The Ombudsman can also make awards for non-financial injustice. The incorrect information provided and the amount of time the Council took to identify its consistent errors have caused Mr S serious distress and inconvenience. In line with the Ombudsman's published guidance, an award of £1,000 is justified where there has been a serious level of distress and/or inconvenience that has materially affected the applicant. The Adjudicator believed that this had occurred on several occasions; there was a lasting effect over a long period and the respondent was slow to put matters right. Therefore, an award of £1,000 is justified and should be made by the Council.

36. Mr S and the Council both agreed with the Adjudicator's Opinion in principle, but both made further comments to be considered before a final decision is made, and sought clarification about how the matter would be put right.

The Council's comments

37. It said that while it agreed in principle, there is a possibility that the Regulations will be amended prior to Mr S' normal retirement date which would result in Mr S being able to purchase additional pension with his AVCs. It does not want to be put into the position where Mr S has received redress, as recommended by the Adjudicator, and then the Regulations are amended to allow him to use his AVCs to purchase additional pension, as this would essentially put him in a better position than he would have been in had he been given the correct information.
38. The Council suggested that the redress recommended by the Adjudicator be conditional upon the situation at Mr S' retirement date. For example, if the Regulations had not been changed by the time Mr S reached his retirement date the Adjudicator's recommended redress be used. However, if the Regulations had been amended by Mr S' retirement date, no redress would be required as Mr S would be able to purchase additional pension with his AVC's. In either situation the Council was willing to pay the £1,000 for distress and inconvenience within a reasonable timeframe of the complaint being concluded.

Mr S' further comments

39. Mr S also agreed the Adjudicator's Opinion but wanted further clarification on how the loss of investment would be calculated and specified that he would like the £1,000 for distress and inconvenience paid directly to him. He also requested a reasonable time frame, especially in light of the current situation regarding Covid-19 for him to pay the £10,000 contribution. He suggested 12 months to be a reasonable timescale for him to disinvest the money from his various accounts or investments without suffering early withdrawal fees and to allow the market to recover.
40. Mr S did not agree with the Council's suggestions that the redress recommended by the Adjudicator be conditional on the situation at his retirement date. He said this

would mean that the distress and inconvenience the matter is causing him would continue until his retirement benefits were settled and he would rather the matter be agreed and settled immediately.

41. The complaint was passed to me to consider. Mr S' and the Council's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mr S and the Council for completeness.

Ombudsman's decision

42. While I understand the Council's concerns and the logic behind it in suggesting the redress be on a conditional basis, dependant upon the situation at Mr S' retirement, my role is to determine the complaint within the current legislation and Regulations. In addition to this Mr S has expressed his concern about such an arrangement and said that it would not bring to an end the distress and inconvenience the matter is causing him.
43. For these reasons I agree with the redress the Adjudicator recommended to put matters right.
44. Both parties have made comments on how to perform the profit and loss calculation; the timeframe for the payment of the £1,000 award for non-financial injustice; and the timeframe for Mr S to make a £10,000 contribution (including any tax relief due).
45. Standard Life has confirmed that Mr S' AVCs have remained invested in the Pensions Managed Fund. The Council should perform a profit and loss calculation that represents the loss that Mr S' has suffered, had the £10,000 contribution been invested on 2 January 2003, to the date the payment is received and invested by Standard Life. Standard Life has confirmed that it will provide the relevant information for the Council to arrange for this calculation to be performed. This will have the effect of putting Mr S in the position he would have been in had the £10,000 been invested on 2 January 2003, by correcting any investment loss he has suffered.
46. I usually direct an award for non-financial injustice to be paid within 21 days. Given the current circumstances I feel that 31 days is reasonable at this time.
47. Mr S has asked for a period of 12 months to make the contribution of £10,000. The Council has suggested 2 months from the point it makes the payment of the award for non-financial injustice. While I understand Mr S' reasons for requesting 12 months I do not agree that this is reasonable. The matter needs to be brought to a conclusion and, as the Council is making up any investment loss Mr S suffers, a timeframe of 12 months is excessive. Instead a timeframe of three months from the date of this Determination is reasonable.
48. I uphold Mr S' complaint.

Directions

49. Within 31 days of the date of this Determination, the Council shall pay £1,000 directly to Mr S in respect of the serious distress and inconvenience which he has suffered.
50. Within three months of the date of this Determination, Mr S shall make a single contribution, including any tax relief due, of no more than £10,000 to the Council.
51. Within 28 days of receipt of the contribution from Mr S, the Council shall perform the profit and loss calculation to determine the loss that Mr S has suffered from 2 January 2003 to the date the contribution is received and invested by Standard Life, and on receipt of the contribution make the required payment to Standard Life to redress this loss.

Anthony Arter

Pensions Ombudsman
1 June 2020