

Ombudsman's Determination

Applicant	Mr S
Scheme	Local Government Pension Scheme (LGPS)
Respondent	City and County of Swansea Council (the Council)

Outcome

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

Complaint summary

3. Mr S is complaining that the Council (as the administrator of the LGPS) gave poor advice to his former employer, Neath Port Talbot Council, in 2007 and 2013 and, as such, Mr S' benefits should not be abated following his decision to take flexible retirement.

Background information, including submissions from the parties

4. Mr S says Neath Port Talbot Council (where he worked as the Head of Human Resources) first wrote its Flexible Retirement Policy (**the Policy**) in 2007, following advice Mr S says it received from the Council. This was reviewed in 2013.
5. The relevant sections of the Policy relating to Mr S' complaint are:
 - "4. **Pension Implications**
 - 4.1 The practice of "abatement" (which would restrict an employee from receiving a combined sum of pension and new pay package which was greater than the original pay package) is not applicable to pension benefits payable as a result of flexible retirement.

...

6. Determination of requests for flexible retirement

6.2 It will be the responsibility of the employee to ensure that he/she obtains all necessary information about pension benefits payable, additional voluntary contributions, etc. and other financial matters to inform his/her decision to take flexible retirement. Employees may wish to seek independent financial advice before making this decision.”

6. The relevant LGPS regulations can be found in the Appendix.
7. In February 2014, Mr S made the decision to take flexible retirement from the LGPS. He decided to continue in his role, with reduced hours, while receiving his benefits from the LGPS. The Council wrote to him on 5 February 2014 with details of his tax-free cash lump sum and annual pension benefits.
8. On 2 November 2014, Mr S left Neath Port Talbot Council and started a new post the next day, working three days per week, with Pembrokeshire Council. Neath Port Talbot Council's leaving form, dated 5 November 2014, states that Mr S' reason for leaving was due to retirement. The Council sent Mr S a letter on 19 January 2015 confirming his retirement and provided him with details of the benefits he accrued after February 2014, including interest for late payment.
9. The Council wrote to Mr S on 27 March 2015 regarding his new employment with Pembrokeshire Council. He was informed that his pension benefits from the LGPS would be abated retrospectively and that he owed an overpayment of £3,690.37. Mr S said he took steps with his employer to reduce his hours to avoid any further abatement of his benefits. However, this was not sustainable, and he left his role shortly afterwards. He subsequently set up his own consultancy business and therefore abatement did not apply as he was no longer in local government employment.
10. Mr S was unhappy and raised a complaint via the LGPS' internal dispute resolution procedure (**IDRP**). In summary, Mr S said that he was given an expectation that his benefits would continue to be unreduced following his flexible retirement, whether he remained with his employer or not. It is his belief that the Policy is flawed, as the Council never provided advice to Neath Port Talbot Council about situations such as his and therefore the wording of the Policy is incorrect.
11. The Council replied on 15 April 2015, under Stage 1 of the IDRP.
12. The Council stated that Mr S started full retirement when he left service in November 2014. Therefore, the Policy no longer applied, and his benefits became subject to the normal rules of abatement. It was also the part of the Swansea Administration Authority Discretionary Policy that abatement would be applied to all cases, regardless of any costs to the employer.

13. Mr S appealed under Stage 2 of the IDRP on 18 September 2015. He reiterated that the LGPS regulations relating to non-abatement of pension benefits applying if a member stays in the employment of the employer who granted flexible retirement was not mentioned when the Policy was drafted (especially Regulation 71(5)), nor was any information about it made available in any other documents issued by the Council to members. Mr S mentioned that he was not challenging the LGPS regulations, but it was the financial “penalty” being applied to him that was unfair and unreasonable. He claimed that he made an employment based decision on what he considers to be a lack of advice from the Council.
14. The Council responded under Stage 2 of the IDRP on 9 November 2015. As part of the Council’s investigation, Mr S agreed that he had left service with Neath Port Talbot Council due to retirement, but as he was not aware of the abatement provisions, he had not asked to be seconded to his new employer.
15. The Council confirmed that, under regulation 70, it had adopted a policy in relation to exercising discretion, which concluded that abatement would apply following re-employment. Although there is an exemption under Regulation 71(5), this does not apply to Mr S as he left employment with Neath Port Talbot Council via retirement. Therefore, it agreed that the abatement of Mr S’ pension was correct.
16. The Council also noted a memo Mr S took to a meeting with the Neath Port Talbot Personnel Committee in October 2007, but there would not be a reference to the relevant regulations as these were not in force at the time. Instead, it made Mr S aware of a LGPS Committee Circular in January 2007 that mentioned the previous LGPS regulations (which also covered flexible retirement and non-abatement if the member stayed in the employment of the employer at the date of the election). Given the passage of time, the Council was unsure as to whether employers were made aware of the circular, but the decision maker referred the matter to the Local Pension Board for further consideration.
17. The Council wrote again to Mr S on 10 December 2015. It stated that the question over the equity of the abatement policy and his situation had been referred to the Local Pension Board as a case study. It concluded that this did not mean that his case was being re-opened and confirmed that the IDRP had concluded.
18. Mr S was unhappy with the response and the outcome of his complaint. He continued to pursue his complaint with various councillors and committee members and made a Freedom of Information (**FOI**) request, until he brought a complaint to this Service in February 2018. As part of the FOI request, Mr S stated that this provided evidence to show that the Council took no steps to inform Neath Port Talbot Council or LGPS members of Regulation 71(5).

19. As part of this service's investigation of Mr S' complaint, the Council was asked to provide further information. This included a copy of the LGPS' member guide applicable in 2014 which states:

"What if I'm already receiving an LGPS pension and I have become re-employed?

If you become re-employed in Local Government or by an Employer who offers you membership of the LGPS, you must tell the Pension Fund that pays your pension that you have become re-employed, regardless of whether you wish to join the scheme or not. A check will then be made to see whether your pension will be reduced or even stopped."

20. The Council also submitted that there was no documentation in relation to the advice that was given in 2007 and 2013. Staff involved in the discussion have since retired and all that it would be able to provide is anecdotal information, rather than documents or file notes.

Adjudicator's Opinion

21. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below:-

- The evidence submitted showed that Mr S had clearly left employment in November 2014 via retirement. Therefore, he was being treated in accordance with the relevant LGPS regulations and it was correct for the Council to abate his pension following his new employment in November 2014.
- There was no evidence submitted from either party in relation to what advice was or was not given to Neath Port Talbot Council in 2007 and 2013, in relation to the formation of the Policy. This included a lack of evidence submitted of what discussions were undertaken, or what advice or enquiries were made. There was only a reference in the IDRP documentation to a circular in 2007 that may, or may not, have been provided to employers. It was therefore difficult to make a finding on an event that may or may not have occurred and the Adjudicator based her opinion on the wording of the Policy as it stands.
- The Adjudicator agreed that the Policy does not make a reference to having to stay in the employment of the employer granting flexible retirement, as it only related to members taking flexible retirement as defined by the LGPS regulations. It was therefore her view that the intention of the Policy was not to cover all possible scenarios, but just to relate to flexible retirement with the employer who wrote the Policy, not any future employer, as this would then be covered under guidance issued by the Council for re-employment and abatement. Regardless of which, the LGPS regulations would override any wording of the Policy.

- The Policy also states that it is the responsibility of the member to make sure that they are aware of any implications when making the decision to take flexible retirement, so the Adjudicator argued that there was also an onus on Mr S to make sure that any decision he made going forward was the right one for him.
- While the Policy does not mention future employment, other documents issued by the Council at the time did. The LGPS members' booklet made clear what would happen should an employee be re-employed following retirement. Knowing that he had taken full retirement in November 2014 (and that he was receiving additional benefits from January 2015), it is reasonable to conclude that information was available to members that related to Mr S' position.
- The Adjudicator also noted that Neath Port Talbot Council were not a party to Mr S' complaint. While Mr S had written the Policy as an employee, this did not mean that his opinion was the same as what may be the current position of Neath Port Talbot Council. As the Council pointed out, the responsibility of drafting the Policy was Neath Port Talbot Council's, not the Council. All that the Adjudicator could consider was whether the relevant regulation (Regulation 70) was applied correctly. It was her view that there was no evidence that it had not been applied. As Neath Port Talbot Council were not a party to the complaint, she could not form a view on how it interpreted the relevant regulations or what advice it did or did not take.

22. Mr S disagreed with the Opinion and submitted the following (in summary):

- The Adjudicator failed to take into consideration the redress that he was seeking in the findings of her Opinion.
- He claimed that due process had not been followed and the IDRP process was flawed.
- Mr S says that he did not retire from Neath Port Talbot Council in November 2014. He said that he made this clear when he left employment and that he was merely resigning and moving to a new post.
- The evidence provided shows that the Council was unaware and failed to advise Neath Port Talbot Council of Regulation 71(5). Mr S provided additional emails from 2013 regarding the updating of the Policy.
- When moving employment, he had no reason to believe that abatement would apply, as he believed that the Policy applied to his circumstances.
- The Council's response that it will highlight his situation and regulation 71(5) to other employers supports his argument that this is a wider issue and goes towards confirming that the advice from the Council was deficient.

23. Following Mr S' response to the Opinion, further clarification was requested from the Council. It confirmed that there are no documents relating to Mr S disputing his retirement in November 2014, nor did he question the additional pension benefits paid to him from January 2015. It also provided a copy of a benefit option form dated and signed by Mr S on 14 January 2015, selecting an option to take his "core pension benefits".
24. As Mr S did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr S' comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

25. Mr S has detailed what he considers to be the redress that I need to respond to, including what he considers as various issues for which the Council should acknowledge and apologise for. My role is to consider complaints of maladministration, causing an injustice. If the decision is that there is no maladministration, then it follows that there is no injustice to remedy. I cannot put a matter right if I find that there was no error in the way in which Mr S' benefits were abated. It was therefore correct for the Adjudicator not to address issues that Mr S is asking to be remedied.
26. While Mr S may be unhappy with the IDRP process and he disagrees with the outcome, I do not find that the Council erred in its approach. Under the relevant regulations and legislation¹, the Council must only respond to a complaint raised under the procedure within a relevant time frame and provide the member with referral rights to this service. The Council responded to Mr S' complaint within a timely manner and he was able to bring a complaint to me for consideration. There is also nothing within the legislation or regulations relating to IDRP that states a manager/trustee should take witness statements or question third parties. While Mr S may remain unhappy with how the Council decided to handle his complaint after the IDRP process had completed, this does not mean that there was maladministration in how it approached and responded to Mr S' IDRP requests.
27. Mr S says that he did not retire from Neath Port Talbot Council in November 2014 and that the paperwork provided does not adequately reflect the options. However, there is no evidence provided to show that this was not the case. It was established during the IDRP Stage 2 response that there was no document showing how Mr S left service and that he had agreed, as part of its investigation, that he had retired, which I note he now disputes. Also, when he received the letter from the Council, in January 2015, regarding his additional benefits, there is no evidence submitted to

¹ The Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential, Miscellaneous Amendments) Regulations 2008 and The Pensions Act 1995 (50) and The Local Government Pension Scheme Regulations 2013

show that Mr S disputed this or raised a complaint about why he was receiving additional benefits if it was his understanding that he had not taken full retirement. I therefore find that Mr S did take full retirement in November 2014. All of this points to Mr S no longer being in flexible retirement, but full retirement with a new employer and therefore the Policy no longer applied. While Mr S assumed that it was, there is no evidence that he clarified the position before he made the change of employment decision, as suggested in the wording of the Policy.

28. I have considered the emails Mr S has highlighted in his recent letter. While regulation 71(5) was not specifically discussed, this does not automatically mean that the Council was deficient in its advice. The purpose of a flexible retirement policy is to set out the employer's stance in relation to approving requests for flexible retirement. Its purpose is not to set out what would happen should a member decide to take employment elsewhere, it is to explain what will happen with the employer in question. It is more likely than not that merely failing to take all of Regulation 71(5) into account may just relate to relevance; it may not have been relevant to mention it, as it was not applicable unless an employee changed employer and then other documentation issued by the Council informed employees of the consequences. It is only relevant now because Mr S is making it so. But, his circumstances may not have been foreseen at the time of drafting the Policy and, according to the documents submitted as part of this investigation, it has not been an issue with other members. On the balance of probabilities, I cannot conclude that the advice (if any) provided by the Council was deficient. By the Council stating that it will pass information on to other employers is also not definitive that there has been an error, only that it will be up to employers to decide if they wish to include it in their individual flexible retirement policies. It is not an admission of maladministration, only that it has decided to share information.
29. As the Adjudicator explained, regardless of the advice provided by the Council, the scheme rules take precedent. It is clear from the evidence that Mr S took retirement benefits, in full, from November 2014. Therefore, he left employment with Neath Port Talbot Council via retirement and started work with a new employer. He is not entitled to the exemption under Regulation 71(5) and his pension benefits were therefore subject to abatement as per Regulation 70.
30. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
24 January 2019

Appendix

Local Government Pension Scheme (Benefits, Membership and Contributions) regulations 2007 (revoked April 2014)

18 Flexible retirement

(1) A member who has attained the age of 55 and who, with his or her employer's consent reduces the hours he or she works, or the grade in which he or she is employed may make a request in writing to the appropriate administering authority to receive –

(a) in the case of a member who has accrued benefits under the 1997 Scheme –

(i) all of the benefits from his or her current membership under that Scheme;
and

(ii) all, part or none of his or her benefits accrued under these Regulations;
and

(b) any other case, all or part of his or her benefits accrued under these Regulations, and such benefits may, with the member's employer's consent, be paid to the member notwithstanding that he or she has not retired from that employment.

Local Government Pension Scheme (Administration) Regulations 2008 (revoked April 2014)

66 Statements of policy about exercise of discretionary functions

(1) Each employing authority must prepare a written statement of its policy in relation to the exercise of its functions under regulations 12 (power of employing authority to increase total membership of active members), 13 (power of employing authority to award additional pension), 18 (flexible retirement) and 30 (choice of early payment of pension) of the Benefits Regulations, 30 (choice of early payment of pension) and 30A (choice of payment of pension; pensioner member with deferred benefits) of the Benefits Regulations.

...

70 Statements of policy concerning abatement of retirement pensions in new employment

(1) Each administering authority must formulate and keep under review its policy concerning abatement (that is, the extent, if any, to which the amount of retirement pension payable to a member from any pension fund maintained by it under the Scheme should be reduced (or whether it should be extinguished) where the member has entered

a new employment with a Scheme employer, other than one in which he is eligible to belong to a teachers' scheme).

...

71 Application of abatement policy to individual cases

(1) Where a member who is entitled to the payment of a retirement pension proposes to enter a new employment with an employing authority, he must inform the employer about that entitlement.

(2) If such a member enters such new employment, he must immediately notify in writing the body from whom he has become entitled to receive the pension.

(3) Paragraphs (1) and (2) do not apply where the new employment is employment in which the person is eligible to belong to a teachers' scheme.

(4) The authority which is the member's appropriate administering authority as respects the retirement pension to which he is entitled-

(a) must have regard to regulation 12 of the Transitional Regulations;

(b) must apply to the member the policy published under regulation 70; and

(c) may reduce the annual rate of that pension or, as the case may be, may cease to pay it, during the period while the member holds the new employment, in accordance with that policy.

(5) A retirement pension paid following a request under regulation 18(1) of the Benefits regulations (flexible retirement) is not subject to abatement under regulation 70 in respect of any subsequent employment with the person who is his employer at the date of his request.