

Ombudsman's Determination

Applicant	Dr K
Scheme	Scottish Teachers Superannuation Scheme (the Scheme)
Respondent	Scottish Public Pensions Agency (SPPA)

Outcome

1. I do not uphold Dr K's complaint and no further action is required by SPPA.

Complaint summary

2. Dr K holds SPPA responsible for a reduction in her pension benefit entitlement at retirement age. Dr K argues this is a result of SPPA's decision, made in 2011, that she was no longer eligible to continue her membership in the Scheme following a change in job role.

Background information, including submissions from the parties

3. On 19 December 2011, SPPA wrote to West Lothian Council (**the Employer**) following its review of Dr K's full job description for her new role as 'Head of Services'. SPPA told the Employer that it was a Senior Management position and could not reasonably be described as teaching, which was a requirement for eligibility of the Scheme.
4. On 21 December 2011, the Employer informed Dr K that, with her new role, she would no longer be eligible for membership within the Scheme, but would instead be eligible to join the local government pension scheme (**LGPS**). In Dr K's case, her membership of the LGPS would be administered by Lothian Pension Fund.
5. On 12 January 2012, Dr K wrote to SPPA to challenge the decision that she was no longer eligible to be a member of the Scheme. In her letter, Dr K said that she was aware of its internal dispute resolution procedure (**IDRP**), but noted the guidelines suggested she first write to the decision maker before invoking the IDRP. A summary of Dr K's complaint is set out below:-
 - Dr K was a teacher by profession and would still be involved in classroom teaching within her new role.

- Dr K had been told (but did not state by which party) that she could retain her membership of the Scheme on assuming her new role.
 - Dr K had been instructed to make up significant back dated contributions into the LGPS due the delay in SPPA's decision making.
 - Dr K added that she was being discriminated against compared with colleagues in a similar position to her.
6. On 18 January 2012, SPPA responded to Dr K's complaint. SPPA maintained its position that her new role did not meet the criteria for eligibility of the Scheme, as the job description did not show that she would be undertaking any teaching duties. SPPA highlighted that the duties of the Head of Services post, specified in the job description, were that of 'Administrative, Professional, Technical and Clerical grades'. SPPA invited Dr K to provide evidence that her new role would involve classroom teaching. SPPA has confirmed that Dr K did not provide any such evidence.
 7. Dr K did not pursue her complaint further at this time.
 8. On 4 May 2012, Dr K requested to transfer her accrued benefits from the Scheme into the LGPS. It is my understanding that Dr K did not obtain financial advice before making her decision to transfer her accrued benefits.
 9. On 24 May 2012, Lothian Pension Fund wrote to Dr K to confirm that her membership in the LGPS had commenced on 1 March 2012.
 10. In August 2012, Lothian Pension Fund confirmed to SPPA that the transfer was complete.
 11. Dr K has said that, in November 2017, she discovered her forecast of benefit entitlement at retirement was lower within the LGPS than it would have been, on the same basis, had she remained a member of the Scheme.
 12. On 5 December 2017, Dr K wrote to SPPA with a complaint that the termination of her membership in the Scheme had led to a reduction of her future retirement benefits. Dr K argued that SPPA ought to have put certain guarantees in place.
 13. On 22 December 2017, SPPA wrote to Dr K. It told her that, due to the time that had passed since its response to her complaint about its decision on her eligibility, it would not consider the complaint under IDRP, unless Dr K provided it with sufficient grounds for her late application.
 14. On 9 January 2018, Dr K responded to add that SPPA's previous correspondence had not addressed her claim that SPPA improperly terminated her membership of the Scheme.
 15. Dr K originally said her complaint was about the reduction in her retirement benefits, which she became aware of in 2017.

16. On reviewing Dr K's full application and the documents she shared, it became apparent that she is also complaining about SPPA's 'improper termination' of her membership of the Scheme.
17. Dr K argues that her role as Head of Services falls under the definitions within the Scheme Regulations for "adviser, organiser, supervisor and services ancillary to education", which would have made her eligible for membership of the Scheme.

Adjudicator's Opinion

18. Dr K's complaint was considered by one of our Adjudicators who concluded that no further action was required by SPPA. The Adjudicator's findings are summarised below:-
 - The Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (SI 1996 No. 2475) (**the Regulations**), do not allow the Pensions Ombudsman to consider Dr K's complaint concerning SPPA's decision, made in 2011, that the role of Head of Services was not eligible for membership of the Scheme.
 - Dr K's entitlement to retirement benefits for pensionable service from 1 March 2012, is payable from the LGPS. This is the only scheme Dr K was eligible to be a member of, so there is not a financial loss.
 - It is possible that Dr K's estimated benefits at retirement age were affected when she transferred her accrued benefits from the Scheme into the LGPS, which was not a requirement and not caused by SPPA's decision.
19. Dr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr K 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 Dr K for completeness.

Summary of Dr K's position

20. Dr K argues that the Prescription and Limitation (Scotland) Act 1973 (**the Act**), states that a complaint can be considered within 5 years of when the applicant learns there is a loss.
21. Dr K argues she learned of her estimated retirement benefits in 2017, which is when she says she discovered her financial loss, and so her complaint should be considered.
22. The Adjudicator's statement that Dr K was not eligible for membership of the Scheme within Dr K's new role is unsupported.
23. The Adjudicator has not considered the Head of Services job description and the Scheme definitions allowing for continuity of membership, so cannot state that Dr K was not eligible for membership of the Scheme within the new role.

Ombudsman's decision

24. Regulation 5 of the Regulations sets time limits on the matters we can investigate. In order for me to be able to consider a complaint, the matter must be referred to The Pensions Ombudsman within three years of the events that gave rise to the complaint; or within three years of the date that the Applicant became aware of it, or ought to have been aware of it.
25. Part of Dr K's complaint is about the 'improper termination' of her membership of the Scheme. SPPA issued its decision that Dr K was not eligible to remain a member of the Scheme on 19 December 2011, and the Employer shared this with Dr K on 21 December 2011. Dr K has suggested that the current complaint is about the misapplication of the Scheme Regulations. But, I find that it was the application of the Scheme Regulations that led to the decision, so there is no distinction.
26. As Dr K's application was not received within three years of 21 December 2011, when she received the decision, I cannot investigate this part of the complaint under part 5(1) of the Regulations.
27. I have considered when Dr K became aware of the matter complained of, or when she ought reasonably to have been aware of it. The evidence shows Dr K was aware of SPPA's decision, that she was not eligible to be a member of the Scheme in her new role, on 21 December 2011.
28. As Dr K's application was not received within three years of that date, I cannot investigate this part of her complaint under part 5(2) of the Regulations.
29. In some cases, I can exercise discretion to investigate a complaint that is brought outside the three-year time limit. However, I would usually only exercise this discretion where any relevant delay is beyond the Applicant's control. For example, where the referral to The Pensions Ombudsman is held up by another organisation's complaint process, or by ill health or by family matters, and that has reasonably prevented the Applicant coming to us. In order to exercise this discretion, all of the time dating from when they became aware of the complaint, to the date of their application to The Pensions Ombudsman needs to be accounted for.
30. I have considered whether the lack of review under the Scheme's IDRP could fall under part 5(3) of the Regulations. However, SPPA has shown that Dr K was aware of the IDRP process and that she knew she could pursue her complaint through this process, but she chose not to. Therefore, I do not consider that SPPA or any other organisation caused a delay in Dr K's referral to this Office.
31. As Dr K's application on this part of the complaint was not received within three years of 21 December 2011, and there are no reasonable grounds for the delay in making the application after this point, I cannot investigate this part of the complaint outside our time limits using the discretion contained in part 5(3) of the Regulations.

32. Dr K has told us that she discovered, in November 2017, that her future benefit entitlement from LGPS would be lower than had she remained a member of the Scheme, on the equivalent basis. As Dr K brought this complaint to us within three years of when she became aware of it, I have been able to consider this part of the complaint.
33. Dr K refers to the Act, which is Scottish legislation that sets time limits for bringing claims under Scottish civil law. In general terms, the Act applies to obligations to pay a sum of money; obligations to pay compensation; and contract and breach of contract claims.
34. Dr K has brought her complaint to the Pensions Ombudsman, the jurisdiction of which is governed by the Regulations. The Act, on which Dr K relies, is not applicable here. Should Dr K wish to bring her claim before a Scottish court, the Act might then apply. I cannot consider Dr K's complaint concerning the decision made by SPPA in 2011, that she was not eligible for membership of the Scheme in her new role. It follows that I make my decision on the remainder of her complaint on the basis that, from March 2012 she was only eligible for membership of the LGPS.
35. Dr K has complained that she has suffered a financial loss because of the decision made by SPPA on her eligibility. As Dr K was not eligible to remain an active member of the Scheme, but was only eligible for membership of the LGPS, I am satisfied her estimated retirement benefits are based on her correct entitlement.
36. Dr K says that her estimated benefits at retirement age within the LGPS are lower than they would have been, on the same basis, had she qualified for membership within the Scheme within her new role. Dr K is making the comparison between the benefits available to her within the LGPS and the hypothetical benefits she could have attained had she retained her eligibility of membership in the Scheme. Whilst Dr K has compared the two estimates at retirement age, she was not eligible to accrue benefits within the Scheme from 2012 onwards, for as long as she was employed in the Head of Services role, so this comparison is theoretical. This does not constitute a financial loss.
37. Dr K argues that, as she only learned of her perceived financial loss in 2017, that the decision on her eligibility should be reviewed. However, the decision made in 2011 was based on the facts at that time. Dr K raised a formal complaint about this decision but did not pursue her complaint through the Scheme's IDRP at the time.
38. Under the rules of the Scheme, as Dr K had more than two years' accrued service, she would have been able to defer her accrued benefits within the Scheme and take these at normal retirement age. I note that Dr K chose to transfer these accrued benefits into the LGPS in 2012, but did not seek financial advice when considering this decision. It is possible that this decision has contributed to her perceived reduction in the benefits she will be entitled to at retirement age.
39. Based on the available evidence, I am satisfied that Dr K's estimated retirement benefits have been calculated in accordance with the correct scheme rules.

PO-26133

40. I do not uphold Dr K's complaint.

Anthony Arter

Pensions Ombudsman

18 November 2019