

Ombudsman's Determination

Applicant	Mr Peter Wightman
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Newcastle City Council (the Council)

Complaint summary

Mr Wightman has complained that the Council has refused to comply with the stage two Internal Dispute Resolution Procedure determination dated 24 November 2010. To put matters right the Council should provide him with the benefits set out in the stage two Internal Dispute Resolution Procedure determination dated 24 November 2010.

Summary of the Ombudsman's determination and reasons

The complaint is partly upheld against the Council. Mr Wightman is not entitled to the benefits set out in the stage two Internal Dispute Resolution Procedure determination dated 24 November 2010. His entitlement to discretionary compensation upon termination of his employment in 2009 was limited to that which can be provided to him under the Local Government Pension Scheme (Early Termination of Employment) (Discretionary Compensation) Regulations 2006. However, Mr Wightman should be compensated by the Council for the distress and inconvenience that certain aspects of the Council's conduct in this matter has caused him.

Detailed Determination

Relevant legislation

1. Regulation 8 of the Local Government Pension Scheme (Early Termination of Employment) (Discretionary Compensation) Regulations 2000 (the **2000 Regulations**), entitled 'Award of credited period by way of compensation' (now revoked), says:
 - (1) An employing authority may award a credited period to an eligible person.
 - (2) A credited period must not exceed whichever is the shortest of -
 - (a) the difference between his total membership and 40 years;
 - (b) the period beginning with the day after the termination date and ending on his 65th birthday, less the period of his residual entitlement (if any);
 - (c) the total of -
 - (i) his total membership; and
 - (ii) any period which counts as a period of superannuable membership; and
 - (iii) any increase in membership under regulation 13 of the Transitional Regulations,or, if he is an assumed member, any period which would count or any increase which would be awarded apart from a relevant disqualification and on the relevant assumptions; and
 - (d) 10 years.
 - (3) An award may not be made later than six months after the termination date.
2. Regulation 6 of the Local Government Pension Scheme (Early Termination of Employment) (Discretionary Compensation) Regulations 2006 (the **2006 Regulations**), entitled 'Discretionary Compensation', says:
 - (1) This regulation applies where a person-
 - (a) ceases to hold his employment with an employing authority, and
 - (b) in respect of that cessation may not count an additional period of membership under regulation 52 (power of employing authority to increase total membership of members) of the Pension Regulations.
 - (2) Where this regulation applies, the employing authority may, not later than six months after the termination date, decide to pay compensation under this regulation and in that event shall, as soon as reasonably practicable after the decision, notify the person in whose favour it has been made, giving details of the amount of the compensation.
 - (3) The amount of compensation must not exceed 104 weeks' pay.
 - (4) Chapter 2 (a week's pay) of Part 14 (Interpretation) of the 1996 Act shall apply for the purpose of calculating a person's week's pay as it applies for the purpose of calculating redundancy payments but-
 - (a) with the substitution for references to the calculation date of references to the termination date; and

(b) without the limit on a week's pay imposed by section 227 of that Act.

(5) If the person in whose favour a decision under paragraph (2) has been made receives a redundancy payment under Part 11 of the 1996 Act or compensation under regulation 5 of these Regulations, the equivalent amount shall be deducted from the compensation otherwise payable to him under this regulation.

(6) Compensation under this regulation shall be paid by the employing authority as soon as practicable after the decision under paragraph (2).

(7) The compensation shall be payable in the form of a lump sum.

3. Regulation 11 of the 2006 Regulations, entitled 'Revocation of Regulations, transitional provisions and savings', says:

(1) The following are revoked but subject to the transitional provision in paragraph (2) and the savings in Schedule 2 -

(a) the 2000 Regulations

...

(2) An employing authority may decide to pay compensation under the 2000 Regulations to a person whose employment with them commenced before 1st October 2006 and whose termination date is after 30th September 2006 and before 1st April 2007.

Material facts

Background

4. Mr Wightman worked for Tyne & Wear City Council (**T&WCC**) between 1976 and 1986. T&WCC was abolished on 31 March 1986. At that time Mr Wightman was transferred to the employment of the Council.
5. In 2009 the Council instigated an efficiency programme. As a consequence of this programme, Mr Wightman was made redundant.
6. Prior to his departure, the Council told Mr Wightman - in writing on 8 September 2009 - that it could not provide him with 'added years' as the coming into force of the 2006 Regulations had "statute-barred" this action. Further, the Council said that it would not exercise its discretion under the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 to pay him compensation under that legislation as it was not its policy to do so.
7. Mr Wightman left employment with the Council on 18 December 2009.

The Internal Dispute Resolution Procedures

8. Mr Wightman lodged an appeal under the Scheme's Internal Dispute Resolution Procedure (**IDRP**) on 27 May 2010. In his application he said that he believed that the Council had incorrectly interpreted the Regulations and, therefore, that he challenged the decision.
9. The Employment Appeals Tribunal (**EAT**) decision in *Worrall & Others v Wilmott Dixon Partnership* UKEAT/0521/09/DM (**Worrall v Wilmott Dixon**) was handed down on 9 July 2010.
10. The stage 1 IDRP decision was issued by the Council on 9 August 2010. In that decision the Council said that it would not exercise its discretion to augment Mr Wightman's benefits in the manner he requested as it was its policy not to exercise discretion to augment pension membership (by buying extra years' service in the LGPS) and that such policy applied to all staff, which included staff transferred to the Council on the abolition of T&WCC.
11. Mr Wightman lodged a stage 2 IDRP appeal, this time (as required by the regulations governing the LGPS) to the Tyne & Wear Pension Fund (**T&WPF**), on 23 August 2010. As part of its appeal process, the Council wrote to Ms Rawlinson of South Tyneside Council (**STC**) (the T&WPF representative), in order that she could consider the rationale adopted by the Council in its stage 1 IDRP response.
12. On 24 November 2010, Ms Rawlinson wrote to Mr Wightman saying that she upheld his case. Broadly, she said that the Council should take into account an element of pension rights he accrued whilst working with T&WCC and, as such, provide these benefits.
13. Ms Rawlinson wrote to the Council on 14 February 2011, to confirm her decision.
14. The Council then began the process of examining what Mr Wightman would be entitled to under the 2000 Regulations. The Council proposed to use a calculation based on the regulations that applied at the time, which provided benefits on a 1/80ths basis. It set out its proposed calculations to Mr Wightman in a letter dated 8 July 2011. In that letter the Council said that it would enhance his service in the LGPS by 6 years and 312 days.
15. Mr Wightman disputed the Council's view as to how his benefits should be calculated (initially, I understand, by email on 25 July 2011). He said that the Council should use 1/60ths as the basis of their calculations as this is what the current regulations provided. The Council responded by email on 29 July 2011. It argued that the 1/60ths calculation didn't exist at the time the Regulations were in force and, as such, it was more suitable to use the 1/80ths calculation.

16. An initial, substantive decision on the abovementioned point was made by the Council on 25 August 2011. In that decision the Council maintained that it believed that it would be correct to use the 1/80ths calculation, saying that "...At no time has legislation allowed for 'added years' pension to be paid at the 1/60ths calculation".
17. Mr Wightman submitted a stage 1 IDRП appeal on 22 September 2011. In that appeal Mr Wightman also claimed that the Council owed him interest on the arrears of enhanced pension they were due to pay him.
18. The Council sent Mr Wightman their response to his stage 1 IDRП appeal on 13 February 2012. In the response the Council maintained its previous position with respect to the 'added years' calculation. (It also confirmed that it would pay Mr Wightman interest to the sum of £154.85 for the 'added years' retiring allowance in accordance with regulation 44 of the Administration Regulations.)
19. Unhappy with the outcome, Mr Wightman submitted a stage 2 IDRП appeal to the T&WPF on 5 March 2012.
20. The stage 2 IDRП response was again provided by Ms Rawlinson of STC. She wrote to Mr Wightman on 4 May 2012. In her letter she said that the outcome in Mr Wightman's 'first' stage 2 IDRП appeal (dated 24 November 2010) would have been very different had she been aware of the decision in the EAT case of Worrall v Wilmott Dixon, because the decision to pay 'added years' was not an option under the Regulations and so to do so would be "illegal". Specifically, she said:

"Their [the Council's] decision to compensate you by 'added years' is therefore not actually an option under the Local Government (Early Termination of Employment) (Discretionary Compensation) Regulations 2006, and to do this would actually be illegal."
21. The Council wrote to Mr Wightman on 17 May 2012, confirming that it would revise his payment to accord with the 2006 Regulations, but that any such payment would be less the compensation already paid to him on termination of his employment. The payment suggested was £18,881.76 (instead of the 'added years' retiring allowance) which the Council said would take Mr Wightman up to the maximum permitted under the 2006 Regulations. This figure comprised the maximum payment based on 104 weeks' pay less an amount equal to the redundancy payment already paid.
22. Mr Wightman responded to the Council on 21 May 2012, saying that the offer was unacceptable.
23. Over the next two years the Council and Mr Wightman attempted to reach a settlement. However, negotiations broke down in or around March 2014. The Council informed Mr Wightman in their letter of 28 March 2014, that it withdrew all previous settlement offers, reinstating only the offer made in their letter of 17 May 2012 (referred to previously).

Summary of Mr Wightman's position

24. The essence of his complaint is that the Council failed to adhere to a legally-binding stage 2 IDRPs determination (referred to above) dated 24 November 2010. The Council must ensure that the benefit entitlement conferred in the stage 2 IDRPs determination dated 24 November 2010 is provided.
25. To put matters right the Council must replicate his entitlements conferred by T&WCC even if it is at a cost to it. As such - and as set out in his letter of 19 June 2014 - the Council must provide:
 - pension payments to the same value as the LGPS;
 - the effective elimination of any risk from his pension regarding market conditions, investment rates, etc.; and
 - pension for the remainder of his life.
26. Mr Wightman also asserts that he has suffered distress and inconvenience as a consequence of the Council's conduct during its negotiations regarding his benefit entitlement.
27. Mr Wightman has also said, in his response to my Preliminary Decision in this matter, that I should consider making a finding against STC. He says that if I find that the 'first' stage 2 IDRPs appeal (dated 24 November 2010) is incorrect then he should be compensated for this by STC as he "has suffered financially by rejecting offers which he would have accepted if he had received a more equivocal decision".

Summary of the Council's position

28. Contrary to Mr Wightman's view, the first stage 2 IDRPs determination, dated 24 November 2010, is not legally binding. As such, the Council has no legal obligation to pay Mr Wightman an 'added years' allowance (pursuant to the 2000 Regulations).
29. The Council views the second stage 2 IDRPs determination - dated 4 May 2012 - as rectifying the decision made in the first stage 2 IDRPs determination. The first stage 2 IDRPs determination was incorrect as it asked the Council to pay compensation to Mr Wightman outside of the 2006 Regulations and without advice on how they might do this. The Council will only act on the decision dated 4 May 2012.
30. The offer of compensation determined in the letter of 28 March 2014 (as set out in letter of 17 May 2012), is correct and in accordance with the 2006 Regulations.
31. The Council is prepared to make a payment to Mr Wightman outside of the 6 months permitted by law.

32. The Council have acknowledged that their initial decision dated 25 August 2011 did not comply with regulation 57 of the Administration Regulations and their stage 1 IDRPs response of 13 February 2012 did not comply with regulation 59 of the Administration Regulations.

Conclusions

The status of the IDRPs decisions

33. Both of the stage 2 IDRPs decisions provided by Ms Rawlinson - dated 24 November 2010 and 4 May 2012 - are expressed to be binding on the Council. Ms Rawlinson has said in both that they can only be overturned by a determination of the Pensions Ombudsman or a decision of the High Court.
34. I do not concur with Ms Rawlinson's view of the binding nature of LGPS IDRPs decisions. Whilst it is correct that if a complaint remains unresolved after the IDRPs process has been exhausted it can often be brought to my office or the High Court for resolution, it does not follow that a final decision under the LGPS IDRPs is binding on the relevant employer, former employer, etc. and can only be overturned by a determination from my office or a decision of the High Court. Ms Rawlinson's statement is not supported by the Local Government Pension Scheme (Administration) Regulations 2008 (the **Administration Regulations**), which are silent as to whether a decision by an administering authority made pursuant to those regulations binds the relevant employer, former employer, etc. (as the case may be). Further, whilst they do not apply to disputes with employers, the Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008 (SI 2008/649) do not provide that a stage two decision in an IDRPs binds the relevant party/parties against whom the directions are made. The IDRPs is a process by which complaints may be resolved, but if a resolution is not achieved then the matter can be advanced to a next stage (here, by a complaint to my office or by recourse to the High Court). As such the second stage IDRPs decision under the LGPS IDRPs does not, by its very nature, produce an outcome which binds the parties.
35. So the question that I must consider is not which IDRPs decision binds the Council but, rather, what the correct position is in law.

The legal position

36. The position in law is that compensation by 'added years' is not available to Mr Wightman. This is because compensation by 'added years' is not available under the 2006 Regulations and any decision with respect to the award of discretionary compensation relating to Mr Wightman is subject to those regulations.

37. Regulation 11 of the 2006 Regulations effectively revokes the 2000 Regulations with effect from November 2006. The only circumstance in which compensation continues to be payable in accordance with the 2000 Regulations post-November 2006 is set out in regulation 11(2). This provides that the Council can only exercise discretion to pay compensation to Mr Wightman under the 2000 Regulations if he satisfies the two-limbed test; (1) his employment with the Council commenced before 1st October 2006; and (2) his employment was terminated by the Council after 30th September 2006 but before 1st April 2007. Mr Wightman transferred to the employment of the Council in 1986, so he meets the first limb. However, his employment with the Council terminated in December 2009. Mr Wightman does not, therefore, meet the second limb.
38. The effect of Mr Wightman not meeting both limbs of the test set out in regulation 11(2) of the 2006 Regulations is that he can only be considered for discretionary compensation by the Council under the 2006 Regulations. The 2006 Regulations do not provide that the Council have discretion to award Mr Wightman 'added years'. Instead, the 2006 Regulations provide that Mr Wightman can be awarded a compensation payment of up to 104 weeks' pay less any payment made on redundancy (regulation 6).
39. This interpretation of the 2006 Regulations also conforms with the decision of the EAT in *Worrall v Wilmott Dixon*, where it was found that subsequent statutory changes could not be ignored. In that case the coming into force of the 2006 Regulations had the effect of abolishing the rights under a collective agreement relating to redeployment and redundancy (on which the appellants relied). The judge found that even if the relevant clause providing 'added years' had been incorporated into Mr Worrall's contract of employment (incidentally, he found that it had not), it ceased to have effect when the 2006 Regulations repealed the 2000 Regulations.
40. It follows that I determine that discretionary compensation is not available to Mr Wightman under the 2000 Regulations. Any discretionary compensation awarded is to be awarded pursuant to the 2006 Regulations.

The Council's offer

41. The Council has offered Mr Wightman the maximum amount of compensation available to him under the 2006 Regulations. It has recently reiterated that offer orally to my investigator.
42. The amount offered by the Council is not to be paid pursuant to its discretion to pay compensation in the 2006 Regulations. Regulation 6(2) of the 2006 Regulations provides that a decision to pay compensation under regulation 6 should be made not later than six months after the termination date of the relevant employee's employment. The decision (in essence, the final offer) was made by the Council long after the expiry of the six month deadline. It follows that the amount to be paid by the Council is not, in the strictest sense, being paid under the 2006 Regulations. Instead,

the amount being paid is an equivalent amount to the maximum amount of compensation the Council could have paid Mr Wightman under the 2006 Regulations had the Council exercised its discretion to make the payment within the six month period.

43. The purpose of my determination is to put Mr Wightman in the position he would have been in had the Council made their current offer to him - which constitutes the maximum amount payable to him under the 2006 Regulations - within six months of the termination of his employment in December 2009. The amount is not payable pursuant to the 2006 Regulations so the compensation due is payable by the Council and not the T&WPF.

Interest

44. In their letter of 17 May 2012, the Council have highlighted that there is no provision in the 2006 Regulations to allow for interest to be paid on a payment of discretionary compensation.
45. However, as set out previously, the amount to be paid to Mr Wightman is not - in the strictest sense - being paid pursuant to the 2006 Regulations. It follows that any provisions relating to interest (or lack thereof) in the 2006 Regulations will not conflict with or override my statutory power to direct the Council to pay interest under section 151(2) of the Pension Schemes Act 1993.

Distress and inconvenience

46. Whilst I cannot uphold Mr Wightman's substantive complaint, in considering this matter it has become clear that there are a number of things that the Council should have done differently.
47. Both the first and second IDRP processes - and the original decisions being reviewed - were clearly strewn with errors, some of which constituted breaches of the Administration Regulations. These breaches are detailed in the Council's letter of 17 May 2012, in which it acknowledges that they occurred.
48. It also appears that throughout the many years of correspondence between the parties that the Council has been slow to respond to Mr Wightman on a number of occasions.
49. These errors and shortcomings have clearly caused Mr Wightman to suffer distress and inconvenience.

The conduct of STC

50. Mr Wightman's complaint about STC is a separate complaint to his complaint about the Council. His complaint is, essentially, that STC's incorrect interpretation of the position at law has caused him to suffer a financial loss because had he known the true position he would have accepted settlement offers made by the Council.
51. Case law authority says that I am unable to make a finding that would adversely affect a party if that party has not been given an opportunity to comment on the allegations made about it. It follows that, in order to make a finding against STC I would have to seek their response to this complaint and include them as a respondent to it. As I have identified that the complaint about STC is separate from Mr Wightman's complaint about the Council, I do not think it would be suitable to bring STC in as a respondent in this complaint, especially at this stage in the investigation. It follows that if Mr Wightman wishes he should bring a complaint about STC to my office separately (such complaint would be subject to our usual jurisdiction tests).
52. In any event - on the basis of the facts that have been provided and on the basis that the complaint about STC would fall within my jurisdiction - my view is that if Mr Wightman brought this complaint about STC to my office it would not be successful. Whilst I have identified (in this complaint) that STC made errors in the 'first' stage 2 IDRP decision dated 24 November 2010, the offers that Mr Wightman refers to from the Council have all been made as a consequence of that decision. If maladministration is identified, my aim is to put the parties back in the position they would have been in had that maladministration not occurred (if this is possible). If STC's decision of 24 November 2010, had correctly reflected the position in law, it is inconceivable that the Council would have offered Mr Wightman anything beyond what was payable to him under the 2006 Regulations. In other words, if a finding of maladministration was made against STC, putting Mr Wightman back in the position he would have been in had it not occurred would - in light of the Council's offer to Mr Wightman - arrive at the same position that this Determination has arrived.

Directions

53. The Council must pay Mr Wightman, as set out in their letter of 17 May 2012 (and subsequently agreed with my investigator), an amount constituting 104 weeks' pay less an amount equal to that has already been paid. The Council has calculated this amount to be £18,881.76.
54. The Council must pay to Mr Wightman simple interest on the compensation payable - interest being calculated at the base rate for the time being quoted by the reference banks from the due date that would have applied if the compensation had been paid on 1 February 2010 (which is approximately two months after the date of termination of Mr Wightman's employment).

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55. The Council must pay Mr Wightman £1000 in recognition of the significant distress and inconvenience their conduct in certain aspects of this matter has caused him to suffer.

Anthony Arter

Pensions Ombudsman
8 October 2015