

Ombudsman's Determination

Applicant	Mrs Y
Scheme	Local Government Pension Scheme (Scotland) (Strathclyde Pension Fund) (the Scheme)
Respondent	South Ayrshire Council (the Council)

Complaint Summary

Mrs Y has complained that the Council did not treat the payments she received under an equal pay settlement (**Compensation Payments**) as pensionable under the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint shall be partly upheld against the Council because:-

- It has been treating Mrs Y's Compensation Payments as non-pensionable where there is sufficient information indicating that the Compensation Payments made to Mrs Y fall within the definition of "pay", and are consequently pensionable, under Regulation 12(1) of the 1998 Regulations.
- As a result, in the absence of evidence from the Council that the Compensation Payments were not intended to be pensionable under the 1998 Regulations, Mrs Y is in receipt of incorrect pension benefits, and has been since she retired in 2009.
- The operation of Section 6 of The Prescription and Limitation (Scotland) Act 1973 means the obligation to make the correct pension payments between 2009 and the date five years before Mrs Y brought her complaint to my Office, on 20 March 2019, is extinguished. However, a new loss will occur each time a pension payment is made so the obligation to make the correct pension payments from 20 March 2014 onwards is not affected by the Act.
- The Council omitted information about pensions in the Equal Pay Information Pack and failed to follow guidance from the Strathclyde Pension Fund Office in a Bulletin No. 13 "Equal Pay Settlement Guidelines" (**the EP Guidelines**).

As a result, the Council shall provide redress to Mrs Y in accordance with the Directions set out in paragraph 37 below.

Detailed Determination

Material facts

1. On 18 May 1995, Mrs Y began working for the Council and joined the Scheme.
2. For some time prior to 2006, the Council, with all other councils in Scotland, recognised that there was an inequality in pay between male and female employees, under equal pay legislation.
3. Consequently, the Council worked collectively with the trade unions (**COSLA**) to resolve these issues in accordance with the Scottish Joint Council National Framework. This resulted in an 'Equal Pay Settlement', an agreement on how to rectify the inequality in pay between male and female employees, which had an anticipated implementation date for equalising pay of 1 April 2007.
4. In 2006, the Council issued a draft compromise agreement (**the Compromise Agreement**) as a compensation package to its affected employees, to reflect the Equal Pay Settlements. Employees were offered a compensation payment if they agreed not to pursue their claims for equal pay to an employment tribunal. A copy of the Compromise Agreement is set out in Appendix 1.
5. The Compromise Agreement included guidance entitled "South Ayrshire Council Equal Pay Compensation Payments 2006 – 2007" (**The Equal Pay Information Pack**). This explained details of the offer and noted that:-
 - This package was based on a payment matrix produced by COSLA. The compensation payments were not individual calculations but based on a general formula, related to service.
 - Employees eligible for compensation would be offered a financial payment based on contracted hours and length of service in the relevant post.
 - Payments would be net of employee costs and the Council would pay any income tax and NI. Consequently, the amount offered was cash in hand.
 - The Council had entered into a special arrangement with HM Revenue and Customs (**HMRC**) to pay tax and national insurance contributions (**NI**) so the payments would not appear on a P60 tax form.
 - To receive payment, employees had to attend a short presentation, with the Council and COSLA, to hear details of the cash in hand offer and allow further questions to be asked.
 - Employees were required to receive impartial legal advice prior to acceptance. The Council arranged, and met the cost of, any impartial legal advice.
6. At a meeting in 2006, with the Council and COSLA, Mrs Y was represented by her husband, Mr Y. She was provided with legal advice by a solicitor (**the Solicitor**) and

signed the Compromise Agreement. No advice was provided in writing. In relation to this meeting, Mrs Y has said:

“I attended a seminar of fellow employees where I signed for a final settlement on Equal Pay but did not receive a copy. My husband asked the solicitors present why the compensatory payment did not include a calculation for pensionable pay. Their response was, as the payment was a tax-free lump sum, it could not be treated as earnings.”

7. On 8 May 2006, the first Compensation Payment was made to Mrs Y (period covered 1 April 2001 to 31 March 2006) and on 19 June 2007, a second Compensation Payment was made (period covered 1 April 2006 to 31 March 2007), a combined total of £5,500.
8. On 20 November 2008, Mrs Y retired and drew her pension. On 22 October 2009, a third Compensation Payment was made (period covered 1 April 2007 to 15 August 2008).
9. On 13 June 2018, Mr Y contacted the Council and asked why the equal pay Compensation Payment was not taken into account in calculating Mrs Y's pension, although the Compensation Payment represented deferred pay. Mr Y asked for the shortfall to be made up.
10. On 29 June 2018, the Council responded to Mr Y. It did not agree to make up the shortfall because Mrs Y had signed the Compromise Agreement in “full and final settlement” of her equal pay claim.
11. On 20 July 2018, Mr Y emailed the Strathclyde Pension Fund Office (**SPFO**), the administrator of the Scheme, and asked why the Compensation Payments were not pensionable. He referred to a newspaper article published on 9 June 2018, that referred to a Circular issued by the Scheme, number 6/2016, dated April 2016. This referred to changes made to regulation 20 of the Local Government Pension Scheme Regulations (Scotland) 2014 (**the 2014 Regulations**) that meant that arrears of pay paid under equal pay settlements were pensionable, including compensation payments.
12. On 1 November 2018, the Council responded that Mrs Y had signed the Compromise Agreement in “full and final settlement” of her equal pay claim and it could not be reopened.
13. On 22 November 2018, Mrs Y asked for her complaint to be considered under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). There followed correspondence between the Scottish Public Pensions Agency (**SPPA**), the Council and Mr Y in relation to the appropriateness of Mrs Y's complaint for the IDRP.
14. In a letter dated 20 December 2018, (re-sent on 9 January 2019), the Council responded to Mrs Y's complaint under stage one of the IDRP and said that it did not accept her complaint. This was because the compensation had been decided in the

Compromise Agreement, in “full and final settlement” of her equal pay claim. Mrs Y had also received legal advice, in relation to the Compromise Agreement.

15. Unhappy with the Council’s response, Mrs Y appealed under stage two of the IDRPs to the SPPA. The SPPA stated, on 7 February 2019, that it was unable to consider her appeal under the IDRPs as her complaint was not about a decision made under the Scheme.

Summary of Mrs Y’s position

16. Mr Y, on Mrs Y’s behalf, provided a copy of the EP Guidelines, dated October 2005, issued by the SPFO, that referred to Regulation 12 of the Local Government Pension Scheme Regulations (Scotland) 1998 (**the 1998 Regulations**). He said that they applied to Mrs Y. Extracts from the 1998 Regulations are set out in Appendix 2 and a copy of the EP Guidelines is set out in Appendix 3. In addition, Mr Y said:-
 - The Council had incorrectly calculated Mrs Y’s pension at retirement, as it had omitted the arrears of pay included in the Compensation Payments.
 - The EP Guidelines instructed members and employers to arrange payment of pension contributions as the equal pay could be pensionable under Regulation 12. The Compromise Agreement did not affect this. There was no need to reopen it.
 - Mrs Y had been deprived of her right to bring her complaint through the IDRPs. SPFO Bulletin 26¹, relating to IDRPs and complaints against employers, showed that she was entitled to bring her complaint under the IDRPs.
 - He had read, in his local newspaper on 26 July 2020, that an equal pay settlement for 620 retired former council employees had included a backdated lump sum payment for pensionable pay. Some retirees had received two payments to reflect adjustments to their lump sums on retirement and their pensionable pay.
 - He noted that, in that case, both the contributing employer and the employees had paid the appropriate sums to the scheme under the equal pay settlement agreement. He asked whether Mrs Y was entitled to a similar backdated lump sum.

Summary of the Council’s position

17. The Council referred to a proforma copy of the Compromise Agreement and said:-
 - In line with Local Government Pension Scheme Regulations, at that time, the Compensation Payments were not subject to pension contributions.

¹ A technical bulletin issued to employers that have employees in the Scheme, reminding them that Scheme members could bring a complaint under the IDRPs about any ‘first instance decisions’ made by the employer, such as deciding what benefit the member is entitled to.

- It was not able to open the Compromise Agreement once signed. This agreement was made between Mrs Y and the Council and concluded in 2006.
 - Mrs Y had received impartial legal advice and subsequently accepted the Compensation Payments. She received advice on the terms of the settlement, in particular, on the pension question, and then elected to sign it.
 - There was no requirement for her to sign the Compromise Agreement. If she had considered the advice to have been incorrect (which the Council disputes), then the matter should be raised with the Solicitor who provided the advice or another legal advisor.
 - Mr Y had referred to an equal pay tribunal case involving a council's Pay Protection Scheme, which was settled in 2017. The Pay Protection Scheme was part of the National Single Status Agreement, adopted by Scottish councils that resulted in a 'second wave' of equal pay claims. The Council had still to settle its second wave claims, in accordance with the changes to regulations on 1 April 2015. These changes provided that payments made in settlement of an equal pay claim were arrears of pay and would be classed as pensionable. This provision did not apply to Mrs Y.
 - The 1998 Regulations were in force when Mrs Y ceased to be an active member of the Scheme. Regulation 12(5) provided that the employer may agree with a representative body to agree a method of determining pay. The Compensation Payments were not negotiated locally by the Council. The levels of compensation were determined by COSLA. There was no explicit statement that they were or were not pensionable. No pension contributions were factored into the calculation and there was a clear understanding that the payment would not be pensionable. Payment did not in any way represent arrears of pay; it was a compensation payment. The same COSLA agreed formula was used for each payment.
 - The payment was not tax free. Tax was deducted at a standard rate of 20%. This rate was agreed with HMRC and applied to all employees, whether or not they were personally liable to pay tax. As with all compensation payments, employees were provided with the net figure and either accepted or refused the offer.
 - COSLA was unable to provide an opinion regarding settlements in historical equal pay cases as the officers involved at that time were no longer in its employment. The records held there made no reference to pension contributions.
 - Its view remained that "the Local Government Pension Scheme Regulations at that time" meant that Compensation Payments to Mrs Y were not pensionable, in line with other Councils'.
18. The Council also raised a jurisdiction objection, noting that Mrs Y raised her claim in 2018, which was approximately 10 years after retiring and nine years after the final compromise agreement payment. It believes that the Prescription and Limitation (Scotland) Act 1973 (**the Act**) applies and so the latest date that any claim could

have been made, on the most recent compromise agreement payment, was 21 October 2014. As a result, any obligation to make recompense has prescribed.

19. It notes that there is an exception in the legislation if the individual has not claimed and was not induced to claim by the fraud or error of the person having the obligation or something acting on their behalf. However, it does not believe that this is the case here as Mrs Y stated that her husband raised the issue in 2006, with the Solicitor providing advice. As the Solicitor was independent of the Council, even if the advice given was erroneous, it falls outside of the exception.

Conclusions

The Compensation Payments

20. When reviewing the Compensation Payments, I have taken note of the following:-

- Mrs Y's equal pay claim was settled with the Compromise Agreement in 2007.
- The Council claims that "in line with Local Government Pension Scheme Regulations at that time, the Compensation Payments were not subject to pension contributions". It has said there was no reference to equal pay settlements being pensionable in the 1998 Regulations.
- The 1998 Regulations were in force when Mrs Y was an active member of the Scheme and signed the Compromise Agreement.
 - Regulation 11 provided for the level of member contributions to be payable, based on the member's "pay".
 - Regulation 12(1)(a) defined "pay" as "all the salary, wages, fees and other payments paid [...] in respect of [...] employment."
 - Regulation 12(10) stated that the "pay" must also be subject to income tax to be pensionable under the Scheme.
- The EP Guidelines said that equal pay settlements were likely to fall within "other payments" in Regulation 12(1)(a) and could be treated as "pay" but each case would depend on the terms of the settlement. They also said that each council was responsible for determining whether a payment constituted pensionable pay under the 1998 Regulations, but payments had to be subject to income tax to be pensionable.
- The Compensation Payments that the Council made to Mrs Y were part of a negotiated settlement between the Joint National Council and COSLA. The Council was not part of the negotiations. There is no evidence that there was an agreement about pensions.
- The Council said that it was generally understood, at the time, that compensation payments would not be pensionable. The fact that pension contributions were not

factored into the calculation or paid to the Scheme suggests this was the case. The Compromise Agreement also did not refer to pension contributions.

21. I acknowledge that based on the points set out in paragraph 20 above, there is nothing that explicitly says that the Compensation Payments would be considered as pensionable. Nevertheless, I find that there are factors, listed below, that indicate the Compensation Payments are within the definition of “pay” in the 1998 Regulations:-
- The Equal Pay Information Pack stated that the “Payments will be net of employee costs and the Council will pay tax and national insurance contributions” suggesting that the Compensation Payments included an element of arrears of pay.
 - This seems to be at odds with Mrs Y’s statement that she was told she was receiving a tax-free lump sum, by cheque. However, the Council has confirmed that Mrs Y’s Compensation Payments were made net of tax and NI.
 - The Equal Pay Information Pack also stated that employees were offered a payment “based on contracted hours worked and length of service” which also suggested that the Compensation Payments were made in respect of arrears of pay. It did not, however, make specific reference to pensions.
 - The Compensation Agreement stated that the Compensation Payments were made in settlement of Mrs Y’s equal pay claim and that the Council was responsible for the payment of any income tax due.
 - In the 1998 Regulations, the definition of “pay” is also silent on the issue, but it is arguable that arrears paid under equal pay settlements fall within Regulation 12(1)(a) as “other payments”. This is reflected in the EP Guidelines, which also added that if the payments were subject to income tax, they could constitute pensionable pay.
 - Under Regulation 12(10) of the 1998 Regulations, “no sum may be taken into account in calculating pay unless income tax liability has been determined on it.” This suggests that the key determiner for what qualifies as “pay” within “other payments” under Regulation 12(1) is whether income tax was determined on the payment. Although in this case the tax deducted was via an agreement with HMRC and did not appear on an individual’s P60, income tax was determined on the Compensation Payments.
22. Given that the Compensation Payments made to Mrs Y are capable of falling within the definition of “pay” under Regulation 12(1), and there is no contemporary evidence of an understanding to the contrary, I do not consider that the Council’s statement that “there was a clear understanding that the payment would not be pensionable” is sufficient to exclude the Compensation Payments from the definition of “pay” under Regulation 12(1)(a). The natural meaning of the phrase “other payments” within the definition of “pay” is wide enough to comfortably accommodate the Compensation Payments and the Council has not been able to provide any positive evidence that the Compensation Payments were not intended to be pensionable under Regulation

12(5) of the 1998 Regulations. Consequently, I find that the Compensation Payments qualify as “pay” and were pensionable under the 1998 Regulations, and that Mrs Y is accordingly in receipt of incorrect pension benefits.

23. I also find that the Compromise Agreement does not prevent Mrs Y from complaining that the Compensation Payments were not treated as pensionable. Although, Mrs Y agreed not to make a complaint about equal pay in exchange for these payments, I cannot see that this includes claims against the Council about how the Compensation Payments should have been treated for the purposes of the 1998 Regulations. So, she has not been prevented from complaining that the Compensation Payments were pensionable under the 1998 Regulations.

Prescription

24. The Council has raised a prescription argument, and, in Mrs Y’s case, there is a period of recovery for which Mrs Y is time barred. Following *Arjo Wiggins Ltd. v Ralph* [2009] EWHC 3198 (Ch), I should not direct a remedy where the court would be unable to do so. In this case there is a remedy which could be directed that has not been extinguished by the operation of the Act.
25. Section 6 of the Act provides:
- “(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years –
 - (a) without any relevant claim having been made in relation to the obligation, and
 - (b) without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished.”
26. Schedule 1 of the Act sets out the obligations affected by the five-year prescriptive period in section 6. Part 1, paragraph (g) provides:
- “(g) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph;”
27. There is no dispute that Mrs Y knew in 2009, at the latest, that the Compensation Payments were not being treated as pensionable after having claimed her pension benefits. So, 2009 is the latest point at which Mrs Y was aware of her complaint under section 11(3) of the Act. Section 6 operates to extinguish any claim about the advice provided by the Solicitor in 2006, as well as a complaint about the terms of the Compromise Agreement itself.
28. Nevertheless, the underlying obligation in Mrs Y’s case is for the Council to provide the correct information about Mrs Y’s pensionable pay to the SPFO to enable it to calculate the correct level of pension Mrs Y should be receiving. Its failure to do so

here amounts to negligence for the purposes of the Act, given that the Compensation Payments fall within the definition of “pay” in the Regulations. Paragraph (da) of Schedule 1 of the Act, provides that a five-year prescription period applies to:

“any obligation arising from delict [negligence], not being an obligation falling within any other provision of this paragraph;”

29. In addition, section 11(1) of the Act provides that:

“any obligation [...] to make reparation [...] for loss, injury or damage caused by an act, neglect or default [act or omission] shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.”

30. Consequently, I consider a new loss will occur each time an incorrect pension payment is made for the purposes of section 6 and the five-year prescription period.

31. As Mrs Y retired and has been in receipt of her pension since 2009, the obligation to make the correct pension payments between 2009 and the date five years before she brought her complaint to my Office on 20 March 2019, are extinguished by the operation of section 6 of the Act. However, the obligations to pay the correct level of pension after that date still subsist, from 20 March 2014 to 20 March 2019, as the loss in respect of these payments occurred within five years of Mrs Y bringing a complaint to my office, and as a result, the operation of the Act would not prevent me from granting a remedy for these later payments.

Other acts and/or omissions

32. In addition to the Council’s position on the Compensation Payments not being pensionable, I find that the Council acted incorrectly with the following acts and/or omissions:-

- omitting information about pensions in the Equal Pay Information Pack; and
- failing to follow guidance from the SPFO in the EP Guidelines.

33. The Council provided Mrs Y with the Equal Pay Information Pack before she signed the Compromise Agreement. However, it did not contain information about pensions. While I note that Mr Y was informed verbally by the Solicitor that the Compensation Payments were not pensionable, the Council cannot rely on this as the Solicitor was not acting as its agent or representative and, in any event, little weight can be placed upon information given verbally over fifteen years ago. So, I cannot see that there is clear evidence that the Council had provided information about the Compensation Payments in relation to pension benefits prior to Mrs Y signing the Compromise Agreement.

34. With regard to the guidance concerning the EP Guidelines, its purpose was to prevent future disputes with employees about their equal pay settlement and pension contributions. The guidance advised the Council to determine whether the

Compensation Payments constituted pensionable pay and to inform the SPFO of this. It also added that, if payments were treated as non-pensionable, the SPFO must still be advised of the details. There is no evidence that the Council did this. So, I consider the Council's failure to do so amounts to maladministration.

35. The maladministration identified above has caused Mrs Y significant distress and inconvenience and so the Council shall pay an award in recognition of this.
36. Lastly, I note that Mrs Y believes she had been deprived of her right to bring her complaint through the IDRP. While the Council did not accept Mrs Y's complaint on the basis that she had accepted a full and final settlement of her equal pay claim, Mrs Y still had the opportunity to bring her complaint to my Office. So, I cannot see that this has caused inconvenience. I also acknowledge that the SPPA did not review her complaint under stage two of the IDRP. However, as SPPA is not party to this complaint, I make no comment on this.

Directions

37. To put matters right, within 28 days of the date of this Determination, the Council shall:-
- pay £500 to Mrs Y, in recognition of the significant distress and inconvenience its maladministration has caused;
 - inform the SPFO that Mrs Y's Compensation Payments should have been treated as pensionable, under Regulation 12 of the 1998 Regulations;
 - consider, with the SPFO, how to rectify the calculation of Mrs Y's future pension payments on the basis that the Compensation Payments are pensionable; and
 - calculate, with the SPFO, and pay to Mrs Y, the arrears of pension she is due, from 20 March 2014 to the date of this Determination, based on the difference between the pension payments she received and the payments she would have received had the Compensation Payments been treated as pensionable, plus simple interest at the Bank of England base rate.

Anthony Arter

Pensions Ombudsman
23 September 2021

Appendix 1

Extracts from the Council's Compromise Agreement

"SOUTH AYRSHIRE COUNCIL COMPROMISE AGREEMENT

between

- (1) South Ayrshire Council, County Buildings, Wellington Square, Ayr (hereinafter referred to as "the Employer"); and
- (2) (Employees Name) (hereinafter referred to as "the Employee")

WHEREAS the Employee and Employer desire to settle fully the Employee's Equal Pay Claim against the Employer:

It is hereby agreed by and between the Employer and the Employee as follows:

1. DEFINITIONS

In this Agreement the following words and expressions shall have the following meaning

Compensation Date will be within ten working days of the Employee's compliance with clauses 2.1.1 and 2.1.3 (where applicable).

Compensation Payment means (Amount Due) which is net of income tax and national insurance liability.

Equal Pay Claim means the Employee's claim or entitlement to claim compensation (whether by way of payment or damages) for breach of the Equality Clause whether by way of equal pay claim, sex discrimination claim, unlawful deduction from wages or breach of contract, or otherwise as at the date of the execution of this Agreement.

Equality Clause means the clause referred to in section 1(2) of the Equal Pay Act 1970, as amended.

2. COMPENSATION PAYMENT AND RENUNCIATION

2.1 Without admission of liability and subject to:

- 2.1.1 the Employer receiving the principal of this Agreement signed by the Employee and with the attached relevant independent advisor's certificate signed by the Employee's adviser.
- 2.1.2 the Employee's compliance with her obligations under this Agreement; and
- 2.1.3 the Employee, or her representative, providing written evidence to the Employer that any Equal Pay Claim that she may have presented, or had presented on her behalf, to an Employment Tribunal or Court of Law has been withdrawn, the Employer shall pay the Compensation Payment to the Employee on the Compensation Date.

- 2.2 Subject to clause 2.3, the Employee accepts the Compensation Payment in full and final settlement of all present claims competent to the Employee against the Employer arising from the Employee's Equal Pay Claim, whether under the Equal Pay Act 1970 (as amended), the Sex Discrimination Act 1975 (as amended) (the "SDA"), Part II of the Employment Rights Act 1996 (the "ERA"), or under contract, statute, at common law or under legislation of the Council of the European Union.
- 2.3 Subject to clause 2.4, the Employee hereby renounces her whole right, title and interest to present a complaint to, or institute or continue any proceedings before an Employment Tribunal or Court of Law seeking damages, compensation, payment or other statutory or common law remedy in connection with or arising out of her Equal Pay Claim.
- 2.4 This Agreement applies to any claim for physical or psychiatric illness or injury or stress related claims which the Employee has or may have against the Council arising out of her Equal Pay Claim but does not apply to any claim by the Employee relating to a latent personal injury.
- 2.5 If the Employee's rights in respect of her Equal Pay Claim have not been validly excluded by the provisions of this Agreement (which is not admitted) and if the Employee exercises any such rights and an Employment Tribunal or Court of Law or other competent authority shall find that the Employee is entitled to any remedy, then if a monetary award is made the Employer will be entitled to set off the Compensation Payment against any such monetary award in diminution or total extinction thereof and the Employee will repay the Employer the balance (if any) of the Compensation Payment remaining after the application of such a set off.

3. BREACH OF AGREEMENT

If at any time after the date of signing this Agreement but before payment of the Compensation Payment the Employee has breached any of her obligations in terms of clauses 2.1, 2.2 or 2.3 of this Agreement, the Employer will be released from its obligations to pay the Compensation Payment in terms of this Agreement. If at any time after the date of signing of this Agreement and after the Compensation Payment has been paid to the Employee, the Employee has breached clauses 2.1, 2.2 or 2.3 of this Agreement, the Employee will repay the Compensation Payment within 14 days of a demand to do so from the Employer.

4. TAX

The Employer hereby undertakes to be responsible for any Income Tax, National Insurance Contributions, interest and/or penalties thereon arising in respect of the Compensation Payment or any benefits provided pursuant to this Agreement and the Employer will indemnify and keep the Employee indemnified on a continuing basis against all liability together with any reasonable costs and expenses incurred by the Employee, provided that no payment shall be made to the HM Revenue & Customs, or other competent authority, without particulars of any proposed payment being given to the Employer and the Employer being given the opportunity at its own expense to dispute any such payment.

5. INDEPENDENT LEGAL ADVICE

The Employee declares and acknowledges that, before signing this Agreement, she received independent legal advice from a qualified lawyer as to the terms and effects of this Agreement and, in particular, its effects on her ability to pursue her rights before an Employment Tribunal or a Court of Law. The qualified lawyer who has so advised the Employee is detailed below and is a relevant independent advisor who holds a practising certificate.

The lawyer has confirmed to the Employee, all in terms of the relevant independent advisor's certificate annexed that there is in force and was at the time she received the advice referred to above, a policy of insurance covering the risk of a claim by the Employee in respect of loss arising in consequence of that advice.

Name of relevant independent advisor:.....

Firm:

Address:

6. CONFIDENTIALITY

Both parties agree that the compensation payment and terms of the agreement will remain confidential between the parties and will not be revealed to any third party other than their respective professional advisors, Her Majesty's Revenue & Customs or as may be required by law.

7. ACKNOWLEDGEMENT

The Employee declares and acknowledges that she has carefully read and fully understood all of the provisions of this Agreement and voluntarily agrees to and intends to be legally bound by all its terms and in particular she acknowledges that this Agreement is a compromise agreement within the meaning of Section 77(4A) of the SDA and Section 203 of the ERA and that by entering into this Agreement the Employee has agreed not to institute or continue proceedings before an Employment Tribunal or the courts arising out of her Equal Pay Claim.

8. COMPLIANCE

The conditions regulating this Agreement under Section 77(4A) of the SDA and Section 203 of the ERA are intended to be and have been satisfied in relation to this Agreement.

9. ENTIRE AGREEMENT

The terms of this Agreement constitute the entire agreement and understanding between the parties and it supersedes and replaces all prior negotiations, agreements, arrangements or understandings (whether implied or expressed, orally or in writing) concerning the subject matter hereof all of which are hereby treated as terminated by mutual consent.

10. JURISDICTION

PO-29311

The terms of this Agreement are governed by and are to be construed in all respects in accordance with Scots Law and the Employer and Employee hereby agree to submit to the exclusive jurisdiction of the Scottish Courts.

Signed

(the Employee)

Dated

Signed

(Employee's Relevant Independent Advisor)

Dated

Signed

(for and on behalf of the Employer)

Dated

SOLICITOR'S CERTIFICATE

I hereby certify as follows:-

1. I am a Relevant Independent Advisor holding a current practising certificate.
2. Before (the "Employee") signed the Compromise Agreement to which this certificate is annexed, I provided independent advice to the Employee on the terms and effect of the Compromise Agreement with South Ayrshire Council (the "Council") and in particular its effect on the Employee's ability to pursue the Employee's rights before an Employment Tribunal.
3. I am not employed by and not acting (and have not acted) in relation to this matter for the Council or any associated employer.
4. When I gave the advice referred to above, there was in force a policy of insurance or an indemnity provided for members of a profession covering the Employee in respect of loss arising in consequence of the advice I have given.

Signed Dated

Name of relevant Independent Advisor :

Firm:

Address:

APPENDIX

SOUTH AYRSHIRE COUNCIL

EQUAL PAY – COMPENSATION PAYMENTS

2006 - 2007

South Ayrshire Council is fully committed to the principle of equal pay and is currently engaged in an exercise to rationalise pay and grading arrangements to meet current equal pay legislation and to reflect the need for modern, flexible working practices.

Implementation of the national Scottish Joint Council Single Status Agreement underpinned by a robust and non-discriminatory job evaluation system is a key element of this process and will involve bringing together terms and conditions of employment, including pay, for all former Manual Workers and APT&C staff.

Within South Ayrshire Council it is anticipated that changes to pay and grading will take effect from 1st April 2007 although actual assimilation to the new grades will take place later in the year. In addition, changes to other terms and conditions will be subject to negotiation with trade unions and implemented over the longer term.

However, the Council also recognises that in certain areas there is a potential historical inequality relating to pay and grading which requires to be addressed immediately. Therefore, the Council has developed a compensation payment package, which will be offered to those employees who are affected by the potential pay inequality identified under equal pay legislation.

This is in keeping with other local authorities across Scotland who have developed similar packages. However, as circumstances are different in each Council compensation payments offered will differ across the country.

The Council is fully committed to ensuring any historical inequality is addressed however this will result in a significant cost to the Council and therefore the compensation payment package reflects the need to ensure a fair and equitable offer to employees yet allows the Council to continue to provide essential services and safeguard jobs in the future.

As you commenced your employment with South Ayrshire Council during the period 1st April 2006 – 31st March 2007 you will be entitled to a payment in accordance with your service during this period. The actual amount you are entitled to is outlined in your Compromise Agreement which is enclosed with this pack.

Details of the Offer

Employees identified as being eligible for compensation will be offered a financial payment based on contracted hours worked and length of service in the relevant post.

Payments will be net of employee costs and the Council will pay tax and national insurance contributions. Therefore, the amount offered is cash in hand.

The payments on offer are subject to a maximum payment which will not be exceeded.

Payments on offer will be dependent on the grade you are currently employed and split between:

- Manual Worker 1 and 2,
- Manual Worker 3 and 4,
- Manual Worker 5 and above

Who is eligible for Payment ?

You will be eligible for the offer of a compensation payment if you are employed in a Manual Worker grade within the following areas:

- Cleaning
- Catering
- Home Care
- Community Alarm Attendants
- Mobile Toilet Attendants
- Play Leaders and Assistants

The compensation payment will be based on your contracted hours as at 1st April 2006.

If you have more than one contract eligible for an offer of compensation you will receive more than one payment but the total amount of compensation payable will not exceed that made to an employee on full-time (37) hours.

The amounts payable have been calculated using a formula recommended at national level and is based on your grade, hours worked and your contracted rate of pay.

Compromise Agreement

If you want to accept the offer of a compensation payment you will be required to sign a legally binding Compromise Agreement. A copy of the agreement detailing the amount you are being offered is enclosed with this information pack.

Before signing this agreement, it is recommended that you seek independent legal advice. The Council will make available free and impartial independent legal advice which you will be entitled to take advantage of.

The Council has arranged for legal advisers from an independent legal firm to provide advice and guidance to employees. A number of presentations have been arranged where legal advisers will be available to give advice on an individual and collective basis.

Using Solicitors

You have the right not to accept the offer made by the Council and engage a solicitor who will advise on any potential claim to an Employment Tribunal.

However, should you wish to consider this you should be aware that:

- There is no guarantee you will win your case and you could end up with nothing.
- It could take a considerable time for the case to be heard and there is no guarantee that any compensation payment awarded will be more than the current offer by the Council.
- You may be liable for all tax and national insurance deductions.
- You will be charged legal fees by the solicitor(s) acting on your behalf.
- Should you decide to engage a no win/no fee lawyer then at some stage of the proceedings change your mind you may still be required to make a significant financial payment to the solicitor.

Why should I accept the Council Offer?

There are several reasons why the Council offer should be seriously considered:

- You will receive a guaranteed (cash in hand) payment.
- The Council will pay your income tax and national insurance contributions.
- You will not be required to pay any legal fees. There will be no need to go through a lengthy and costly Tribunal process after which you may end up with nothing.
- You are likely to have to make a payment to any solicitor instructed which is likely to be a sizable part of any award you receive.
- You will be helping the Council protect services and jobs.
- You will receive your cheque immediately after the presentation.

What happens next?

It is vital that all employees have sufficient information to allow them to decide on how to proceed.

To receive your payment, you will need to attend a short presentation.

The presentation by representatives from the Council and Trade Unions will detail the cash in hand offer and allow further questions to be asked.

Details of the meeting you should attend is [sic] outlined in the letter enclosed with this pack. Please note that dates have been allocated to employees within specific areas and you should therefore attend the presentation relevant to your location.

In addition, independent solicitors will be available to advise on an individual basis on the offer made by the Council and to assist in completing the compromise agreement.

If you wish to accept the offer you need to sign the agreement which is then signed by the solicitor and an authorised signatory of the Council.

Questions and Answers

Q When will I get my payment ?

A The Council is committed to making payments as soon as is practicable and your cheque will be available at the end of the presentation you have been asked to attend.

Q Will this payment have any effect on future pay rises ?

A No, the annual cost of living pay increase is not affected and will continue to be negotiated separately.

Q Should I take legal advice ?

A Impartial, independent and free legal advice will be made available to every employee who has been identified as being eligible for a compensation payment. It is your choice whether to accept this offer or to seek your own independent legal advice which you will be obliged to pay for yourself.

Q Will this payment affect my tax credits ?

A Because the Council has entered into a special arrangement with HM Revenues and Customs (Inland Revenue) to pay tax and NI contributions the payments will not appear in your P60 tax form. Therefore, we believe there will be no effect on any benefits or tax credits. This includes Council Tax and Housing Benefits. However, you may wish to contact your local benefits/tax/housing office to confirm this.

Also, you should note that employees will not be required to report this payment to the Inland Revenue for any purpose.

Please note these arrangements apply only to compensation payments.

Q What will happen if I can't attend the presentation.

A If you are unable to attend the presentation allocated to you contact the Job Evaluation Project Team ."

Appendix 2

Extracts from The Local Government Pension Scheme (Scotland) Regulations 1998 [1998/366]

“Chapter III Contributions

11 Members' contributions

- (1) Each member shall make contributions to the Scheme at the standard contribution rate on his pay in each employment in which he is an active member (but see regulation 14).
- (2) The standard contribution rate for a member is six per cent, unless he is a member with lower rate rights.
- (3) The standard contribution rate for a member with lower rate rights is five per cent.
- (4) A person who is an active member in more than one employment must make contributions for each of those employments.
- (5) The appropriate administering authority may decide the intervals at which the contributions are made.
- (6) For this regulation any reduction in pay by reason of the actual or assumed enjoyment by the member of any statutory entitlement during any period away from work shall be disregarded.
- (7) Regulations 15 to 17 affect this regulation.

12 Meaning of “pay”

- (1) An employee's “pay” is the total of—
 - (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment;
 - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.
- (2) However, an employee's pay does not include—
 - (a) payments for non-contractual overtime;
 - (b) any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment ;
 - (c) any payment in consideration of loss of holidays;
 - (d) any payment in lieu of notice to terminate his contract of employment;

- (e) any payment as an inducement not to terminate his employment before the payment is made;
 - (f) any amount treated as the money value to the employee of the provision of a motor vehicle or any amount paid in lieu of such provision (but see paragraphs (8) and (9));
 - (g) any compensation paid under the Local Government (Compensation for Reduction of Remuneration or Reorganisation) (Scotland) Regulations 1995.
- (3) For regulation 11, the pay of a part-time employee for any period is the pay he would have received if during that period he had worked the contractual hours.
- (4) However, paragraph (3) does not apply to periods during which the employee was away from work by reason of illness or injury with reduced or no pay.
- (5) If a Scheme employer agrees with the bodies or persons representative of any description of employees the method for determining the whole or a specified part of the pay of employees of that description for the period during which the agreement applies, the pay of a member who is such an employee is the amount so determined.
- (6) A Scheme employer must notify in writing every member affected by such an agreement.
- (7) That notification must include a conspicuous statement as to the place where he may obtain information about details of the agreement.
- (8) Where—
 - (a) a member's contribution under regulation C2 or C3 of the 1987 Regulations for a period including 31st December 1992 was based on remuneration which for the 1987 Regulations as then in force included an amount representing the money value to him of the provision of a motor vehicle; and
 - (b) immediately before the commencement date his remuneration for the 1987 Regulations included such an amount, then his pay includes such an amount.
- (9) However, paragraph (8) shall cease to apply if—
 - (a) he leaves employment with the employing authority who were employing him on 31st December 1992 (otherwise than as a result of a transfer to another Scheme employer which is beyond his control); or
 - (b) he is neither provided with a motor vehicle nor receives an amount representing the money value to him of the provision of such a vehicle.
- (10) No sum may be taken into account in calculating pay unless income tax liability has been determined on it.

Appendix 3

Extracts of the Technical Bulletin No. 13 dated October 2005 issued by the SPFO

“TO ALL EMPLOYERS WITH MEMBERS IN THE LOCAL GOVERNMENT PENSION SCHEME. PLEASE ENSURE COPIES ARE PASSED TO RELEVANT STAFF

Equal Pay Settlements

Introduction

We are aware that a number of our participating employers, Local Authorities in particular, are considering equal pay claims. It is essential that the pensions treatment of any payments made in respect of these claims is clarified ex ante, in order to avoid any dispute or levy of additional contributions after payment is made.

The purpose of this Technical Bulletin is to bring this matter to employers' attention and to provide some guidance.

Issues

The pensions issues involved are:

- should pension contributions be deducted from settlement payments made; and
- should any payments made count in the calculation of final salary for those employees nearing retirement?

The key to both of these issues is whether any payments made constitute part of an employee's pay.

As ever, our first recourse in answering this question is to the regulations.

Regulations

The Local Government Pension Scheme Regulations in their entirety can be accessed via <http://www.lg-employers.gov.uk/timeline/Latest.htm>

The relevant Regulation in this instance is regulation 12 of the LGPS (Scotland) Regulations 1998 (as amended). This is reproduced in full in the appendix to this Bulletin.

In summary, regulation 12 provides that all payments (other than those specifically excluded at 12(2)) made –

- to an employee
- for his/her own use
- in respect of his/her employment
- form part of his/her pay for pensions purposes.

Assessment

Our initial assessment is that equal pay settlements are likely to fall within this definition of pay, particularly as there is no explicit reference to compensation payments within the regulation and they would therefore be assessed to fall within “other payments” at 12(1)(a) and be treated as pay.

However, the details of settlement may vary from employer to employer and even within employers, and ultimately the correct treatment of each payment (whether individual or bulk) may be dependent upon the specific terms of the settlement.

Employer’s Responsibility

In the first instance it will be the responsibility of the employer to determine whether or not a payment constitutes pensionable pay in terms of the regulations.

There is one further feature of the regulations that may be important in this regard. The final part of regulation 12(10) provides that “No sum may be taken into account in calculating pay unless income tax liability has been determined on it.”

Employers’ pensions treatment of settlement payments may therefore be subject to their tax treatment of them.

SPFO

Employers should advise SPFO of any settlement payments they are making together with their pensions treatment.

Where payments are treated as pensionable the employer should deduct employee contributions, add employer contributions, and make payment to SPFO in the usual way. The employer will also need to provide a breakdown of the payment for each individual member together with details of the period covered by the payment so that SPFO can apply the correct amounts to the individual years to ensure that final salary calculations are completed accurately.

Where payments are treated as non-pensionable, SPFO must still be advised of the payment details, together with a clear explanation, with reference to the regulations, of the treatment so that subsequent disputes with individual members can be avoided.

Please contact [...] if you require any further information.

Summary

- Equal pay settlements may be pensionable.
- Responsibility for determining the treatment lies in the first instance with employers.
- Employers should initially decide their treatment with reference to Regulation 12 of the LGPS(S) 1998 Regulations.

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- The tax treatment may be important in determining the pensionable treatment.
- SPFO should be advised of the details of any payments.
- Please contact SPFO if you require any further information.

Appendix: Excerpt from LGPS (Scotland) Regulations 1998 (as amended) 1998 No. 366 (S.14)

The Local Government Pension Scheme (Scotland) Regulations 1998 ...”