Ombudsman's Determination

Applicant	Mr N
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Oxfordshire County Council Pension Fund (**OPF**)

Complaint Summary

1. Mr N complained that OPF incorrectly brought his pension benefits into payment in February 2018, without his instructions, and with arrears backdated to January 2011.

Summary of the Ombudsman's Determination and reasons

2. The complaint is partially upheld because OPF caused significant distress and inconvenience to Mr N.

Detailed Determination

Material facts

3. Mr N was employed by Oxfordshire County Council (**OCC**) and joined the Scheme on 7 October 1994.

4. On 2 January 1995, he left employment and became a deferred member of the Scheme. He also had prior membership in the Scheme from 29 September 1975 to 1 July 1984.

5. On 30 January 1995, OPF wrote to Mr N and provided him with the value of his deferred pension benefits. It confirmed that the payment date for his benefits was January 2011, at age 61.

6. OPF sent Mr N his annual benefit statement in June 2005. Similar statements were issued to him each year. These statements explained that his pension benefits were payable from January 2011.

7. In November 2009, OPF wrote to Mr N in response to a query about his pension benefits. In this letter, OPF reminded Mr N that his pension was due for payment in January 2011.

8. On 9 September 2010, OPF sent a further letter to Mr N confirming that his pension benefits were due to be brought into payment in January 2011. The letter included Retirement Declaration Forms (**RDFs**) and a statement of his benefits. The RDFs said:-

- His pension was due to be put into payment from January 2011.
- Before it could pay the pension, Mr N must complete all parts of the form, otherwise payment would be delayed.
- Mr N must provide his passport or birth certificate.

9. OPF sent further letters to Mr N chasing the return of the RDFs on 4 February 2011 and 11 November 2011. In a further letter on 11 July 2012, an officer from OPF said:

> "As I have not received your completed RDFs, I am unable to pay your pension benefits and I have closed your file. You can elect to bring your pension benefits into payment at any time by asking for a revised quotation. Payment must be made by your 75th birthday."

10. On 1 October 2013, Mr N queried his latest deferred benefit annual statement. OPF responded to his query and explained that his deferred pension benefits were due to be brought into payment in January 2011 and must be paid from that date. OPF told him it would send new RDFs and an updated statement.

11. In response, Mr N told OPF that he did not realise he had to return the RDFs. He thought he had properly deferred his pension indefinitely. He wanted to defer payment of his pension benefits until he reached state pension age or left employment. He would be 65 in January 2015.

12. On 10 October 2013, OPF responded and explained to Mr N that the payment of his pension could not be deferred beyond January 2011. It said that when he decided that he wanted his pension, he should return the completed RDFs. OPF would then be required to pay his pension arrears back to January 2011 and tax the payment according to the year in which it related. It sent Mr N another set of RDFs on 17 October 2013, but again received no response.

13. In February 2015, Mr N contacted OPF, asking for an estimate of his pension benefits. OPF told him again that his pension was due for payment in January 2011 and sent him another set of RDFs. OPF received no response from Mr N.

14. On 12 August 2016, Mr N asked OPF for a transfer value for his pension. OPF replied that it was not possible to transfer his pension to another scheme as he had reached his normal pension age. OPF explained that his only option was to receive his pension. When he wanted to take it, he should ask OPF to send him the RDFs.

15. On 15 December 2017, Mr N asked OPF for a forecast of his benefits as he intended to retire at age 68, in January 2018. OPF then provided a further set of RDFs and a

forecast, calculated on the basis that he became entitled to his pension in January 2011, with adjustments for annual increases.

16. Mr N completed the RDFs on 11 January 2018 and returned them to OPF. The RDFs were headed “Pension payable from January 2011”.

17. On 23 January 2018, Mr N called OPF and asked about the timetable for paying his pension benefits. OPF explained to Mr N that a future date was not relevant as his pension benefits would be backdated to January 2011. Payment would be made once the calculations had been completed and checked.

18. On 31 January 2018, OPF sent a confirmation letter to Mr N and provided him with a breakdown of the payments to be made.

19. The payments were subsequently paid as follows:-

- 8 February 2018, £8,545.75 which was Mr N’s tax-free lump sum, including interest.
- 28 February 2018, £22,455.65 which was Mr N’s gross pension arrears backdated to January 2011. This payment was subject to a 40% tax charge of £8,982.00 based on the tax code OPF was provided with by Her Majesty's Revenue and Customs (**HMRC**). This meant a net payment of £13,473.65 was paid.

20. Mr N called OPF on 29 March 2018 to complain. He was unhappy that his pension benefits had been backdated without his authority and that his pension arrears had been taxed at 40% as he was still in paid employment. He said that when he signed the RDF, he did not realise that his pension would be paid immediately without him having a say in the date of payment.

21. Mr N received no response to his complaint. He called OPF again in August 2018, and September 2018, raising his concerns and saying that OPF should have waited until the next tax year to pay him. He thought the RDF was a request for information, not authority to pay the pension immediately.

22. On 14 September 2018, OPF wrote to Mr N in response to his complaint. and said:-

- It had provided clear advice that his pension benefits were due to be paid and backdated from January 2011, once the completed RDFs had been received.
- It had no flexibility regarding the taxation of the payments. They had to be taxed in accordance with HMRC guidance and he should follow up his concerns with HMRC directly.
- It accepted that the RDFs did not state that his pension would be put into payment when he completed them. But it believed that the information provided on the RDFs did not leave Mr N with any doubt that his benefits would be paid in accordance with his instructions. There was no suggestion that he wanted payment to be made later.

- In addition, OPF set out a timetable showing the dates when it had corresponded with Mr N about his pension.

23. Mr N did not agree with OPF's response. He said that he had spoken with HMRC who said that OPF should reclaim the pension payment and then re-issue it in the new tax year. Mr N asked OPF if it would accept the return of the pension payment in line with the suggestion from HMRC and meet him to discuss it.

24. OPF responded in October 2018 and explained that it would seek further guidance on the matter and would respond when it had received the advice. It asked Mr N if he was able to provide written confirmation of HMRC's suggestion. Mr N was unable to provide written confirmation.

25. Between October 2018 and December 2018, OPF corresponded with Mr N regarding the backdated payment of his pension. In a letter of 29 November 2018, OPF explained that the Local Government Pension Scheme Regulations 1995 (**1995 Regulations**), did not allow Mr N to defer his pension and OPF had a legal obligation to put it into payment from January 2011. OPF did not uphold Mr N's complaint and explained that its responses would be treated as the stage one response under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

26. Mr N remained unhappy with OPF's decision and requested a stage two response under the IDRP. OPF provided this on 25 January 2019, not upholding his complaint**.**

Summary of OPF's position

27. OPF said:-

    - It made an error in quoting the 1995 Regulations. The Local Government Superannuation Regulations 1986 (**1986 Regulations**), applied to Mr N because he became a deferred member from 2 January 1995. Relevant extracts from the 1986 Regulations and an analysis by OPF are set out in Appendix 1.

    - Its interpretation of clause E2 (6) of the 1986 Regulations meant that Mr N reached his pensionable age in January 2011, when the assumed continuous service, plus his previous service within the Scheme reached 25 years; his pension became payable from January 2011. This was in line with all its correspondence with Mr N. There was no provision in the 1986 Regulations allowing him to defer his pension.

    - Although, it had quoted the wrong Regulations in previous correspondence, all the information provided to Mr N in terms of his pension and when it was payable was accurate. He has suffered no financial or non-financial losses as a result of its correspondence with him.

    - The only reason Mr N's pension benefits were not brought into payment earlier was because he had failed to complete and return the RDFs. The RDFs provided sufficient information to make him aware that his pension would be generated by following the instructions.

- Two tax manuals produced by HMRC, namely Pensions Tax Manual Reference PTM062320 (**Tax Manual One**), and Employment Income Tax Manual Reference EIM74103 (**Tax Manual Two**), made it clear that delaying the payment until the new tax year, in April 2018, would have had no impact on the size of the "ultimate" tax bill (Relevant extracts from Tax Manual One and Tax Manual Two are summarised in Appendix 2).

- There was no benefit with the proposal put forward from HMRC as it would not change the overall tax due. Making the payment as soon as it had received the completed RDFs did not lead to a financial loss for Mr N. A tax liability is calculated at the point the liability becomes due, rather than at the point it is paid.

- It had provided Mr N with a breakdown of his pension benefits that were due, and tax paid, in each of the tax years from 2011 to 2018. This was based on him being a 40% taxpayer for each of the years. It explained that if he paid tax at a different rate in any of the years covered by the arrears, he should provide this information to HMRC to establish the true tax liability due for each year. HMRC could then determine if the payment made in February 2018 was correct, in relation to the taxation position.

- It was not aware of the FAQ Leaflet which Mr N had referred to and had no record that any such leaflet was sent to him. Any leaflet that explained the information Mr N described would not be consistent with pension legislation.

- The letter that OPF had sent to him on 14 September 2018, was consistent with its stage one response. Instead of accepting fault, this made clear that Mr N's complaint was not upheld.

- Its communications were clear. They all complied with regulatory requirements, including the issue of deferred benefit statements.

- It had explained to Mr N that he needed to complete the RDFs to enable it to bring his pension into payment. The RDFs were not complicated to complete. Mr N did not raise any issue with completing them, other than a wish to delay taking his pension beyond January 2011. OPF had already told him that this was not possible under the1986 Regulations.

- There was no evidence that OPF had done anything wrong or directly caused any distress or inconvenience to Mr N. Any finding of maladministration would set a precedent, at a cost to the public purse, as well as rewarding non-compliance with standard administrative procedures.

- If Mr N suffered any distress and inconvenience, it was because he did not accept that he could not defer his pension, under the 1986 Regulations, until he thought he would have a lower tax liability.

Summary of Mr N's position

28. Mr N said:-

- OPF's Frequently Asked Questions Leaflet (**the FAQ Leaflet**) led him to believe that he would not have to claim his pension benefits until after he had retired on 16 March 2018. If OPF had indicated from the outset, that his pension had to begin in 2011, he could have taken early retirement then, due to his ill health. It was not unreasonable for "the man on the Clapham omnibus" to suppose that pension "deferment" meant delaying actual payment until ceasing work, to avoid paying additional income tax.

- He was unhappy that his pension arrears were paid in the 2017/18 tax year. Due to the timing of the payment it was taxed at 40% as he was still working at the time.

- OPF paid his pension benefits without his authority and without notifying him. He was entitled to defer the payment of his pension to a date after he retired. He wanted to take his pension from 6 April 2018, in the new tax year.

- OPF's letter of 14 September 2018, explained that the RDFs gave it no authority to generate his pension payment. He believed that this was an admission of fault by OPF.

- The 1995 Regulations and definition of NRD did not apply to him as they only came into force after he had left the Scheme, on 2 January 1995. He mistrusted OPF's calculations of his NRD, as his active pensionable service was less than nine years.

- At no time, between January 2011 and March 2018, did OPF inform him in writing that his pension was "in payment" from 2011. So OPF did not act in his best interests.

- In April 2018, he had contacted HMRC who advised him to return his pension payment to OPF and to ask OPF to repay it in his post retirement tax year (2018/19). OPF refused to do so, without explanation.

- "Payable" normally means "capable of being paid", not "must be paid". He was not told that he had to accept the pension from January 2011.

- He understood that OPF's letter of 11 July 2012 had confirmed his entitlement to "defer" his pension beyond January 2011 because it stated (a) that he could elect to receive his pension "at any time by asking for a revised quotation" and (b) "payment must be made by your 75th birthday".

- Had OPF given him the option to receive his pension benefits between November 2012 and March 2014, when he was not a higher rate taxpayer, he would have avoided a financial loss of over £9,000. He had requested a formal meeting to discuss this but OPF had refused.

- The reason he did not return the RDFs earlier than 2018 was because he was not ready to retire, and honestly believed that he had properly deferred his pension until he stopped working.

- The unnecessary delays in dealing with his complaint also had a substantial effect on him.

Conclusions

29. I accept that the 1986 Regulations apply to the payment of Mr N's pension, as he left the Scheme before the 1995 Regulations came into effect, as shown in Appendix 1.

30. Mr N's normal pension age (**NPA**) was correctly calculated as 61, in accordance with clause E2 (1)(a) of the 1986 Regulations. This was the age that his membership as an active and deferred member reached 25 years. Mr N reached age 61 in January 2011.

31. The definition of NPA in the 1986 Regulations is capable of various interpretations, but I find that OPF's interpretation is reasonable, given that the Scheme was set up to administer payments in this way.

<u>Deferring the pension</u>

32. Regulation E (6) of the 1986 Regulations states that preserved benefits become payable from the date on which the person attains pensionable age, it does not allow members to defer payment of their retirement benefits or require a member to consent before payment is made. Payable for the purposes of the Regulations means 'requiring to be paid'. OPF was correct not to allow Mr N the option to defer the payment of his pension benefits as doing so would have been contrary to the 1986 Regulations.

33. If Mr N had thought that he was able to defer his pension, he should have asked OPF to clarify this or responded to one of its letters. It was made clear to Mr N that his pension was payable from January 2011 on more than one occasion. Mr N may have thought "retirement" meant retirement from any paid employment. If that was the case, he should have queried it with OPF. The meaning of "retirement" was made clear in guidance available on the Scheme website (see Appendix 3). It is now normal practice for the Scheme to publish guidance online and Mr N could have accessed this through any publicly available facility. However, if he was unable to use the internet he could have asked the Scheme for assistance.

<u>Payment without authority</u>

34. I do not agree with Mr N's assertion that OPF accepted fault, in its letter of 14 September 2018, for paying his pension benefits without his authority. This letter was part of the Scheme's stage one IDRP response that rejected Mr N's complaint. OPF did not accept any responsibility or fault.

35. In any event, Mr N's actions following the return of the RDFs indicated that he was aware that completing them would trigger payment of his pension. He called OPF on 23 January 2018, to query the timetable for the payment of his pension benefits. He was informed that payment would be made once the calculations had been completed. OPF also wrote to Mr N on 31 January 2018, setting out the payments to be made, including arrears. There is no evidence that Mr N had contacted OPF to question this.

Deduction of tax

36. Mr N claims that he suffered a financial loss of £9,080.40 because his pension arrears were paid in the 2017/2018 tax year when he was paying tax at a rate of 40%.

37. The guidance in Tax Manual one and Tax Manual two indicates that the amount of tax due on the pension arrears is not dependent on when it was paid, but when it was due to be paid. So, it was reasonable for OPF to refuse to meet with Mr N to discuss this aspect. OPF had no discretion in this matter and it was for Mr N to contact HMRC concerning his own tax affairs and not OPF's.

38. Mr N's pension benefits were paid and backdated in accordance with the 1986 Regulations and OPF correctly deducted the relevant tax, as required by HMRC.

Maladministration

39. I accept Mr N's claim that, as a layman, he genuinely thought that, from OPF's letters, he could ask for his pension to be paid at any time, as it was "deferred."

40. OPF asserted that it had complied with all regulatory and current standards of practice, but I find that Mr N clearly misunderstood the technical issues. I am satisfied that he did not understand the concept of his pension being rolled up from 2011, even though he had not received it and that his tax liability arose each year.

41. OPF should have made more effort to enquire why Mr N did not return the RDFs. No correspondence was issued at all between October 2013 and February 2015 except his deferred benefit statements. Mr N then asked for a transfer value in August 2016, showing that he did not understand that his pension was effectively in payment from 2011 and that he was confused. OPF could have provided Mr N with statements showing this; instead, it continued to issue deferred benefit statements which did not make clear that Mr N's only option was to take his pension benefits from the Scheme and that, when he did so, the payment would be backdated to 2011. That must have been confusing to Mr N. It also referred to the 1995 Regulations in the IDRP instead of the 1986 Regulations, that is likely to have caused further unnecessary confusion. Had OPF provided clearer information and not allowed the considerable gap in communicating with Mr N, the current difficulties may have been avoided. I find that this amounted to maladministration.

42. Mr N has not suffered any financial loss as a result of OPF's maladministration, but I am satisfied that he has suffered significant distress and inconvenience, at a time when he was also suffering from serious ill health.

43. I uphold Mr N's complaint in part and make the following directions.

Directions

44. Within 28 days of the date of this Determination, OPF shall pay £500 to Mr N in recognition of the significant distress and inconvenience it has caused.

Anthony Arter

Pensions Ombudsman
8 December 2020

Appendix 1

The Local Government Superannuation Regulations 1986[1986/24]

E2 Entitlement to retirement pension and retiring allowance

"(1) Subject to paragraphs (3) to (10), when a person ceases to hold a local government employment he becomes entitled in relation to that employment to an annual retirement pension and a lump sum retiring allowance if—

(a) he has attained the age of 60 years and the total of his reckonable service and any qualifying service is not less than 25 years, or

(b) the total of his reckonable service and any qualifying service is not less than 2 years or regulation C12(11)(e) applies to him and in either case—

(i) he is incapable of discharging efficiently the duties of that employment by reason of permanent ill-health or infirmity of mind or body, or

(ii) he has attained the age of 65 years, or

(iii) he has attained the age of 50 years and one of the conditions in paragraph (4) is satisfied, or

(c) neither sub-paragraph (a) nor sub-paragraph (b) applies and—

(i) the total of his reckonable service and any qualifying service is not less than 2 years, or

(ii) he makes an election under regulation C12(4)(b) or regulation C12(11)(e) applies to him, or

(iii) he is treated by virtue of regulation J13(3) as having ceased to hold the employment on becoming subject in it to an approved non-local government scheme, or

(d) none of the preceding sub-paragraphs applies and he—

(i) has attained state pensionable age, or

(ii) would attain state pensionable age before the following 6th April.

(2) When a person ceases to hold a local government employment he becomes entitled in relation to that employment to an annual retirement pension if—

(a) he is not so entitled under paragraph (1)(a) to (c), or he is entitled under paragraph (1)(c) but makes an election under regulation C12(5) and receives a return of contributions (in which case he shall be treated as having ceased to hold the employment on the day before the date of receipt), and

(b) the whole or some part of his reckonable service was service in a non-participating employment or was reckonable service which relates to employment with a non-local government employer in a non-participating employment, and

(c) a period of his service in a non-participating employment came to an end by reason of the repeal of section 56(1) of the Insurance Act or by reason of the provisions of regulation 2(2) of the National Insurance (Non-participation — Assurance of Equivalent Pension Benefits) Regulations 1960 as modified by regulation 9(2)(a) or (b) of the Transitional Provisions Regulations , and

(d) at some time during the settlement period (within the meaning of regulation 2 of the Transitional Provisions Regulations) he became, and has remained, assured of equivalent pension benefits.

(3) Where but for the revocation of the 1974 regulations regulation E2(2) of those regulations (certain female nursing and other staff deemed to have satisfied regulation E2(1)(b)(iii) of those regulations) would have applied to a person on her ceasing to hold a local government employment, she shall be deemed to have ceased to hold the employment in the circumstances mentioned in paragraph (1)(b)(iii).

(4) The conditions mentioned in paragraph (1)(b)(iii) are—

(a) that the employing authority certify that the person has ceased to hold the local government employment by reason of redundancy or in the interests of the efficient exercise of their functions, or

(b) that the person was one of the holders of a joint appointment and his appointment has been terminated because the other ceased to hold his appointment.

(5) Benefits to which a person has become entitled by virtue of paragraph (1)(a) or (b) are payable immediately.

(6) Subject to paragraphs (9) to (11), preserved benefits become payable from the date on which the person attains pensionable age, or if earlier—

(a) from any date on which he becomes incapable by reason of permanent ill-health or infirmity of mind or body of discharging efficiently the duties of the employment he ceased to hold, or

(b) from any date after he has attained the age of 50 years from which the employing authority determine on compassionate grounds that the benefits are to become payable, or

(c) in the case of a woman, from the first date on which she both—

(i) has attained the age of 60 years, and

(ii) is no longer in any local government employment,

unless he is a man who has attained the age of 60 years and has, on or after but not more than 3 months after the date of his attaining that age or of his ceasing to be employed, whichever is the later, by notice in writing to the employing authority elected to receive payment from that date.

...

(9) A person who is entitled to preserved benefits ceases to be entitled to them—

(a) if the whole of the aggregate amount of his contributions to the appropriate superannuation fund, within the meaning of regulation C12 , has been returned to him (whether with or without interest) under that regulation or under regulation C8 of the 1974 regulations and, after receiving the return of contributions, he has no further right to reckon any reckonable service to which a transfer value accepted under regulation J8 relates, or

(b) if rights in respect of the reckonable service he was entitled to reckon in relation to the employment he ceased to hold have been transferred to a non-local government scheme by virtue of the payment of a transfer value, or

(c) if he re-enters local government employment, unless he elects to remain entitled to the preserved benefits or

(d) if the body who employed him in the employment which he ceased to hold certify under regulation E24 that on ceasing to hold it he suffered a material reduction in remuneration .

(10) An election for the purposes of paragraph (9)(c) must be made by giving notice in writing to the appropriate administrating authority, within 3 months after re-entering local government employment unless they or, where there is a change of fund, the administering authorities of both funds, allow a longer period.

(11) A person may not make an election under paragraph (6) or (7)(a)if the retirement pension to which he has become entitled—

(a) is a pension in relation to which he has a guaranteed minimum under section 35 of the Pensions Act, and

(b) would, but for regulation E1(3)(a), be reduced under regulation E3(14) to less than his guaranteed minimum pension.

Schedule 1

“Pensionable age”

A person's pensionable age is the earliest age at which (assuming continuous local government employment) he could become entitled by virtue of regulation E2(1)(a) or (b)(ii) to a retirement pension.

“**Local government employment**”

In relation to any time before 1st April 1974, the expression means employment by virtue of which the person employed was, or is deemed to have been, a contributory employee or a local Act contributor,

In relation to any time after 31st March 1974, the expression means employment by virtue of which the person employed is or has been, or is or has been deemed to be, a pensionable employee or a local Act contributor

“Preserved benefits”

Benefits to which a person—

(a) was entitled immediately before 1st March 1986 by virtue of regulation E2(1)(c) of the 1974 regulations, or

(b) has become entitled by virtue of regulation E2(1)(c),and which have not become payable…”

Appendix 2

Tax Manual One

Pensions Tax Manual Reference PTM062320.

Taxation of a scheme pension.

Paragraph 6 Schedule 31 Finance Act 2004.

Section 579A to 579D chapter 5A Income Tax (Earnings and Pensions) Act 2003.

“A scheme pension is taxable as pension income on the recipient through PAYE. The taxable pension income for a tax year is the full amount of the scheme pension under the registered pension scheme that accrues in that year, irrespective of when any amount is actually paid.”

Tax Manual Two

Employment Income Manual Reference EIM74103.

Arrears of pension.

“If a pension provider discovers a long-standing underpayment of pension, the underpayment is calculated and paid in a single sum. The provider is required to operate PAYE on the lump sum, which may give rise to higher rate liability for a pensioner who is usually a basic rate taxpayer. The pensioner should contact the tax office and supply a schedule showing the years to which underpayments are attributable. HMRC will spread the payments back over the relevant years and recalculate liability. Underpayments in the earlier years may be set-off against the resulting over-payment in the year of the lump-sum payment.

Appendix 3

Online guidance on the Scheme for Members.

“If you left the LGPS before 1 April 1998:

Your deferred pension benefits are normally payable in full at your Normal Retirement Date (NRD). Your Normal Retirement Date is different to the Normal Pension Age for members who left on or after 1 April 1998.

Your Normal Retirement Date is age 60, if by that age you would have built up 25 years membership if you had remained in the Scheme until then or the date you would have achieved 25 years membership if you had remained in the Scheme if that date falls between your 60th and 65th birthday, or age 65 if, by that age, you would not have had built up 25 years membership if you had remained in the Scheme until then.

You do not have an option to defer payment of your benefits beyond your Normal Retirement Date i.e. you have to take payment of your benefits at that date if they are not already in payment…”.