

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN**

Applicant	Mr A Davies
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	North West Leicestershire District Council (NWLDC) Leicestershire County Council (LCC)

Subject

Mr Davies has complained that his eligibility for payment of benefits under either Regulation 19 or Regulation 30 has not been properly considered. He has also complained that LCC took an excessive amount of time to consider his case under the internal dispute resolution (**IDR**) procedure.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against NWLDC to the extent that they did not give proper consideration to the payment of benefits to Mr Davies under Regulation 30. It should be upheld against LCC to the extent that they failed to provide Mr Davies with a second stage appeal decision within an acceptable timeframe.

DETAILED DETERMINATION

Material Facts

1. Mr Davies' eligibility for benefits under the LGPS Regulations was the subject of a previous complaint to the Ombudsman. This was determined in December 2011. On that occasion, the Ombudsman upheld Mr Davies' complaint and remitted the decision to NWLDC for reconsideration. This investigation concerns the subsequent review by NWLDC.
2. Mr Davies' wife was diagnosed with a malignant brain tumour in December 2009. Following surgery, she suffered a stroke and required specialised care. Unfortunately, she died in August 2010. Mr Davies resigned from NWLDC in April 2010 and left their employment in July 2010. He requested early payment of his deferred benefits on compassionate grounds (Regulation 30 – see appendix). His request was declined and that decision was the subject of the earlier determination. The Ombudsman directed NWLDC to review their policy on exercising discretion under Regulation 30 and to then review Mr Davies' case in the light of the new policy.
3. Mr Davies submitted a further request for the early payment of his deferred benefits on compassionate grounds in January 2012. This was declined in May 2012. Mr Davies also requested payment of retirement benefits on the grounds of business efficiency (Regulation 19 – see appendix) because his post had been abolished shortly after his departure. This was declined in June 2012.

Regulation 30 Application

4. NWLDC's Cabinet met, on 17 January 2012, to discuss their policy on the exercise of discretion under Regulation 30. Prior to the meeting, NWLDC obtained details of the policies adopted by other authorities. Unison were also given the opportunity to comment. They asked that the requirement for a member to have worked for NWLDC for ten years be changed. A paper was prepared for the Cabinet which outlined proposed changes to the policy.
5. The paper stated that there was a legal requirement to periodically review the policies NWLDC had in place in relation to the exercise of discretionary functions under the LGPS. It specifically stated that there was a requirement for them to review the exercise of discretion following a direction from the Pensions Ombudsman. The paper went on to say that the Council was required to have

regard to the extent to which the exercise of the discretionary powers, unless properly limited, could lead to a serious loss of confidence in the public service. The Council was also to be satisfied that the policy was workable, affordable and reasonable having regard to foreseeable costs. The latter is a requirement contained in the Local Government (Discretionary Payments) (Injury Allowances) Regulations 2011, rather than in the LGPS Regulations themselves. The paper stated that the recommendations had been drafted with due regard for all equalities legislation, on the basis of advice from a specialist pensions lawyer. An appendix to the paper explained that an employee had applied for the early release of his pension under Regulation 30. It also explained that this application had been refused and had been the subject of a successful complaint to the Ombudsman. The appendix contained a note to the effect that, in 2010, NWLDC were facing a financial challenge, the need for clarity as to what was meant by caring responsibilities would have been needed and the existing policy would not have been considered workable, affordable and reasonable.

6. The Cabinet approved the new policy which stated that they agreed to exercise discretion under Regulation 30 where all of the following criteria were met:
 - The member had worked for NWLDC for 10 years or more in total;
 - The member was aged 55-59; and
 - The member was required to provide medium to long term care, i.e. potentially no less than 2 years for a substantial period of each day, for a mentally or physically incapacitated and dependent family member whose incapacity and need for care was confirmed by the Council's independent occupational health physician.

They also agreed that they would waive any actuarial reductions if the above criteria were met. The new policy differed from the old policy only in clarifying what was meant by medium to long term care and requiring confirmation of this from NWLDC's occupational health physician.

7. Mr Davies' application under Regulation 30 was then reviewed by NWLDC's interim Head of Finance, **Mr N**. Mr Davies was asked to provide information about the level of daily care he needed to provide for his daughter and parents in July 2010. Mr Davies responded that he had been providing very little daily care for his parents in July 2010 because he was spending as much time as possible

with his wife and providing emotional support for his daughter. He confirmed that his mother had been registered blind in 2009 and his father had been diagnosed with Alzheimer's disease in 2011.

8. Mr N issued a decision on 28 February 2012. He said that Mr Davies met only one of the above criteria; that he was aged between 55 and 59 in July 2010. Mr N said that he had considered whether there were circumstances which required him to consider departing from NWLDC's policy in Mr Davies' case. With regard to Mr Davies' length of local government service and work undertaken for NWLDC, Mr N said,

“While this is very commendable, the work you undertook at the time was no more than could have been reasonably expected of a professionally qualified Section 151 Officer but who in any case had the opportunity to delegate at least some of it to his Head of Finance. Also, the Council's policy is very specific to length of service with [NWLDC] in particular rather than service in local government generally, and for these reasons I do not consider a departure from the policy is warranted on this ground.”

9. With regard to the provision of care, Mr N said that he had taken account of Mr Davies' daughter's age in 2010 and said,

“I have been provided with no evidence to suggest that the long term care you provide for her is any more than any father would undertake for his daughter.”

10. Mr N noted that Mr Davies' mother had been registered “severely sight impaired” in 2009 and went on to say that, in view of her age, he did not consider this to be a long term problem. He also said that he had not been provided with any evidence that Mr Davies had needed to provide her with care for a substantial period of each day in July 2010. Mr N said that the evidence provided in relation to Mr Davies' father was “not up to the standard of proof” which might be expected and the diagnosis had been made after Mr Davies had resigned. He went on to say that, even if the evidence was taken into account, it would not change his decision because it was “not of sufficient weight bearing in mind the policy requires independent certification by the Council's Occupational Health Physician”.

11. Mr N went on to say that he had considered any care Mr Davies had needed to provide for his wife in 2010. He said that, at the time of his application, Mr Davies' wife was being cared for in a hospice and there was no evidence that he was providing care for substantial periods of each day. Mr N also said that Mr Davies' wife's prognosis also meant that any care given was not likely to be long term in nature.
12. Mr N said that he had considered whether all of the various pieces of evidence when taken together would support a departure from the policy. He said that he had determined that this was not the case. Mr N said he had also considered the cost to the Council of paying Mr Davies' pension early and said that this amounted to £64,384. Mr N concluded,

“Bearing in mind that in formulating the policy the Council, in accordance with Regulations, has to be satisfied that the policy is workable, affordable and reasonable having regard to foreseeable costs, I believe that the intention and rationale of the Council in setting the policy was to be able to help employees with a relatively long period of service with the Council who had to retire in order to provide medium to long term care for physically or mentally incapacitated dependents.

At the time of your departure in July 2010 the Council would have been learning of the likely level of reductions in Government funding ... This placed the Council in a situation of uncertainty and one where it was likely that a very considerable level of savings would be required to be made in the short and medium term for it to be able to function properly. In other words it was facing a very challenging period of severe financial restraint – a situation which still exists.

Taking this into consideration, and bearing in mind your length of service with the Council was just a little over 2½ years when you left, I do not consider it reasonable or in the best interests of the Council or the wider council tax payers of the District to spend nearly £65,000 in agreeing to your request.”

13. Mr Davies appealed under the internal dispute resolution (**IDR**) procedure. A stage one IDR decision was issued on 24 May 2012. The decision maker upheld Mr N's conclusions. In addition, he said that he did not consider that NWLDC's policy review was defective or unsound. With regard to age discrimination in relation to the 10 years' service criterion, the decision maker said that NWLDC had taken legal advice and he was satisfied that they would not be open to claims of age discrimination. He referred to the Employment Equality (Age) Regulations 2006 and said that these contained exceptions for the provision of certain

benefits based on length of service where this fulfilled a business need such as encouraging loyalty or rewarded experience. The decision maker said that he was satisfied that Mr Davies had not been discriminated against because of his age.

14. Mr Davies appealed further. A second stage IDR appeal would usually be considered by LCC's County Solicitor. Because the County Solicitor had been involved in the previous appeal process, Mr Davies' case was referred to an external reviewer (at Derbyshire County Council) in December 2012¹. Both Mr Davies and NWLDC were given the opportunity to make submissions. The external reviewer initially said that she would respond by April 2013. She wrote to LCC, on 11 June 2013, apologising for the delay and explaining that she had been involved in local elections. The external reviewer recommended that Mr Davies' appeal be declined. Amongst other things, she acknowledged that the report to the Cabinet had not recorded the Ombudsman's previous determination, but said that this was not the purpose of the report, which was to present the revised policy for review. The decision maker also referred to Mr Davies' allegations of age discrimination. She said that, at the time the revised policy was agreed and Mr Davies' claim reviewed, the Employment Equality (Age) Regulations 2006 permitted the service criterion adopted by NWLDC.
15. LCC's County Solicitor wrote to Mr Davies, on 3 July 2013, providing a stage two decision based on the above report; a copy of which was provided for Mr Davies. The County Solicitor said that he was adopting the external reviewer's recommendation. On the question of age discrimination, he expressed the view that the 2006 Regulations had been repealed by the enactment of the Equality Act 2010. The County Solicitor went on to say that he did not consider that the requirements of the Equality Act 2010 (specifically Section 61) and the subsequent Equality Act (Age Exemptions for Pension Schemes) Order 2010 (as amended) changed the position.
16. In correspondence with Mr Davies, the County Solicitor acknowledged that his appeal had "taken longer to resolve than should have been the case". He

¹ A stage two IDR decision in respect of Mr Davies' application for benefits to be paid under Regulation 19 was issued in December 2012. LCC's County Solicitor has made the point that, had this been upheld, there might have been no need for a stage two decision in respect of Regulation 30.

apologised for this and explained that the external reviewer had been unable to respond by April 2012 as promised because of events beyond her control.

Regulation 19 Application

17. Mr Davies' claim for payment of a pension under Regulation 19 was considered by NWLDC's Director of Services & Deputy Chief Executive. He issued a decision on 17 April 2012. The key points in the decision are summarised below:

- Mr Davies' claim was based on the fact that, shortly before his employment ended, he had presented NWLDC's Chief Executive with a paper outlining options which would have allowed him and the then Head of Finance to leave and access their pensions.
- Mr Davies further asserted that his claim was supported by the fact that, shortly after he left, NWLDC undertook a restructuring exercise under which his previous post was deleted.
- Mr Davies was relying on Regulation 19(1)(b) (see appendix); namely, the NWLDC had decided, on the grounds of business efficiency, that it was in their interests for him to leave.
- Mr Davies had voluntarily resigned his post as a result of his personal circumstances; he was not made redundant or otherwise required to leave NWLDC's employment.
- The requirements of Regulation 19 had not been met.
- Mr Davies' paper had indicated that, due to personal circumstances, it was likely that both he and the Head of Finance would resign and offered four options for dealing with this.
- Mr Davies had discussed the paper with the Chief Executive and she had expressed the view that none of the options were in the best interests of the Council. Mr Davies had disagreed, but he had not pursued the matter further.
- NWLDC's current Chief Financial Officer had been asked to look at the options and had commented that, whilst they were the expected options, they were not as detailed as would be expected and the financial implications outlined were not accurate.

- Mr Davies had not pursued the proposals in his paper seriously at the time of his departure. He had not expressed the view that NWLDC should remove his post on the grounds of business efficiency clearly, if at all.
 - Even if Mr Davies had expressed this view at the time, the information to support this was incomplete and incorrect. The Chief Executive was, therefore, correct not to pursue the suggested options; they were not in NWLDC's interests at that time and would not have led to any significant savings.
 - Mr Davies had implied that it was always NWLDC's intention to remove his post.
 - Mr Davies had informed the Chief Executive of his intention to leave in January 2010 and was asked to prepare his paper. He met to discuss this with the Chief Executive in February 2010. In May 2010, there had been discussions about restructuring, but the proposals did not include removing Mr Davies' role. It had been proposed to appoint a consultant to review the management structure. He started work in August 2010. Discussions in June and July 2010 envisaged reducing the number of directors from three to two, which would not have involved the removal of Mr Davies' post. In June 2010, another director tendered his resignation. A revised management restructure proposal which recommended a reduction to one director was published on 23 August 2010. The proposed restructure was agreed by the Full Council on 28 September 2010.
 - There was no evidence that NWLDC's intention was anything other than to retain Mr Davies' post throughout his notice period.
 - It would not be appropriate to apply Regulation 19 retrospectively on the basis that Mr Davies' post was removed soon after he left. Any decision to award benefits under Regulation 19 could only be made when he was still employed by NWLDC.
18. Mr Davies appealed under the IDR procedure. On 11 June 2012, his appeal was declined at stage one on the grounds that he had not been made redundant nor dismissed on the grounds of business efficiency and, therefore, was not entitled to

benefits under Regulation 19. Mr Davies appealed further, on 14 September 2012, and his case was considered by LCC's County Solicitor. A stage two decision was issued, on 12 December 2012, declining Mr Davies' appeal.

19. Mr Davies has since retired on full benefits.

Summary of Mr Davies' Position

20. Mr Davies has made detailed submissions. It would not be practical to include them in their entirety in this document. A summary of the key points is provided below:

- He informed NWLDC's Chief Executive that the change in his personal circumstances was likely to lead to his departure in 2010. He was asked to prepare an options paper, which he presented at the end of January 2010. The Chief Executive rejected his paper and told him that she needed to retain his post.
- He resigned on 23 April 2010 and left NWLDC on 16 July 2010.
- He had worked for NWLDC since January 2008 and had over 39 years' continuous local government service.
- He requested immediate payment of his pension on compassionate grounds. This was refused in 2010 and again in 2012.
- Despite the previous determination by the Ombudsman, NWLDC have continued to treat him unreasonably and unfairly.
- NWLDC manipulated the policy review in order to retain a discriminatory criterion; namely, the 10 years' service requirement. No other Leicestershire council has a length of service requirement.
- It is perverse that a regulation intended to allow employers to relieve the suffering of employees is being utilised as a tool to retain staff.
- The real purpose of the review was to ensure that he did not meet the care criterion in respect of his daughter. He disagrees with the statement to the effect that he was providing no more care than any father for his daughter.
- There were no consultations and no equality impact assessment undertaken prior to the policy review.

- In July 2012, NWLDC's Cabinet agreed that all pension discretions apart from Regulation 30 could be exercised where there was a clear financial or operational benefit to them. There was a clear financial benefit in his case because NWLDC saved £300,000 when they abolished his post.
- The 10 years' service requirement discriminates against older people. He was aged 55 when he joined NWLDC and could never meet the requirement. It is not a legitimate or proportionate requirement. He cites *Homer v Chief Constable of West Yorkshire* [2012] UKSC.
- He disagrees that the Equality Act 2010 does not assist his case. Its primary aim is to eliminate workplace discrimination.
- NWLDC's discretions policy contains no reference to cost and yet there was a reference to the cost of paying his benefits early in the decision to decline his application. There was no mention of the saving NWLDC made when his post was deleted. There was no mention of the savings he had made personally, for example, by refusing his annual salary increment, or the saving from the deletion of his secretary's post. He believes the costs of his early retirement have been overstated, but he has been refused access to the figures used to calculate it.
- The Ombudsman's previous determination was not formally reported to NWLDC's elected members.
- NWLDC failed to determine his pension under Regulation 19.
- The paper he submitted in January 2010 included the option to delete his post and achieve significant efficiency savings. The Chief Executive rejected his proposals without proper consideration and told him that she needed to retain his post. There was no evidence to support her response.
- His options paper was submitted with a view to agreeing an early release from his role and constituted a request under Regulation 19. That request was made whilst he was in employment and remains outstanding.
- NWLDC immediately abolished his former post following his departure. They implemented a management restructure option which he had put

forward in his paper. NWLDC say this is a coincidence. It confirms the financial viability of his proposed option.

- Planning for the deletion of his post started well before his departure and demonstrates a lack of substance to the Chief Executive's response in saying she needed to retain his post.
- The process for dealing with his case has been unfair and flawed from the start. It lacked independence, openness, transparency and objectivity. The Chief Executive has appointed the people who decided his case which is contrary to the IDR procedure and unlawful.
- NWLDC have confirmed that their Chief Executive is authorised to deal with all staffing and management issues. Allowing an officer to exercise unfettered powers is poor governance and unlawful. It is a general principle of public law that powers should be used in a right and proper way. No power is of unlimited scope and is never absolute and unfettered. He cites *Credit Suisse v Allerdale Borough Council* [1997] and *Porter v Magill* [2002] 2 AC 357. In the context of the pensions regulations, the Chief Executive's use of delegated powers is contrary to the IDR procedure and unlawful.
- NWLDC sought external legal advice. He would like to know what instructions were issued to the advisers, who issued the instructions, what advice was received and how it was used. In particular, he was told that the evidence concerning his father's illness was not up to the standard of proof expected. These words are more usually associated with a court case than a pension application.
- LCC's County Solicitor should not have dealt with his Regulation 19 appeal because he had prior knowledge of the case and was predisposed to reject the appeal. It was contrary to IDR guidance which states that a decision maker should have had no previous personal involvement with the case.
- LCC took over nine months to deal with his Regulation 30 appeal. He would like to know what the County Solicitor did about the delay when the external reviewer did not respond by April 2012.

- The IDR procedure guidelines states that administering authorities may wish to consider the need for internal monitoring of IDR arrangements within their locality and a pension committee would provide an ideal forum.
- He asked LCC for statistics on the cases they had dealt with under IDR and received no response.

21. Mr Davies would like the Ombudsman to:

- agree that he should receive immediate unreduced payment of his pension, with effect from July 2010, under either Regulation 19 or Regulation 30, together with compensation for time, inconvenience, cost and additional distress suffered as a result of the way in which his case has been handled,
- instruct NWLDC to carry out a comprehensive and meaningful review of their Regulation 30 policy and their pensions applications decision making process, and
- instruct LCC to review and improve their procedures for discharging their responsibilities under the LGPS.

Summary of NWLDC's Position

22. A summary of NWLDC's submission is provided below:

- The deadline for complying with the Ombudsman's previous directions was 31 January 2012. They spoke to a member of the Ombudsman's staff and explained that, because of the timing of Council meetings and the need to obtain submissions, some additional time was required. They were told a month's extension was reasonable.
- Despite the short timescale, they did consult the recognised trade union and their response was shared with the Cabinet.
- All members of the Cabinet were in attendance on the day of the meeting.
- Their Interim Head of Finance considered Mr Davies' case in line with the revised policy as if it had been in place in July 2010. He specifically included consideration of Mr Davies' daughter's dependency and other

information concerning his parents. He concluded that Mr Davies did not meet the policy criteria and was not persuaded that a departure from the policy would be fair and reasonable.

- They had taken legal advice prior to preparing the report for the Cabinet regarding the 10 years' service requirement. They were advised that this was not discriminatory in light of the exceptions set out in the Employment Equality (Age) Regulations 2006 which were in place at the time. Exceptions are provided for where the provision of certain benefits fulfils a business need such as encouraging loyalty or motivation.
- The external reviewer at stage two of the IDR procedure agreed that the policy criteria adopted were permitted by the 2006 Regulations.
- The report prepared for the Cabinet and the fact that the matter was considered by the most senior and experienced members of the Council demonstrates that they have considered the matter correctly.
- A number of opposition members were present at the Cabinet meeting and, if they had considered the process to be flawed, they could have exercised their option to call-in the decision at a full Council meeting. This did not happen.
- The stance of other councils may be of interest, but the legality of the approach is a more relevant consideration and they took steps to assure themselves of this.
- Mr Davies was within the age ranges set out in the policy at the time of his departure. He cannot, therefore, have been discriminated against.
- The Interim Head of Finance did refer to the cost of paying Mr Davies' pension, but this was in the context of considering a departure from the policy. He considered the purpose of the policy and the requirement for NWLDC to be satisfied that the policy is workable, affordable and reasonable having regard to foreseeable costs.
- The Interim Head of Finance was appropriately qualified and experienced to consider Mr Davies' case and had no previous knowledge of Mr Davies' history.

- The Chief Executive did not consider any of the options included in Mr Davies' paper to be in the best interests of NWLDC and explained this to him. He was given the option of reviewing his paper, but he did not pursue this prior to his departure.
- The Director of Services concluded that Regulation 19 did not apply because Mr Davies had not been made redundant nor was there any other requirement for him to leave; he voluntarily resigned his post. He also concluded that the Chief Executive had been right to dismiss the options outlined in Mr Davies' paper as not being in NWLDC's best interests.
- Mr Davies simply does not meet the criteria set out in Regulation 19.
- Mr Davies' paper did not constitute a formal request under Regulation 19; it did not refer to Regulation 19.
- The Cabinet has properly and lawfully delegated responsibility for decisions made under the LGPS Regulations to the Chief Executive.
- It was not until after an external consultant had been appointed and reported, at the end of August 2010, that they began to consider removing Mr Davies' former role. The final decision was not made until the end of September 2010.
- They refute the allegation that the decision making process has been unfair and flawed. They deny any allegation of bias on the part of any of the officers involved.
- Regulation 30 makes it clear that there are two discretions which must be exercised by the employing authority. First, whether to consent to early payment (Regulation 30(2)) and, second, whether the pension should not be reduced on compassionate grounds (Regulation 30(5)).
- The decisions are separate and distinct. They are also clearly sequential. This is the approach previously adopted by the Ombudsman (PO-2535).
- The wording of the two discretions within Regulation 30 is different; the discretion in Regulation 30(5) is restricted to determining whether there are compassionate grounds for not reducing the benefits. Cost is not an issue under Regulation 30(5).

- Their policy clearly separates out the two discretions. Notwithstanding this, they have, in effect, decided to apply their discretion under Regulation 30(2) primarily on compassionate grounds.
- A published policy cannot fetter the decision making process. So, in relation to Regulation 30(2), they were required to consider whether there were other reasons for exercising their discretion. They were entitled to weigh those factors against the cost of paying the pension.
- Their published policy in relation to the exercise of their discretion under Regulation 30(2), in effect, requires a consideration of compassionate grounds. It would not be a decision lawfully open to them to consider that a member should be paid their pension early (on primarily compassionate grounds), but not dis-apply the reduction under Regulation 30(4). They could, therefore, only consider the cost of paying the full pension.
- With regard to the delay in dealing with Mr Davies' applications, they have provided a chronology of actions taken.

Summary of LCC's Position.

23. A summary of LCC's submission is provided below:

- It was appropriate for the County Solicitor to seek an external opinion in respect of Mr Davies' Regulation 30 appeal because he had been involved previously. However, the Regulation 19 appeal related to different legal provisions and was an entirely new matter.
- The guidance issued by the Office of the Deputy Prime Minister in 2004 stated that an IDR decision maker should be able to say that they have not previously advised on, given an opinion on or been involved in the case. The County Solicitor fulfilled these requirements in relation to the Regulation 19 appeal.
- All the documentation submitted by Mr Davies and NWLDC in relation to the Regulation 19 appeal was carefully considered by the County Solicitor.

- The County Solicitor gave further consideration to the question of age discrimination in relation to the Regulation 30 appeal, but did not explore the findings of fact made by the external reviewer.
- On the question of whether NWLDC's policy on the exercise of discretion under the LGPS is fit for purpose, this is a matter for NWLDC and not a matter for the complaints adjudicator.
- The County Solicitor apologised to Mr Davies for the delay in dealing with his Regulation 30 appeal. He did also point out that, had the Regulation 19 appeal been successful, it would not have been necessary to determine the Regulation 30 appeal. The County Solicitor was in contact with the external reviewer on a number of occasions to see if the process could be speeded up, but it was clear that she was under considerable pressure from her workload at the time.
- The County Solicitor has since contacted a number of law firms and identified those who would be able to provide support should an external review be required in the future.
- They are prepared to accept that it would be appropriate to consider a financial award to Mr Davies for any distress caused by the delay in dealing with his Regulation 30 appeal.

Conclusions

24. Mr Davies' complaint can be broken down into the following elements:

- NWLDC failed to review their discretions policy properly and, as result, the revised policy is discriminatory and unlawful;
- His application for payment of benefits under Regulation 30 has not been considered in a proper manner;
- His application for payment of benefits under Regulation 19 has not been considered in a proper manner; and
- The appeal process was not carried out in a proper manner and, in particular, there were excessive and unnecessary delays.

25. NWLDC had been directed to review their discretions policy, including considering what the policy would have been in July 2010 had they kept it under review. It is not my role to determine whether NWLDC complied with the previous directions. That would be a matter for a County Court on an application by Mr Davies for an enforcement order. On the basis that Mr Davies has not sought enforcement, I start from the point that NWLDC complied with the directions and reviewed their policy, including deciding what it would have been in July 2010. However, I may then consider whether the review was undertaken in the proper manner and whether the revised policy is discriminatory and unlawful, as claimed.
26. The policy was reviewed by a cabinet of elected members, having been presented with a paper and recommendation by NWLDC officers. I can see nothing in the paper which supports Mr Davies' allegation that those officers manipulated the policy review in order to retain a discriminatory criterion or that the real purpose of the review was to ensure that he did not meet the care criterion in respect of his daughter. Nor would it be true to say that there were no consultations since NWLDC sought comment from Unison prior to the review meeting. A formal equality impact assessment may not have been completed, but NWLDC had taken advice from a pensions lawyer on the question of equality. I also find that the elected members were made aware of my previous determination because there was direct reference to it in the paper presented to them. I find that the conduct of NWLDC's review of their discretion under Regulation 30 was carried out in an appropriate and reasonable manner.
27. Mr Davies is of the view that the criterion that a member must have worked for NWLDC for 10 years or more before discretion will be exercised amounts to age discrimination. NWLDC disagree. In July 2010, the date at which Mr Davies' employment ceased and the policy should have been applied to him, the Employment Equality (Age) Regulations 2006 were in force. Regulation 11 made it unlawful for the trustees or managers of a pension scheme to discriminate against a member in carrying out any of their functions in relation to the scheme. Schedule 2 to the Regulations included the provision that every pension scheme should be treated as including a non-discrimination rule so as to prohibit the trustees or managers of the scheme from discriminating against a member in carrying out their functions in relation to the scheme. Paragraph 3A to Schedule

2 contained the length of service exemptions. It provided that nothing in the Regulations should render it unlawful for “any rule, practice, action or decision” of the trustees or managers regarding eligibility for any benefit under the pension scheme to put a member at a disadvantage when compared to another member if and to the extent that the disadvantage was a result of length of service with the employer. Where the disadvantaged member’s length of service exceeded five years, the trustees or managers were required to ask the employer to confirm that the length of service criterion reasonably appeared to fulfil a business need.

28. Whilst NWLDC were required to operate the LGPS as if it contained a non-discrimination rule, the policy provision requiring 10 years’ service fell within the length of service exception. Since Mr Davies had not been working for NWLDC for more than five years, they were not required to confirm that the length of service criterion fulfilled a business need. However, NWLDC have confirmed that they consider the 10 years’ service criterion to fulfil a business need to encourage loyalty or reward experience. It is also the case that the 10 years’ service criterion is a policy provision rather than a scheme rule and NWLDC considered whether to disapply it in Mr Davies’ case. In view of this, even if the criterion could be found to be in breach of the Equality Regulations, Mr Davies’ case was also considered outside the policy and he, therefore, would not have suffered any injustice as a consequence.
29. Mr Davies’ application for the early payment of his benefits on compassionate grounds under Regulation 30 was declined on the grounds that he only met one of the policy criteria (he was aged between 55 and 59), his length of service with NWLDC was only 2½ years, he was not providing more than the ordinary level of care for his daughter, he was not providing substantial care for his mother and the evidence in his father’s case was not up to the standard required. NWLDC also took into account the cost to them of paying Mr Davies’ benefits. The decision is the exercise of a discretion by NWLDC and, as such, they can be expected to follow certain well-established principles in making it. Briefly, they must:
 - take into account all relevant matters and no irrelevant ones;
 - direct themselves correctly as to the law (in particular, interpret the LGPS Regulations correctly);

- ask themselves the correct questions; and
 - not come to a perverse decision.
30. In this context, a perverse decision is one which no other decision maker, properly directing themselves, would come to in the same circumstances.
31. The matters taken into account by NWLDC were all relevant to Mr Davies' case. Mr Davies has made the point that the subsequent abolition of his post would have represented a saving for NWLDC which was not taken into account. The decision under review was whether or not NWLDC should have exercised their discretion to consent to the early payment of Mr Davies' benefits as at the date of his departure in July 2010. At that time, the decision to abolish his post had not been taken. Understandably, given the timing of the subsequent decision, Mr Davies considers that this is something which should be taken into account. However, if the decision had been taken in July 2010, the subsequent cost saving would not have been a factor which NWLDC could have taken into account. It is right, therefore, that it is not taken into account in this review.
32. Having said that the matters taken into account were relevant, I note that Mr N said that the evidence he had in respect of Mr Davies' father was "not up to the standard of proof" which might be expected and was "not of sufficient weight bearing in mind the policy requires independent certification by the Council's Occupational Health Physician". In view of the fact that it is a policy requirement instituted by NWLDC, I consider that it would be more appropriate for them to take the initiative in seeking the evidence they require and, in particular, seeking input from their occupational health physician. Having said that, Mr N also pointed out that the diagnosis of Alzheimer's disease had been made after Mr Davies had resigned and I would agree that this evidence should not be taken into account in assessing the situation in July 2010. The lack of a diagnosis would not, of itself, be detrimental to Mr Davies' claim, but I note that he had, himself, confirmed that he was not providing care of a substantial nature for his parents at the time.
33. There are in fact two questions for NWLDC to consider under Regulation 30: whether it would be appropriate to consent to the early payment of Mr Davies' benefits; and whether any reduction which would normally apply should be waived on compassionate grounds. On this point, NWLDC and I appear to be in

agreement. Nor do we disagree that the decision called for under Regulation 30(5) is more restricted than that called for under Regulation 30(2).

34. Under the policy agreed by the Cabinet, the same criteria are applied to answer both questions. NWLDC say that their policy clearly distinguishes between the two discretions available under Regulation 30. However, they then say that they have, in effect, decided to exercise the discretion under Regulation 30(2) on compassionate grounds. NWLDC say that, as a result, it is not open to them to exercise discretion to agree to early payment under Regulation 30(2) but not dis-apply the reduction under Regulation 30(4).
35. By adopting this approach, NWLDC have conflated the two discretions open to them under Regulation 30 and, thereby, removed one of the options open to them. By so doing, they deprived Mr Davies of the possibility of having reduced benefits paid early under Regulation 30(2). I do not consider that this was the intention of the Regulations.
36. Taking the sequential approach, the first question for NWLDC was to decide whether to consent to the early payment of Mr Davies' benefits on a reduced basis. Their policy states that this discretion will be exercised where the following criteria are met:
 - The member had worked for NWLDC for 10 years or more in total;
 - The member was aged 55-59; and
 - The member was required to provide medium to long term care, i.e. potentially no less than 2 years for a substantial period of each day, for a mentally or physically incapacitated and dependent family member whose incapacity and need for care was confirmed by the Council's independent occupational health physician.

However, the policy cannot fetter what is a wide-ranging discretion allowing for other factors (including cost) to be taken into account. Additionally, the policy cannot fetter the discretion available under Regulation 30(2) by restricting NWLDC to considering payment of the full pension only.

37. The second question, which only falls to be considered if discretion is exercised under Regulation 30(2), is whether to waive the reduction of benefits. This is a separate discretion and should be exercised separately. It does not follow that agreement to the early payment of benefits under Regulation 30(2) on

compassionate grounds means that NWLDC are then bound to waive the reduction of benefits under Regulation 30(5). Regulation 30(5) is more restrictive than Regulation 30(2) inasmuch as it allows NWLDC to waive the reduction of benefits on compassionate grounds only. However, it is still a separate discretion from that contained in Regulation 30(2) and must be exercised separately.

38. However, it is not clear from Mr N's decision that both discretions were exercised. Mr N made reference to the cost to NWLDC of paying Mr Davies' benefits (which is something he was entitled to take into account under Regulation 30(2)), but did not distinguish between paying reduced benefits and paying unreduced benefits. Clearly, paying unreduced benefits would represent a greater cost to NWLDC. This omission was not addressed at either stage in the IDR procedure.
39. I find, therefore, that NWLDC failed to consider Mr Davies' application for payment of his benefits early under Regulation 30 in a proper manner. This amounts to maladministration on their part, as a result of which Mr Davies suffered injustice. I uphold this part of his complaint. However, it is not my role to make a decision as to whether Mr Davies' benefits should be paid early or whether they should be reduced. The proper course of action would be for me to remit the decision for NWLDC to reconsider. In view of the fact that Mr Davies is now in receipt of his full pension, the option to take reduced benefits from an earlier date may not be one he would wish to pursue. I have taken this into account in formulating my directions.
40. I now move to consider Mr Davies' claim for the payment of benefits under Regulation 19. Mr Davies would be eligible to receive benefits under Regulation 19 if NWLDC had decided that his employment with them should cease either through redundancy or on the grounds of business efficiency. It is accepted that Mr Davies was not made redundant. It remains, therefore, to consider whether NWLDC had decided that his employment with them should cease on the grounds of business efficiency.
41. Mr Davies bases his claim on the fact that, shortly after his employment with NWLDC ceased, his post was abolished as part of a restructuring exercise. He further asserts that this was one of the options he had proposed in the paper he had prepared at the beginning of 2010. NWLDC state that it was not until they had received a report from an external consultant, in August 2010, that they

considered removing Mr Davies' post and that the final decision was not taken until September 2010.

42. Mr Davies accepts that, when he presented his paper to NWLDC's Chief Executive, none of his proposed options were accepted. He then tendered his resignation, which took effect in July 2010. The evidence indicates that NWLDC had begun the process of reviewing their management structure prior to Mr Davies' departure. The review appears to have been prompted, at least in part, by his likely departure; along with that of two other key officers. However, the evidence does not support a finding that NWLDC had decided that, in July 2010, Mr Davies' employment with them should cease on the grounds of business efficiency. The fact is he resigned. The eligibility criteria set out in Regulation 19 are not met. I do not find that it was maladministration on the part of NWLDC not to pay Mr Davies benefits under Regulation 19 and I do not uphold this part of his complaint.
43. Mr Davies has also complained about the appeal/IDR procedure. His complaint is two-fold: that the process adopted by NWLDC was unfair and unlawful; and that the second stage appeal undertaken by LCC took an excessive amount of time to conclude.
44. Mr Davies has drawn my attention to a number of Court cases concerning the exercise of powers by public authorities. However, his case concerns the exercise of a discretion under the terms of the LGPS Regulations. In this context, NWLDC are acting as a participating employer in the LGPS rather than as a public authority. Their actions, therefore, must be considered in the light of the requirements of the LGPS Regulations and pensions legislation in general, together with the principles applicable to the exercise of discretion outlined above. The LGPS Regulations require NWLDC to make the first instance decision in cases involving Regulations 19 and 30. The Regulations are silent on the actual mechanism by which a decision is made. It would not be a breach of the Regulations for NWLDC to delegate the making of an initial decision to the Chief Executive. In fact, it was NWLDC's interim Head of Finance who made the initial decision in Mr Davies' application for benefits under Regulation 30 and their Director of Services & Deputy Chief Executive who determined the Regulation 19 application. Both of whom were chosen because they had not

previously made a decision in his case. In the circumstances, I find that this was an appropriate approach to take.

45. Mr Davies argues that, to allow the Chief Executive to exercise an unfettered decision making power is unlawful and poor governance. However, the discretions contained in Regulation 30 must be unfettered and it is for this reason that NWLDC are required to consider Mr Davies' case both in the light of their policy and free from that policy. The safety mechanism is contained within the Regulations' provisions for review; not only by NWLDC, but also by LCC.
46. Mr Davies also argues that it was contrary to the IDR procedure for the Chief Executive to appoint someone to hear his appeal at stage one. The LGPS Regulations require members to be given the job title and address of the person who can hear an appeal. They are silent on who that person should be. This is an *internal* dispute procedure and comes before a referral to the administering authority (LCC). It is likely, therefore, the person chosen to hear the appeal at this stage will be an officer of the employing authority. Provided that the individual chosen has sufficient authority to bind the employer when making a decision, I do not find this to be inappropriate. NWLDC chose officers who had not previously made a decision in Mr Davies' case and I find this to be appropriate. I do not find that NWLDC could or should be required to provide Mr Davies with details of the legal advice they took in connection with his case.
47. With regard to the time taken to decide Mr Davies' applications, I have not identified any excessive delay by NWLDC. The notable delay came at the second stage of his appeal on his Regulation 30 application. The appeal process was complicated by the fact that the person at LCC who would normally decide stage two appeals had been involved in Mr Davies' case previously. It was decided that an external reviewer should be appointed and I find this to be an appropriate approach to take in the circumstances. However, the chosen reviewer was unable to respond within an acceptable timeframe. In fact, it took the external reviewer over six months to respond which is well outside the two months provided for in the LGPS Regulations. The progress made by the external reviewer was outside LCC's control. However, they retained responsibility for the conduct of the second stage of Mr Davies' appeal under the LGPS Regulations and were in breach of those Regulations. I find that this was

maladministration on the part of LCC. Such a delay will have caused Mr Davies considerable distress and I find that it is appropriate that he receive a modest payment in recognition of this.

Directions

48. I direct that, within 21 days, NWLDC will give further consideration to the early payment of Mr Davies' benefits. They are to give due consideration to the option of consenting to the payment of reduced benefits from July 2010 as an alternative to waiving the actuarial reduction on compassionate grounds. However, before implementing any decision to pay reduced benefits, NWLDC are to ask Mr Davies whether he wishes to pursue this option in light of the fact that he is now receiving full benefits from a later date. When NWLDC issue their decision to Mr Davies, they are to provide him with details of any funding calculations they have taken into account.
49. Within the same 21 days, I direct that LCC shall pay Mr Davies £300 in recognition of the distress caused by the delay in dealing with his stage two appeal.

Jane Irvine
Deputy Pensions Ombudsman

2nd October 2014

Appendix

Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended)

50. At the time Mr Davies left the employment of NWLDC, **Regulation 30** provided,

- “(1) If a member leaves a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he has attained the age of 55 he may choose to receive payment of them immediately.
- (2) A choice made by a member aged less than 60 is ineffective without the consent of his employing authority or former employing authority.
- (3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29.
- (4) His pension must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary.
- (5) A member’s employing authority may determine on compassionate grounds that his retirement pension should not be reduced under paragraph (4) ...”

51. **Regulation 19** provided,

- “(1) Where -
 - (a) a member is dismissed by reason of redundancy; or
 - (b) his employing authority has decided that, on the grounds of business efficiency, it is in their interest that he should leave their employment; and
 - (c) in either case, the member has attained the age of 55,
 he is entitled to immediate payment of retirement pension without reduction.
- (2) In the case of a person who is a member on 31st March 2008, and to whom paragraph (1) applies before 1st April 2010, that paragraph applies as if “the age of 50” were substituted for “the age of 55”.