

## Determination by the Pensions Ombudsman

<b>Applicant</b>	Mr Andrew Costa
<b>Scheme</b>	Local Government Pension Scheme
<b>Respondent</b>	Cardiff County Council ( <b>Cardiff</b> )

### Complaint summary

Mr Costa says that because his pay was subject to a pay freeze Cardiff should use an alternative method of calculating his final pensionable pay.

### Summary of the Ombudsman's determination and reasons

I do not find in Mr Costa's favour. Cardiff have correctly interpreted the relevant regulations.

## DETAILED DETERMINATION

### Material Facts

1. This is essentially a dispute about the meaning of Regulation 10 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. Mr Costa took flexible retirement under the Scheme on 31 May 2010. He had apparently not had a pay increase since April 2009.
2. Regulation 10 says:
  - “(1) Subject to paragraph (2), where a member's pensionable pay in a continuous period of employment is reduced or restricted-
    - (a) because the member chooses to be employed by the same employer at a lower grade or with less responsibility;
    - (b) for the purposes of achieving equal pay in relation to other employees of that employer;
    - (c) as a result of a job evaluation exercise;
    - (d) because of a change in the member's contract of employment resulting in the cessation or restriction of, or reduction in, payments or benefits specified in the member's contract of employment as being pensionable emoluments; or
    - (e) because the rate at which the member's rate of pay may be increased is restricted in such a way that it is likely that the rate of the member's retirement pension will be adversely affected,the member may choose to have his or her final pay calculated in accordance with paragraph (4), by giving notice-
    - (i) in writing;
    - (ii) to the appropriate administering authority; and
    - (iii) no later than one month prior to the date on which the member ceases active membership.
  - ...
  - (3) Paragraph (1) does not apply if the member's employment on reduced pensionable pay-
    - (a) commences before the beginning of the period of ten years ending with the member's last day as an active member;

- (b) immediately follows a period in which the member occupies a post on a temporary basis at a higher rate of pay; or
    - (c) is because the member chooses to reduce his or her hours of work or to be employed at a lower grade, for the purposes of regulation 18 (flexible retirement).
  - (4) Subject to regulations 8(3) and 8(4), the calculation mentioned in paragraph (1) is made by dividing by three the member's total annual pensionable pay in any three consecutive years of the member's choice, ending with 31st March, within the period of thirteen years ending with the member's last day as an active member."
3. Mr Costa argues that, because of Regulation 10(1)(e), he should be able to choose to have his final pay under the Scheme calculated by averaging three years' pay of his choice ending in the thirteen before retirement.
4. Mr Costa says that the condition "the rate at which the member's rate of pay may be increased is restricted in such a way that it is likely that the rate of the member's retirement pension will be adversely affected" is met by the absence of pay increases. In particular he says:
- that the public sector pay freeze was imposed by central government;
  - the effect of the pay freeze was to restrict the rate of increase to his pay, which impacted his pension entitlement; and
  - though he did not have an automatic right to a pay rise there was always an expectation that his salary would rise.
5. Cardiff agree that Mr Costa did not have a pay rise from 1 April 2009 to when he accepted flexible retirement. But they say it was not directly due to a government pay freeze, as pay awards for local government employees are discussed at a national level between the trade unions and Local Government Employers (LGE). LGE did not offer any pay rises in 1 April 2010, 2011 or 2012.
6. They add there is no entitlement to a pay rise. As no entitlement exists, there has not been a restriction in the meaning of Regulation 10(1)(e).

## Conclusions

7. Stitching together the relevant parts of Regulation 10, it says:
- "...where a member's pensionable pay in a continuous period of employment is ... restricted ... because the rate at which the member's rate of pay may be increased is restricted..."

8. That is not easy to make sense of. I can see why Mr Costa thinks his circumstances might have been covered by it. His case was certainly not a hopeless one.
9. In spite of the awkward wording, it is reasonably clear that for 10(1)(e) to be brought into effect there has to be a restriction in *pensionable* pay, due to the rate of *pay increase* being restricted. I find there are certain other features of the pay increase restriction that Regulation 10 implies.
10. First it cannot be merely a matter of the recipient's subjective judgment. Many, perhaps most, pay increases are less than the recipient might wish for. Recently they will usually have been less than the recipient expected before the recession, and often less than inflation. None of those things makes the increase a "restricted" increase. Restriction implies the starting point of a higher increase in the mind of the provider of the increase, not merely in the mind of the recipient.
11. Next, the restriction should be lasting. There are several grounds for that inference:
  - "pay in a continuous period of employment" suggests a period of time;
  - sub-paragraphs (a) to (d) are all circumstances in which the reduction or restriction is long-term, if not permanent;
  - the exclusions in 10(3) concern similarly long-term circumstances;
  - "the rate at which the member's rate of pay may be increased is restricted" implies a restriction in advance of the application of pay increases, because it refers to the rate at which the rate of pay may be increased (as opposed simply to the increase itself).
12. Mr Costa's case fails in my view because the absence of an increase after April 2009 was not objectively a restriction as against any alternative other than his expectation.
13. There was, as Cardiff say, no externally imposed restriction. The Chancellor of the Exchequer said in his 2010 emergency budget speech that he was "asking the public sector to accept a two year pay freeze". Neither ministers nor Parliament had power to force local authorities to adopt such a freeze, though they no doubt held considerable sway over them. Local authorities were not planning to give increases which they then found they could not give. They decided not to give increases, consistently with central Government's request (doubtless actually a very strong expectation) that they would not.
14. Mr Costa says, in effect, that he had an expectation of some increase, so no increase was a restricted rate of increase. But as he had no right to any increase, his perception that the increase was restricted is no stronger than if, say, he had

been given a 3% increase when he was used to 5%. To put it slightly differently, no increase is the contractual default, so the mere fact there is no increase does not mean there has been a restriction of increases – unless by comparison to something else. And that something else must, as I have said, be more than Mr Costa's subjective expectations or hopes.

15. For the reasons given above, I do not find in Mr Costa's favour.

**Tony King**

Pensions Ombudsman

30 January 2015