

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

Applicant	Mr Colin J Smith
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	St Albans City & District Council (the Council)

Subject

Mr Smith says that the Council, his former employer, failed to take into account the car allowance and mileage payments he received when it determined the pensionable pay used to calculate the benefits available to him from the LGPS on his redundancy and also to calculate pension contributions to the LGPS.

The Pensions Ombudsman's determination and short reasons

I do not find in Mr Smith's favour because the regulations governing the LGPS at the time that Mr Smith was made redundant exclude the car allowance and mileage payments from the definition of pensionable pay.

DETAILED DETERMINATION

Material Facts

1. Mr Smith became employed by the Council on 27 May 1997 as an environmental health technician. His remuneration package included a car allowance as he would be an “essential car user”, because driving formed an essential part of his work. The car allowance consisted of two components: (1) a lump sum, of an amount dependant on his car’s engine capacity, and (2) mileage payments of 50.5 pence per mile, payable when he used his own car on Council business.
2. I understand that a “casual car user” would not have received the lump sum.
3. Mr Smith’s role became redundant on 18 May 2012. On leaving service he started to draw his pension from the Hertfordshire County Council Pension Fund, which was part of the LGPS.
4. Under the regulations then governing the LGPS Mr Smith’s pension was required to be calculated by reference to his pensionable pay for the year ending on 18 May 2011. When the Council calculated Mr Smith’s pensionable pay it took no account of the car allowance that he had received during that year, being a lump sum of £1,239.00 and mileage payments of £3,018.15.
5. In February 2013 Mr Smith complained to the Council that its calculation of his pensionable pay was incorrect. The Council rejected his complaint on the grounds that its calculation was in accordance with the relevant regulations. Mr Smith then invoked the LGPS’s internal dispute resolution procedure (**IDRP**) because he did not accept the Council’s decision.
6. At stage 1 of the IDRP the person appointed to consider the dispute, the Council’s head of legal, democratic and regulatory services, decided that the Council had correctly interpreted the legislation.
7. In September 2013 Mr Smith invoked stage 2 of the IDRP. The chief legal officer at Hertfordshire County Council (**HCC**), the body appointed to consider the matter, rejected Mr Smith’s appeal. Mr Smith then complained to the Pensions Ombudsman.

Regulations

8. Pensionable pay is defined in Regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the 2007 Regulations**). Regulation 4 says:
- “(1) An employee’s pensionable 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, and
 - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.
- (2) But an employee’s pensionable 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, or
 - (e) any payment as an inducement not to terminate his employment before the payment is made;
- ...
- (3) No sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it.”
9. Regulation 55 of the Local Government Pension Scheme (Administration) Regulations 2008 (**the 2008 Regulations**) is also relevant to Mr Smith’s complaint, as it set out who was responsible for determining questions in relation to the LGPS:
- “(1) Any question concerning the rights or liabilities under the Scheme of any person other than an employing authority must be decided in the first instance by the person specified in this regulation.
- ...
- (4) Where a person is or may become entitled to a benefit payable out of a pension fund, the administering authority maintaining that fund must decide its amount.
- (5) That decision must be made as soon as is reasonably practicable after the event by virtue of which the entitlement arises or may arise.
- ...
- (9) Any question concerning what rate of contribution a member is liable to pay to the appropriate fund must be decided by his employing authority.
- (10) Other questions in relation to any member or prospective member must be decided by his employer as soon as is reasonably practicable

after he becomes a member or a material change affects his employment.”

Summary of Mr Smith’s position

10. Mr Smith’s position is that the lump sum car allowance of £1,239.00 that he received over the period between 19 May 2010 and 18 May 2011 should have been included in his pensionable pay when the Council calculated both his pension entitlement his pension contributions. The lump sum was not based on his car mileage or frequency of car use, and therefore in his view it was paid as an incentive for carrying out extra duties, and was not a reimbursement of “expenses incurred in relation to the employment” for the purposes of regulation 4(2)(b) of the 2007 Regulations. He has said that a casual car user could have used their car far more than an essential car user, but would not have received the lump sum.
11. Mr Smith also contends that because the mileage allowance that the Council paid him for business use (50.5 pence per mile) exceeded HMRC’s maximum allowance for income tax purposes (40 pence per mile), the excess element (10.5 pence per mile) was not an actual travelling expense or a reimbursement of expenses, and therefore that part of the mileage allowance (totalling £1,608.95 for the tax year 2010/2011) ought to count towards his pensionable pay because he had incurred an income tax liability in respect of it.
12. Mr Smith initially put forward an additional argument that all of the mileage payments he received in the relevant tax year (totalling £3,018.15) ought to count towards his pensionable pay, because the Council’s mileage payments were originally based on the car mileage rates that had been negotiated by the National Joint Council for Local Government Services until these were considered by the Council to be too generous. However, Mr Smith’s complaint to the Pensions Ombudsman only referred to that element of the mileage allowance which exceeded HMRC’s maximum allowance for income tax purposes. I have considered both elements of the Council’s mileage allowance.
13. Mr Smith also considers that the word “incurred” in paragraph (2)(b) of Regulation 4 of the 2007 Regulations is included to prevent employers from paying excessive amounts to employees in travelling expenses (so amounts paid

above expenses properly considered to be “incurred” are not excluded from pensionable pay).

Summary of the Council’s position

14. The Council’s position is that both the car lump sum (£1,239.00) and the mileage payments (totalling £3,018.15, including a taxable element of £1,608.95) fall within the terms of Regulation 4(2)(b) of the 2007 regulations, and therefore those payments to Mr Smith were correctly excluded when the Council calculated his pensionable pay.

Conclusions

15. Both parties have accepted that the key issue is whether the wording of paragraph (2)(b) of Regulation 4 of the 2007 Regulations, which expressly excludes certain payments from being pensionable, applies to the car allowances that Mr Smith has received. I agree that these are the relevant regulations.
16. In my view the words “any travelling, subsistence or other allowance paid in respect of expenses incurred” in paragraph (2)(b) of Regulation 4 of the 2007 Regulations are wide enough to cover both the flat-rate lump sum and all the mileage payments received by Mr Smith.
17. Mr Smith has argued that the payments he received exceeded the amount of his actual travel expenses, so the payments cannot be said to be “paid in respect of expenses incurred”. In my view, however, Mr Smith’s interpretation would give an unreasonably narrow meaning to the words. I do not consider that the words “in respect of” in paragraph (2)(b) require that the payments match the expenses, or are directly proportionate to them, or are calculated in some way that is an attempt to reproduce them with any precision. I do not think that the word “incurred” adds anything beyond, perhaps, making it clear that the expenses cannot be completely notional.
18. That is clear because in practice even the mileage rate the car allowances would amount to more or less than the travel expenses that the employee actually incurred. Mr Smith’s actual expenses would have depended on a number of factors including fuel consumption, vehicle depreciation and wear and tear. Fuel consumption will in turn depend on a number of factors including the vehicle’s laden weight, the type of engine, distance travelled, speed, traffic jams or other hold ups and the employee’s individual driving style.

19. Mr Smith says the lump sum was in fact an incentive for carrying out extra duties. But the mere fact that it was unrelated to distance travelled does not stop it being a payment in respect of expenses incurred. I have not seen the justification for the lump sum payable to essential car users – but a not uncommon justification would be that those persons would have found it necessary to keep a car available for business use, whereas casual car users would not. In my judgment the payment falls within the wide definition of “any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment”.
20. Mr Smith has focused much of his argument on the fact that he has been charged to income tax on part of the car allowance he received because it exceeded HMRC’s maximum allowance for income tax purposes. Paragraph (3) of Regulation 4 of the 2007 Regulations expressly excludes from pensionable pay any payment which has not had income tax liability determined on it. However, it would not be correct to infer from this that any payment that is taxed should automatically be included in pensionable pay. HMRC may have set the limit for any number of reasons (maintaining tax revenue, while encouraging economical and non-polluting vehicles were probably among them), but they were certainly not saying that any sum over the tax ceiling could not be regarded as in respect of expenses incurred.
21. Therefore I consider that Mr Smith’s pensionable pay, for the purpose of calculating LGPS contributions and benefits, was correctly calculated by the Council as not including the car allowances that Mr Smith received.
22. For the reasons set out above I do not find in Mr Smith’s favour.

Tony King
Pensions Ombudsman

16 October 2014