

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

Applicant	Mr Gary Nightingale
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Kent County Council (the Council)

Subject

Mr Nightingale's complaint against Kent County Council is that it mis-managed his appeal against the decision not to award him early release of his benefits under the Scheme on compassionate grounds. He is also unhappy with the original decision that was made.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the Council as it failed to consider whether an exception to its usual policy should be made in Mr Nightingale's case.

DETAILED DETERMINATION

Material Facts

1. Mr Nightingale left the employment of the Council on 31 March 2013 under a compromise agreement.
2. Mr Nightingale wrote to the Scheme's administrator in mid-July 2013 in order to request the early release of his benefits. The administrator responded on 2 July 2013 to say that this was a decision for his employer to make and so they had forwarded his request to his former employer. His benefits would normally be payable at age 60 but early payment was at the discretion of his former employer.
3. Later in July 2013 (the exact date is not clear) Mr Nightingale wrote to the Council's HR Officer to say that he had been the full-time carer for his 87 year old mother since February 2012. He was now 58 years old and would reach 60 in January 2015. In the circumstances, and in consideration of his age, he felt that it was unlikely that he would ever be in paid employment again and so needed to request the early release of his benefits on compassionate grounds. He asked that they inform him how to go about this.
4. The Council's policy on the early release of pensions is contained in their terms and conditions of employment, and the pertinent sections say:

“...Regulation 30 (2)

It is not KCC's policy to give consent to the immediate payment of benefits to a scheme member who voluntarily retires prior to age 60 unless there is a demonstrable benefit to the organisation which would take full account of any extra costs.

It is not KCC's general policy to give consent to the early payment of benefits to a deferred scheme member prior to age 60. However each request will be considered on its merits.

Regulation 30 (5)

If it is determined that *compassionate grounds apply for the early payment of benefits, the benefits may be paid without reduction.

* The definition of 'Compassionate grounds' currently in the Blue Book is that the circumstances must be exceptional and would not reasonably be expected to prevail i.e. the occurrence of a disaster or accident etc. Financial hardship alone would not normally be deemed sufficient.

...”

5. The Council responded to Mr Nightingale on 25 July 2013, via a HR Officer, and said that his request had been considered. They referred to the definition of “compassionate grounds” as above and said his request under Regulation 30 (2) could not be agreed to as he was currently under the age of 60 and it was the Council’s policy not to give consent to early payment of benefits to a deferred member under the age of 60. They were also unable to agree the release under compassionate grounds, under Regulation 30 (5), as his request did not meet the aforementioned criteria.
6. Mr Nightingale responded to the Council in early August 2013. He gave a bit more background to his request saying that his mother had gone into hospital in February 2012 and thereafter needed full-time care in the home. Without hesitation he took responsibility for this. He was also the only family member within 300 miles of his mother, meaning that there was no support network in place to even let him work part-time. He provided a doctor’s letter that said his mother would not be able to continue living at home without his help and he also gave evidence of receipt of Carer’s Allowance.
7. In an attempt to make his application clearer, “as far as the Regulations go”, Mr Nightingale enclosed a page from a document entitled “Early payment of Pensions Policy, Local Government Pension Scheme”. He said that under the criteria section it said that being a carer constitutes an exceptional reason for early pension release for circumstances similar to his. He added that his role as a carer was saving the Council money and that he had been informed by social services that the minimum cost of residential care is £500 a week.
8. The document in question is actually a copy of the early payment policy for the City of Westminster Council, in relation to their involvement with the London Pension Fund Authority. Mr Nightingale only enclosed one page of this document which said the following (with the references to “the Council” here being in relation to the City of Westminster Council):

“Summary

Regulation 30 of the Local Government Pension Scheme (Benefits Membership and Contributions) Regulation 2007 enables the Council, at its discretion, to award the immediate payment of pension benefits to an employee who meets the personal criteria...

...

Criteria

- The employee is 55 or over and under age 60.
- Has requested early release of their pension benefits.
- Has left employment with the council at the time their pension is released (subject to approval).
- The employee must provide exceptional reasons why their pension should be released early i.e. compassionate grounds. It should be noted that for compassionate grounds to be accepted as justification this will presume both a significant and long term impact on the member. Example: A member is no longer able to work because they fulfil the role of a permanent carer for their partner or child. The members requirement to care full time for the dependent because of severe long term care needs of that individual will need to be confirmed by a Doctor. Members living in the UK will also be expected to confirm that they are a registered carer by receipt of carer's allowance.
- The Council will not waive any actuarial reduction unless the employee..."

9. The Council sent a response to Mr Nightingale on 15 August 2013, from their Head of Employment Strategy, saying that they had considered his appeal. They said it had appeared that he had undertaken his carer duties for some time prior to leaving employment. They therefore found it difficult to see this as an unforeseen and exceptional reason. In response to the early payment policy Mr Nightingale had enclosed they said that the Council had a duty to set a criteria as to how they considered compassionate grounds applications as was set out in their letter of 25 July 2013. Based on the information they had seen they could not agree to the early payment of his benefits.
10. The matter then went to the Internal Dispute Resolution Procedure (**IDRP**). Mr Nightingale completed a form provided for this purpose on 4 September 2013. He summed up his complaint as being about the refusal of early payment as his situation was not deemed to be "unforeseen" or "exceptional". Within the papers he provided he repeated many of his reasons for making this application. His mother had looked after his father for ten years and he had always promised her that he would look after her if required. He added that initially he had a combination of carers leave and annual leave agreed with his line manager in order to look after his mother. The need to provide full-time care was

unforeseen and he did not know at that time how long he would need to be away from work. He went on unpaid leave from March 2012. He applied for voluntary redundancy in late 2012 but was refused. He would have liked to stay in his employment but was unable to do so due to his mother's daily care requirements. His mother had gone into hospital for an operation that no-one had expected to result in the need for full-time care, with a further doctor's letter saying that prior to her admission she was living at home independently. This was therefore unforeseen and exceptional. There was no financial advantage in his receiving the early pension rather than continuing to work.

11. The IDR response was considered by the appointed person, Mr G. He responded with his decision on 4 November 2013. He noted that the appeal was in relation to a discretionary decision and said that he could not replace a decision. He had to confine himself to addressing whether the discretion had been exercised in a proper and reasonable manner. Mr G detailed Regulation 30 of the Regulations governing the Scheme. He then quoted the Council's statement relating to requests made under Regulation 30. Mr G went on to list information in his possession. Included in this list was the extract of "Early Payment of Pension Policy" as provided by Mr Nightingale. Underneath this he said:

"You therefore also attached to your letter a from [sic] from your mother's GP confirming you are a full time care [sic] for your mother and without your help and support she would not be able to continue living at home, and a copy of a letter from Department for Work and Pensions confirming you were awarded Carers Allowance from 22 July 2013".

Mr G went on to say that he had confined himself to addressing whether the Council had a published policy along with how they exercised their decision making process. He felt that the procedure used by the Council in dealing with such requests was fair but from the evidence submitted he was not satisfied that the Council had exercised their discretion in a proper and reasonable manner as they had not "considered your application against their published policy which requires that for compassionate grounds to be accepted as justification this will presume a significant and long-term impact rather than unforeseen and exceptional which was the reason given by Kent County Council for not agreeing to the early release of your pension benefits." He directed therefore that the

Council should reconsider the matter, reaching a proper decision based on all the relevant facts. This would ensure that they had considered all the relevant information and followed the requirements of the Scheme's Regulations. His decision was final and binding on both parties unless it was overturned on appeal at stage two of the IDRP. He could not discuss or comment further on any matter relating to the case. A similar letter was also sent on the same day to the Council.

12. On 25 November 2013 the Council's Head of Employment Strategy wrote to Mr Nightingale. He said the latter part of Mr G's letter was incorrect as he quoted from the "Early Payment of Pension Policy", which had been attached to his appeal letter and was not the Council's own criteria. Therefore they felt that Mr G's judgment had been based upon the wrong criteria and facts. They had raised this with Mr G but on the basis of this discrepancy they had no basis to alter their original decision in declining his request. If he was not satisfied with their response he could proceed to stage two of the IDRP.
13. Mr Nightingale wrote to complain on 28 November 2013. He said that Mr G's view was that the Council had fettered its discretion and should look at the matter again properly. That decision was binding. He also felt that the response from the Head of Employment Strategy breached natural justice and it was incorrect for the matter to be referred back to him. He had compounded this by saying he was right all along, rather than referring it to someone more senior and independent.
14. On 23 December 2013 an email from the Council's Corporate Head of HR said that they regretted that Mr Nightingale felt he was treated in a shoddy way and that this had not been their intention. However they did not accept that their Head of Employment Strategy had failed to discharge his duty. The letter of 25 November 2013 accurately summarised the Council's position on his request and the response from Mr G.
15. The second stage IDRP response was issued on 20 January 2014 by the Pensions Manager. He said that he had no power to overturn the decision but could refer the matter back if he thought the Council had made a wrong decision. They must have a published policy on exercising discretion but could not fetter their discretion by having a fixed and prescribed basis for decisions. He said that he

was at a loss to explain where the “Early Payment of Pension Policy” extract had been obtained from. It did not form part of the Council’s policy and so must be disregarded for the purposes of the appeal. The definition of “exceptional” was aberrant, abnormal, anomalous, exceptive, irregular etc. He took the view that it was not exceptional for a family to have ageing members who require full-time care as a consequence of failing health. And it was regrettable that the standard of care and costs of care in the UK left much to be desired but this did not make the need of such care an exceptional circumstance. Therefore he believed that the Council had reached a decision that would not be considered perverse. Mr Nightingale had made his own decision to provide care which, whilst admirable, was not a compelling reason that met the definition of “exceptional”.

Summary of Mr Nightingale’s position

16. Mr Nightingale, or his representative on his behalf, has said the following.
17. He initially wrote to the Council to enquire how to go about applying for the early release of his pension. He was surprised to receive a response informing him that his request had been turned down. He therefore had to contact them again to agree that he could send in more information and have it considered again.
18. The Council did not comply with its own IDR procedure. It had also fettered its discretion in his case. He is a full-time carer, which is stressful enough, but he has been put through an ordeal by the Council since July 2013. No attempt has been made by them to deal with him in a fair manner. He should be compensated for them putting him through a process from which he could never gain any useful result.
19. Mr G clearly thought that he had not misdirected himself in any way. This was evidenced in the wording of his letter when he referred to Regulation 30 of the Scheme’s Regulations and then set out the Council’s own policy. Even if he had come to a mistaken view it was for him to explain himself. If he did not then the Council were required to carry out the actions required by him. There was no provision in the IDR for the Council to override the adjudicators’ decision. He points to some text that says that the specified person may decide that an employer reconsider how they exercise their discretion.

20. The injustice of the matter had been compounded by the matter being referred back to the original decision maker after the stage one decision, who then decided that he was right all along. It was a matter for the Council to decide if they wanted to complain formally about the adjudicator and this was the only route open to them. The original decision maker had failed to consider the matter properly and it was now for someone senior to and independent of him to consider it correctly.
21. If the adjudicator had misdirected himself to such an extent that the Council is justified in breaching its procedure and refusing to accept the “correct decision” then he has been denied this stage of appeal. However he is not advocating another appeal as he feels he is justified in taking the view that the Council would reject any conclusion that it found inconvenient.
22. He considers that three things would have been different if the stage one decision had been followed. First the Council would have been forced to consider whether compassionate grounds applied, rather than taking refuge behind the subjective words “exceptional” and “unforeseen”. They could not set ironclad criteria that prevented it from considering any request on its merits. Second the stage two decision maker said himself that he did not have the power to overturn the original decision and was simply reviewing whether it had been taken properly. Therefore if that review had been the reconsideration directed by Mr G then Mr Nightingale would have lost the theoretical opportunity for the decision to be overturned. The third issue is that it was not appropriate for the Pensions Manager to carry out the review at the second stage. In effect he had lost two stages of appeal rather than just the one.
23. The Council had blamed him for allegedly providing the adjudicator with the wrong information. He refutes this allegation and says he had spoken to Mr G who did not accept that he had been misled in any way. The extracts that he provided were the Government’s criteria for early release. The purpose of supplying them was to demonstrate that the Council had not carried out its duties correctly. The adjudicator was perfectly aware of this and did not mistake them for the Council’s own criteria. This came from the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and was sent to show that the Council was not acting in accordance with the law of the land. The response from Mr G made it clear that he understood this and

there was no question of him believing that this was the Council's own policy – if he had done so he surely would have instructed the Council to release his pension. By relying on its own "Regulations" the Council had fettered its discretion to look at the whole case. A great number of local authorities do specify that caring responsibilities are solid grounds for agreeing to early release of pensions. The national guidelines should not have been disregarded for two reasons. First the moral obligation to consider caring responsibilities in a favourable light. Second the legal obligation to consider the whole case rather than limiting the matter to pedantic considerations of what could be deemed "exceptional" and "not expected to prevail". Neither of these criteria were particularly satisfactory in assessing a compassionate grounds application.

24. After my office wrote to Mr Nightingale and said that the extract came from the early payment policy for the City of Westminster Council, rather than from the Scheme's Regulations, he responded with the following comments. When he wrote to the Council he said that he was enclosing a page from that document in order to make the point that in *that* document the criteria states that being a carer was an exceptional reason. The point being made was that the Council should follow suit and also agree that being a carer was sufficiently exceptional to justify early payment. Later he sent all the papers relating to his application to Mr G. There was no intention to deceive Mr G.
25. The Council has fettered its discretion at every stage of the process. It chose to override the correct views of the adjudicator in the mistaken belief that he in turn had mistaken the Government's criteria for the Council's. The Pensions Manager's statement that the Government's criteria must be disregarded is itself an admission that the Council has fettered its discretion. He was also disappointed that the Council has never sought clarification from him anytime that his application was unclear to them or that he could not make his case in person.
26. In response to a submission from the Council he says he first raised the issue of procedural flaws in his second stage appeal, not when he wrote to my office.
27. It was disturbing that the Pensions Manager had spoken to the appointed person and asked him to change his stage one decision. He had also contacted the

human resources area to ask it to review its decision before Mr Nightingale had contacted him.

28. There was also a flaw in the second stage of IDRP. This decision had been made by the Pensions Manager who was junior to the previous staff members involved in the earlier decisions, which he views as inappropriate and put to that individual. It was a bad principle for an appeal to be considered by someone who is of a lower grade than the person who made the decision. In the second stage decision the Pensions Manager answered this by saying that he had no power to overturn decisions but could refer the decision back to the Council if he took issue with the decision making process. But having said he had no power to override the original decision he carried on his review as if he did and also by setting out the reasons why he believed the request should not be granted. He also made a value judgement that it was not exceptional for a family to have ageing members who require full-time care. He could also not have been independent having attempted to get the appointed person to change his earlier decision. His response also suggested that the Council generally failed to provide adequate care for the elderly and that this was so normal early payment requests should be turned down. But if he was wrong and adequate assistance was available for the majority of the elderly population then it would mean that the circumstances of this case are exceptional.
29. He had never planned to be a full-time carer and had not prepared for this. It had been unforeseen that his mother would need this level of care before she went into hospital. He had no support network to rely on and the decision to care for her came at a great cost to him. To enter her into residential care in February 2012 would have been impossible and she did not want this. Therefore 24 hour care was required once she left hospital. It was not practical to employ care workers and home care service could be hit and miss. He could not have gone to work worrying about this and went onto unpaid leave hoping the situation would improve, but it did not. He had planned to look after his mother no matter what, but did not think it would change his life in such a radical way. The circumstances were both unforeseen and exceptional.

Summary of the Council's position

30. The original appeal to the Council was that Mr Nightingale was unhappy with their decision in this matter. However in his application to my office he has expanded his complaint to claim that the process of his appeal had been incorrectly dealt with.
31. The decision to provide full-time care was one that Mr Nightingale had made himself. His decision to leave employment to undertake these duties is not consistent with the circumstances being unforeseen.
32. At the point of his appeal Mr Nightingale presented an extract from the "Early Payment of Pension Policy", which was not part of any documentation produced by the Council. The definition of 'compassionate grounds' published by them is that the circumstances must be exceptional and would not reasonably be expected to prevail. An example given being a disaster or accident. Financial hardship alone would not normally be deemed sufficient. It was against this policy that the decision must be made.
33. Mr G had not contacted the Council for their comments before making his stage one IDRP decision.
34. There is no mention of "full-time carers" in their policy as was presented to the appointed person. The appointed person quoted the extract presented to him by Mr Nightingale in his response. This was not part of the Council's policy and so must be disregarded. Since this was not their policy it would be perverse, inconsistent and inappropriate to agree to it. They called Mr G after receipt of his decision as it was clear that he had been misdirected. He confirmed that he had considered the extract to be a part of their policy. They asked that he review the matter again but he said that he was unable to do so. After a review of the situation they confirmed to Mr Nightingale that the decision remained unchanged but he could go to the second stage of the dispute process.
35. They had given their opinion that the circumstances that Mr Nightingale was in were not exceptional. In a high percentage of cases they would expect the need for care for the elderly to be the case. While his circumstances matched the extract he sent the appointed person this was not the criteria against which the decision should be considered. It seems that Mr Nightingale was unhappy with

the wording of the published policy, rather than the decision that was reached against that criteria.

36. Their understanding of the wording of the policy was that an event would need to be out of the ordinary or unforeseen.

Conclusions

37. The early payment of Scheme benefits is in this case at the discretion of the employing authority, as too is the decision that benefits will not be reduced for early payment on compassionate grounds.
38. In considering whether discretion has been properly exercised I need to take into account the following factors – whether the correct questions were asked, the legal position was correctly understood, all relevant factors and no irrelevant matters were taken into account and the decision reached was not perverse. If I find the decision making process is flawed I do not usually substitute my own decision but I direct that the matter be reconsidered properly. I will deal first with the matter of the stage one IDRPs decision as this appears to have caused problems between the parties as to how the matter should be dealt with.

The first stage decision

39. Mr Nightingale says that he has spoken to Mr G, who confirmed to him that he understood that the policy paper was not one of the Council's. The Council say they also spoke to Mr G who told them that he had not understood the policy paper was not one belonging to the Council.
40. The letter of 4 November 2013 from Mr G made reference to the "Early Payment of Pension Policy" of the City of Westminster Council. He also made reference to Mr Nightingale's submissions in relation to Carers Allowance and the letter from his GP. He did not say at any point that these items were irrelevant to his decision or that he would not be taking them into account. While he did say he had confined himself to addressing whether the Council had a published policy along with their decision making process he then said they had not considered his application against their published policy which requires that for compassionate grounds to be accepted as justification this will presume a significant and long-term impact, rather than being unforeseen and exceptional. This he said would ensure that they had considered all the relevant information and followed the requirements of the Scheme's Regulations.

41. In light of the wording used in his response it seems clear that Mr G took the City of Westminster papers into account when considering Mr Nightingale's complaint. He did not dismiss the Early Payment of Pension Policy papers. Indeed he went further and specifically said that the Council's policy required that for compassionate grounds to be accepted it would presume a "significant and long-term impact". He therefore took into account information that was irrelevant to his decision and as a result I consider that his decision was flawed. The question then is what should have happened next?
42. The Council decided to disregard the stage one IDR decision and told Mr Nightingale that he could proceed to stage two. In effect that would mean another review of the earlier decision.
43. In my judgment a better course of action would have been for Mr G to take the decision again, having regard for the Council's policy rather than the City of Westminster's but it appears there was no process for doing so.
44. It follows that I agree with Mr Nightingale's observation that he has been denied a stage of the appeal process here (indeed he says that in effect he has been denied two stages). He also says that following Mr G's decision could have resulted in the approval of his compassionate grounds application. However even if the Council had re-reviewed their initial decision it does not follow that a different decision would have been made by them as Mr Nightingale suggests. They still would not have taken into account the same information that Mr G did as the City of Westminster policy was not relevant to them. So they would not have considered the matter in the same manner as Mr G. The submission of the Early Payment Policy papers caused confusion with the stage one decision maker – and it is that, if anything, which has caused the resultant confusion.

The Council's approach as a whole

45. When Mr Nightingale wrote to the Council's HR Officer in July 2013 he asked that they inform him how he went about making a compassionate grounds application and set out a short summary of his situation. In their response of 25 July 2013 the Council instead proceeded immediately to a decision. In my view they should have explained the process to him and invited further submissions from him at that point. However Mr Nightingale was later given a further chance

to submit information, which he did, with the matter being revisited again in August 2013. So I do not consider that any injustice was ultimately caused here.

46. I can understand why Mr Nightingale considers it anomalous that different local authorities have different policies. The City of Westminster papers he provided made specific reference to carers. The Regulations that govern the Scheme require each local authority to formulate their own policy. They do not specify the nature of that policy or require consistency across different authorities. The nature of a discretionary decision is such that different decision makers can reach different conclusions on the same facts and there is no one decision that must be right. Provided the decision maker has approached the decision correctly then the decision cannot be challenged on the basis that a different decision maker would have reached a different decision. I do not consider that there was any requirement on the Council to take into account information relating to the policies of other authorities.
47. Mr Nightingale also considers that his case should have been heard in person. There is no requirement for such an application to be heard in person, although the Council would have been free to arrange this at their discretion. However, I see no issue with the matter being dealt with via written correspondence.
48. Mr Nightingale has also raised a concern over the appropriateness of the members of staff chosen to carry out the reviews and their level of seniority. I see no particular concern over the individuals that were appointed to carry out the reviews, all of whom appear quite senior (the second stage reviewer was the Pension Manager). As long as they approached their reviews in the right manner I take no issue with their standing within the organisation. I note that Mr Nightingale says that it would be extremely difficult for that individual to ensure he has set aside all irrelevant considerations. I do not consider that it is for me to decide who should carry out the review. I would only intervene were it apparent that any decision maker was not impartial, showed bias or exhibited another failing. In the absence of any express wording in the regulations as to who the decision maker should be (they simply say it is a decision for the employing authority to take) it was and is for the Council to make the decision about an appropriate person,

49. In relation to the decisions and reviews I do not have any particular concerns over the Council's decision that being a full-time carer was not, of itself, exceptional. There was some debate between the parties over the quality of residential care in the UK but I do not think that was a relevant factor that the Council needed to consider (in any event Mr Nightingale has said that he would have taken the decision to care for his mother regardless).
50. Mr Nightingale argues that the Council's decision was fettered. It is quite proper for the Council to have in place a policy regarding the exercise of its discretion, and indeed the Regulations governing the Scheme require this. But they must not fetter that discretion. An inflexible adherence to a policy, without consideration of the individual's particular circumstances and whether an exception to the usual policy should be made, may amount to a fettering of discretion. In this case there is nothing to show that the Council did consider Mr Nightingale's application from the perspective of whether the Council's usual policy should prevail. The letters in July and August 2013 suggest that the Council's decisions makers have regarded its policy as definitive and determinative and I am not satisfied that the Council did not in fact fetter its discretion.
51. The IDRP stage two decision maker did comment in the background of his response that the Council should not fetter its discretion by having a fixed and prescribed basis. But he made no further comment on this in his conclusions – indeed he seemed to review the matter from the point of view of whether he himself would have made the same decision rather than the decision making process itself. He made no comment on the earlier responses from the Council and whether they ever considered the matter from any angle other than their policy being the be all and end all.
52. I uphold the complaint on this point and direct that the Council reconsiders the matter. He has made numerous submissions now about the specifics of his application since his first letter and the Council should consider all the submissions he has put forward and decide which are relevant to their decision.

Directions

53. Within 28 days of this Determination the Council are to reconsider whether Mr Nightingale's request should be granted based on all his submissions to date. Whether they depart from their published policy or not, they are to identify their reasons for their decision.
54. If the outcome is that a pension and/or cash sum is payable from either date then payment should commence with effect from that date. Arrears of pension or cash should be paid with simple interest at the rate for the time being quoted by the reference banks from the due date to the date of payment.
55. Within 28 days of this Determination the Council are to pay Mr Nightingale £150 as compensation for the distress and inconvenience caused.

Jane Irvine
Deputy Pensions Ombudsman

2 February 2015