PO-5848

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (**LGPS**)
Respondents	Autism East Midlands (**AEM**), Nottinghamshire County Council (**NCC**)

Complaint Summary

1. Mrs N has complained that AEM and NCC denied her access to an immediate retirement pension under the LGPS when she left AEM's employment in circumstances which in her view amounted to redundancy.

Summary of the Ombudsman's Determination and reasons

2. The complaint is not upheld, because the circumstances under which Mrs N left AEM's employment by way of a compromise agreement, neither qualify her for an immediate pension, nor constitute maladministration by the respondents.

Detailed Determination

Material facts

3. In July 2001, Mrs N became employed as a part-time cleaner by AEM (known until 2014 as The Nottingham Regional Society for Autistic Children and Adults, or NORSACA). From 1 October 2002, she was re-employed by AEM under a new contract as a part-time cook. Both jobs were for 20 hours a week, at AEM's Beechwood residential home in the Sherwood area of Nottingham.

4. Section 3 of Mrs N's contracts of employment with AEM, signed in 2001 and 2002, referred to her work location as being "Whitegates Adult Services (South)".

5. In April 2010, AEM added a mobility/relocation provision to its staff handbook. This said that:

> "Employees' normal place of work is within NORSACA Adult and Further Education Services. NORSACA reserves the right to require employees to work at any other establishment, or place of business of NORSACA, whether current or future, within a reasonable commuting distance of their home, whether on a temporary or permanent basis, according to the needs of NORSACA's business. NORSACA reserves the right to determine what a reasonable commuting distance is.
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> Where an employee is required to move on a permanent basis, NORSACA will give them 4 weeks' prior written notice of the move.
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> Where an employee is required to move on a temporary basis, NORSACA will endeavour to give them some prior written notice of the move but, depending on the particular circumstances, it may not always be possible to do so."

6. Mrs N was invited to attend a meeting with AEM's Assistant Director and its human resources manager on 18 May 2012. At the meeting she was offered a position in her current role as a part-time cook, but at another of its residential homes at Linby Drive in the Strelley area of Nottingham, because AEM had decided that cooked meals would no longer be produced at Beechwood.

7. Two days later Mrs N asked for further details in writing, saying that her initial view was that the new role would not be suitable for her for a number of reasons, and that in view of her excellent work record "a straight forward redundancy may be the best way forward".

8. The AEM human resources manager told Mrs N, in a letter on 3 June 2012, that due to the mobility/relocation provision contained in the staff handbook "NORSACA does not deem this to be a redundancy situation": it considered that relocating Mrs N to Linby Drive was in NORSACA's interests, and that the commuting distance from Beechwood was reasonable.

9. Mrs N told the human resources manager on 12 June 2012, that she would be unable to accept the job at Linby Drive due to the increased travelling time, as she did not drive and needed to rely on public transport, and this would take longer due to the need to change buses; it would cost her more money, and she had care commitments every day for her elderly mother whose doctor was based near Beechwood.

10. AEM replied that its proposed relocation was within a reasonable commuting distance and said that Mrs N could request flexible working hours and/or unpaid time off for her dependants if she wished to do so. AEM gave Mrs N four weeks' formal notice of her transfer to Linby Drive.

11. On 9 July 2012, Mrs N submitted a grievance complaint to her manager. From that time onwards she was signed off from working due to work-related stress. One of her main complaints was that she believed the relocation of her role to Linby Drive constituted a redundancy, and the relevant procedures had not been carried out properly by her employer. She said that she had been told by her manager at Beechwood on 7 May 2012, that she was being made redundant, and that this had been confirmed at the meeting on 18 May. She said that the bus journey to Linby Drive was likely to take her at least ninety minutes, compared with only twenty minutes to Beechwood, and this would be an unreasonable amount of travelling for her four hour shifts. Mrs N also said that the mobility clause was not part of her employment contract, and in any event its terms were unreasonable; it had not been included in her employment contract, or the staff manuals that were issued in 2002 and 2004.

12. Due to a panic attack, Mrs N was unable to attend a grievance meeting arranged with AEM, and declined to attend a rearranged meeting, saying that her letter of 9 July 2012 set out all her grievances.

13. AEM told Mrs N on 5 October 2012, that her grievance complaint was not upheld, on the basis that there was not a redundancy situation in practice, and said that Mrs N had not been told by AEM that her position at Beechwood was being made redundant; furthermore AEM said it was entitled to move staff from one of its residential homes to another for the benefit of its service users.

14. Mrs N appealed, but AEM told Mrs N on 6 November 2012, that her appeal was unsuccessful. In its letter AEM explained:

> "This situation is not a redundancy situation because although there is not a requirement for a cook at Beechwood, there is still a requirement at our other home, Linby Drive. You stated in the meeting that you do not believe that there are enough hours at Linby Drive to support having both cooks. I can confirm that there is enough work to support the existing cook's hours as well as yours. A redundancy situation occurs where the role has "ceased or diminished" and it is found that your role has not fallen into this category. You

> were requested to move to our other site as is our contractual right to request you to do so in accordance with the mobility clause which is in your handbook. This is deemed to have been a reasonable request. You stated that this role was inappropriate and that no other job or role would be acceptable for you and that you wanted to be made redundant. I would like to reiterate at this point that there is no requirement for voluntary redundancies to be offered and no redundancy situation. There is no need to reduce head count; we undertake a continual financial review and service efficiency and there is no evidence that we need to take this action."

15. AEM also said that the additional travel time required was not excessive, and in view of Mrs N's comments about additional travel costs AEM would be willing to pay her reasonable travel costs at the rate of 45p per mile; this proposal could be discussed subsequently. AEM also said that case law supported its view that it was entitled to rely on its mobility clause and not follow redundancy procedures.

16. Mrs N did not return to work and subsequently decided, according to her letter of 22 September 2014, that she would have to leave service and seek redress at an industrial tribunal in respect of her employment grievances. Her solicitor suggested to AEM that a compromise agreement could be signed as a means of avoiding a tribunal hearing. After further correspondence, Mrs N signed a compromise agreement with AEM on 21 December 2012, at age 55. This stated that her contract of employment was terminated immediately "by mutual agreement", and did not make any reference to leaving on redundancy or business efficiency grounds. Under the agreement AEM paid Mrs N an immediate lump sum of £6,000. Upon leaving service she became entitled to a deferred pension under the regulations governing the LGPS, normally payable from age 65.

17. In October 2013, Mrs N's representative and partner contacted the new chief executive of AEM to ask if, on compassionate grounds, AEM would exercise its discretion to allow payment of her pension from the LGPS before the age of 65 (without admitting that a redundancy situation had arisen) as Mrs N was now unable to work due to an illness that had started in 2012. AEM's solicitors wrote back to say that because her employment was terminated under the compromise agreement Mrs N did not qualify for an immediate pension.

18. Mrs N complained unsuccessfully to AEM's specified officer, under stage 1 of the LGPS internal dispute resolution procedure **(IDRP**), on 3 March 2014. Her subsequent appeal to NCC's appointed officer under stage 2 of IDRP on 28 April 2014 was also unsuccessful.

19. Mrs N complained to us later in 2014. Having reviewed the papers and made further enquiries, one of my senior investigators issued an opinion on 23 October 2015 (**the Opinion**), that he thought that Mrs N's complaint should not be upheld because:

    - AEM was entitled to ask Mrs N to transfer to another of its work sites, and

- Mrs N's refusal to do so, which led to her leaving employment under the terms of a compromise agreement, did not constitute redundancy.

20. Mrs N did not accept the Opinion and submitted more evidence to us in support of her case.

The Regulations

21. In Mrs N's case, the relevant regulation is Regulation 19 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the Regulations**). Regulation 19(1) says:

> "Early leavers: inefficiency and redundancy
>
> 19(1) Where
>
> (a) a member is dismissed by reason of redundancy; or
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> (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
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> (c) in either case, the member has attained the age of 55,
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> he is entitled to immediate payment of retirement pension without reduction".

22. This means that if either condition (a) or (b) is satisfied as well as condition (c) a retirement pension is payable.

Summary of Mrs N's position

23.

- Her role was made redundant, so a redundancy pension should be paid to her; the fact that after she left Beechwood no additional cook was recruited to fill the vacancy that she turned down at Linby Drive and there was a reduction in headcount indicated that there was a redundancy.

- The job that AEM offered her at Linby Drive was not a suitable alternative role for her, because she would have to spend more time travelling and change buses, and she did not consider it safe to walk through parts of the Broxtowe housing estate by herself as at that time it had a high level of street crime.

- AEM did not take Mrs N's objections to the proposed move seriously enough and provided inadequate support for her during 2012, refusing to discuss possible working patterns and flexible hours, and not making contact with her while she was off sick.

- Her compromise agreement did not mean that a redundancy had not arisen; it did not refer to or affect her pension rights; the settlement figure was only a little more than would normally be calculated for completing twelve years' service.

- She had not thought it necessary to question the pension implications of signing the compromise agreement as it did not refer to pension benefits, and therefore she did not ask AEM for more time to consider the proposal, or to seek pension advice from a specialist.

- She always understood that Beechwood was to be her place of work, and disagreed that "Whitegates Adult Services (South)" included Linby Drive.

- In 2012 she was not aware of the mobility clause, because it was only available as an online document on AEM's intranet from 2010, and she did not have access to the computer at Beechwood; furthermore the clause was not contractual or enforceable against her.

- She considered that various employment law cases including Home Office v Evans [2007] EWCA Civ 1089, Packman v Fauchon (UKEAT/0017/12/LA) and Sparks v Department of Transport [2015] EWHC 181 (QB) supported her claim, in addition to the previous Pensions Ombudsman's determination in respect of Mrs Lam (PO-1162).

Summary of AEM's position

24.

- Mrs N was not entitled to draw her pension early because she had not been dismissed by reason of redundancy, and AEM had not decided that she should leave its employment on grounds of business efficiency; she was offered an alternative position because AEM wanted to retain her services.

- Mrs N's employment had been terminated by mutual agreement, pursuant to the compromise agreement that she willingly signed after seven months' absence from work due to ill health; the agreement contained generous financial terms (nearly one year's salary) and was not entered into on the basis of a redundancy arising.

- Mrs N had taken legal advice before signing the compromise agreement and this should have included advice on the pension scheme implications of signing the agreement.

- AEM had offered Mrs N considerable support to enable her to remain in its employment, and the offer of the job at Linby Drive was not unreasonable; AEM was entitled to relocate its employees within a reasonable distance, and Linby Drive was not an unreasonable distance from Mrs N's home.

- It was standard practice for AEM to communicate handbook changes by means of a memorandum to all staff, so Mrs N should have been aware of the mobility clause.

Summary of NCC's position

25. Mrs N was not entitled to early access of her pension from the LGPS on grounds of redundancy/efficiency of the business, because she was not dismissed by reason of redundancy, and her employer did not decide that she should leave on grounds of business efficiency.

26. Mrs N left service due to mutual agreement, as set out in the compromise agreement, which was offered once it became clear that Mrs N was unwilling to remain in AEM's employment.

Conclusions

27. Mrs N's complaint is primarily against AEM, her former employer. NCC was not Mrs N's employer and has been included as a respondent only because it was the body appointed to carry out stage 2 of the IDRP. I am satisfied that NCC carried out its obligations under the IDRP appropriately, and do not uphold the complaint against NCC.

28. With regard to AEM, Mrs N contends that all the facts indicate that her part-time role as a cook was made redundant in 2012. The pension scheme implications of redundancy are that an immediate retirement pension (without the usual reduction for early payment) would be payable under the Regulations if she is "dismissed by reason of redundancy" or if her "employing authority has decided that, on the grounds of business efficiency, it is in their interest that [s]he should leave their employment."

29. Mrs N's contracts of employment with AEM referred to her work location as being "Whitegates Adult Services (South)". The contracts could have stipulated Beechwood as her sole work location, but were not that restrictive.

30. Mrs N was clearly unhappy about AEM's transfer proposal, and put forward various grounds on which it was unattractive to her. I have some sympathy with her comments about the additional travelling involved, particularly as she had her elderly mother's welfare to consider. On a map Mrs N's home was about four miles from Beechwood and about five miles from Linby Drive, but travelling from her home to Linby Drive would increase her journey time considerably because she would have to travel into the city to change buses and would not wish to walk through the Broxtowe housing estate on her own. Mrs N estimated that her new journey time would be about ninety minutes, although AEM has contested the amount of travel time that would normally be needed.

31. Although Mrs N suggested to AEM in her letter of 20 May 2012, that "a straight forward redundancy may be the best way forward", she has acknowledged that she has not supplied any written evidence to show that AEM told her that her role as a cook would be made redundant, and AEM disputes the contention that redundancy was offered to her verbally. In its letter of 6 November 2012 AEM explained:

> "This situation is not a redundancy situation because although there is not a requirement for a cook at Beechwood, there is still a requirement at our other home, Linby Drive…I can confirm that there is enough work to support the existing cook's hours as well as yours. A redundancy situation occurs where the role has "ceased or diminished" and it is found that your role has not fallen into this category. You were requested to move to our other site as is our contractual right to request you to do so in accordance with the mobility clause which is in your handbook. This is deemed to have been a reasonable request. You stated that this role was inappropriate and that no other job or role would be acceptable for you and that you wanted to be made redundant. I would like to reiterate at this point that there is no requirement for voluntary redundancies to be offered and no redundancy situation. There is no need to reduce head count; we undertake a continual financial review and service efficiency and there is no evidence that we need to take this action."

32. Mrs N has said that the mobility clause mentioned in this letter, which was added to the staff handbook in April 2010, should not apply to her because her contract of employment had started before that date.

33. Following several months of sickness absence, Mrs N left AEM's employment pursuant to a compromise agreement which she signed, voluntarily, on 21 December 2012. This terminated her contract of employment "by mutual agreement". It did not make any reference to redundancy. Under the terms of the agreement AEM paid Mrs N the sum of £6,000.

34. Mrs N maintains that she was made redundant by AEM, notwithstanding the terms of her compromise agreement. AEM state that Mrs N was not made redundant. The question therefore arises whether I should investigate her employment issues in detail. Mrs N would like me to do this, and has reiterated in some detail many of her grievances against her employer, citing several employment law cases to support her arguments, but I do not consider it appropriate for me to investigate those matters. The reason I say this is because my role is to investigate and make rulings on maladministration in relation to pension schemes. In exercising my jurisdiction, in rare cases, I may consider it appropriate to look behind the terms of a compromise agreement, for example if it makes no reference to any pension rights. However, although in Mrs N's case the compromise agreement does not refer to pension rights, there is no clear evidence of what would have happened to her employment with AEM if she had not signed the agreement, so any consideration of the pension rights claimed by Mrs N becomes secondary to the factual situation in December 2012 and the position at employment law.

35. Mrs N's solicitor has expressed the view that Mrs N would have had a strong case against her employer under employment law, but the matter never went to an employment tribunal. It is not my role to stand in for that tribunal over three years later. Therefore, I do not need to consider whether the employment cases which Mrs N has cited, in particular Home Office v Evans, Packman v Fauchon and Sparks v

Department of Transport, are relevant to her complaint, and at what stage the mobility clause should have been brought to her attention. These are matters of pure employment law and, for the reasons which I have already outlined, it is not appropriate for me to assume the role of an employment tribunal (as at December 2012) and investigate what would or might have happened in the absence of what in fact did happen. My role is to look at whether there has been maladministration in relation to the decision not to award a pension under Regulation 19.

36. Mrs N pointed out that the previous Pensions Ombudsman's determination in the case of Mrs Lam [PO-1162] looked into the circumstances in which a compromise agreement was signed. However, each case is determined on its own facts and I consider that there are sufficiently distinguishing features for me not to follow that course here. For example, in Lam there was a background of discussions about redundancy and no attempts to consider or offer redeployment (which were affected by a TUPE issue about a "split" contract). The then Ombudsman found that in those circumstances Mrs Lam clearly had no effective choice but to sign the agreement. Mrs N's case is quite different – there was no redundancy discussion, an offer was made, and so the key employment law issues were in dispute, including whether there was effectively any choice for her. Rather than argue out those factual and legal issues at a tribunal, the compromise agreement was made.

37. Mrs N also said that in accordance with section 91(1) of the Pensions Act 1995, the compromise agreement should not reduce her pension rights. Section 91(1) applies where there is an entitlement or accrued right to a pension. However, Mrs N's right to any pension that she was already entitled to was not compromised – rather, she compromised her right to argue that she was made redundant, and thus there was a *disputed* (not accrued or absolute) right to an early pension. Compromise agreements are allowed to compromise disputed pension rights. It is merely because of the compromise agreement and the situation surrounding it that Mrs N is unable to prove on the facts that she was made redundant, because as a matter of fact there was no dismissal by reason of redundancy.

38. It may be that Mrs N would have been willing to sign the compromise agreement in any event, whatever her feelings at the time about the true nature of her departure, because the agreement promised her an immediate lump sum, which was a substantial amount (when compared with her part-time earnings of about £7,000 per annum), and at that time, before her health deteriorated, she may have been reasonably confident of being able to obtain another job elsewhere. However, this is only conjecture. It is not clear what would have happened in the absence of the compromise agreement, including whether Mrs N would have been made redundant or not.

39. In any event, it is clear that when she signed the compromise agreement Mrs N gave up her right to make a claim at an employment tribunal in respect of the employment issues that were in dispute at that time. It is not my function to assume the role of an employment tribunal and make a finding on whether AEM's treatment of Mrs N was

unfair and whether it handled Mrs N's grievances properly, including whether the terms of its alternative job offer, concerning its location, and the details it supplied to Mrs N, were reasonable. My role here is limited to determining whether a pension should have been awarded under Regulation 19 of the Regulations.

40. As set out in paragraph 21 above, Regulation 19(1) sets out two alternative situations in which an immediate pension is payable from the LGPS before normal pension date, which can be summarised for convenience as item (a) redundancy and item (b) business efficiency.

41. With regard to item (a), the fact that for personal reasons Mrs N would have preferred a redundancy over a transfer to Linby Drive does not mean that her leaving AEM was due to dismissal by reason of redundancy. Mrs N's employment ended on 21 December 2012, solely by virtue of the compromise agreement that she signed on that day. This said that the cause of her leaving employment was "mutual agreement". It did not refer to redundancy. It was up to Mrs N whether she firstly sought advice from a pensions solicitor or a financial adviser on the pension scheme implications of her signing the agreement in that form. The fact that she did not do that should not constitute a reason for me to make a finding that her role with AEM was made redundant.

42. I should (for completeness) also consider whether Mrs N has a claim to an immediate pension on grounds of business efficiency, as set out in item (b), even though Mrs N has focused her complaint only on item (a).

43. Item (b) applies where the employer has decided that, on grounds of business efficiency, it is in its interest that the employee should leave its employment. AEM has said that the proposed transfer to Linby Drive was for "business efficiency" reasons, and Mrs N has acknowledged this. However, AEM also said that it did not decide that it was "in its interest" for Mrs N to leave its employment for reasons of business efficiency, and that this is evidenced by the fact that AEM asked Mrs N to transfer to another of its sites within Whitegates Adult Services (South). I accept that AEM's alternative job offer indicates that AEM would have preferred Mrs N to have remained in its employment in 2012. Again, the reason that Mrs N left AEM's employment cannot be said to be for reasons of business efficiency but by way of a compromise agreement. This was entered into because there were employment issues in dispute at the time which both parties were unable to agree upon. It is unclear what would have happened in the absence of the compromise agreement, but it cannot be said that the reason Mrs N left employment was in the interests of business efficiency.

44. Therefore, as Mrs N did not satisfy either item (a) or (b) set out in Regulation 19(1), I am of the view that she did not qualify for an immediate pension under the LGPS.

45. For the reasons set out above I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
12 May 2016