

Ombudsman's Determination

Applicant	Mrs Ann Chapman
Scheme	Local Government Pension Scheme
Respondents	Birmingham City University West Midlands Pension Fund

Complaint Summary

Mrs Chapman complains that Birmingham City University (**BCU**) and West Midlands Pension Fund (**WMPF**) have wrongly declined her application for early payment of her deferred pension in the Local Government Pension Scheme (**LGPS**). She contends that:

- BCU and WMPF failed to provide her with satisfactory reasons for their decision;
- BCU failed to exercise discretion correctly in relation to their policy on early payment of deferred pensions; and
- she would not have taken voluntary redundancy at age 54 if BCU had told her that by remaining in their employment until age 55, she would have been entitled to immediate payment of her unreduced pension if she was subsequently made redundant (before age 60).

She has also requested that I determine whether or not the termination of her employment entitled her to the immediate payment of her pension on the grounds of redundancy or business efficiency.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against BCU and WMPF because I consider that BCU had asked Mrs Chapman the right questions about her financial status and considered all the relevant factors before reaching the decision that her request for early retirement should be declined.

Detailed Determination

Material facts

1. Mrs Chapman left BCU on 31 July 2012, after applying successfully for voluntary severance in accordance with the terms being operated by BCU at the time.
2. She also became a deferred pensioner in the LGPS on this date and received a deferred benefits statement (in September 2012).
3. In April 2013, Mrs Chapman considered applying for early payment of her deferred pension from her 55th birthday on 24 June 2013. BCU informed her that if her application was successful, she would be entitled to a pension of £8,257 pa and a lump sum of £18,875 from the LGPS. They also said that the cost to them of paying these benefits to her would be £36,195.
4. BCU sent Mrs Chapman a copy of their “Policy in Relation to the Local Government Superannuation Scheme Discretionary Powers and Premature Retirement” (**the Policy**) and drew her attention to paragraph 2.1 (reproduced in the Appendix below). BCU informed her that:
 - as she had already left their employment, they would not be able to fund the cost of paying her early retirement pension within a three year period; and
 - the cost to them of £36,195 exceeded six months’ her gross pay (at date of leaving) of £24,427 by £11,768.

BCU had, therefore, essentially alerted Mrs Chapman in advance that any early retirement application from her was unlikely to be successful in accordance with the Policy.

5. Mrs Chapman proceeded with her application on 14 June 2013. She informed BCU that she was in financial hardship because she had loan/mortgage commitments and two children to support. She said that due to restructuring at BCU, she had to accept a position which paid less and involved greater travelling time and costs.
6. Mrs Chapman also said that:
 - she had taken voluntary redundancy at a time when her life was in considerable turmoil;
 - her husband had lost his job and was supplementing his income through temporary work;
 - her mother had recently been diagnosed with cancer;
 - she underwent major surgery after redundancy and currently was unable to work because of stress;
 - early release of her pension would considerably alleviate her financial pressures; and

- further details of her finances were available from her advisers, if required.
7. BCU asked Mrs Chapman to provide by 5 July 2013, any additional information from her financial advisers which she would like them to consider. On 3 July 2013, she sought clarification from BCU on what they were asking for. BCU replied that her advisers should supply anything which she deemed relevant to her application. After Mrs Chapman told them that she had no more evidence to submit, BCU responded that they would make their decision on her application in accordance with the Policy.
 8. BCU notified Mrs Chapman on 12 July 2013, that they had declined her application after carefully considering all the available evidence. The reasons which they gave for their decision were essentially those shown in paragraph 4 above. BCU also informed her that they could not fund the cost of her early retirement of £36,195 using financial resources already earmarked for other commitments.
 9. Mrs Chapman's appeal at both stages of the LGPS Internal Dispute Resolution Procedure (**IDRP**) was unsuccessful. In their Stage One IDRP decision letter dated 16 December 2013, BCU said that:
 - early payment of her deferred benefits from LGPS was entirely at their discretion;
 - they did not force her to provide any additional evidence by 5 July 2013;
 - there would not have been any benefit to them by doing so;
 - they set the deadline only to try resolving the matter without any unnecessary delay;
 - the criteria developed for use in considering early retirement applications balanced their needs with those of the applicants;
 - following a period of pay protection, Mrs Chapman had applied successfully under a general voluntary severance scheme, the clear terms of which she accepted only after taking legal advice;
 - they had properly considered her circumstances and also their operational needs at the time before granting her voluntary redundancy application;
 - Mrs Chapman was not made redundant because the need for her position remained (albeit adjusted to meet their continuing and future operational needs);
 - as no savings could be made by agreeing to her release, it was relevant in the context of the Policy;
 - they did not apply the Policy criterion relating to six months' pay as a blanket consideration but applied appropriate flexibility within their resource constraints after taking into account the applicant's personal circumstances and whether the cost only surpassed this limit slightly;
 - in Mrs Chapman's case, the cost to them far exceeded the norm for the release of early retirement benefits and they were unable to identify any savings which could be used to offset such costs;
 - they had exercised their discretion properly after taking into account all the information available to them at the time; and

- they had, therefore, done all they reasonably could before declining her application.
10. In their stage two IDRP decision letter dated 25 July 2014, Wolverhampton City Council (**WCC**), the administering authority for WMPF, informed Mrs Chapman that:
- Regulation 30 of the LGPS (Benefits, Membership & Contributions) Regulations 2007 allowed a member who had left local government employment before being entitled to immediate payment of his/her retirement benefits, to request payment once he/she had attained age 55;
 - the Regulations stated that the employer had to give consent where payment was being requested before age 60;
 - the employer was required to have a written policy statement on the matter;
 - BCU would incur a cost payable to WMPF if they had accepted her early retirement application;
 - they could only ensure that BCU had exercised their discretionary power reasonably and could not overturn their decision;
 - BCU had properly taken into the account the reasons which she gave for applying and also the costs associated with early payment of her benefits; and
 - they consequently agreed with the decision made by BCU at stage one IDRP.

Summary of Mrs Chapman's position

11. She was refused early payment of her deferred pension by BCU on grounds which fell outside the terms of the Policy. The fact that she was no longer in BCU's employment (which meant that BCU could not make further savings) should be irrelevant to her application. This criterion did not appear in the Policy. BCU had consequently taken into account an irrelevant factor when considering her request.
12. Application of the Policy leads to the extraordinary conclusion that only members in employment (with no need of an immediate pension) who have opted out of the LGPS can qualify for consideration of early release of their deferred pensions. She, therefore, had no chance of receiving her deferred pension early prior to age of 60 in accordance with the Policy.
13. BCU's decision was not based on pertinent financial and operational considerations and is inconsistent with the relevant regulations. To make regulatory provision for early payment of a deferred pension and then permit employers to operate policies that make the regulations unenforceable cannot be right.
14. If she had remained in employment with BCU until age 55, she would have been entitled to immediate payment of her unreduced pension on subsequent redundancy before age 60 (in accordance with regulation 19 of LGPS (Benefits, Membership and Contributions) Regulations 2007).

15. She accepts that BCU could have made her redundant before age 55 if she had decided not to take voluntary redundancy at age 54. But by failing to inform her of the pension implications before she took voluntary redundancy, BCU deprived her of the opportunity to take this into account before making her decision.
16. She contends that if BCU had told her, she would either have not accepted voluntary redundancy at age 54, or challenged their decision to terminate her employment eleven months before her 55th birthday.
17. It was insufficient for BCU to merely have pointed out to her that she could have studied the Policy on their website. BCU should have instructed her to do this. But even if she had done so, she would still have been unaware that by accepting voluntary redundancy at age 54 subsequent early release of her deferred pension would be made more difficult because the Policy did not explain this.
18. BCU knew how much it would cost them to release her deferred pension early at age 55 and pay it up to age 60 (if they made her redundant at age 55). She cannot be expected to have the level of knowledge to work this out by herself.
19. BCU have acted in bad faith by not allowing her to appeal against their decision to terminate her employment and by failing to provide her with adequate information to make an informed decision on whether taking voluntary severance would be in her best interests.
20. This gives rise to a perverse interpretation of the requirement for members to make themselves aware of the factors that should properly inform their decisions.
21. The voluntary severance scheme had pension implications. It was clearly in the best interests of BCU that she took voluntary redundancy before age 55. By granting her application, BCU made immediate and long term savings by not having to pay a lump sum to finance the early release of her pension and they could also defer paying her pension until she attained age 60.
22. BCU knew that it would not be possible for them to authorise the release of her deferred pension early on cost grounds regardless of the discretionary terms of the Policy before she even made her application. But if she had contacted BCU to discuss the Policy, they would not have told her that they could not grant her request but merely have cited vague concepts of discretion and the requirement to consider all relevant information available.
23. The fact that BCU could not release funds from other sources should also be irrelevant to her application. The Policy states that her application should be judged specifically on its own merits. Any money needed to be spent under given circumstances could just as easily be spent elsewhere. Application of this criterion would suggest that any early retirement application stood a high chance of being rejected because it presented a cost to BCU.

24. BCU have not explained why the criterion, that the cost of releasing pension benefits early should not exceed six months' pay (at date of leaving), should apply in her case. In her view, this criterion was, therefore, applied by BCU as a "blanket consideration" to her application without regard to its merits. They have also not justified why the cost cannot be funded over three years. The excess cost (over and above her six months' pay) could be met by a little over £8,000 pa for three years. This amount cannot be that great in the overall context of BCU's budget.
25. BCU have not been able to show that they have applied the Policy criteria independently to her circumstances when they made their decision.
26. BCU have not provided any contemporaneous evidence detailing the reasons for their decision (such as minutes of the meeting at which her application was considered or the relevant chain of e-mails concerning her claim). Without such evidence, BCU cannot demonstrate that they have exercised their discretion in the correct manner. It is a matter of good administrative practice for BCU to give the reasons for their decisions to those with a legitimate interest in them. Not knowing the basis upon which an unfavourable decision was taken is in itself an injustice.
27. She was given insufficient time to submit further evidence in support of her application. She was pressurised by BCU to respond before she was able to gather the extra information for their consideration.
28. Her position at BCU no longer existed after she took voluntary redundancy. It was amalgamated with other jobs and its nature changed afterwards.
29. By accepting voluntary redundancy at age 54 instead of being let go by BCU on the grounds of either redundancy or business efficiency after attaining age 55, she was marginally better off financially. This did not adequately compensate her for losing the opportunity to decide whether or not she was prepared to accept that early release of her deferred pension would be made more difficult afterwards by doing so.
30. She has suffered considerable distress and inconvenience as a consequence of the incorrect decision made by BCU.
31. It is reasonable for her to expect BCU to have provided her with salient information about the impact of voluntary termination on her retirement benefits in light of the Policy.

Summary of BCU's position

32. They provided contemporaneous proof of how they correctly applied the criteria specified in the Policy after taking into account all the available evidence in Mrs Chapman's case. Their letter of 12 July 2013 set out the reasons behind their decision and the manner in which they exercised discretion. This information was also given in their letter of 16 December 2013. Furthermore, WCC's letter of 25 July 2014, confirmed that BCU had considered the reasons given by Mrs Chapman for her application and the associated cost if they had agreed to her early retirement request.

33. They do not therefore accept her allegation that they have failed to supply details of the evidence considered at the time they made their decision to reject her early retirement application.
34. They did not deliberate over Mrs Chapman's request at a meeting so there are no minutes recording how they arrived at their decision. It is not the absence of minutes, however, which gives rise to maladministration but a failure to exercise discretion in the proper way.
35. They have not erred in the manner which they exercised discretion in her case. Her application was declined because she unfortunately did not meet the Policy criteria in respect of her request. They refute her allegation that they took irrelevant factors into account outside of the terms of the Policy.
36. The issue of early payment of pension benefits was not raised at the time Mrs Chapman applied for voluntary severance because it did not form any part of the terms of the voluntary severance scheme on offer.
37. There was no redundancy situation in Mrs Chapman's case. They did not dismiss her because of redundancy, or on the grounds of business efficiency. Mrs Chapman ceased employment with BCU voluntarily for her own personal and financial reasons.
38. They applied the rules of the voluntary severance scheme appropriately after taking into full account of her circumstances at the time.
39. Mrs Chapman contends that she is worse off financially by accepting the voluntary severance compensation payment than if she had remained in BCU's employment. She says that if she had been made redundant by BCU after attaining age 55, she would have been better off. But her post continued after she left. It cannot be said with certainty that she would have been made redundant by BCU if she had not applied for voluntary severance. In any case, her assertion is irrelevant to her allegation that they failed to exercise their discretion properly in making their decision on her early retirement application.
40. There is no duty in tort, or contract, on an employer to provide information to an employee in respect of pension benefits, particularly when he/she is able to obtain this from readily available documentation. They cannot be criticised for not drawing Mrs Chapman's attention to the Policy which was available on their website.
41. The Policy sets out the manner in which they exercise discretion in respect of requests for early payment of retirement benefits.
42. In situations concerning cessation of employment with compromise agreements, the normal practice is for employers not to advise an employee in any way about his/her pensions rights. There was no basis for the normal practice not to apply in her case.
43. They do not accept Mrs Chapman's view that her financial situation is worse off by taking voluntary redundancy than it would otherwise have been. The ex-gratia payment available from the compromise agreement was approximately £8,000 more

than the statutory redundancy payment. Moreover, she is still entitled to the retirement benefits available to her from the Scheme (at NRA). She has not suffered any financial injustice by successfully applying under the voluntary severance scheme.

44. It was not the case that the voluntary severance scheme had pension implications for Mrs Chapman but rather that she left BCU's employment voluntarily before the age of 55.
45. It was not that Mrs Chapman no longer worked for BCU, but the cost to them of funding the release of her pension benefits early which was a relevant consideration in exercising their discretion. The fact that it was not possible to fund the cost of early payment of her pension benefits from the post she held at BCU was a part of that consideration.
46. The cost to them, however, is not the sole deciding factor when deciding whether or not to grant an early retirement application. They took into account all relevant factors as required by the Policy which states that each request must be judged equally and fairly on its own merits.
47. They gave Mrs Chapman the opportunity to provide additional evidence relevant to her application in their letter of 28 June 2013, before making their decision but she told them that she had no more pertinent information to offer.
48. It is not the case that Mrs Chapman would automatically be refused early payment of her deferred pension prior to her reaching age of 60.
49. They have not acted in bad faith towards Mrs Chapman. They gave sympathetic consideration to her personal circumstances both at the time of her request for voluntary severance and the subsequent application for an early retirement pension.

Jurisdiction

50. Her request that I determine whether or not the termination of her employment entitled her to the immediate payment of her pension on the grounds of redundancy, or business efficiency, is an employment matter outside of my jurisdiction and should not be investigated by me. In any case, regulation 19 of LGPS (Benefits, Membership and Contributions) Regulations 2007, does not apply to Mrs Chapman because she left BCU voluntarily before attaining age 55.

Conclusions

51. Regulation 30 of the LGPS (Benefits, Membership & Contributions) Regulations 2007 provides for early payment of deferred pension benefits to Mrs Chapman at an earlier age than 60 at the discretion of her former employing authority, i.e. BCU.
52. When considering how discretion has been exercised by BCU, I can look at whether the correct questions have been asked, the applicable scheme rules, or regulations

have been correctly interpreted and all relevant but no irrelevant factors have been taken into account.

53. I will not generally interfere in the exercise of discretion unless I consider the decision process was in some way flawed, or the decision reached was perverse. That is, one that no reasonable body faced with the same evidence would have taken.
54. Providing BCU have acted in accordance with the above principles, and within the powers given to them by the regulations, I cannot overturn the exercise of discretion merely because I might myself have acted differently. It is my opinion that BCU have complied with the regulations and the above principles.
55. Although the decision to grant early retirement is entirely a matter for BCU, they are required under the LGPS (Benefits, Membership & Contributions) Regulations 2007, to formulate a policy concerning the exercise of this function. In my view, BCU applied this discretionary policy in Mrs Chapman's application with due diligence, fairly and in a reasonable manner that was consistent with the regulations. As a public body, it is important that they are able to justify their decisions on relevant financial, operational and compassionate considerations.
56. The available evidence, in my view, clearly demonstrates that BCU did ask Mrs Chapman the right questions about her financial status before considering all the relevant factors (including the cost of funding the release of her benefits) in reaching their decision. Furthermore, I have seen no evidence that BCU did not exercise their discretion properly in Mrs Chapman's case after considering all the evidence submitted on its own merits.
57. Mrs Chapman argues that BCU did not detail the reasons for their decision. It would have been an injustice if BCU had made an unfavourable decision without providing details of the basis on which they reached their decision, however, BCU did provide detail of the rationale behind its decision. In its letter of 12 July 2013, they said they had declined her application because Mrs Chapman had already left their employment and so they would not be able to fund the cost of paying her early retirement pension within a three year period; and the cost to them exceeded six months of Mrs Chapman's gross pay.
58. Mrs Chapman contends that the excess cost (over and above her six months' pay) could be met by a little over £8,000 pa for three years. She says this amount cannot be that great in the overall context of BCU's budget. However, BCU are entitled to prefer their own interest and it is clear that the cost in Mrs Chapman's case was not outweighed, in BCU's view, by any advantage to them, or by Mrs Chapman's circumstances. BCU was entitled to decline Mrs Chapman's application and in my opinion, their decision cannot be said to be perverse.
59. Mrs Chapman says that BCU should have told her that by remaining in their employment until age 55, she would have been entitled to immediate payment of her unreduced pension on subsequent redundancy before age 60.

60. Early retirement with an unreduced pension was not under consideration as a part of the voluntary severance scheme. Information concerning BCU's early retirement Policy was available on their website. It was consequently unnecessary for BCU to have drawn to Mrs Chapman's attention regulation 19 of LGPS (Benefits, Membership and Contributions) Regulations 2007 at the time she made her decision to accept the voluntary redundancy scheme.
61. Furthermore, Mrs Chapman's contention that she is worse off by taking voluntary severance than if she had remained in BCU's employment until at least age 55 is, in my view, an unreasonable assumption for her to make. Much could happen during the six years prior to her NRD. As Mrs Chapman has already conceded, if she had not taken voluntary severance at age 54, BCU could have made her redundant prior to her attaining age 55. Moreover, given that there was still a need for her post (albeit adjusted to meet their operational needs) after she left, there was no guarantee that she would subsequently have been made redundant between age 55 and 60.
62. I do not find that BCU had sought to encourage Mrs Chapman to apply for the voluntary severance scheme by deliberately not informing her of regulation 19 of LGPS (Benefits, Membership and Contributions) Regulations 2007, in the knowledge that subsequent early retirement could be more difficult for her by doing so.
63. Mrs Chapman has also asked me a question of pure employment law which is outside of my jurisdiction. I am satisfied, however, that she had accepted voluntary severance without being coerced into doing so by BCU.
64. Although, I fully sympathise with the Mrs Chapman's circumstances, I do not consider that they are the result of any maladministration on the part of BCU or WMPF.
65. I do not uphold the complaint made by Mrs Chapman.

Anthony Arter

Pensions Ombudsman
16 February 2016

APPENDIX

Local Government Pension Scheme Regulations 2007 – Regulation 30

30 (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 the member's

(a) employing authority;

(b) former employing authority where the member has no current employing authority; or

(c) appropriate administering authority where the member has no current employing authority and the member's former employing authority has ceased to be a Scheme employer...

(3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29(SI 2008/1083).

(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, former employing authority or, where such authority has ceased to be a Scheme employer, the appropriate administering authority, as the case may be, (SI2012/1989) may determine on compassionate grounds that his retirement pension (SI2008/1083) should not be reduced under paragraph (4).

Relevant paragraphs taken from BCU's "Policy in Relation to the Local Government Superannuation Scheme Discretionary Powers and Premature Retirement" dated January 2013

1. Introduction

1.1 Under Regulation 106 of the LGPS Regulations 1997 (as amended), each employer must formulate, keep under review and publish their policies on certain discretions contained within the LGPS Regulations. The purpose of this paper is to define the University's current policy in relation to the discretionary powers granted to employers.

1.2 This statement is applicable to all employees of BCU who are also eligible to be members of the LGPS.

2. Background

2.1 Member's request for early payment of benefits

2.1.1. From age 55, members (including those who become deferred members from 1 April 1998) have the right to apply for early payment of their retirement benefits subject to

the consent of their employer. However, members aged 60 and over do not need their employer's consent. There are special provisions for members with service prior to 31 March 2008 with the earliest age for release of 50 becoming 55 by 2010.

2.1.2 The University's policy on this matter is that each specific request for the early payment of benefits will be judged equally and fairly on its own merits, on the grounds that a decision to support a request would need to be funded by a lump sum contribution into the pension fund by BCU. This discretion will only be exercised by BCU in cases where it can be demonstrated that the University can fund the cost of the release within a three year period. In addition, as a general rule, the costs involved should not exceed a sum equivalent to that of six month's gross pay of the member.