

Ombudsman's Determination

Applicant	Mr T
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Peterborough City Council, Cambridgeshire County Council

Complaint Summary

Mr T has complained that Peterborough City Council (**PCC**) and Cambridgeshire County Council (**CCC**) have failed to pay his pension benefits in respect of his LGPS membership from 1975 to 2004 following his redundancy in 2013.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against PCC and CCC because the correct test was applied by the correct decision maker and there is no basis to hold the decision perverse or otherwise unreasonable.

Detailed Determination

Scheme's Regulations

1. At 22 August 2014, when Mr T left the LGPS for his first period of membership, Regulation 31 (Other early leavers: deferred retirement benefits and elections for early payment) of The Local Government Pension Scheme Regulations 1997 (**the 1997 Regulations**) said:
 - (1) If a member leaves a local government employment (or is treated for these regulations as if he had done so) before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he is aged 50 or more he may elect to receive payment of them immediately.
 - (2) An election made by a member aged less than 60 is ineffective without the consent of his employing authority or former employing authority (but see paragraph (6)).
2. Regulation 32 of the 1997 Regulations said:
 - (1) Where a deferred member becomes an active member again before becoming entitled to the immediate payment of retirement benefits in respect of his former membership, he may elect to have his former membership aggregated with his membership on or after the date he becomes an active member again.
 - (2)
3. Regulation 19 (Early Leavers: inefficiency and redundancy) of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the 2007 Regulations**) says,
 - (1) Where –
 - (a) a member is dismissed by reason of redundancy; or
 - (b) ...; and
 - (c) in either case, the member has attained the age of 55,he is entitled to immediate payment of retirement pension without reduction”.

Other Regulations

4. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**the 2006 TUPE Regulations**) says,
 - “10 Pensions**
 - (1) Regulation 4 and 5 shall not apply –
 - (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993;

- (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme."

Material facts

5. CCC is the administering authority for the Cambridgeshire County Council Pension Fund (**the Fund**), which is part of the LGPS.
6. Mr T was employed by PCC and he joined the Fund on 20 October 1975.
7. Mr T was employed as a Plumber. Because of a reduction in his pay which occurred in 2004, Mr T chose to cease his pensionable employment with effect from 22 August 2004. On 14 February 2005 Mr T completed form 'PEN4' recording the fact that he wished to be awarded deferred benefits in respect of his pension rights earned from 20 October 1975 to 22 August 2004 (the first period of pensionable service). PCC says Mr T's rationale for this was that the LGPS at that time was a final salary scheme, and he protected his first period of pensionable service against his higher pay.
8. PCC completed form 'PEN8' – which is undated – giving notification to Mr T of his entitlement to deferred benefits.
9. Mr T re-joined the Fund with effect from 23 August 2004.
10. On 1 August 2008 Mr T's employment was transferred to Mears Group plc (**Mears**). This transfer came within the provisions of the 2006 TUPE Regulations. PCC says at the point of transfer Mr T had a deferred pension benefit in the Fund for his first period of pensionable service (20 October 1975 – 22 August 2004). All other terms and conditions and pensionable service from 23 August 2004 transferred to Mears.
11. Mears became a Scheme Employer by virtue of an Admission Agreement made at the time of the transfer. Thus, Mr T's active membership of the LGPS continued.
12. In 2011, Mr T expressed a wish to be supplied with figures to enable him to make an informed decision about amalgamating his pension rights. In response, CCC wrote to Mr T on 14 June 2011. They said,

"As you have left your employment as a Plumber with Peterborough City Council on 22nd August 2004, ..., you have a number of options available to you, and in order to simplify this for you, I have taken the action that should provide you with the highest pension benefits, assuming a retirement age of 65, the normal retirement age for the ... Scheme. In your case I have therefore awarded you deferred pension rights, which I have enclosed, in respect of your former job as the pay in your subsequent job is less than the pay in your previous job. Your pension rights in respect of your subsequent job, which has a lower pensionable pay, remain separate.

The value of your final pay in your former job is currently £33,663.29 including cost of living increases and the most recent pay that I have for your subsequent job is £26,183.72.

Please note other options may be available to you. These may be particularly relevant if you plan to take all or part of your pension earlier than age 65. The enclosed leaflet explains the things you need to think about.

Having read the above, should you prefer an alternative option to the one we have exercised, please complete and return the enclosed form by 1st October 2011, stating your preferred option.”

13. CCC say either the December 2010 or February 2011 versions of the leaflet ‘Options available if you have previous LGPS benefits’ would have been sent to Mr T in June 2011. They have similar wording and say,

“FUTURE ... OR REDUNDANCY / BUSINESS EFFICIENCY RETIREMENT BENEFITS

If you keep your benefits separate and you eventually retire early on ill health grounds or are made redundant or retired on business efficiency grounds you are entitled to immediate payment of benefits, your benefits will be calculated on your re-employed membership only. However, it may be possible to have your deferred benefit put into payment early with your former employer’s consent from age 55 or from any age on ill health grounds”.

14. The February 2011 version additionally says, “... or from any age on ill health grounds but you should be aware that this is not always granted”.
15. Mr T did not exercise his option to amalgamate the two periods of service and his pension rights from his first and second periods of pensionable employment therefore remained separate.
16. Mr T reached age 55 in 2012.
17. A group consultation took place on 7 January 2013 between Mr T and Mears. It was explained that, due to a business review of the Mears Peterborough Branch, Mr T’s role was potentially at risk of redundancy.
18. On 24 January 2013, Mr T wrote to PCC asking for clarification of the pension benefits he would be entitled to if he were to be made redundant. Mr T noted his age and service, of 38 years, meant that he met the 85 year rule. PCC informed Mr T that as they were not his current employer, they were unable to provide him with a statement about his current entitlement.
19. Following the consultation, Mears wrote to Mr T on 28 January 2013. They noted Mr T had requested voluntary redundancy, which they confirmed had been accepted. Mears’ letter gave formal 12 weeks’ notice of the termination of his employment on the grounds of redundancy from 6 February 2013 and details of his redundancy

payment. Mears did not require Mr T to work his notice and so his employment ended from that date, with a payment in lieu of notice.

20. Mr T counter-signed Mears' letter of 28 January 2013 on 4 February 2013 accepting these terms in full and final settlement.
21. Mr T wrote to PCC again on 28 February 2013 saying he had now been made redundant, but was still waiting to hear from them about the pension benefits he would be entitled to.
22. On 4 March 2013, PCC replied to Mr T after considering the matter. In their letter to him, PCC said they must exercise the power they had under regulation 30(2) of the 2007 Regulations, and explained their consent was required if the member had not reached age 60. They went on to say,

“Our policy regarding this issue states –

'LGPS (Benefits, Membership & Contributions) Regulations 2007 Regulation 30(2) [the wording is also identical for Regulation 31(2) of the 1997 Regulations]

It is not the policy of Peterborough City Council to release pension early unless:-

(i) It is to bring an earlier deferred benefit into payment following redundancy, or efficiency retirement of an existing employee from a current job in Peterborough City Council, or

(ii) ...

...

In exceptional circumstances, and only with the prior approval of the chief executive, the council may vary the terms of this policy on an individual basis.

...

Your case has been assessed very carefully against the council's current pension discretionary policy. I have taken note of your particular circumstances. I have decided that on the basis of (a) the information provided in your letter, (b) your meetings with the undersigned and (c) careful assessment of your personal circumstances, that it is not possible to agree to release of your pension early.

My main reasons for this decision are:

- It was your choice, and decision to take the option of deferring previous pension benefits in 2004;
- The council's discretionary policy is clear that deferred benefit will only be released if the person is being made redundant from a current job in Peterborough City Council;

- Peterborough City Council is responsible for making appropriate, measured decisions regarding pensions to ensure pension scheme members are treated fairly, consistently and in accordance with the regulations.

On the basis of this, I have decided that your circumstances do not allow me to apply the employer's discretion".

23. Mr T disputed the PCC's interpretation of regulation 30(2), saying that subsection (i) of the policy applied, i.e. to bring an earlier deferred benefit into payment following redundancy, and these were his circumstances. He also queried how the fact he qualified under the 85 year rule helped him. He said he had always been told that under the 85 year rule he would get full pension benefits. In his letter of 6 March 2013 he requested the PCC's decision be reconsidered.
24. PCC replied to Mr T on 12 March 2013. They did not change their decision. Taking his points in turn, they said,
 - PCC were unable to take part in the administration of any pension following his redundancy from Mears. Mears needed to contact Local Government Shared Services (**LGSS**) Pension Service (a joint venture between CCC and Northampton County Council) about his pension benefits resulting from his employment with them.
 - The regulation stated the deferred benefit would be released if the redundancy is of an existing employee from a current job in PCC. Mr T's employment with Mears was not employment with PCC. The discretionary policy was repeated.
 - The 85 year rule determines whether there is to be an actuarial reduction applied to a member's benefits, and if there is, how much the reduction will be. The 85 year rule does not, however, provide a date at which benefits can be taken automatically. So, although Mr T satisfied the 85 year rule, it did not mean that he could automatically take payment of his benefits before age 60.
 - The information stated about voluntary redundancy was the information stated in the letter from your employer and was also the position he had expressed in their conversation when they met. It was not a major factor in PCC's decision but a contributory factor.
25. In his letter of 5 April 2013, Mr T appealed against PCC's decision. He said under the TUPE regulations he should be treated as a transferred employee with Mears with the same rights and benefits as if he was still an employee of PCC, including his pension rights.
26. PCC rejected Mr T's appeal on 24 May 2013.
27. On 16 September 2013, Mr T wrote to LGSS Pension Service about his further appeal. He reiterated his points about the 85 year rule, his employment being under TUPE and regulation 30(2) applying to his circumstances.

28. LGSS Pension Service, on CCC's behalf, did not uphold Mr T's appeal. This decision was communicated in a letter dated 23 April 2014 by GLSS Law to Mr T.
29. Mr T's pension benefits from his second period of pensionable service (from 23 August 2004 to 6 February 2013) have been put into payment. However, his complaint to this service concerns the non-payment of his deferred benefits from his first period of pensionable service from 20 October 1975 to 22 August 2004).

Summary of Mr T's position

30. The decision to defer in 2004 was on the basis of advice that this would be beneficial to him but no mention was made of any restriction on receiving his full pension benefits whenever retirement happened.
31. When his employment transferred to Mears under TUPE, he was assured that all terms and conditions of employment (including full pension rights) were protected. PCC have never denied that.
32. Had he known the consequences of deferment was that he would be denied his full pension in the event of redundancy following the transfer under TUPE he certainly would never have deferred.
33. As to redundancy itself he was only given the redundancy figures on 4 February 2013, the very day he was persuaded to sign which was very unsatisfactory given that redundancy took effect two days later.
34. Redundancy itself does indeed enable PCC, if it were to be so minded, to bring his deferred pension benefits in payment under section 30(2)(i), namely following redundancy. It is disingenuous to try to infer now that those regulations only applied to current employees because that would completely negate the protection afforded by TUPE. He contends that would be tantamount to a deliberate misinterpretation of those regulations and be against natural justice and challengeable in court.
35. It is misleading of PCC to state he requested voluntary redundancy when this was made without sufficient information about his full entitlement to pension benefits etc. He asked for information on 24 January 2013 and sent a reminder on 28 February 2013.

Summary of PCC's position

36. They do not believe that they should pay the pension benefits that Mr T chose to defer in 2004. They consider the rules have been correctly and appropriately applied to Mr T.
37. The LGPS is a statutory pension scheme. However, since 1997 local decision making has been introduced and employers have more flexibility to determine certain decisions. To enable this, employers are required to 'formulate, publish, and keep under review a policy statement' in relation to how they will exercise certain discretions under the LGPS.

38. At the time Mr T left employment with Mears he had not reached age 60. His deferred benefits could only be released with the employer's consent. This was an employer's discretion.
39. PCC's view is that when Mr T deferred his benefits, they were the employing authority and therefore it is only right they were the decision maker and not Mears. PCC say that as there is a cost implication for them to release the pension early, they have to reach decisions based on their policy to ensure that they are fair and consistent in their decision making.
40. Their policy states that deferred benefits would only be brought into payment following the redundancy (or efficient retirement) of an existing employee from a current job in PCC. The policy was written in this way to ensure that the council was only releasing deferred pension when it had control over the decision to make the individual redundant. Otherwise PCC would have no control over costs that were incurred because of another employer's actions. It was decided that such action would leave the council open to unacceptable excessive risk in respect of costs. The policy is very clear in respect of this discretion.
41. They decided that Mr T's circumstances did not meet the requirements of the policy statement and therefore consent could not be given to release his deferred benefits. Further, they did not believe that it would be appropriate to move away from the policy statement in Mr T's case.
42. At no time did Mr T ask them to consider his case under point (ii), i.e. compelling, compassionate grounds. However, on appeal they did so, but in the absence of any information they could not agree on these grounds either.

Summary of CCC's position

43. Whilst they agree TUPE applied to the transfer of Mr T's contract of employment from PCC to Mears, pension rights are not included in the terms and conditions that automatically transfer (TUPE regulation 10).
44. The facts, as presented, are that Mr T was not made redundant within the true sense of the word but voluntarily entered into an agreement with Mears whereby his employment would be terminated.
45. PCC's policy is a valid one and has been exercised properly by them.
46. When Mr T was granted deferred benefits, the 1997 Regulations were effective and therefore any decision made regarding the release of these benefits must be made relying on Regulation 31 (1) and (2) of the 1997 Regulations. Regulation 31(2) requires consent from the former employing authority, in this case PCC.

47. PCC may have referred to the 2007 Regulations in their decision making. However, the incorrect reliance on the 2007 Regulation has made no material difference to the outcome. PCC as the former employing authority, are the body which needs to reach a decision, which is what they have done.

Conclusions

48. Mr T had two separate periods of pensionable employment in the LGPS scheme, the period up to and including 22 August 2004 and the period after that date up until his redundancy in 2013.
49. When Mr T proceeded with voluntary redundancy in 2013 he expected both periods of employment to be treated in the same way for pension purposes. However, under the Scheme Regulations, I am satisfied that the first and second periods should be treated differently. Mr T considers his pension rights should be protected by the 2006 TUPE Regulations. However, these regulations do not operate to join together the two separate periods of pension scheme membership. They remained separate because Mr T did not elect to amalgamate them. I find that the deferral and amalgamation options were explained at the relevant time.
50. Had Mr T amalgamated his two periods, then his argument that he was made redundant and therefore benefits should have been released from both periods would have been valid. But as Mr T did not amalgamate the two periods into one period of service, even though sufficient information was given to him about this option, I cannot agree with Mr T when he says that redundancy from Mears automatically triggers release of his pensions from both periods.
51. When the redundancy took place Mears were responsible for explaining its effects, but a decision whether to pay the deferred benefit had to be taken by PCC.
52. I find that the relevant regulation governing payment of the deferred benefit is Regulation 31 of the 1997 Regulations. Regulation 31(1) of the 1997 Regulations permits Mr T to elect to have deferred benefits from the first period paid, once he is aged 50 or above and is no longer a member of LGPS. However Regulation 31(2) states where a member is less than 60, an election made by the member is ineffective unless it has the consent of the employing authority or former employing authority. In this instance, PCC are the former employing authority and they are entitled to give or withhold consent for payment of the deferred benefit.
53. I am satisfied that PCC were the correct decision maker in relation to the first period of service and that it exercised the discretion available to it under Regulation 31(2).

54. The established principle in considering the exercise of discretion is that I can only interfere with a decision if there was a procedural fault, a misunderstanding of the law or other provisions, some irrelevant consideration had been taken into account or a relevant one ignored or if it was a decision no reasonable decision maker could make.
55. In the absence of exceptional circumstances PCC will not consent to release a deferred benefit early unless a member has been made redundant from their “current role” with PCC. Mr T was not employed by PCC when he was made redundant. Mr T was an employee of Mears.
56. I am satisfied that PCC applied the policy to the relevant facts and decided that they would not release the benefit because Mr T was no longer employed by PCC and therefore they were not his current employers. They were entitled to adopt the policy and interpret it in the way they have and I cannot find that the decision which they reached was in any way perverse. I therefore find no reason to interfere with the decision made by PCC and do not uphold Mr T’s complaint.

Karen Johnston
Deputy Pensions Ombudsman

20 October 2016