

Ombudsman's Determination

Applicant	Mr D
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Great Yarmouth Port Authority (GYPA)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by GYPA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr D's complaint is summarised as follows:
 - Mr D says GYPA have refused to allow him to join the LGPS. Mr D says when he asked to join the LGPS he was still an employee. He says at no time did he agree to give up his right to join the LGPS and he was not advised that his right to join had been removed.
 - GYPA say Mr D has never had a legal or contractual right to join or (switch to) the LGPS. GYPA say under the LGPS rules, their admission agreement and a May 2007 deed of variation, Mr D does not have a legal right to join the LGPS. They say the offer he was given to join the LGPS was a one-off opportunity.

Background information, including submissions from the parties

4. Mr D is employed as an Authorised Pilot for GYPA (formerly Great Yarmouth Port and Haven Commissioners (**GYPHC**)). He took up the post in November 1989.
5. In 1969 GYPHC entered into an admission agreement (**the 1969 Agreement**) with Norfolk County Council (**the Council**). As part of the 1969 Agreement, GYPHC had the discretion to offer some or all of its employees the option to join the Norfolk Pension Fund (**the Fund**) which is part of the LGPS.
6. In Mr D's offer of appointment letter of 21 September 1989, GYPA advised that he would be eligible to join the Fund or the Pilots' National Pension Fund (**PNPF**). Mr D joined the PNPF in 1990.

7. In January 1990, an 'Agreement for the employment of Authorised Pilots' (**the 1990 contract**) was formally signed by GYPA and the Pilots' union. A 'Statement of Terms of Employment – Authorised Pilots' (**the Statement**) formed part of the 1990 contract. Clause 15 (Pension Fund) of the Statement says that whilst an Authorised Pilot remains in the PNPf, contributions will be met by the employee and the employer as determined by the Fund. No reference is made to membership of the LGPS in the Statement.
8. On 22 January 2000, Mr D signed a new contract with GYPA. Under clause 26 'Superannuation' the contract states that "the Authority participates in the Pilots' National Pension Fund and you have elected to join as a contributory member of the Fund".
9. In 2007, GYPA leased the port of Great Yarmouth to the Great Yarmouth Port Company Ltd. (**GYPC**). As a consequence of the deal, GYPA's management and staff at the port (other than Marine Pilots) became employees of GYPC.
10. During 2006 and 2007 GYPA held meetings with staff representatives to discuss a Transfer of Undertakings (Protection of Employment) (**TUPE**) transfer from GYPA to GYPC (**the 2007 transfer**). The 2007 transfer did not apply to GYPA's Pilots and Marine Officer Pilots.
11. A meeting took place in April 2007 to discuss the reasons for Pilots staying with GYPA. The notes of the meeting record that "as far as the pilots were concerned they would continue with their current terms and conditions" Mr D says he understood this to be a guarantee protecting his right to join the LGPS at a later date.
12. On 23 May 2007, Mr D received written notice of the 2007 transfer. The letter advised that he would not be transferring and there would be no change to his current terms and conditions and pension benefits in the PNPf.
13. On 25 May 2007, a deed of variation came into effect separating the GYPA from the GYPC and closing the Fund to new members employed by GYPA. At the same time, GYPC entered into its own admission agreement with the Council restricting membership of the Fund to named employees.
14. Mr D formally agreed his existing contract of employment on 8 September 2010 (**the current contract**). The current contract says:

"the particulars given in this Statement together with the Terms and Conditions set out in the accompanying letter dated 5th August 2010, constitute the current terms and conditions of your employment, and shall, where applicable, supersede any previous agreement or understanding, whether verbal or written, between you and the Authority".

15. The 'statement of main terms and conditions of employment' revised on 4 June 2010 (**June T&Cs**), formally agreed by Mr D in September that year, forms part of his current contract. Clause 14 states that GYPA "participates in the Pilots' National Pension Fund (PNPF) which you are eligible to join." There is no option to join the LGPS.
16. In December 2012, Mr D asked to join the LGPS. He was refused on the grounds that the LGPS was closed to new members (since 2007) and that only GYPA's employees who were LGPS members before the 2007 transfer were eligible to remain in the LGPS.
17. Mr D says between 1989 and 2007, GYPA had a liberal attitude to employees switching between pension funds. He has provided written statements from colleagues which support this assertion.
18. Mr D has also provided the names of two employees who were allowed to join the LGPS around March/April 2007. GYPC has confirmed that both were eligible to join as named employees under GYPC's own admission agreement.
19. Mr D argues that GYPA has since applied the local government terms and conditions to all employees and as a result, GYPA no longer has the discretion to be selective in their admission criteria for the LGPS.
20. Norfolk Pension Fund has confirmed that GYPA's admission agreement does not currently allow new members to join the LGPS.

Adjudicator's Opinion

21. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by GYPA. In summary, the Adjudicator said that at the time Mr D asked to join the LGPS he was not eligible to join the scheme and did not have a legal or contractual right (whether written or implied) to join.
22. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D has provided further comments but they do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr D for completeness.

Ombudsman's decision

23. The focal point is whether Mr D had a right (contractual or implied) to join the LGPS at the time he was refused entry.

24. The May 2007 agreement between the Council and GYPA closed, with immediate effect, the Fund to new employees of GYPA. There is no evidence that this was later relaxed or that “the local government terms and conditions” overrides the bar.
25. GYPA did not have a legal duty to inform Mr D about the closure as it did not affect him.
26. Even if GYPA’s initial offer of appointment had given Mr D the right to switch schemes at a later date, the new (2010) contract he formally agreed superseded it. Furthermore, at the time he asked to join the LGPS he was not eligible to join.
27. Mr D says GYPA had a liberal attitude to employees changing pension funds between 1989 and 2007. But Mr D did not ask to join the LGPS until 2012 at which point the LGPS had closed to new members employed by GYPA.
28. Any implied terms which may have arisen were superseded by his current contract which he formally agreed to.
29. Therefore, I do not uphold Mr D’s complaint.

Anthony Arter

Pensions Ombudsman
24 June 2016