

## Ombudsman's Determination

<b>Applicant</b>	Mrs Alice Lennon
<b>Scheme</b>	Northern Ireland Local Government Officers' Superannuation Scheme ( <b>NILGOSS</b> )
<b>Respondent(s)</b>	South Eastern Education and Library Board ( <b>SEELB</b> )

### Complaint Summary

1. Mrs Lennon previously complained to our service, leading to a determination on 14 May 2014. The matter has subsequently been heard by the Northern Ireland Court of Appeal and remitted for reconsideration. Mrs Lennon's complaint remains that SEELB:
  - did not advise her of the option of a pension transfer when she commenced employment with them in September 1992 and specifically did not inform her that there was a time limit of 12 months for her to make an application for a transfer on a transfer club basis; and
  - have failed to exercise their discretion to allow a retrospective transfer; and
  - acted incorrectly in completing an application form without her consent.

### Summary of the Ombudsman's determination and reasons

2. My decision is that Mrs Lennon's complaint cannot proceed because it has been brought outside the time limits set out in the Regulations governing our service and it would not be appropriate to exercise the discretion to extend those time limits in all the circumstances, including that any remedy directed would not be available in the courts.

## Detailed Determination

### Material facts

3. Mrs Lennon was appointed to a permanent post with SEELB on 1 September 1992, as an Assistant Advisory Officer. She had been working for SEELB since 1988 but in 1990 was seconded from a permanent teaching post to a teaching/advisory support role. During the secondment, Mrs Lennon remained a member of the Teachers' Pension Scheme (**TPS**).
4. Mrs Lennon received a letter from Mr Gillies, a Personnel Officer at SEELB dated 13 August 1992, confirming her appointment, salary and starting date. There was no mention of pension details or other literature being enclosed with the letter.
5. SEELB have provided a copy of the appointment letter, annotated with the words "S/A Forms sent". Heather Loveday, then a Senior Clerical Officer in the HR Department of SEELB, has identified this annotation as being in her handwriting and in accordance with her practice to confirm that an LGS1 form (and NILGOSS employees' guide) had been sent. The LGS1 form is the NILGOSS Admittance Form and has a section for completion of details of preserved benefits with other pension arrangements and a request for transfer information. The 1991 NILGOSS guide, which was the current one in print says (under "Reckonable Service"):

***"Bought Service – Transferred In***

*Additional service which may be purchased by payment of a transfer value from a previous scheme. Application for such a transfer should be made through your employing authority immediately on commencing employment."*

6. The guide also says that all whole-time employees join the Scheme immediately on commencing employment, but have an option to opt out at any time.
7. However, Mrs Loveday cannot provide specific knowledge of whether an LGS1 form and guide were sent to Mrs Lennon. Her annotation is also undated. Mrs Lennon says that the LGS1 form and guide were not sent to her with the appointment letter.
8. On 2 September 1992, A Campbell, on behalf of Mr Gillies, wrote to Mrs Lennon enclosing two copies of the Statement of Terms and Conditions of Service and asked her to return one signed copy as soon as possible. There was no mention of pension details or other literature being enclosed with the letter.
9. Mrs Lennon signed the Statement of Terms and Conditions of Service on 23 September 1992. Section 10 of the document is headed 'Superannuation' and says:

*"You may join the Northern Ireland Local Government Officers' Superannuation Scheme."*

10. In fact, NILGOSS membership was considered the automatic default position. However, Mrs Lennon was not issued with a NILGOSS membership certificate until March 1995, though it was backdated to 1992. On 3 March 1995, a SEELB officer partially completed an (unsigned) LGS1 form on her behalf. Although the form had sections for completion by both employer and employee, and was unsigned, it appears that the 3 March 1995 submission was acceptable for SEELB and NILGOSS to proceed with membership and neither sought to contact Mrs Lennon further.
11. The membership certificate was sent to Mrs Lennon in 1995 with a copy of the current NILGOSS guide. This had the same wording on transferred-in service as the 1991 version (see para 5 above). I am aware that the 1996 guide added a sentence to the effect that transfers in could not be considered after 12 months from the date of joining the scheme.
12. By 18 January 2001, when Mrs Lennon signed a new Statement of Terms and Conditions of Employment as an Assistant Senior Education Officer, the relevant section (under "Pension") specified that although NILGOSS membership was optional, employees would automatically become a member unless they elected in writing not to join, and completed the appropriate documentation.
13. On 8 December 2004, NILGOSC (the Superannuation Committee) wrote to SEELB regarding some members within the SEELB who joined the Scheme in 2002 but whose membership details had only been received by NILGOSC on a spreadsheet late in 2003. The letter suggested that these members were never issued with LGS1 forms and so could not request any transfer, including club transfers, from TPS.
14. The letter indicated that two members were to receive club transfers, as it was not their fault. SEELB was asked for details of any other affected members. According to a letter dated 11 January 2011 to the union, Aspect, no further cases were reported to NILGOSC.
15. SEELB have provided an annotated copy of the 8 December 2004 letter. The annotation is:

*"Checked all other staff. Lgs1 issued. – NILGOSC waiting for response from DENI CM. 3.2.05"*
16. On 28 March 2005, Mrs Lennon wrote to Jenna Fisher of NILGOSC to 'investigate the transfer of my previous pension rights from the Teachers' Pension Fund to NILGOSS.' This was in the context of a possible redundancy situation. Mrs Lennon referred to an earlier telephone conversation with Mrs Fisher and also asked her to investigate whether she had been offered the opportunity to transfer her previous pension funds to NILGOSS as she could not recall it, had not completed the NILGOSS admittance form and it appeared NILGOSC was unaware that she had previous pension rights.

17. Mrs Fisher replied on 8 April 2005 to say that a transfer had to be requested by the member within 1 year of joining the scheme. As she was outside this time period, the Committee would only be prepared to calculate the transfer on a non-club basis – which would buy less service. The letter also said that it appeared the employer had completed the admittance form on her behalf, however, she would have received a member’s guide from NILGOSC which explained the procedure for requesting a pension transfer.
18. Mrs Fisher wrote to SEELB on the same day, enquiring as to whether Mrs Lennon had ever been given an LGS1 form to complete as the copy held by NILGOSC had only been completed by SEELB and remained unsigned. Any transfer now would be on a non-club basis and required the agreement of SEELB to cover any increased actuarial costs which would fall to them if Mrs Lennon were to be subsequently made redundant.
19. The transfer quote was sent to Mrs Lennon on 24 May 2005, but then followed with a letter on 8 June 2005, whereby Mrs Fisher explained that SEELB were not prepared to fund the costs of the transfer at this late stage. There had been emails between NILGOSC and SEELB to chase this information and confirm the answer.
20. In 2009, under the Freedom of Information Act, Mrs Lennon requested sight of her personnel and NILGOSS records. The material obtained included the LGS1 form partially completed by a SEELB employee and the 8 December 2004 letter from NILGOSC to SEELB.
21. Mrs Lennon subsequently went through an internal grievance procedure and took part in (unsuccessful) settlement negotiations before approaching the Pensions Advisory Service in late 2010 and our service in July 2012.
22. This complaint was initially determined by the then Deputy Pensions Ombudsman (DPO), Jane Irvine, on 14 May 2014. The DPO upheld the complaint on its first limb and directed the Board to meet the cost of the additional pension as if the applicant had transferred her Teachers Pension into NILGOSS within the 12 month time limit. She also awarded the applicant £250 for distress and inconvenience caused by the maladministration.
23. The Board appealed the DPO’s determination on the following grounds:
  - i. That the DPO misapplied the burden and standard of proof in placing the onus on the Board to prove beyond all doubt that an LGS1 form was provided to the applicant upon the commencement of her permanent employment with the Board in September 1992;
  - ii. That the DPO failed to address the question of whether the maladministration she found gave rise to an injustice to the applicant and whether the applicant mitigated any loss arising therefrom;

- iii. That the DPO erred in finding the Occupational Pensions Schemes (Disclosure of Information) Regulations applied;
  - iv. That the DPO erred in law in failing to convene an oral hearing;
  - v. That the applicant's complaint to the DPO was statute barred.
24. The Court of Appeal in Northern Ireland upheld the Board's Appeal on the first ground (standard of proof) and remitted the case back to our service for re-determination. The Court noted that there were further issues in the appeal beyond the initial assessment of whether the LGS1 form had been sent, including whether even if it had, that amounted to sufficient publication of the applicable term under *Scally v Southern Health Board [1992] 1 AC 294 (Scally)* (see paragraphs 45-46), which had not been referred to in the DPO's determination.
25. The Court also requested that further consideration be given to the merits of holding an oral hearing. However, it concluded that it would be inappropriate to determine any of the other grounds of appeal bearing in mind the case had to be reheard.
26. The parties made further written submissions to our service following the judgment and an oral hearing then took place in Belfast on 2 October 2015, at which evidence under oath was given by Heather Loveday, Mary Walker (HR Manager) and Mrs Lennon. Closing submissions were then made to me.
27. I will not set out in detail every point made by the parties since there have been numerous (shared) submissions as part of both case files and the court proceedings. Also, a recording of the oral hearing has been made available. However, a summary of the main arguments is set out below.

### **Summary of Mrs Lennon's position**

28. To the best of her knowledge, she did not receive the LGS1 form in 1992. She firmly believes that the first time she saw it was in 2009, following a Freedom of Information request. She understands that at least eight other officers did not receive LGS1 forms. These were in the main Curriculum, Advisory and Support Services officers, moving from seconded to permanent posts.
29. If she had known of the option of a "club" transfer in 1992, she would have taken it.
30. She believed she was still an active member of the Teachers' Pension Scheme until 1995, when she received a membership certificate for the NILGOSS. She contacted the Board but was told that she could not transfer her Teachers' Pension across. She was not advised of any other options, such as an out of time application to NILGOSC.
31. In 2005, in the context of a potential redundancy situation, she exchanged correspondence with NILGOSC. She was told that the Board had completed part of the form required to enter her into the Scheme. However, she was not then aware

that there were others who had been granted 'late' club transfers. This came to her notice in 2009, after she submitted the Freedom of Information request.

32. She was also unaware that the LGS1 form, which was not named in the 2005 correspondence, was the only mechanism for transferring her pension and its partial completion by SEELB had, by default, prevented transfer.
33. *Scally* is applicable to her complaint. SEELB did not take reasonable steps to inform her of her valuable right to a club transfer, therefore the breach continued until she became aware of the right in 2009.
34. It is not true to say that she failed to mitigate any losses; she persistently pursued the matter but was blocked by the Board.
35. In convening the oral hearing, the complaint must already have been ruled within jurisdiction - either that it was brought within the time limits or discretion was exercised to allow an extension of time.
36. If the above is not the case, there is no limitation period for cases of pure maladministration; the complaint is not only relating to the automatic admission into NILGOSS but also the failure to inform of the option of a club transfer; the failure to inform of the option of a retrospective club transfer thereafter; and the completion of the LGS1 form without Mrs Lennon's consent. The earliest Mrs Lennon became (or could reasonably have become) aware of these acts and omissions was in July 2009 – just less than 3 years before her complaint was made to the Ombudsman. Mrs Lennon's case is that there was a continuing *Scally* breach, which endured until 2009.
37. Even if that were not the case, I should exercise my discretion to extend the time in all the circumstances of this case.

### **Summary of South Eastern Education and Library Board's position**

38. On the balance of probabilities, taking into account Mrs Loveday's evidence about her process and the marking on the records, it must be more likely than not that the LGS1 form was sent out to Mrs Lennon. It can be found, therefore, that the applicable term was brought to her attention in 1992. The complaint should go no further.
39. In any event, Mrs Lennon was certainly aware that she had been enrolled into NILGOSS by 1995. If she had been unhappy to be told that a transfer of her Teachers' Pension was not possible, she could have brought the complaint then. She took no reasonable steps to mitigate her loss by doing so.
40. By 2005, Mrs Lennon also had information regarding the significance of the LGS1 form and that it had been completed by an SEELB employee. Seeing the form itself in 2009 did not change anything.

41. Mrs Lennon's complaint is thus out of time under the rules of our service and it is not appropriate to exercise discretion and extend the time. It is also statute-barred because the matter would have needed to be taken to court at the latest by 2011, so no remedy can be granted for any proven breach of contract.
42. This case is distinctive from *Sally* where there was a continuing breach due to a continuing failure to notify of an applicable term. Mrs Lennon received the LGS1 form and accompanying documentation in 1992 and, on her own evidence, was aware of the relevant position in 1995, so any breach would not continue in the same way as in *Sally*.
43. SEELB did not exercise any discretion with regard to the out of time club transfers referred to in NILGOSC's 2004 letter. NILGOSC made that decision and funded it.
44. SEELB no longer wish to pursue the Disclosure of Information Regulations point as it is accepted that the Northern Ireland regulations mirror those in Great Britain.

### **Sally v Southern Health Board [1992] 1 AC 294**

45. The House of Lords held in *Sally* that there was an implied obligation on an employer to take reasonable steps to publicise a valuable pension right to an employee where three conditions applied:
  - The terms of the contract were not negotiated with the individual employee but resulted from negotiation with a representative body or were otherwise incorporated by reference;
  - A particular term of the contract must make available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; and
  - The employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.

The parties have not disputed that the first two conditions are met but the third is not agreed.

46. Girvan LJ indicated that this decision "*has a clear resonance in the instant case and when this matter is reheard the implications of that decision must be teased out since it may well impact on the question of maladministration, on the issue of the failure by the respondent to mitigate (where the onus of proof lies on the Board) and on the issue of delay and the passage of time.*"

### **Conclusions**

#### Sending of documents

47. The first issue to determine is whether the LGS1 and NILGOSS employee guide were sent to Mrs Lennon in August 1992. If reasonable steps were taken to make her aware of the relevant term at that point, then I need go no further on this issue. I am

satisfied that those steps would not have to be carried out face to face - provision of documentation which sufficiently publicised the term meets the standard.

48. In support of Mrs Lennon's position I have her account and the inference from NILGOSC's letter of 8 December 2004, that a small number of other members may not have received their LGS1 forms (over time).
49. On the other side I have Mrs Loveday's account of her relatively simple procedure and her annotation on SEELB's copy. This is undated but she said under oath that it would have been made at the time.
50. If SEELB had a process in place at the time whereby members were contacted when they did not return their forms, this problem would not have arisen. And since Mrs Loveday indicated around 95% of staff brought the completed forms in on their first day, it would not have been a significant undertaking. Nevertheless, no verification was carried out. But that is most relevant to what happened next rather than the balance of proof on sending.
51. I found Mrs Loveday's evidence under oath to be the most persuasive on this point. Although no longer an employee of SEELB, she might still be considered by some to be 'their' witness; however, I consider her to have been conscientious and meticulous, fairly accepting that she could not say 100% whether any particular form had been placed in an envelope but that, through her own procedure and that of her Manager, she was very confident that she would not have annotated 'S/A form sent' if she had not sent it.
52. Mrs Lennon, of course, could not speak for the practices of SEELB's HR department. She was clear that she had not, to the best of her knowledge, received the form. She also said that she was thorough in reading all her post. It is possible the form was not in the envelope. But I cannot exclude the possibility that Mrs Lennon overlooked it through human error, as Mrs Lennon fairly accepts is always possible, or that it was less important to her than it has since become. The terms and conditions of service she signed on 23 September 1992, said that she may join the NILGOSS so there was the opportunity to make further enquiry and it could be, on the basis that she was perhaps satisfied with her existing provision and not appreciating her automatic dual membership, that she paid little attention. On the balance of probabilities, I find that the form was sent out by SEELB.

### Publication

53. But that finding is not determinative of the complaint - as SEELB argued at the oral hearing. I also need to consider whether the relevant term was sufficiently publicised, as discussed in *Scally* and by Girvan LJ (at paragraph 21 of the court judgment).

54. The term in issue relates to the opportunity to obtain a club transfer within the designated period (or later, subject to the positive exercise of any discretionary power). It is clearly a potentially favourable benefit, albeit once publicised it would be for the member to then decide whether it was in their best interest to pursue it.
55. Neither the LGS1 form nor the 1991 guide, mention club transfers, former public sector schemes, favourable terms etc. They only refer to buying in service from generic other schemes. Even if they had done, they also say that an application should be made immediately, so do not provide information on the designated time period to make the transfer. It is notable that the 1996 guide corrects this part.
56. The cover letter does not mention the enclosures, or what was required of the recipient in relation to them.
57. There is no question of the material providing enough information to expect or enable a recipient to enquire further about club transfers; it simply was not flagged up so prior knowledge of such benefits would have been needed by the recipient to encourage further enquiry. Under *Sally*, it was the responsibility of SEELB to bring it to Mrs Lennon's attention unless she could be reasonably expected to have been aware of it by other means. SEELB have not argued or evidenced that she could.
58. For those reasons, I do not consider SEELB's 1992 material to have sufficiently publicised the applicable term to Mrs Lennon.

#### Time Limits

59. The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations (Northern Ireland) 1997 (SR (NI) 1997/39), set out the relevant time limits for complaints made to our service. They mirror those in Great Britain:

"5. – (1) Subject to paragraphs (2) and (3), the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute was referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1), the period of 3 years shall begin on and include the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraph (1) or (2), the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable."

60. The Court confirmed in *Arjo Wiggins Limited v Henry Thomas Ralph [2009] EWHC 3198*, that the Ombudsman may need to investigate a complaint to decide whether it fell within the time limits. This complaint is one that requires substantial interrogation of the evidence and factual background in order to be able to reach a final decision on jurisdiction. The decision to hold an oral hearing when the matter was remitted from the Court did not constitute confirmation that the complaint was ruled in time or that the discretion to proceed out of time had been exercised.
61. *Arjo Wiggins* is also precedent for the point that a matter which would be time-barred in Court proceedings does not necessarily preclude my investigation. However, I have no power to award substantive relief where it would be defeated by a limitation defence had it been brought in court. In the case of pure maladministration, there is no statutory limitation period.
62. The Northern Ireland Court of Appeal did not make any findings on limitation, or discuss the wording in our Regulations (above). Statutory limitation was argued in *Sally*, where it was held that the complainants were too late to complain about the loss of opportunity to purchase added years *as of right* because their cause of action accrued at the end of the relevant 12-month window and more than 6 years had since elapsed. However, since there was also a discretionary right to make the purchase out of time, the obligation to publicise the term continued until the relevant Regulations were superseded.
63. As SEELB have mentioned, the Local Government (Superannuation) Regulations (Northern Ireland) 1981, provided NILGOSC with discretion to extend the time period for transfers-in (section 69(3)). This discretion remains under the current (2014) Principal Regulations. Under *Sally* then, it could be said that the valuable right to be publicised by SEELB extended to the opportunity to transfer as of right within 12 months and to be considered by NILGOSC for an out of time transfer under their discretionary power.
64. The discretion does not specifically refer to club transfers. While the wording might be read to include club transfers, the favourable terms provided and actuarial cost of taking on the transfer benefit would naturally be a factor in the decision-making when exercising that discretion. But, exercising the discretion was a matter for NILGOSC, which is not part of the complaint made to me. Publicising it was for SEELB.
65. Our time limits are different to the courts. Time (3 years) starts from the date of the act or omission (1992 and continuing until appropriate publication), or from the date the applicant knew or ought reasonably to have known of the act or omission. 1992 is not an appropriate point on that basis.
66. I have considered the situation in 1995. At that time, Mrs Lennon was aware that she had joined the NILGOSS and that her Teachers' Pension had not been transferred. She says she was told it could no longer be transferred. If that is the advice she was

given, it was incomplete. She could have pushed it further herself, for example with NILGOSC, though the guide said to contact the employer. But, since a discretionary right existed, with NILGOSC, Mrs Lennon should have been advised of this and assisted in pursuing it.

67. Even if the conversation had not taken place, Mrs Lennon had still not been properly advised of the right so time did not start to run.
68. The situation is different in 2005. Mrs Lennon knew then that SEELB had completed a section of the (then unnamed) LGS1 form. She knew the significance of the form and the nature of the material that she should have received even if she may not have seen the form itself. In response to her enquiry about whether she had been offered the opportunity to transfer her pension, she was told by NILGOSC that the form contained a section to list existing pension rights. She was told about SEELB's actions and that she should have been given a copy of the form and a members' guide. She knew that there had been a limited time to transfer, which she had missed. NILGOSC told her that any transfer would now be on a non-club basis, so she knew that she was missing out on the most favourable terms.
69. As part of their discretionary power procedure, NILGOSC approached SEELB. The potential actuarial costs were high and it would be SEELB who would have to meet those. Perhaps not unsurprisingly, they declined to cover those costs. Mrs Lennon was informed of this. So she was then in possession of knowledge of the transfer right, the acts or omissions of SEELB, and that SEELB would not cover the costs of her transferring in late. She was then able to bring an action to our service or the courts, in full knowledge of the injustice she now asserts. Any breach of an implied term under *Sally* had been corrected by publication at this point. Mrs Lennon's complaint thus falls outside Regulation 5(2) because she did not bring her complaint to our service by 2008.
70. The actual discretionary power lay with NILGOSC. So, Mrs Lennon was also able to complain to NILGOSC about their decision, which I believe she did. However, she did not make a complaint to our service about NILGOSC (and it would now be too late).
71. I am not persuaded that seeing the LGS1 form in 2009 changes the position. Time limits do not turn on when a party is able to obtain the proof they consider they need to bring a claim. They run from the time of the act or omission or discovery thereof. And in any event, Mrs Lennon already had a letter from NILGOSC saying that SEELB had filled out the form which set out existing pension rights, without her involvement; and SEELB have never argued that they did not do so (only that they were permitted to).
72. Discovering that others had obtained out of time transfers would have been surprising and upsetting for Mrs Lennon. However, they were in very specific circumstances with much shorter out of time periods. And they were granted by NILGOSC, with no SEELB involvement. If Mrs Lennon considers NILGOSC should have done the same

for her, that is a matter for her to take up with them but she decided to bring her complaint only against SEELB. SEELB did not have the discretionary power so even if the matter were in time, we could not say they should have exercised it, or agreed to pay.

73. Mrs Lennon needed to bring a written complaint to our service, then, by 2008. I do have the discretion to extend our time limits under Regulation 5(3), and I am sympathetic to the fact that there was a period where a valuable term was insufficiently publicised. Also, that a proper system of follow up on receipt of the LGS1 forms at SEELB should have prevented this situation arising, However, I do not consider it appropriate in all the circumstances of the case to extend the time limits from 2008 to 2012.
74. Even if I did so, under *Arjo Wiggins*, I cannot provide a remedy which would be defeated by a limitation defence in court. If it could be said that the valuable right to be publicised by SEELB extended to the opportunity to a club transfer as of right within 12 months *and* to be considered by NILGOSC for an out of time club transfer under their discretionary power; a court claim for breach of contract (which this would be as breach of an implied term under *Sally*) would have expired at the latest in 2011.

**Anthony Arter**

Pensions Ombudsman  
25 November 2015