

Ombudsman's Determination

Applicant	Ms S
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Royal Borough of Greenwich (RBG)

Outcome

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

Complaint summary

3. Ms S' complaint is that RBG provided her with incorrect annual benefit statements over a number of years and she based certain decisions on this misinformation.
4. Among other things Ms S says:
 - She works in an area of social work where posts are hard to fill so she is paid a retention payment.
 - As she is at the end of her career she has watched her pension avidly.
 - Her intention was to retire at age 60.
 - Following receipt of her 2012 annual benefit statement and knowing that she could not afford the mortgage on her existing property in retirement she decided to sell it and buy a property for her retirement and a flat to live in while she continued working (to be sold on retirement with the net proceeds used to reduce the mortgage on her retirement property).
 - She was aware that the 2012 statement was not guaranteed but did not expect the prediction to be out by approximately 10 per cent.
 - RBG failed to timely notify affected employees that retention payments were not pensionable.
 - If she had known that retention payments were not pensionable she would have sought a better paid job.
 - She has calculated that, based on a life expectancy of 85, her pension loss is approximately £45,000.
 - It is too late for her to make up this shortfall.

Background information, including submissions from the parties

5. As relevant, regulation 4(2), of 'The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007' (**the 2007 Regulations**), says:
 "... an employee's pensionable pay does not include –
 ...
 (e) any payment as an inducement not to terminate his employment before the payment is made."
6. Ms S has been employed by RBG since 1978. She was a senior manager in adult services. In 2002 she transferred over to become a child protection social worker.
7. Ms S is an active member of the Scheme. Her normal retirement age is 65 (in February 2022).
8. Since 2005 Ms S has received retention payments on top of her basic salary. The payment amounts to 10% of salary (paid as a lump sum once a year).
9. Until March 2012 the payment was erroneously included as part of Ms S' pensionable pay and pension contributions were paid on it by Ms S and RBG.
10. The last annual benefit statement to include the retention payment as pensionable was for year ending 31 March 2012.
11. In early August 2013 Ms S agreed the sale of her house (subject to contract).
12. In late August/early September 2013 Ms S agreed the purchase (subject to contract) of two properties (49 WB and 66 MG).
13. Separate mortgages were offered on both properties. As part of Ms S' evidence to support her future capability to make the mortgage repayments she provided the mortgage provider with a copy of her 2012 annual benefit statement.
14. On 10 October 2013 Ms S received her March 2013 annual benefit statement and noticed the estimated pension benefits were reduced from the 2012 statement – the retention payment was no longer part of her pensionable pay.
15. The next day Ms S contacted RBG and was informed that retention pay was not pensionable and that pension contributions that had been deducted from a retention pay would be refunded to her.
16. On 22 October 2013 Ms S complained to RBG. RBG replied on 28 October 2013 maintaining their position.
17. The next day Grant Saw (Ms S' Solicitors) wrote to Ms S enclosing a contract, mortgage deed and stamp duty form to sign in respect of the purchase of 49 WB.

18. On 18 December 2013 Grant Saw wrote to Ms S with their bill of costs and completion account for the sale of her house. Amongst the enclosures was a sales commission invoice from Ms S' estate agent. This noted the 'Exchanged Date' as 17 December 2013 and the 'Completion Date' as 7 January 2014.
19. No evidence of the exchange date on 66 MG or 49 WB has been provided. Ms S says sale and purchase contracts were exchanged on 5 November 2013.
20. The mortgage provider on 49 WB wrote to Ms S on 6 January 2014 to confirm that the mortgage was in place.
21. At IDR stage 1 RBG decided that Ms S had not suffered an injustice resulting in financial loss (on the grounds that she will receive the pension benefits due under the Scheme) and that it was not appropriate to exercise discretion (under regulations 12 and 13 of the 2007 Regulations) to award her additional pension benefits.
22. At IDR stage 2 the decision maker recommended that RBG pay Ms S £500 for distress and inconvenience caused and requested RBG to consider exercising discretion under regulation 31 of the Local Government Pension Scheme Regulations 2013 (which had replaced regulation 12 and 13 of the 2007 Regulations).
23. Regulation 31 ('Award of additional pension') says a Scheme employer may resolve to award an active member an additional pension up to a prescribed limit.
24. RBG's Chief Executive and Director of Finance subsequently determined not to exercise discretion to award additional pension under regulation 31, but "in recognition of the disappointment she may have faced" resolved to award Ms S a further compensatory sum of £3,287.67 (equivalent to the pension contributions that RBG had paid to the Scheme on Ms S' retention payments) in addition to the £500 recommended at IDR stage 2.
25. To date RBG have refunded to Ms S her pension contributions (on the retention payments) with interest (1 per cent above bank rate) and paid her £500 plus £3,287.67 for non-financial loss. Ms S now has the option of investing the three sums in the Scheme, which if she chooses to do so, will purchase an additional pension of £349.71 per year.

Adjudicator's Opinion

26. Ms S' complaint was considered by one of our Adjudicators who concluded that no further action was required by RBG. The Adjudicator's findings are summarised briefly below:
 - Regulation 4(2)(e), of the 2007 Regulations, excludes retention pay from the definition of pensionable pay.

- While the provision of several incorrect benefit statements and the incorrect deduction of pension contributions from Ms S' retention pay amount to maladministration by RBG, Ms S has not suffered a financial loss.
- Ms S was informed that retention payments were not pensionable before the sale and purchase contracts were signed and exchanged and her mortgages were finalised. While it would have been upsetting; and probably some costs would have been incurred, Ms S could have pulled out of all of the transactions. She was not irreversibly committed. In effect she chose to proceed.
- Ms S' pension entitlement had been corrected. She had not suffered an actual financial loss but a loss of expectation.
- Ms S' claim that she would have sought higher paid employment elsewhere if she had known that retention payments were not pensionable was too speculative to warrant compensation.
- Correctly RBG had refunded to Ms S her pension contributions on her retention pay. In addition RBG had paid her compensatory payments of £500 and £3,287.67 for their error and any disappointment suffered, which sums were adequate in the circumstances

27. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms S has provided her further comments which 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 Ms S for completeness.

Ombudsman's decision

28. Ms S says she disagrees with the Adjudicator's opinion in four areas:

- Its approach to her decision whether to proceed with the property transactions. RBG's exercise of discretion.
- The denial of opportunity to mitigate loss by changing employment.
- Opportunity costs relating to purchasing additional pension.

29. Ms S says she was not unduly concerned when she received her annual benefit statement for year ending 31 March 2013 as it seemed to her to be a typical processing error. Ms S says it would have been foolish to back out of the transactions (the agreed mortgages and the sale of her house and purchase of two properties) and incur costs on such a flimsy basis.

30. I am satisfied that at the time Mrs S made her decision to go ahead she had knowledge of the corrected lower pension figures and RBG had confirmed that they were correct. It was not reasonable in those circumstances to rely on the higher figures as the basis for decision making.

31. Turning now to RBG's exercise of discretion. Ms S says she was not treated as an individual, with exceptional circumstances, but as a member of a class of persons for

whom a blanket response would be appropriate. She says RBG have provided no evidence for their reasoning that the appropriate remedy for her should be identical to that for all other staff, and that they properly took account of any considerations of exceptionality in her case.

32. Where a body (such as an employer or trustee) connected to a scheme has discretion to pay benefits I look to see whether the discretionary powers have been applied consistently with the rules or regulations governing the scheme (and any other relevant legislation) and whether a correct process has been followed in arriving at the decision.
33. Regulation 31 provides a very wide discretion for awarding an additional pension to an active Scheme member. RBG does not have to make such an award but can do if they so wish.
34. In exercising that discretionary power RBG has an implied duty of good faith to Ms S. This broadly requires that the exercise of discretion is genuine and rational and it must not produce a perverse decision. RBG must also ensure that it takes account of all relevant factors and ignores any irrelevant factors. However, the implied duty of good faith is not a fiduciary duty. That is RBG may take their own interests into account (and indeed, favour those).
35. RBG have provided a summary of their discretionary policy in relation to Regulation 31. As relevant to Ms S, this says an additional pension may be made "in exceptional circumstances subject to the approval of each case by the Chief Executive and Director of Finance".
36. RBG have provided contemporaneous evidence that the Chief Executive and Director of Finance discussed Ms S' case specifically and individually to consider the relevant discretion under Regulation 31. The decision reached was not to award additional pension but to provide a further compensatory payment for distress which was equivalent to RBG's pension contributions on Ms S' retention payments. If RBG have made the same decision in respect of other affected members that does not automatically mean that they fettered their discretion in respect of Ms S. I am satisfied that RBG properly exercised their discretion in this matter.
37. Ms S says she would have immediately left her job with RBG if she had known that retention payments were not pensionable. She says that other London Boroughs pay higher pensionable pay rather than using retention payments and there is virtual freedom of movement for qualified social workers within London local authority children's departments as there are more vacancies than qualified applicants for posts with 'at risk' children.
38. Ms S has not said that she turned down a job offer paying a higher pensionable salary prior to being informed that retention payments are not pensionable. A good indication of what someone might have done is what they actually did after being informed of the correct position. Ms S has remained in her job with RBG. On this

evidence, I am unable to conclude that Ms S would have taken the step she says she would have taken and that she would have received higher pensionable pay had she been aware of the situation earlier.

39. Ms S says had she used the incorrect deductions from her retention pay to purchase an additional pension at the time they were deducted she would now have a better outcome than is afforded by the opportunity to purchase an additional pension of £349.71 per year in the Scheme.
40. I think that is unlikely. There is no evidence that Mrs S would have invested in additional pension or an AVC. Moreover in my view the evidence does not support the conclusion that she would now have a better outcome had she decided to do soothed total employee contributions that were wrongly deducted from Ms S' retention pay amounted to £1039.61. This is the amount of money which, absent the maladministration, she would have had available to invest as it was earned. Had she chosen to buy additional pension or invest in an AVC as she earned she would not have been entitled to an employer contribution. She would not have been able to invest either the distress and inconvenience payment of £500 payment or the additional compensation payment of £3,287.67 representing RBG's contributions made on her retention pay..
41. RBG have correctly refunded to Ms S the pension contributions that were deducted from her retention pay with interest. They have also awarded her an additional £3,787.67 for non-financial loss and offered her the opportunity to invest that sum in the Scheme to purchase a guaranteed pension of £349.71 per year. I consider that RBG have put Ms S in the position she would have been in if their maladministration had not occurred and have made adequate compensation for the significant distress and inconvenience caused. Therefore, I do not uphold Ms S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
12 August 2016