

Ombudsman's Determination

Applicant	Mr H
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Hampshire County Council (HCC) Hampshire Pension Fund (HPF)

Outcome

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

Complaint summary

3. This complaint concerns HCC's decision to refuse Mr H's application for early payment of his deferred pension benefits under regulation 30(2) of the LGPS Regulations 2007.

Background information, including submissions from the parties

4. The relevant regulations and applicable policy are set out in the Appendix to this Determination.
5. Mr H was an active member of the LGPS until being made redundant on 31 March 2011. Mr H was 54 years and 8 months old when he was made redundant. As he had not yet attained age 55, the minimum age to qualify for immediate payment of his benefits, his pension was deferred. Mr H was subsequently re-employed by HCC on 5 July 2011.
6. On 8 February 2013, Mr H applied to HCC for unreduced early payment of his deferred pension benefits from his 57th birthday, and on 4 July 2013. Mr H stated compassionate grounds for his request as his wife had been unwell and had reduced her working hours, thereby reducing their household income.
7. On 19 February 2013, HCC forwarded Mr H's request, together with details of the cost to HPF for waiving the early retirement actuarial reduction (the **pension strain**)

to the Employment Practice Centre (**EPC**). The pension strain, or cost, to HPF was calculated to be £34,482.48.

8. On 22 May 2013, Mr H was informed, in writing, that he would not be eligible for unreduced benefits before age 60, even on compassionate grounds, as there was a cost to HCC. HCC did however inform Mr H that it would be willing to allow him to take his pension benefits early, but with a reduction for early payment. The benefits quoted were:

“An annual pension of £10,180.42

And

A tax-free lump sum of £29,289.87”

Payment of these benefits would incur no cost to HCC or HPF. HCC considered the reduction to be modest in comparison to the disproportionately high pension strain considering the unreduced amounts were:

“An annual pension of £12,361.64

And

A tax-free lump sum of £32,225.48”

The unreduced figures were not disclosed to Mr H at that time.

9. On 7 July 2013, Mr H wrote to the Director of Corporate Services at HCC to dispute HCC’s refusal to pay his unreduced benefits. In the letter, Mr H stated that he satisfied the necessary criteria to qualify for the rule of 85 and so should benefit from an unreduced pension. This prompted HCC to review its records at which point it was confirmed that Mr H did meet the rule of 85. Despite this, HCC was still not willing to allow Mr H to receive an unreduced payment of his benefits on the grounds of cost. HCC did however pay £100 to Mr H as a result of its initial error.
10. Mr H appealed the decisions under the LGPS internal dispute resolution procedures (**IDRP**). His complaint was not upheld at both stages of the IDRP process. The grounds were that, although he satisfied the rule of 85, this was not sufficient to ensure automatic payment of his unreduced benefits. The IDRP responses also explained that Mr H did not qualify for early release on compassionate grounds as he did not “satisfy the necessary criteria”.
11. In July 2014, Mr H elected to receive payment of his reduced pension benefits from his 58th birthday, while still pursuing his claim through the IDRP.
12. During Mr H’s appeals process the IDRP procedure was updated and amended. Formerly a stage 2 would have been heard by a board of councillors. Under the new procedure an appropriate HCC nominated person would oversee Stage 1, with Stage 2 being reviewed by either the Monitoring Officer or the Deputy.

13. After receiving the initial IDRP response Mr H felt that the appeals process was inherently flawed, and therefore subsequently appealed this decision. An extended period of correspondence followed during which Mr H's stage 1 and stage 2 appeals were revisited by HCC, but it reached the same outcome. None of Mr H's appeals were successful.

Summary of Applicant's position

14. Mr H maintains that he qualifies for the payment of his benefits, unreduced, under the rule of 85. He believes HCC's refusal to honour this rule is against LGPS regulations.
15. Mr H also feels HCC failed to take into account his personal circumstances and consequently believes this is the reason his compassionate request was never fully considered.
16. Having been refused unreduced payment of his pension benefits Mr H has questioned the suitability of the decision making and appeals process saying:

"The council officers of the employing department and monitoring officers involved in my appeal cases have not adopted safe, sound, impartial procedures in reaching their decisions".

And

"...the decision process is arbitrary, placing applicants at a[n] unfair position depending on the whim of the employing department...this is not treating their employers on a[n] equal basis, treating them differently".

17. Mr H has also questioned the impartiality of the decision makers. Specifically referencing the fact that the investigating officer who initially refused his request for unreduced pension benefits was also the same manager that dealt with a previous, unrelated disciplinary matter. Mr H feels this overlap in roles meant the investigating officer:

"use[d] his position as deciding officer employer side in not letting me have unreduced benefits on compassionate grounds and access under the 85 rule. This was not an independent and impartial process having the same officer deal with two situations - totally unfair".
18. In short, Mr H believes he has been unfairly treated throughout the process and would like his entitlement under the rule of 85 to be confirmed with payment adjusted, then backdated accordingly.

Summary of Respondent's position

19. HCC have acknowledged an initial error was made when it informed Mr H that he did not satisfy the rule of 85.

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20. HCC has also robustly defended both its appointed decision makers specifically and its IDR process.
21. The decision not to allow unreduced early access to Mr H's pension was the legitimate exercise of the scheme employer's discretion.
22. The compassionate grounds put forward could not compel HCC or the Employer to incur what was a significant cost, as early release on compassionate grounds is still ultimately at the discretion of HCC.
23. The application of the rule of 85 impacts upon the amount of benefits that would be paid - but it did not remove the need for HCC's consent for an applicant aged under 60 years.
24. The issue of whether to grant consent on compassionate ground was properly considered but was overtaken by the fact that the cost to the council was considered prohibitive.
25. HCC feels that it has applied an appropriate IDR Process at stages 1 and 2 - during which the correct use of the rules has been applied. The fact that the exercise of the Council's discretion is not the most favourable outcome to the Applicant does not render it unlawful or unsound.

Adjudicator's Opinion

26. Mr H's complaint was considered by one of our Adjudicators who concluded that no further action was required by HCC. The Adjudicator's findings are summarised briefly below:
 - HCC had taken into account all the relevant information;
 - that it had followed current rules and regulations; and
 - that the rules governing the scheme state that the decision to allow payment of unreduced pension benefits, using the rule of 85, is completely at HCC's discretion.
27. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, but feel further comment is required. I will therefore only respond to the key points made by Mr H.

Ombudsman's decision

28. Mr H did not accept the findings in the Opinion. His disagreement can be summarised as follows:
 - the decision makers in his case were not impartial and therefore not suitable for the task of deciding if Mr H should receive his benefits unreduced;

- the appeals process is grossly unfair and too arbitrary;
- due consideration was not given to his request for early release on compassionate grounds;
- HCC made no offer of reduced pension benefits at the time his original request was refused; and
- he feels he has been discriminated against as a result of an unrelated disciplinary matter prior to his request for early release.

Mr H also raised 11 specific points in a letter to this Office dated 1 June 2015. These points can all broadly be said to be included or accounted for above, so there is no need to provide specific answers to each individual point.

29. What is commonly referred to as the “rule of 85” was set out in Regulation 31 of the Local Government Pension Scheme Regulations 1997. Briefly, if the age at which a member of the LGPS wants to take their benefits (subject to the minimum retirement age of 55), added to their scheme membership, is a minimum of 85 years, then the rule of 85 is said to be satisfied. It is material to this case that a person under the age of 60 can only elect to receive immediate benefits with the consent of their employer or former employer, regardless of whether the rule is satisfied or not. The rule of 85 does not come into play in the absence of that consent.
30. Dealing with Mr H’s point about the suitability of HCC’s decision makers, it is for HCC to determine who it appoints as the most appropriate person for assessing applications on early retirement. In this instance, the decision was made and reviewed at various stages by the assistant HR Director, the Head of HR Operations and the Deputy Monitoring Officer. All of whom came to the same conclusion. It would seem to me that this level of seniority was appropriate for the application concerned.
31. Regarding the impartiality of the aforementioned members of HCC, the decision that was made and confirmed was based on an established and documented policy. Regulation 30(2) of the LGPS (2007) rules gives the employer, the discretion to decide whether Mr H can access his benefits early, and whether he can do so unreduced. Discretion in this sense, using its ordinary meaning, means HCC have a power to decide or act according to its own judgment or choice.
32. As required by the same LGPS Regulations, HCC have a policy in place on how it exercises this discretion for applications under the regulation in question. HCC will consider each case on its individual merits but will take into account that it “will not consent to immediate payment of benefits to an employee or ex-employee who requests this and retires voluntarily between age 55 and 60 unless there is no cost to the employer”. Accordingly, the main condition that HCC is required to consider is what cost it will incur if consent is granted. The policy does not rigidly set out what other factors would lead to the granting or refusal of consent, but highlights cost as being of paramount importance.

33. So, regardless of who reviewed Mr H's application that person would always be bound to follow both the regulations and the discretionary policy. Put simply, HCC have the power to refuse any claim on the grounds of cost alone. To give consent for Mr H to receive payment of his benefits unreduced would have incurred a significant cost and HCC's guidance is clear in such cases. HCC can choose, at any time to meet the cost, but that is a matter for its own internal management structure to decide. I cannot therefore say that HCC or its appointed decision makers have broken any rules in refusing Mr H's request. And, having reviewed all the information presented to me, I do not find that there was any bias.
34. Mr H has also highlighted issues with the appeals process. My role is to review the process by which HCC reached its decision and, if it was flawed, I can set the decision aside and ask them to consider the matter afresh. The decision is one for them to make however, and I will not usually substitute my own decision for theirs unless the decision is so perverse that no reasonable decision maker could have made it.
35. With regard to the IDRP and appeals process itself, I acknowledge Mr H's point that a change in procedure midway through the process was unhelpful. However, I cannot say that this change has materially affected the outcome. I accept that it would have been helpful if the policy had not changed midway through an active appeal and that more clarity could have been provided to Mr H. But I do not find that HCC or its appointed decision makers reached a perverse decision in refusing the application of Mr H's unreduced benefits. Despite Mr H's assertions, I do not find that he has been treated unfairly or discriminated against as a consequence of any other preceding event.
36. Mr H has also asserted that HCC did not fully consider his reasons for requesting payment on compassionate grounds. In this I must respectfully disagree. It is clear that Mr H's circumstances were considered, but HCC came to the conclusion that there was insufficient reason to depart from its policy in this respect, as Mr H's reasons were deemed insufficient to meet the necessary criteria to qualify for an unreduced pension to be paid on compassionate grounds. This was explained in HCC's letters of 21 January 2015 and 13 May 2015.
37. Mr H has also questioned the way HCC has made its decision. Where the decision maker in question is an employer exercising a discretionary power, it has an implied duty of good faith to its employees; that is, there is an implied duty of trust and confidence between an employer and its employees, even if there has been a former disciplinary event for example. However, the implied duty is not a fiduciary duty, meaning, an employer may take its own interests into account. The implied duty is not to be assessed by reference to the concept of reasonableness; for what seems reasonable to an employer may seem unreasonable to an employee and vice versa. This combined with the clear and established regulations and discretionary policy show HCC have considered the relevant information in this case.

38. Guided by its discretionary policy, HCC informed Mr H at a relatively early stage that granting his application would involve a significant cost (over £32,000). On 22 May 2013, HCC also offered Mr H access to a reduced pension, which would have incurred no cost. HCC took the stance that this reduced pension and lump sum (a reduction of £2,181.22 per annum and £2,935.61 respectively) was broadly equivalent to the unreduced amounts that would have been payable but was preferable as no cost would be incurred by HCC.
39. Whilst I am sympathetic to the underlying reasons behind Mr H's application, and fully understand the point he is making, I cannot substitute HCC's decision for my own. I cannot prescribe the weight that HCC should have applied to Mr H's compassionate request, nor can I say that the refusal to grant consent is anything other than the rightful application of a legitimate right by HCC. I find that HCC considered all the relevant evidence submitted before reaching its final decision.
40. I am satisfied that HCC has legitimately exercised its discretionary rights under the regulations, and while the appeals process could have been conducted differently this did not affect the outcome.
41. Therefore, I do not uphold Mr H's complaint.

Anthony Arter

Pensions Ombudsman
17 May 2017

Appendix

Scheme Regulations

The Local Government Pension Scheme (Benefits, Membership and Contributions) 2007 (SI2007/1166)

“Regulation 30 – Choice of early payment of pension

- (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 his employing authority or former employing authority.
- (3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29.
- (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 may determine on compassionate grounds that his retirement pension should not be reduced under paragraph (4).

...”

The Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239)

“Regulation 66 – Statements of policy about exercise of discretionary functions

- (1) Each employing authority must prepare a written statement of its policy in relation to the exercise of its functions under regulations 12 (power of employing authority to increase total membership of active members), 13 (power of employing authority to award additional pension), 18 (flexible retirement) and 30 (choice of early payment of pension) of the Benefits Regulations.

...

- (5) In preparing, or reviewing and making revisions to, its statement, an employing authority must have regard to the extent to which the exercise of any of the functions mentioned in paragraph (1) in accordance with its policy could lead to a serious loss of confidence in the public service.”