

Ombudsman's Determination

Applicant	Mr S
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Bridgend County Borough Council (the Council) Rhondda Cynon Taf (RCT)

Complaint summary

1. Mr S's complaint against the Council and RCT is about the calculation of his final pensionable pay.

Summary of the Ombudsman's decision and reasons

2. The complaint should not be upheld against RCT. However, the complaint should be upheld against the Council but only to the extent of the non-financial injustice suffered by Mr S.

Detailed Determination

Relevant regulations

3. The relevant provisions under the Local Government Pension Scheme (Benefits, Membership & Contributions) Regulations 2007 (the **2007 Regulations**) say:

“Regulation 8(1)...on ceasing a period of active membership in an employment, a member’s final pay is that member’s pay for as much of the final pay period as the member is entitled to count as active membership.

(2) A member’s final pay period is the year ending with the day on which he stops being an active member or, if that would produce a higher figure, either of the two immediately preceding years)

...

Regulation 10(1)...where a member’s pensionable pay in a continuous period of employment is reduced or restricted –

(a) because the member chooses to be employed by the same employer at a lower grade or with less responsibility;

(b) for the purposes of achieving equal pay in relation to other employees of that employer;

(c) as a result of a job evaluation exercise;

(d) because of a change in the member’s contract of employment resulting in the cessation or restriction of, or reduction in, payments of benefits specified in the member’s contract of employment as being pensionable employments; or

(e) because the rate at which the member’s rate of pay may be increased is restricted in such a way that it is likely that the rate of the member’s retirement pension will be adversely affected

the member may choose to have his or her final pay calculated in accordance with paragraph (4), by giving notice –

(i) in writing;

(ii) to the appropriate administering authority; and

(iii) no later than one month prior to the date on which the member ceases active membership.

(3) Paragraph (1) does not apply if the member’s employment on reduced pensionable pay –

(a) commences before the beginning of the period of ten years ending with the member's last day as an active member;

(b) immediately follows a period in which the member occupies a post on a temporary basis at a higher rate of pay; or

(c) is because the member chooses to reduce his or her hours of work or to be employed at a lower grade, for the purposes of regulation 18 (flexible retirement).

(4)...the calculations mentioned in paragraph (1) is made by dividing by three the member's total annual pensionable pay in any three consecutive years of the member's choice, ending with 31st March, within the period of thirteen years ending with the member's last day as an active member."

Material facts

4. Mr S was employed by the Council. In 2006, he was offered, and accepted, an honorarium by the Council. In a letter dated 30 June 2006, he was informed that the honorarium was discretionary but pensionable.
5. Payment of the honorarium to Mr S stopped in 2009.
6. Mr S received pension benefit statements in 2008, 2009 and 2010, showing estimated benefits based on his pensionable salary including the honorarium he had received. His pension benefit statements for 2011 and 2012 were based on his pensionable salary excluding the honorarium.
7. Mr S says that during 2009 and 2010 he appealed the withdrawal of the honorarium through the various levels of the Council's appeal process eventually reaching an Employment Tribunal, where his case was unsuccessful. He says that during his appeal he raised the issue of his pension position saying: 'I have now paid three years pensionable contributions on the supplement and it would be grossly unfair not to receive the future benefit from that contribution and lose the substantial sum I have paid in'. He says that the Council did not address this issue.
8. In January 2012, Mr S wrote to RCT, the administrators of the Scheme, informing them that he will be 60 on 31 July 2013, and asking whether his lump sum and pension would be based on the average of his best three consecutive years' pensionable salaries in the last 10 years. RCT responded, confirming that his benefits payable at 60 will be based on his current salary. RCT said that details of his benefits were provided in his annual benefit statement which was sent in October 2011. It added that if his salary had decreased, it would only look at the best year to base his pension benefits on upon actual termination of his employment.
9. On 20 December 2012, in an internal email to the Head of Service at the Council, Mr S said that he was formally applying for early retirement to take effect from 31 March 2013.

10. In January 2013, Mr S emailed RCT saying that he had been advised by the Council of the lump sum and pension payable on taking early retirement on 5 April 2013. The figures were based on his current salary, but his salary was at a higher level between 2005/06 and 2008/09. He asked for revised early retirement figures to be calculated based on the average of his best three years' salary in the last 10 years.
11. In a letter dated 28 January 2013 to Mr S, RCT said that it could only provide him with estimates when he reached the age of 60. The estimate he had received for Voluntary Early Retirement (**VER**) was only available from his employer – the Council. It confirmed that the best of the last three years would only be provided on actual termination of employment – on receipt of a termination form from his employer with details of his pensionable salary earned for the last three years.
12. On 5 February 2013, Mr S emailed the Council, enclosing the letter from RCT, and asking for his lump sum and pension to be recalculated. He also asked for clarification that his pension would be based on the average of any three years' pay in the last 13 years.
13. On 12 February 2013, the Council confirmed by email that his pension would be based on the average of the best three consecutive years in the last 13 years and enclosed an extract from the guide to the Scheme (the **Guide**). The extract from the Guide which is headed "Final pay – Employees in England and Wales" says:

"This is usually the pay earned during your final year of scheme membership, or one of the previous 2 years if this is higher. Payments made in that year do not count if they relate to a different period.

If your **pay** was reduced, or increases to your pay are restricted, in your last 10 years of continuous employment with your employer, you could have the option to have your benefits based on the average of any 3 consecutive years' pay in the last 13 years (ending on a 31 March).

If your pay was reduced or restricted for reasons beyond your control before 1 April 2008 and you are issued with a "certificate of protection" and you leave the LGPS within 10 years of the reduction or restriction in your pay, your benefits will be calculated on a protected **final pay** of either the best year's **pay** in the last five years prior to leaving, or the best consecutive three years average in the last thirteen years after allowing for inflation."
14. Under a section headed 'Further information and disclaimer' in the Guide it says: "In the event of any dispute over your pension benefits the appropriate legislation will prevail".
15. On 14 February 2013, the Council wrote to Mr S informing him that his request for VER had been approved by the VER Panel.

16. Mr S retired on 13 April 2013. In June 2013, RCT sent him a statement detailing of the lump sum and pension payable to him. The benefits were based on his pensionable salary in the last three years.
17. Mr S complained, via the Pensions Advisory Service, to RCT about the amount of pension awarded to him. In November 2013, RCT wrote to him quoting regulations 8 and 10 of the 2007 Regulations. It said:
 - a. Even though he was informed in 2006 that the honorarium paid to him was pensionable, when it ceased to be paid he reverted to his normal pay and he did not meet the criteria as set out in Regulation 10(d).
 - b. The honorarium was never contractual, but was a temporary increase in pay. He could not use it in working out his pension because the reduction or restriction to his pay was as a result of the loss of a temporary increase in pay.
18. Mr S complained to RCT about the calculation of his pensionable salary and the matter was dealt with under stages one and two of the Scheme's internal dispute resolution procedures (**IDRP**). The IDRP decision was not to uphold his complaint for the following reasons:
 - a. at the time he was contemplating retiring, he was not provided with an estimate of benefits that included the honorarium he received;
 - b. it is reasonable to conclude from the facts that he was aware, or should have been aware, that the period of honoraria may have been outside the scope of regulation 10, but nevertheless he decided to retire; and
 - c. his benefits were calculated correctly in accordance with the 2007 Regulations.

Summary of Mr S's position

19. Towards the end of 2012, he became increasingly concerned at the substantial financial savings the section he managed was asked to make for the following year and future years. He asked his manager whether he could reduce his working hours by a day and access his pension early. Towards the end of 2012 or the beginning of 2013, he was informed that the Legal and the HR Officers would not accede to his request, as it could be construed that they were forcing him to do this and he could take them to an Employment Tribunal. He was subsequently informed about the possibility of early retirement. He met with the Head of Building Control and the Planning Services Manager to explore this rather than reduce his working hours. He cannot recall signing documentation accepting early retirement prior to 5 or 13 February 2013.
20. When he applied for his VER he was aware of the Guide, but it made no reference to the 2007 Regulations.
21. He was induced to retire by receiving totally misleading advice from the Council and RCT and treated unfairly as a consequence. If he had not received confirmation from the Council he would have withdrawn his application for VER. Why would he have

queried the estimated figures he was given other than to know what his pension would be before accepting VER?

22. As his pension is significantly lower than the pension he had expected, based on the email he received from the Council in February 2013, he has had to take part-time agency work.
23. It is implied that it was his fault for not making VER contingent to adjustment in his pension. He had been informed that his pension would be based on the average of the best three consecutive years' pensionable salary in the last 13 years and feels that he was entitled to rely on the information he was given.
24. RCT was only prepared to provide an estimate and referred to the best of the last three years.
25. If he had known that the Council and RCT were not going to honour the assurance provided in the 12 February 2013 email, he would have withdrawn his VER application and stayed with the Council.
26. Whilst he thought that there were reasonable grounds for believing that his pension would be based on his best three years in the last 10, he had no confirmation of this which is why he sought clarification and received the Council's email of 12 February 2013. He accepted this email in good faith and was unaware that it had to be checked by some other party.
27. The Panel may have considered his application for VER in January 2013, but he was only notified that his application had been approved after 12 February 2013. He did not know whether the Panel were holding back its decision until the clarification he had sought had been provided.
28. In his view, to apply for something does not prevent the withdrawal of the application if new information becomes available during the application process. The Council's clarification enabled him to accept VER, rather than withdraw his application. When he accepted VER he did not know that the Council and RCT had misled him.
29. After he had been assured that his pension would be based on the average of the best three consecutive years pensionable salary in the last 13, he was content to await receipt of the pension.
30. He had phoned RCT on 7,10,14,15 and 17 May 2013, about his pension payments and he was initially told that RCT were waiting for his AVCs to be sorted out; then RCT said a payment would be sent out early the following week; and finally that his pension could only be calculated on his pensionable salary in the last three years.
31. In hindsight, he could have withdrawn his application when he received RCT's letter in January 2013. However, he would argue that there was an acceptable alternative approach to seek clarification as to the accuracy of the information which culminated in the Council's email of 12 February 2013.

Summary of the Council's position

32. Mr S's request for VER went before the Panel on 29 January 2013, and it was approved at a cost to the Council as it involved the early release of his pension.
33. At the time the 12 February 2013 email was sent he had already submitted his request for VER and the request had already been approved.
34. Although he queried the pension figures provided to him by email on 5 February 2013, he did not indicate that his application for VER was contingent on adjustments to these figures.
35. The letter of 14 February 2013 confirmed that his request for VER had been approved and also acceded to his request to waive some of his notice period, but there was no suggestion that this request to waive his notice period was subject to an adjustment to the pension figures.

Summary of RCT's position,

36. RCT stand by the IDRP decision which concluded that Mr S's benefits had been calculated correctly, and it was reasonable to conclude that he should have been aware that the period he received the honorarium may have been outside the scope of the 2007 Regulations.
37. With regard to the email of 12 February 2013, this is better dealt with by the Council but suffice to say this email was not the only source of advice/information available to him at that time.
38. While he has submitted annual benefit statements for 2008, 2009 and 2010 in support of his case, he received two subsequent statements for 2011 and 2012 which would have shown a lower pension entitlement because the honorarium was not part of the final calculations.

Conclusions

39. Mr S's complaint is essentially that the honorarium he received between 2006 and 2009 was not taken into account when calculating his final pensionable salary.
40. Mr S's benefits are calculated in accordance with the provisions of 2007 Regulations. Regulation 8 says that a member's pensionable pay is final pay and final pay period is the year ending on the day on which the member stops being a member. However, under regulation 10, if a member's pay in a continuous period is reduced or restricted for the reasons given in sub-sections (a) to (e), the member may choose to have their final pay based on the average of any three consecutive years' in the last 13 years.
41. The reason for the reduction in Mr S's pay was not due to any of the reasons set out in sub-sections (a) to (e) of regulation 10. Consequently, regulation 10 does not apply to him.

42. While I accept that the Guide does not directly refer to the 2007 Regulations, it says that in the event of any dispute the appropriate legislation will prevail. The legislation that applied at the time Mr S retired was the 2007 Regulations.
43. RCT had not at any stage informed Mr S that his pension would be based on the average of any three consecutive years' in the last 13 years. Therefore, as I am unable to find maladministration on its part, I do not uphold the complaint against RCT.
44. I will now consider the complaint against the Council.
45. The Council confirmed to Mr S, in its email of 12 February 2013, that his pension would be based on the average of any three consecutive salaries in the last 13 years. This is an error because regulation 10 did not apply to him and therefore, it is maladministration on the part of the Council.
46. What I now need to consider is whether Mr S has suffered an injustice as a consequence of the Council's maladministration.
47. Around 2009/2010, when Mr S appealed the withdrawal of the honorarium, it is clear that he had concerns as to whether this payment would be included in calculating his final pensionable salary, because he had commented at the time that it would be grossly unfair if he did not receive benefits on the contributions he paid on the honorarium.
48. In December 2012, Mr S formally applied for VER. Prior to that application, the information he had received regarding the calculation of his final pensionable salary were in the benefit statements for 2011 and 2012, and a letter in January 2012 from RCT, which all confirmed that this would be based on his current salary. Therefore, at the time he made his application, the information he received, plus the concerns he had, was that his final pensionable salary would be based on his current salary.
49. The information Mr S had received regarding the calculation of his final pensionable salary prior to making his formal application directly contradicted the information he received afterwards. However, rather than checking that the information provided by the Council in February 2012, was correct, he says that he relied on it in deciding to take VER. He also says that he would not have taken VER if he knew that the information provided by the Council was incorrect.
50. The incorrect information was provided by the Council after he had made his formal application to take VER, so I cannot see how he could have relied on this information in deciding to take VER.
51. Mr S also says that he would have withdrawn his VER application had he not received confirmation from the Council. It is clear that he felt the honorarium he received between 2006 and 2009 should be included in his final pensionable salary. However, as stated above, his VER application was made in the knowledge that his

final pensionable salary would be his current salary. Any doubt as to how his final pensionable salary is calculated should have been clarified before he made his application and not afterwards. Therefore, I am not convinced that he would have withdrawn his application if the Council had not given him the confirmation he was seeking.

52. Even if I were to accept that he had relied on the incorrect information provided by the Council in deciding to take VER, in June 2013 he knew that his benefits would be based on his pensionable salary in the last three years because RCT provided him with a statement showing the lump sum and pension payable. At this stage, he could have approached the Council asking for his application for VER to be withdrawn because of the incorrect information it had provided, but he did not.
53. Therefore, I find that on the balance of probability, he could not have relied on the incorrect information provided by the Council in deciding to take VER.
54. For the reasons given above, I am unable to find that he has suffered an injustice as a consequence of the Council's maladministration. However, I recognise that he has suffered significant non-financial loss in the form of distress and inconvenience and uphold the complaint against the Council to that extent.

Directions

55. I direct that within 21 days of the date of this determination, the Council shall pay Mr S the sum of £500 as redress for the significant non-financial loss he has suffered.

Anthony Arter

Pensions Ombudsman
18 August 2016