

PO-7782

## Ombudsman's Decision

<b>Applicant</b>	Mr O
<b>Scheme</b>	Local Government Pension Scheme ( <b>LGPS</b> )
<b>Respondents</b>	Capita Local Pensions Partnership ( <b>LPP</b> ) (formerly London Pensions Fund Authority ( <b>LPFA</b> ))

## Complaint summary

Mr O has complained that the reason given for leaving his employment has been recorded incorrectly and as result Mr O has not received an unreduced pension.

## Summary of the Ombudsman's decision and reasons

The complaint should be upheld against Capita because based on the evidence available, Mr O left employment by mutual consent on grounds of business efficiency and therefore falls within the scope of Regulation 30(7) of the Local Government Pension Scheme Regulations 2013.

## Detailed Determination

### Material facts

1. In May 2013 Capita Secure Information Solution Limited (**Capita**) entered into contract with Watford Borough Council and Three Rivers District Council, which resulted in Mr O with 18 other employees from the IT Service Desk, transferred to Capita under Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE).

2. On 28 March 2013, Capita emailed a letter to the Business Manager of the two councils in relation to the steps being taken as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**). The letter said the following:

“Capita Secure Information Solutions have committed to make cost savings over the course of the contract. As a result the business will be reviewing the staffing levels required and there may be a requirement for staffing reductions by 2014; however at this time Capita are not yet in a position to confirm what roles or teams will be affected.”

3. Mr O was absent from work due to ill health.

4. Capita emailed LPP on 14 February 2014 asking for details of the pension liability it would face in relation to seven employees from the IT Service Desk, including Mr O. Capita said, “We were looking to understand if the attached staff had any pension redundancy liability and if so could we request actuarial calculations based on a termination date of 17<sup>th</sup>[sic] May 2014.” LPP supplied Capita with the required information.

5. In May 2014, Capita and Mr O entered into a “protected conversation” over the telephone. Capita wanted to terminate Mr O’s employment contract and agree on a financial settlement. During the conversation the following was said by Capita, as relevant:

“Okay, basically, as you’re aware, when the original contract was agreed because the Council and Capita, as part of the consultation there was – I think it’s actually in everyone’s handbooks as well, it was talking about the restructure.

...Under the protected conversation there is no – it’s like have an off the record discussion, really. It’s intended to enable both parties to come to an amicable agreement going forward. Now to cut to the chase, what that actually boils down to...is effectively an offer that is a tax free offer made to the employee to leave the employ.

...What I can say is that if the calculations in terms of the estimated and normal redundancy, the value of your redundancy notice is calculated to be around about £12,500, just under. Now, our offer to you ...is £20,000.”

6. Capita sent Mr O a compromise agreement in which under the heading, “termination of employment” it said, “The Employee’s employment with the Employer will terminate by reason of redundancy on the [sic] 6<sup>th</sup> June 2014”.The “settlement payment” was stated as £20,000.
7. Mr O sent Capita an email on 2 June 2014, in which Mr O expressed alarm that a compromise agreement was sent, whereas he had expected further discussions. Mr O requested a breakdown of how the £20,000 compensation was calculated.
8. Capita replied on 2 June it said that the figure offered was a standalone amount offered via the protected conversation. Capita said that the offer made was full and final but it would be withdrawn if it is not accepted before 6 June 2014.
9. In response to this email, Mr O said that, “...In answer to your immovable and firm deadline (without further consultation) I’m happy to accept a £25K [sic] exit plan.”
10. Capita replied, “We are happy to agree at 25K[sic] all in, I will send you over revised paperwork.”
11. On 3 June 2014, Mr O emailed Capita and said:

“I’ve contacted my pension provider for advice and I’m reliably informed that I’m perfectly entitled to claim my pension benefits (without early reduction) from my local government pension scheme.

However they need for you to please make contact with them (at your earliest convenience) to obtain a settlement figure on my behalf (as the employer).”
12. Capita replied by email on the same day and said, “This is a standalone exit payment and does not include payment into your pension fund.”
13. Mr O replied immediately and said:

“I don’t understand your position, my pension fund is (by far) the most important factor (at 55) when being made redundant (in this fashion).

I’m entitled to retire on the grounds of being dismissed by reason of redundancy or on grounds of business efficiency (which I am).

Please can you consult further (with Capita’s pension guru) and get back to me as a matter of urgency.”
14. Capita replied promptly on the same day and said:

“as[sic] advised the offer was via mutual agreement to exit, and is not redundancy.

The offer is 25K[sic] all in to exit, via a protected conversation route.

The offer is open for you to consider until the close of play this Friday.”

15. Mr O replied within half an hour and said:

“I appreciate we’ve mediated well and have done our best to come to a mutually beneficial and positive agreement but I’m out of my depth.

I’d understood that my job role was terminated because it had changed for business reasons or on the grounds of business efficiency.

Or

There were other employees far more capable, ready and willing to undertake my job role thus the reason why I was offered this exit plan.

It would be good to find out how you could make the pension work for me i.e. would Capita have to pay or just request a final figure?”

16. Capita replied in the evening of 3 June and said:

“There has been no discussion around your role or redundancy, to further clarify ...via a “protected conversation” has offered you an exit package based on 25K[sic] all in.

**This is not a redundancy**[original emphasis], and as such we will not be requesting any actuarial costings in regards to your pension in order you may leave with unreduced benefits.”

17. Mr O on 4 June 2014, emailed Capita after asking a family member to type the email and said:

“...My understanding was the ‘all in’ only applied to my ‘redundancy figure’ as offered...so it was mutually tax effective.

[Capita] used the word ‘restructure’ a few times over which I translated into ‘on the grounds of business efficiency’, the job role itself in a contractual obligation.

On the grounds of ‘business efficiency’ when using a restructure tool (exercise) Capita has no choice but to pay the actuarial costings, it’s a basic fact in law...

In fact you were the one that made it by reason of ‘Redundancy’ and not myself.”

18. Capita replied the same day and issued a revised compromise agreement. Capita's email said:

"Our position remains that the offer was made in a protected conversation and there had been no mention of any "restructure" or "redundancy" as you had advised. For the avoidance of doubt I will re-confirm the offer of £25K[sic] tax free is simply an offer to exit via mutual agreement on the 13<sup>th</sup> [sic] June as per the revised paperwork. We do appreciate the current position with your health and we will understand if you are not in a position to accept."

19. On the revised compromise agreement, the reason for leaving was now recorded as "mutual agreement".

20. Mr O replied to Capita on 4 June 2014, in the evening. Mr O said:

"...I agree to your offer of £25K [sic].

In order to get the paperwork done to your satisfaction and within your timescales you must first expedite a final copy of the compromise agreement (modified) to include details of the Barrister somewhere on the first page."

21. Mr O contacted the Barrister from Becket Chambers on 4 June 2014. The relevant extracts from their telephone call are:

"Mr O Yes, they offered £20,000 originally and I said nowhere near enough, because I'm off on long-term sick at the moment anyway. I said £25,000 and they didn't blink at that, they just said yes, no problem. Then I always thought that this was linking to my pension, I never thought that they were just trying to give me a figure and avoid liability for that, which is effectively, I think, what they're doing at the moment..."

Mr O Yes, well what happened was I brought all my pensions in to the local authority I've worked in since I was 21, so I actually have a quite a few years; I have 24-25 years pension with them, which means I qualified for early retirement. I think you have to have over 20 years [sic] continuous pension, which I have. If you're over 55 and you are laid off, not necessarily for redundancy, because your job role is still active, but through some kind of re-jig – I rang up the pension company and they said that if it's by means of business deficiency[sic], they must pay into the pension fund. That's what they told me. So obviously I bounced this back to the employer and that's when I think they spooked, because they realised that I was onto what they're trying to do at the moment.

Barrister Well if there's a termination of the employment, then there's not necessarily an entitlement for the employer to continue to pay into the pension fund after termination. Ordinarily the termination would finish the employment and any pension payments. If you've already accrued in effect maximum

allowed under the pension, then there are issues as to how much further you can take it anyway.

Mr O Well the pension company said that actuarial costings, which they said can be quite expensive to the company, in my case what they said, because they have to pay it off to the age of 66 or whatever it is. I haven't got the paperwork in front of me, but the person I spoke to said that yes, it would have a liability which is apparently enshrined these days.

Barrister Well if you're unfairly dismissed, then there is scope for the employment tribunal to consider for ongoing pension entitlements, because if the employment should continue. The problem that I have is that I don't have any details of what happened in the lead up that could affect your negotiations with the employer that led to the two of you agreeing this figure...

Barrister ...the redundancy pay figure would ...13 weeks over £410, 13 and a half weeks at £410 per week as a statutory cap which you...So we would then be looking at whether it was an unfair selection for redundancy and on that basis of what you've told me here, that's very unlikely because...so on that basis the economics of the offer of £25,000 does appear to be considerably more than you would get if you were take[sic] the matter to the tribunal...success. So on that basis my advice would be that you should take it.

As far as the redundancy – sorry, the pension payments would be concerned, if they terminated your employment then obligation to make any pension contributions would be knocked on the head as well ... I can't see any legitimate way around the expectation that...As far as the pension entitlement is concerned, if you've already put these monies in, whether the pension fund is prepared to pay out is a matter for the pension fund, rather than for the employer. The employer doesn't actually get a chance to make much of the call on that...

Mr O ...You know in the document they sent me, the reason was redundancy, they put on there.

Barrister ...yes, they've indicated there in paragraph 2 that the employment will terminate by reason of redundancy. That will assist you as far as getting your pension is concerned..."

22. On 5 June 2014, Mr O signed a compromise agreement in which the reason for termination of employment was, "by reason of mutual agreement on the 13<sup>th</sup> June 2014." The compromise agreement was signed by Mr O and the Barrister signed the appropriate section also on 5 June 2014. Mr O's employment was terminated on 13 June 2016.

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23. On 5 June 2014, the same day Mr O signed the compromise agreement, he contacted LPP for a pension statement so that he could retire at 55. Mr O said, "My employer isn't going to pay actuarial costs however I still wish to have my figures to retire voluntarily". LPP replied saying that a statement would be processed within 10 working days.
24. On 4 July 2014, following a telephone conversation with LPP, Mr O contacted Capita, asking Capita to send the leaver form to LPP, as without this form, LPP was unable to process his request for a pension statement to retire from 55. Mr O chased the matter again on 7 July 2014.
25. Capita replied on 7 July 2014 saying that the leaver form was sent to payroll to complete. Mr O chased the matter on 9 July 2014, asking why it was taking so long to return the form. On 10 July 2014, Mr O chased the matter again and on 11 July, Capita said that, "...I can confirm that Capita is currently requesting confirmation that we can submit your completed leaver forms to LPFA..."
26. On 11 July 2014, LPP emailed Capita requesting the leaver form to be returned to it. On 14 July 2016, Mr O asked LPP to chase Capita, for the leaver form to be sent to LPP.
27. On 15 July 2014, Mr O emailed Capita to say that the format in which the leaver form has been sent to LPP makes it impossible for LPP to open it. Mr O asked Capita to re-send the leaver form. Capita agreed to send it by post.
28. On 4 August 2014, Mr O emailed Capita to say that LPP cannot calculate his pension as the leaver form omitted to state the reason why Mr O left employment. Mr O said, that, "Please keep in mind "by reason of "Mutual Agreement" is not a reason for leaving." And Mr O said, "...must have this information from you before they can calculate my pension figures (i.e. It [sic] wasn't redundancy)".
29. Capita replied on 4 August 2014, saying, "The reason we are legally bound to state is as per the settlement agreement which is "mutual agreement", and we will not confirm anything outside this".
30. LPP emailed Capita on 4 August 2014, saying:

"In order for us to proceed with our calculations, we need to know whether early retirement reductions would apply to the member's benefits.

For retirements on grounds of redundancy or business efficiency, under the regulations of the scheme any early retirement reductions are waived and there is a strain cost for the employer..."
31. Capita replied on the same day saying:

"We have signed a legally binding document to confirm the grounds for [Mr O]'s departure from Capita and that reason is "mutual agreement". However I can confirm that the departure was not on the grounds of redundancy or

business efficiencies, and we would not be liable for any such strain costs. Mr [O] is fully aware of this.”

32. LPP on 5 August 2014 emailed Capita, setting out what Capita needed to do in order to move matters forward. LPP said:

“...There also seems to be a disagreement over [Mr O]’s reason for leaving. For the avoidance of doubt, the employer is required to make a first instance decision under regulation 72 and send the member a notification stating the reason for leaving and the pension benefits the member has become entitled to under regulation 73. Unfortunately, “mutual agreement” is not a valid reason and it does not give any indication of the pension benefits payable.

There would seem to be three ... reasons for leaving:

- 1) Resignation – and the member would be awarded preserved benefits.
- 2) Redundancy – if the post was deleted and, if the member was 55 or over the pension would be payable immediately without reductions and the employer would be required to pay a strain cost.
- 3) Business efficiency- and, if the member was 55 or over, the pension would be payable immediately without reductions and the employer would be required to pay a strain cost.”

33. Capita replied on 5 August 2014 and said:

“During a protected conversation, [Mr O] accepted an offer to leave the organisation. In the event he had declined the offer he would have carried on as normal in his substantive post, and there are no future plans for redundancy.

Our correspondence with [Mr O] leading up to reaching agreement was explicit in advising him that this was not a redundancy situation but one of mutual agreement, which meant that he would not be entitled to an unreduced pension.

Taking account of the above, we assert that [Mr O]’s reason for leaving, for the purposes of the pension scheme would be Resignation [sic].”

34. On 7 August LPP emailed Capita to confirm that there was a fourth option, which had been added to the 2013 LGPS Regulations, which was, “Mutual agreement on the grounds of business efficiency- and, if the member was 55 or over, the pension would be payable immediately without reductions and the employer would be required to pay a strain cost.”
35. In response Capita said that its position remains unchanged.



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36. Mr O complained through the Internal Dispute Resolution Procedure (**IDRP**), that he did not believe he resigned from Capita but was either made redundant or asked to leave for reasons of business efficiency. In October 2014 Capita did not uphold the complaint under stage one of the IDR. Capita's reasons were that Mr O was not made redundant and did not leave on grounds of business efficiency. Further, while Capita did consider redundancies, this does not mean that it made Mr O redundant. However, it recognised that it took too long to return the leaver form to LPP and offered £100 in compensation.
37. Mr O escalated the matter to stage two of the IDR. Hertfordshire County Council (**the Council**) reviewed the matter and issued the stage two decision on 5 December 2014. The Council said there is no defined difference between "mutual consent" and "mutual agreement" within the LGPS Regulations, and therefore the Council wanted to consider whether Mr O left because of business efficiency. Capita did not provide the Council with a copy of resignation, so it could only rely on the compromise agreement. Capita has said that Mr O could have remained in employment and Capita did make it clear to Mr O that it did not make Mr O redundant or that he was leaving by means of business efficiency. Knowing this Mr O accepted the termination of his employment for a higher amount. Capita should have informed Mr O that the reason for termination had changed on the compromise agreement. Further, the Council was surprised that considering Mr O knew about the impact it would have on his pension, that he did not query why the reason for dismissal had changed. The Council finding was that Mr O was not dismissed on grounds of business efficiency.

### Summary of Mr O's position

38. Mr O's position is that:-

- Capita made it clear during the protected conversation that he was being asked to leave because of restructure within the organisation.
- As Mr O was on sick leave, he asked for £25,000 thinking this would be objectionable for Capita but was surprised that Capita agreed to it.
- He followed the legal advice he was given by the Barrister.
- He felt under duress and pressurised by Capita to agree the compromise agreement.
- Mr O said that he believed that his role within Capita was being downsized as two posts were removed on the IT helpdesk but no redundancy exercise had been run. But staff were asked to complete a skills matrix to see how they could be redeployed to other areas. However no one was redeployed to new areas.
- It was Capita who initially stated by reason of redundancy on the compromise agreement, only later to change it with by reasons of mutual agreement. The Barrister signed the revised compromise agreement and did not highlight that the reason for leaving had changed before Mr O signed it.

## Summary of Capita and LPP's position

39. Capita's position is that:-

- Mr O was not made redundant. While its initial letter of March 2013 referred to potential redundancies, this does not mean Mr O was made redundant.
- Mr O's role has been taken on by existing employees of Capita, therefore his post was not restructured nor made redundant.
- During the email exchanges between Capita and Mr O, he was made fully aware that this was not a redundancy but a standalone payment and he would not be entitled to an unreduced pension payment.
- Capita made it clear to Mr O that he was not under any compulsion to accept the offer, but he could have declined it and he would still be employed by Capita. Further Mr O obtained independent legal advice regarding the terms of the compromise agreement.
- The initial reason stated within the compromise agreement referred to redundancy, Capita said this was due to an administrative error. However, the final version which Mr O and Barrister received did state by reason of mutual agreement. This was in line with what Mr O was told by Capita during the email exchanges.
- Mr O did not leave by reason of business efficiency either, as his role still remains active and there has been no restructure. This was repeated during the email exchange between Mr O and Capita. Capita said that there is no statutory definition of business efficiency therefore the ordinary meaning of the words must be applied. Mr O left by mutual consent after negotiating with Capita, therefore he was not considered incapable of carrying out his duties.
- Capita did not attempt to mislead LPP by delaying sending the leaver form, it was an administrative error – Capita did not know which explanation could be offered on the leaver form, as it was not redundancy or business efficiency. So resignation was the most suitable reason that could be used.
- Capita made one person redundant and did make a payment to LPP, and were reimbursed – as part of the agreement it had with Watford Three River Councils. However, Mr O's position was not made redundant, it still existed.
- Capita did complete the first instance decision, it is unclear what emphasis LPP are placing on this. A decision can only be reached once the relevant issue has been raised which was not initially the case.
- It is not for the LPP to determine how a member of staff left employment. Capita have said that LPP have made assertions without any evidence. Capita disagrees with LPP in relation to:
  - The letter of 28 March 2013 was sent because it was a requirement under TUPE.

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- It is for the Ombudsman to determine based on the facts as to whether Mr O left on business efficiency grounds or not. Therefore based on the signed compromise agreement, Mr O left by mutual consent.
- The test for business efficiency should be whether there was an objective efficiency gain for the business and not simply the subjective gain of removal of a particular employee who may be slow or less able than other employees.
- Capita would like the Ombudsman to make a considered determination so that it can provide guidance as LPP are unable to do so because they have not dealt with many instances.

40. LPP's position is that:-

- Mr O cannot compromise his pension benefits with a compromise agreement. It was after LPP's email of 5 August 2014 to Capita, that Capita stated the reason for leaving as resignation. This surprised LPP because he left by mutual consent. If he had resigned there needed to be an employee led decision such as a resignation letter.
- LPP state that Capita invalidated its own compromise agreement when it stated that Mr O resigned from employment.
- The cost to make Mr O redundant, in total would have been £50,338.29, with the pension strain cost being £37,838.29 and the minimum redundancy cost being £12,500.
- LPP said that there was an instance, where a member of staff was made redundant. However, this person failed in their security clearance and was undergoing disciplinary action as a result. Capita asked if it will get reimbursed if it makes that person redundant, if not then it will continue to complete the dismissal process. LPP say that this email shows that there was a restructure in process and cost was a factor in Capita's decision making.
- LPP said that 19 members of staff were transferred under TUPE, and only three of the original staff remained with Capita. This in itself is evidence that Capita were conducting a business restructure. LPP have confirmed that when Capita's contract was transferred back to Watford Borough Council and Three Rivers District Council, only 6 employees were transferred back under TUPE. So 13 positions were deleted as Capita had only replaced three positions.
- Capita did not make a first instance decision informing LPP of Mr O's pension entitlement and the compromise agreement does not include sufficient reasons for why Mr O left, whereas LPP believe this was due to restructuring.
- LPP said that business efficiency includes instances where the role still exists and not made redundant. LPP said that if Capita, in order to avoid paying the pension strain, chose to use compromise agreement, this would fall within business efficiency. LPP

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said that Capita tried to deliver the contract with fewer less skilled staff, then those staff including Mr O who left, left because of business efficiency.

- LPP said that it is unable to identify any member aged over 55 who was made redundant, the ones who left all were offered settlement agreements.
- LPP as the pension scheme administrators, do not have any written guidance from the Council for employing authorities within its jurisdiction regarding early termination and the impact on a member's pension entitlement.

### Relevant Regulations

The Local Government Pension Scheme Regulations 2013 (as relevant):

#### 30 Retirement Benefits

(7) Where an active member who has attained the age of 55 or over is dismissed from an employment by reason of redundancy or business efficiency, or whose employment is terminated by mutual consent on grounds of business efficiency, that member is entitled to, and must take immediate payment of-

(a) retirement pension relating to that employment payable under regulation 16 (additional pension contributions), adjusted by the amount shown as appropriate in actuarial guidance issued by the Secretary of State; and

(b) any other retirement pension relating to that employment payable under these Regulations, without reduction.

#### 72 First instance decisions

(1) Any question concerning the rights or liabilities under the Scheme of any person other than a Scheme employer must be decided in the first instance by the person specified in this regulation...

(4) A person's Scheme employer must decide any question concerning any other matter relating to the person's rights or liabilities under the Scheme.

(5) A decision under this regulation must be made as soon as is reasonably practicable.

### Conclusions

41. It is not for me to re-write the compromise agreement or revisit the terms of Mr O's departure with Capita, but to see whether Mr O meets the criteria for an unreduced pension under the LGPS Regulations.
42. In order for Mr O to receive an unreduced pension he must fulfil the criteria stated with Regulation 30(7). So I will need to consider whether Mr O was made redundant, or his employment was terminated on grounds of business efficiency, or whether it

was terminated by mutual consent on grounds of business efficiency. I will address each under separate headings.

*Redundancy*

43. The statutory definition of redundancy (taken from Section 139(1) of the Employment Rights Act 1996) is set out below:

"An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -

(a) the fact that his employer has ceased or intends to cease -

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business -

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

44. There is insufficient evidence to say that Mr O was made redundant. There is no evidence to say that a redundancy exercise was conducted by Capita. No announcements to that effect were made by Capita and no expressions of interest sought for voluntary redundancy. Neither did Capita inform employees of the possibility of compulsory redundancy.

45. Capita has said that Mr O role was not made redundant and Mr O's position remains, but filled by someone else within the organisation. I have no reason to disbelieve Capita in this instance. So the fact Mr O's position still exists leads me to conclude that it has not met the definition of redundancy as defined in the Employment Rights Act 1996.

46. Whilst the initial compromise agreement cited redundancy as the reason for terminating Mr O's employment. I have to agree with Capita that this was more than likely a clerical error. Mr O would not in light of the limited evidence available be able to successfully say that he was made redundant or that Capita were looking to make people redundant by following a set process.

*Business efficiency*

47. This leads me to consider whether Mr O left because of business efficiency. Unlike redundancy there is no legal definition for termination on business efficiency. So I have to base my determination on the ordinary meaning. Efficiency is defined as, “the state or quality of being efficient”<sup>1</sup>. Efficient is defined as, “ (of a system or machine) achieving maximum productivity with minimum wasted effort or expense”.<sup>2</sup>
48. In the absence of any guidance from LPP or the Council, it is my interpretation that business efficiency arises in situations when someone is incapable of carrying out their role efficiently and therefore the employer deems them inefficient and asks them to leave employment. Unlike redundancy, the position may still exist after the employee leaves.
49. In this instance, Capita has not said that Mr O was incapable of doing his role or that he was asked to leave because the role had changed significantly and Mr O would not be able to adapt or work efficiently. During the protected conversation Capita did not suggest this was the reason why Mr O was selected. As such I do not think Mr O was dismissed on grounds of business efficiency.

*Mutual consent on grounds of business efficiency*

50. The compromise agreement that ultimately was signed, stated the reason as mutual agreement. This now leads me to consider whether Mr O’s employment ended by mutual consent on grounds of business efficiency. If, as I have established, business efficiency arises when a council wishes to terminate someone because he/she is incapable of doing their work efficiently, then it follows mutual consent would mean that the council and employee both accept that the role cannot be fulfilled, so it would be in the interest of both parties that the employment ended.
51. LPP are adamant that Mr O falls within this criteria and Capita should have given this as the reason for why Mr O left employment. LPP based its reasons on the fact that Capita did ask LPP for redundancy costs in relation to a certain number of employees, including Mr O. Further, LPP has said that from 19 people who were transferred under TUPE, only three remain employed by Capita. LPP have based this information on the number of notifications it has received from Capita, however none but one was considered for redundancy.
52. Capita did not categorically ask Mr O to end his employment as the offer was subject to Mr O agreeing. Capita has said that had Mr O declined the offer, he would have remained employed with Capita. I see no reason to disbelieve Capita. But having considered the events before Mr O left employment with Capita, there does seem to be significant discussions, compressed over a period of few days where Mr O and Capita have come to an arrangement to mutually agree to terminate the employment. Capita said, categorically, that Mr O was not made redundant and this was not a

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<sup>1</sup> Oxford English Dictionary and Thesaurus

<sup>2</sup> Oxford English Dictionary and Thesaurus

business efficiency situation, a point Mr O seemed to accept. Mr O did not disagree with the reasons given by Capita as he was content with the settlement of £25,000.

53. However, regardless of whether Mr O was happy with receiving £25,000 in compensation for leaving his position, I still need to consider whether Mr O meets the criteria within Regulation 30(7).
54. Based on what LPP has said that out of 19 employees who transferred to Capita under TUPE, 16 have been dismissed, the reason for their dismissal is not relevant, but the fact such significant number of employees have left Capita, leads me to conclude that Mr O was dismissed by mutual consent on grounds of business efficiency. Capita would have made efficiency savings dismissing significant numbers of staff. Capita approached Mr O and both parties agreed to terminate the employment, not for capability reasons, but for mutual reasons because Mr O was no longer capable of undertaking his duties.
55. It follows, that Capita and Mr O mutually agreed to terminate the employment and Capita would have gained some efficiency savings doing so, and this therefore means that under Regulation 30(7), Mr O qualified for an unreduced pension as the reason for dismissal was termination by mutual consent on grounds of business efficiency.

#### *Other issues*

56. Capita stated the reason for Mr O leaving to be “resignation”. This was only after LPP gave Capita a list of options, of which “resignation” was the only option Capita felt it could select and would not need to pay a pension strain cost. As Mr O had not resigned, I will direct Capita to re-submit a fresh leaver form to LPP so that the correct reason can be recorded and appropriate pension strain cost can be made.
57. It is not for me to comment on the legal advice Mr O received, but it does seem that when Mr O spoke to the Barrister both parties were referring to a different compromise agreement and not the updated compromise agreement – which had mutual agreement as the reason for leaving.
58. While I appreciate the matter would have been distressing for Mr O, however I do not believe any award for distress and inconvenience should be made. Mr O entered into an agreement with Capita knowing it was a standalone payment, he was not compelled to do so and he did not need to agree to it.

#### *Conclusions*

59. I uphold the complaint against Capita because the reason given on the leaver form does not reflect the facts. It is my view that the reasons for Mr O being dismissed was by mutual consent on grounds of business efficiency, which falls under Regulation 30(7).

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60. LPP has raised an issue about Capita's failure to issue a first instance decision under regulation 72. The delay in completing the leaver form, if this was a first instance decision under LPP's definition, will be redressed in the directions below.

**Directions**

61. Within 21 days of this Determination:

- Capita will re-submit a leaver form to LPP for Mr O citing the reason for leaving to be by mutual consent on grounds of business efficiency;
- once LPP receives the form, Capita will make any further arrangements with LPP for Mr O to receive backdated pension benefits calculated in accordance with Regulation 30, effective from the date of termination of his employment (the due date); and
- pay simple interest, at the rates quoted for the time being by the reference banks, on any arrears paid to Mr O from the due date to the date of payment.

**Anthony Arter**

Pensions Ombudsman  
8 August 2017