

Ombudsman's Determination

Applicant	Mrs Sarah Ascough
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Worcestershire County Council (the Council)

Complaint Summary

1. Mrs Ascough's complaint about the Council, the administering authority, is that her deceased husband, Mr P Ascough, should have been considered for an enhanced ill health pension before he left employment. She also believes that she should receive an enhanced pension and lump sum payment following his death.

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld against the Council because I am unable to find maladministration on their part.

Scheme Regulations

3. Regulation 20 of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**2007 Regulations**) says:

“Early leavers: ill-health

20. —(1) If an employing authority determines, in the case of a member who has at least two year's total membership—

(a) to terminate his local government employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of obtaining gainful employment (whether in local government or otherwise) before his normal retirement age,

they shall pay him benefits under this regulation.”

Detailed Determination

Material facts

4. Mr P Ascough was employed by the Council as Head of Upton Warren and Malvern Hills Outdoor Education Centres. The Council decided to seek external partners to take over the management of these centres and consequently his employment was terminated on grounds of redundancy on 31 May 2013.
5. On 8 January 2013, Mr P Ascough attended a meeting with regard to his redundancy. There are hand-written notes of the meeting, which are difficult to read, taken by the Council which refers to the other attendees by their initials. It would appear from these notes that Mr P Ascough raised an issue about his health, but there is nothing to suggest that there was a discussion about him leaving on grounds of ill health rather than redundancy.
6. Mr R Ascough, Mr P Ascough's father, has provided a typed copy of questions, and hand-written answers, his son had raised at the meeting of 8 January 2013. The hand-written answer to question 4 'How will the redundancy affect my pension and any rights/benefits should I die in the next 5-10 years before I can access my pension, or with my health record enable me to access my pension at an earlier date' was:

“No change, pension secure can be accessed in future death benefits protected not affected by redundancy...”

*Discuss with pension team cf to follow up”.

7. On 15 January 2013, Mr P Ascough sent Ms S at the Council an email saying that it was likely that he would be made redundant and wanted some advice on the pension options available to him. He said that he had a brain tumour, and at the age of 46 the prognosis meant that he would be unlikely to receive his pension. In the event of his death while he was employed by the Council his wife would get a death in service payment, but this would not happen if he was not employed by them.

8. Ms S responded to Mr P Ascough by email informing him that if he was made redundant, as he is under the age of 55, his pension would be preserved under the Scheme. Ms S added:

“You mentioned in your email that you have a brain tumour. Have you considered or discussed with your HR department applying for early release of your pension benefits on medical grounds? There are 3 Tiers of medical retirement tier 1 where it is determined that you are unable to work up to retirement age and your pension is enhanced to age 65. Tier two...

I am happy to meet up and discuss any questions you might have if the above does not answer any queries you might have...”

9. On 12 March 2013, following a meeting on 11 March 2013, Mr S, the HR manager for the Council, wrote to Mr P Ascough referring to an earlier letter of 11 January and informing him that his post would cease on 31 March 2013, on the grounds of redundancy. Mr P Ascough was informed that his employment was to be extended until at least 31 May 2013. The reason given for the redundancy was that “...the continuation of the Head of Centre within the existing staffing structure threatened a successful TUPE transfer of the Outdoor Education Centres to Acorn, due to the high costs incurred with the post”.

10. On 27 March 2013, Ms K from the Council’s HR Department sent Mr P Ascough an email attaching an email from the Scheme’s pension manager, giving details of his estimated benefits on leaving as at 31 May 2013. The attached email said that the benefits would be deferred until normal retirement date, and confirms the payments (i.e. the death grant and widow’s pension) in the event of his death before he starts to receive his benefits.

11. On 23 May and 14 June 2013, Ms C, an administrator for the Scheme, wrote to Mr P Ascough enclosing statements showing the benefits payable under the Scheme at age 65 based on 31 May 2013 being his last day of service.

12. In September 2013, Mr P Ascough contacted the pension team at the Council requesting the early payment of his benefits on grounds of ill health. He was granted early payment of his deferred benefits and was informed of the level of pension payable to him.

13. In November 2013, Mr P Ascough emailed Ms F, a Human Resources adviser at the Council, saying that he understood that if his employment was terminated on the grounds of ill health rather than redundancy it would be financially better for him. He added that he appreciated that he would have to pay back the redundancy payment he received, but in the long term leaving on grounds of ill health was a far better option for him.
14. After making some enquiries, Ms F emailed Mr P Ascough on 28 November 2013, confirming that the Occupational Health consultant had agreed to backdate his ill health retirement certificate to May 2013. This would mean that the Council could end his contract by reason of ill health retirement instead of redundancy. He would have to repay the redundancy payment. He was asked whether he wished to proceed.
15. Mr P Ascough responded to Ms F by email confirming that he wished to proceed.
16. On 5 December 2013, Ms F telephoned and then emailed Mr P Ascough saying that whilst she had thought that it had been agreed that the Council could allow a backdated ill health retirement to 31 May 2013, when it came to the person responsible for overseeing pensions, a concern was raised in relation to the appropriateness of this. She said that there were concerns that as they had already agreed to his request to pay his deferred pension early on grounds of ill health, there would then be a problem in agreeing a second ill health retirement backdated to when he was still an employee. The concern was that this could be viewed as fraudulent, particularly as the second request will be more costly to the Scheme. She concluded that she would let him know as soon as she was able to confirm the position.
17. On 19 December 2013, the Council wrote to Mr P Ascough informing him that it had been decided not to retrospectively amend the reason for his dismissal from redundancy to ill health retirement. They said that the decision had been made on the facts of the case. These include:
 - 17.1. He was consulted about the proposed compulsory redundancy of his position from December 2012, and this was enacted as at 31 May 2013. During this period he was at work and had no recorded sickness absences in the last 12 months of his service.
 - 17.2. He was not being reviewed by Occupational Health during this period and had not been seen by Occupational Health since 2010.
 - 17.3. During the redundancy consultation period and up to the decision to dismiss him on these grounds there was no evidence to suggest that his health was such that they were or should have contemplated dismissing him on grounds of ill health.

- 17.4. After his dismissal he did not appeal against the grounds of redundancy, which would have suggested that he was unwell and that the reason for his dismissal was incorrect.
- 17.5. They understood from his email of 11 December 2013, that he became aware in August 2013 that his tumour had progressed and he contacted the Scheme in September 2013 to request early payment of his deferred benefits on ill health grounds. The Regulations do not provide for any form of 'backdating' or 'substituting' of a previously made decision.
18. Mr P Ascough made a complaint about the Council's decision not to grant him an ill health pension backdated to 31 May 2013. The complaint was considered under stages one and two of the Scheme internal dispute resolution procedures (**IDRP**). The decision under stage one IDRP was not to uphold the complaint against the Council because:
 - 18.1. they had not misapplied or misunderstood the Scheme;
 - 18.2. he was not misled as to the effects of being dismissed on the grounds of redundancy, during the redundancy consultation period;
 - 18.3. he might have misunderstood the difference between regulation 20 and regulation 31 of the Regulations, but this was not due to him being misled at the time;
 - 18.4. the reason for his dismissal was redundancy - this was not a mistake; and
 - 18.5. it is true that after late October 2013 he was encouraged to think that a change for reason for dismissal to allow for a backdated regulation 20 enhanced ill health retirement pension could and would take place, but it does not make the subsequent refusal to backdate his pension unreasonable.
19. Mr P Ascough died on 1 September 2014.
20. On 12 September 2014, Staffordshire Legal Services issued a second stage IDRP decision on Mr P Ascough's complaint. The decision was not to uphold the complaint, but to award Mr P Ascough compensation of £150 for the inconvenience and upset caused by the Council in providing him with misleading information.
21. Mrs Ascough brought a complaint to us.

Summary of Mrs Ascough's position

22. Mr R Ascough on behalf of Mrs Ascough says:
 - 22.1. His son's tumour was diagnosed early in 2010 as a Grade 2 Astrocytoma. Following radiotherapy treatment over 7½ weeks, which initially contained the growth and after several months recuperation, he was able to return to work

in the summer of 2010, initially on short hours. He was seen by the Council's Occupational Health doctor in May 2010, and again on 29 June 2010. In due course, he returned to full time duties running the two centres.

- 22.2. His son suffered severe headaches and was not permitted to drive which meant that running the two centres, some 18 miles apart, was a further challenge as he needed to travel on public transport between the two centres.
- 22.3. His son's job was far from 9 am to 5 pm and involved very flexible working hours over the 7 day week, including evenings, especially during the summer months. As head of both outdoor centres he was responsible not only for the staffing of the centres for all the activities, but also his own time and therefore there were no recorded absences for him by the HR Department. He did not need to register any sick leave on his records as his extended hours and evening activities more than compensated for his hospital visits and other appointments.
- 22.4. Initially it was planned that the two centres would be sold together. However, a sale did not materialise and in due course the Malvern centre was sold separately. His son was informed in a letter from the HR manager on 11 December 2012, that as head of the two centres, and following the sale of the Malvern centre, he was too expensive to remain as head of just the Upton Warren centre and to aid its sale he was to be made redundant.
- 22.5. At a meeting on 8 January 2013, with the Council's HR staff, his son sought clarity about his position with regard to his health and pension in the case of redundancy and leaving through ill health. He was advised that it made no difference to his benefits.
- 22.6. During various meetings, emails and telephone conversations, with members of the Council's HR department, his son enquired about leaving on grounds of ill health and asked the Council to seek medical advice from the cancer unit at Walsgrave Hospital in Coventry, but this request was never followed up.
- 22.7. During the protracted discussions and various letters with differing end dates of employment, his son again asked about ill health release of his pension and related enhanced benefits. He was clearly misled, as he was advised by the Council that his pension would not be affected under redundancy as he had a pre-existing condition of ill health and the brain tumour was inoperable with a poor prognosis for the future.
- 22.8. During the various negotiations and meetings to discuss the sell-off of the two centres, his son asked about his future bearing in mind his health condition. Therefore, it is surprising that the HR department were not aware

or saw fit to enquire about his son's health or seek expert advice from medical experts to understand the condition.

- 22.9. With regard to his son's notes of the meeting of 8 January 2013, the response to question 4 'How will the redundancy affect my pension...', the response was that there would be no change in the pension secured.
- 22.10. His son relied on the fact that the Council, as a respected and trusted employer, would honour the advice he had been given about his pension.
- 22.11. A member of the Council's HR department sent emails during November/December 2013, asking his son for the return of the redundancy payment in exchange for an enhanced ill health pension. This would indicate the advice from the HR department was that the enhanced pension was allowed and would be honoured.
- 22.12. On 3 September 2013, his son requested that his pension should be released. It was only at this stage, when he examined the figures, that he realised his pension did not have the enhanced amount added that he had been advised and expected. He did not query the redundancy before because he had been assured it would make no difference to his or the widow's pension.
- 22.13. Unfortunately, there is no written record of the assurance/advice his son was given that his pension would be the same for redundancy as for retiring on grounds of ill health. This is because his emails were sent from his work computer and these were not accessible to him after he left the Council.
- 22.14. He acknowledges that being ignorant of actual rules and regulations is no justification for inadvertently not complying with them. In hindsight, he realises that his son was naïve in not informing the HR department, or his line manager, of his absence for hospital appointments. His son was unaware that this lack of notification of absence would affect the acknowledgement of his illness, which never went away. It was always thought that the Council could not deny that his son had cancer, as it had been fully documented when his son was required to take absences for several months for radiotherapy.
- 22.15. Unfortunately, the line manager responsible for terminating his son's employment was also the HR manager, Mr S, who had been charged by the Council to dispose of the centres. Mr S was more interested in instigating this latter task, as soon as possible, without proper regard for the health and welfare of the staff involved.

Summary of the Council's position

23. The Council say:

- 23.1. Mr P Ascough's employment ceased on 31 May 2013, after which he ceased to be an active member of the Scheme.
- 23.2. During an exchange of emails with Mr P Ascough in January 2013, Ms S prompted him to consider applying for an enhanced pension on grounds of ill health – something which he did not do.
- 23.3. Even if they had assessed his eligibility for ill health retirement before terminating his employment, there is no certainty that he would have been awarded a pension.
- 23.4. There is no dispute that Mr P Ascough had an incurable brain tumour. Their records show that he was absent from work following diagnosis from November 2009 during which time he received a course of radiotherapy. He was last seen by their Occupational Health consultant on 6 July 2010. Their sickness reporting arrangement requires all staff unable to attend work due to ill health/sickness to notify their manager. During the last 12 months of his employment no sickness absence was recorded and he did not raise any specific health issues with his manager and his health was not, as far as they were aware, affecting his ability to undertake his job.
- 23.5. From the stage two IDRP decision and a letter from Mr R Ascough dated 26 November 2014, they know that Mr P Ascough attended a regular scan on 18 June 2013. They also know from Mr R Ascough's comments that the results of the scan were not known until 31 July 2013. They were not contacted by Mr P Ascough on or around 18 June 2013, or 31 July 2013, to alert them that things had changed in respect of his tumour.
- 23.6. Mr P Ascough's health deteriorated when he was on holiday in August 2013, resulting in him being rushed to hospital for a CT scan and after that he underwent additional tests and treatment.
- 23.7. When Ms S wrote to Mr P Ascough in September 2013 about early payment of his pension she specifically referred to "...early payment of your deferred benefits due to your ill health".
- 23.8. On 24 October 2013, Mr P Ascough telephoned the Scheme and requested details of the pension benefits he would have received had he retired on first tier ill health when he left the Council. This is the first time their records show that he received these figures.
- 23.9. They have a copy of their hand-written note of the meeting of 8 January 2013. However, they have not seen Mr P Ascough's own notes of this meeting.

- 23.10. Ms K's email of 27 March 2013, to Mr P Ascough, contains notification of the estimated benefits due to him at normal retirement date on leaving the Scheme as at 31 May 2013. It goes on to confirm the payments in the event of his death before he received his benefits.
- 23.11. Ms C wrote to Mr P Ascough in May and June 2013, and attached statements showing the value of his preserved pension entitlement. There is no evidence that he responded to these letters to challenge the estimated benefits, so it is reasonable to assume that he understood his deferred/preserved pension entitlements.
- 23.12. They do not believe that it is appropriate to change the grounds for dismissal retrospectively in such a way to allow for a payment of an enhanced ill health pension. The deterioration in Mr P Ascough's condition after he left employment clearly allowed for the early release of his deferred pension, under the Regulations, but not for a change in the grounds of dismissal to cause an entitlement to an enhanced ill health pension.

Conclusions

- 24. The circumstances of this case make it particularly difficult for both parties and I am conscious of that. The task before me is to determine what responsibilities the Council had in the particular circumstances of this case and whether they discharged these in a proper manner.
- 25. Mr P Ascough was receiving an ill health pension from the Scheme before he died, but this was the early payment of his deferred pension and not the enhanced pension (under regulation 20 of the 2007 Regulations) he would have received had his employment been terminated on grounds of ill health. To be entitled to an ill health retirement under regulation 20, Mr P Ascough had to have at least two years' total membership of the Scheme; his employment with the Council had to be terminated on grounds of ill health; and there had to be a reduced likelihood that he could obtain gainful employment before his normal retirement age.
- 26. The Council says that the reason for Mr P Ascough's dismissal was redundancy. I am unable to find anything in the Council's discussions and communications with him between January and the end of May 2013, to suggest that the termination of his employment was on grounds other than redundancy.
- 27. Mr R Ascough says that at the meeting of 8 January 2013 with the Council, his son sought to clarify how his pension would be affected in the case of redundancy as opposed to ill health and was advised that it made no difference. I can see nothing in the hand-written notes of this meeting to show that Mr P Ascough had raised this matter with the Council and the response they may have given him. However, Mr R Ascough has provided his son's notes of that meeting. Question 4 of these notes asks how his redundancy affects his pension and any rights/benefits should he die in

the next 5 to 10 years, before he accessed his pension, and would his health record enable him to access his pension earlier. The hand-written response is that there would be no change in the pension secured which could be accessed in the future; the death benefits were protected by redundancy; and an asterisk to discuss and follow up the matter with the pension team. I cannot see anything in the hand-written response to suggest that the Council had informed Mr P Ascough that there would be no difference in his pension on being made redundant as opposed to retiring on grounds of ill health. Indeed, Mr R Ascough has said that there is no written record of the advice his son was given on this matter. I am therefore unable to find that Mr P Ascough was misled in this respect.

28. In January 2013, Ms S asked Mr P Ascough whether he had considered or discussed with his HR department the early payment of his pension on medical grounds. She explained to him the three tiers of medical retirement and the criteria that had to be met in order to qualify for these benefits. However, I can see nothing to indicate that he contacted the Council's HR department to enquire about these benefits.
29. It is possible that Mr P Ascough may have misunderstood the difference between a pension paid under regulation 20 and a deferred pension paid early on ill health grounds. However, he received in March, May and June 2013, details of his deferred benefits. At no stage did he query these figures, or ask whether the benefits would be different had he retired on medical grounds. In my view, any misunderstanding on his part was not due to any advice the Council may have given him.
30. However, I would agree that in November 2013 Mr P Ascough was misled by the Council into believing that the grounds of his dismissal could be retrospectively changed from redundancy to ill health, and he could receive a pension under regulation 20. The Council have since said that it would not be appropriate to change the grounds of dismissal retrospectively and pay him an enhanced ill health pension. They also say that their records show that during the last 12 months of his employment, no sickness absence was recorded and he did not raise any health issues with his manager.
31. The decision as to the grounds of dismissal of an employee is an employment issue and therefore it is not a matter I can consider. I do not doubt that Mr P Ascough had visited the hospital and attended other appointments for his condition and did not record these. However, the fact that he did not do so is not the Council's fault.
32. The Council were aware of Mr P Ascough's condition, because he had sick leave in 2010 and had seen their Occupational Health doctor at that time. However, because he had worked in the last 12 months of his employment, and had made no application for an ill health pension while he was employed, they had no reason to believe that his condition had worsened, or they needed to consider him for an ill health pension before his employment was terminated. Even if he had informed the HR department and his line manager of his hospital appointments while he was still employed, unless

he had applied for an ill health pension, the Council, as his employer, had no duty to advise him of the option to take ill health retirement.

33. Therefore, regardless of what was said to Mr P Ascough in November 2013 and whether he could have been retired on the grounds of ill health at the time he left the Council, I do not find that this was a consequence of any maladministration on the part of the Council.
34. I am sympathetic to the situation in which Mrs Ascough finds herself, but, for the reasons given above, I have not found that there are grounds to uphold her complaint against the Council.

Anthony Arter

Pensions Ombudsman
22 January 2016