

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Staffordshire County Council (SCC)

Outcome

1. I do not uphold Mrs N complaint and no further action is required by Staffordshire County Council
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs N has complained that SCC are seeking to recover an overpayment of pension.

Background information, including submissions from the parties

Background

4. Mrs N was employed by SCC from 1979 to 1996. In 1996, she retired on the grounds of ill health. SCC say Mrs N was sent a retirement pack, on 14 December 1995, and they have provided a copy of the notes which they say would have been included in this. Amongst other things, the notes stated,

"If, after retirement, you take up further employment with [SCC] or any other employer where membership of the [LGPS] is open to you (even if you choose not to rejoin) you **must** tell your new employer that you are receiving an LGPS pension. You must also write to inform the Pension Services Section ...

This is a statutory requirement.

Upon re-employment your pension instalments may be temporarily reduced or suspended. This will be determined by the level of remuneration of the new employment ... Contact the Pension Services Section if you are considering re-employment and wish to know the impact on your benefits."

5. SCC say they have no record of being asked to send correspondence to anywhere other than Mrs N's home address and they would not forward correspondence to her

work address. They point out that the 14 December 1995 letter, which contained Mrs N's lump sum cheque, referred to a set of notes. Mrs N recalls that the cheque was hand delivered to her by her then manager and he had opened the envelope before bringing it to her home address. The notes referred to above stated the lump sum would normally be paid by cheque sent to the member's home address, "unless you have given alternative instructions to the Pension Services Section". The letter itself stated that an assessment of Mrs N's benefits and a set of notes was enclosed.

6. In 1998, Mrs N took up part-time employment with SCC. On 19 January 1998, Mrs N wrote to SCC notifying them of her re-employment. She said her new role was permanent and she would be working 18½ hours per week. She provided details of her new salary. Mrs N said she was writing to inform SCC "as a matter of courtesy". She then asked if her monthly pension would be affected and whether it would be paid separately or combined with her new salary.
7. SCC responded on 4 February 1998. Mrs N says she did not receive this letter and has pointed out that it bears an incorrect postcode (the last letter is incorrect). In their letter, SCC said Mrs N's re-employment would not affect her pension. They asked her to notify them if: her contractual hours altered; she transferred to another post at a different remuneration; or she entered employment with a different LGPS employer. Mrs N left SCC's employment again in 2010.
8. On 14 May 2012, SCC wrote to Mrs N saying, as a result of a data matching exercise, it had come to light that she had exceeded her earnings limit in 2001; when she increased her contractual hours to full time. SCC said this should have resulted in a partial suspension of Mrs N's pension from December 2001 to December 2003, followed by a full suspension from January 2004 to August 2007. They had calculated an overpayment of £21,204.44 (gross). SCC offered Mrs N repayment by one-off lump sum or £300 per month over 71 months.
9. In correspondence with the Pensions Advisory Service (**TPAS**), SCC explained that every two years they receive a filtered report from their internal auditors detailing individuals who appear on the payroll as both active employees and pensioners. They explained that the filter means that only individuals who exceed a certain threshold on both payrolls are identified. SCC said their 2010 report (covering April to September 2009) initially produced 419 cases, but this was reduced to 82 on application of the filter.
10. Mrs N appealed against the decision to seek recovery of the overpayment under the internal dispute resolution (**IDR**) procedure. At stage one of the IDR procedure, the decision maker concluded Mrs N had been provided with information in a timely manner and had been aware that she should notify them if her employment changed. The decision maker said SCC had used due diligence in reviewing cases and the time limits set out in the Limitations Act 1980 (**LA 1980**) should run from 2012.
11. At stage two of the IDR procedure, SCC declined Mrs N's appeal. Amongst other things, the decision maker expressed the view that SCC's selection criteria for

reviewing the payroll were reasonable because they were those recommended by the Audit Commission. She did not accept that, by applying a filter, SCC had, in effect, written off those overpayments which were not picked up.

12. With regard to the LA80, the decision maker said the limits related to the time for filing a claim and that this ran from the time of the “offence” or from when the claimant first knew, or could with reasonable diligence have known, of the problem. She said the claimant had six years in which to lodge proceedings in court for the entire claim; not just for six years of the claim. She said SCC could make a full recovery of the whole overpayment even if the payments were made more than six years before 2012. The decision maker said, in view of Mrs N’s statutory duty to inform them if her employment changed, she was of the view that due diligence had been carried out by SCC and they had six years from 2012 to lodge a claim in court for the whole amount.
13. The decision maker acknowledged that SCC had originally proposed recovering the overpayment over 71 months and were now suggesting 57 months. She did not accept that this would cause any hardship or inconvenience to Mrs N. She pointed out that two years had passed since the matter had been first raised with Mrs N and the recovery period would have reduced. She explained that the proposal to recover the overpayment before Mrs N’s 60th birthday was to avoid financial hardship at the date of her retirement; rather than a requirement under the LGPS regulations.
14. The IDR decision maker said SCC had been informed by HM Revenue and Customs (**HMRC**) that they were out of time to recover the tax element of the overpayment. She said, as a result, SCC would be seeking to recover the gross amount from Mrs N. This had been reduced to £20,914.23 because Mrs N had paid £290.20 in July 2014. The decision maker expressed the view that Mrs N’s pension could have been suspended altogether because her re-employment predated October 2006. She said SCC’s abatement policy had been interpreted beneficially for Mrs N so that the pension paid after August 2007 had not been reduced. As a consequence, the decision maker said she was not recommending any payment for distress and inconvenience.
15. In conclusion, the IDR decision maker suggested Mrs N be offered three repayment options: £389.14 per month from November 2014 to her 60th birthday; £182.52 per month to her 65th birthday; or £286.45 per month for 72 months. Having not heard from TPAS or Mrs N, SCC began deducting £190.13 from her pension in February 2015.

LGPS Regulations

16. At the time Mrs N first became re-employed, the Local Government Pension Scheme Regulations 1995 (SI1995/1019) (as amended) applied. The provisions for abating pensions for re-employed pensioners were contained in regulation D15 and schedule D5. Paragraph 2, schedule D5 contained the “General reduction rule”,

“... while the person holds the new employment the annual rate of the retirement pension is reduced -

- (a) if the annual rate of remuneration of the new employment, equals or exceeds the indexed annual rate of remuneration of the former employment, to zero; and
- (b) otherwise, by the amount (if any) which is necessary to secure that the potential receipts during the new employment do not exceed the indexed annual rate of remuneration of the former employment.”

- 17. Paragraph 6 applied if the member altered their contractual hours in a new employment or transferred to another post under the same employing body at a different remuneration. Schedule D5 applied as if he/she had again entered a new employment.
- 18. Paragraph 8 required the member to (a) inform any LGPS employer with whom he/she proposed to accept a new employment that he/she was entitled to a pension; and (b) notify the body from whom he/she had become entitled to receive the pension in writing that he/she was entering new employment.
- 19. At the time Mrs N increased her hours, the Local Government Pension Scheme Regulations 1997 (SI1997/1612) (as amended), required SCC to have a policy on abating pensions for re-employed pensioners. Regulation 110 provided:

“(1) Where a member who is entitled to the payment of a retirement pension proposes to enter a new employment with a Scheme employer, he must inform the employer about that entitlement.

(2) If such a member enters such a new employment he must immediately notify in writing the body from whom he has become entitled to receive the pension.

...

(4) The authority which is the member's appropriate administering authority as respects the retirement pension to which he is entitled -

(a) must apply the policy published by them under regulation 109 to the member, and

(b) they may reduce the annual rate of that pension or, as the case may be, may cease to pay it, during the period while he holds the new employment, in accordance with that policy.

(5) But no reduction under paragraph (4) of the pension of a person who was a member immediately before the commencement date may exceed the reduction which would have applied under the 1995

regulations if those regulations had applied when the member entered his new employment.”

Mrs N's submissions

20. Mrs N has referred to the letter she wrote to SCC on 19 January 1998. She says the use of the word “courtesy” indicates that she did not know that she was required to inform SCC that she had recommenced employment. Mrs N says this step had been suggested to her by the occupational health worker who saw her for a medical prior to recommencing employment with SCC. She also disagrees that it indicates that she was aware that she should notify them of subsequent changes in her employment.
21. With regard to references to a retirement pack having been provided in 1996, Mrs N says she has no recollection of seeing this. She asks if SCC have any evidence that she received such a pack. Mrs N says correspondence was still being sent to her at her workplace at that time despite the fact that she was on sick leave. She believes this may have been at the request of her head of department at the time. She describes this individual as very controlling and has explained that he insisted on all mail arriving in the department being opened by his secretary regardless of whether or not it was marked private and/or confidential. Mrs N says she recalls her head of department visiting her, with her retirement cheque, because she deliberately did not make him welcome by offering him a beverage.
22. Mrs N has explained that she was bullied for the first year of her re-employment. She feels that, if she had received SCC’s letter of 4 February 1998, she would not have been able to grasp its significance.
23. Mrs N says she has been made aware that SCC carry out audit checks to see if the same name appears on two payrolls. She feels they should have picked up the fact that her name appeared twice and, had they done so, the overpayment would have been picked up earlier.
24. Mrs N says she has never refused to repay any monies. However, she says she finds it difficult to accept responsibility for what has happened because she was unaware of her obligations in this respect. She suggests a compromise should be reached with SCC as to the amount she should repay.
25. Mrs N says repaying the overpayment will cause financial hardship for several years to come. She has explained that she has not had a holiday in the last three years and did not replace her car until forced to, which meant taking out a loan. Mrs N says the worry of this debt has had a negative effect on her health.

SCC's submission

26. SCC acknowledge that Mrs N wrote to them, in 1998, notifying them that she was working. They say she was told to contact them if her circumstances changed.

27. SCC have explained that Mrs N's case was discovered after a check of their records was undertaken as part of the National Fraud Initiative. They say they are not obliged to carry out checks on their thousands of pensioners and to do so would be impractical. They have explained that they do carry out checks when it is aware that a pensioner has become re-employed.
28. SCC say they have checked their records and found no notes instructing their pension team to forward correspondence to Mrs N's work address. They say their assistant fund manager has confirmed that such forwarding would not take place anyway. SCC say they received the forms necessary for the payment of Mrs N's pension from her on 1 December 1995 and these included her home address. They say there was no note from Mrs N asking them to send correspondence elsewhere.
29. SCC point out that their letter of 14 December 1995, which enclosed her cheque, refers to a set of notes and asked Mrs N to read these. They believe Mrs N will have received the notes.
30. In response to Mrs N's point that she contacted them, in 1998, out of courtesy, SCC say, even if this were the case, she was informed that she should tell them if her circumstances changed. They also say that, during the IDR procedure, Mrs N's representative said she knew she should inform them and knew she had not done so. SCC also suggest it is acceptable to expect a reasonable person to question their ability to receive an ill health retirement pension whilst returning to full time work.
31. With regard to the incorrect postcode, SCC say they have checked and the incorrect post code applies to an adjacent street. They believe it is highly likely the letter was delivered when all of the other address details were correct. SCC also point out that Mrs N had asked certain questions and was, therefore, expecting a reply. They say they have checked and have no record of any further calls or letters chasing a response to Mrs N's questions. SCC say there is no legal obligation on them to prove that Mrs N received their letter. They refer to the Civil Procedure Rules and to the common law principle that a letter is deemed to be delivered a number of days after it is posted.
32. SCC say they asked Mrs N to agree a repayment plan and she declined to do so. They say, at no time, have they requested full payment upfront. They say they tried to reduce recovery to the net amount but were unable to do so because of HMRC rules. SCC say Mrs N is earning just over £39,000 per annum and is still in receipt of her pension of £7,050 per annum. They note her car payments appear to be quite high and say they do not consider "lavish or luxury holidays" to be an essential living cost which should be taken into account.
33. SCC assert they have six years from 2012, under the LA 1980 to seek recovery of the overpayment.

Adjudicator's Opinion

34. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by SCC. The Adjudicator's findings are summarised briefly below.

- When the salary Mrs N was earning in her new job plus her pension exceeded the salary she had been earning before retirement (increased by indexation), her pension should have been reduced. She has been overpaid and SCC are entitled to seek to recover the overpayment.
- Having said this, the recovery of an overpayment of pension is subject to the LA 1980. The usual time limit for seeking recovery of an overpayment is six years from the date of the mistaken payment (applying section 5 LA 1980). There is, however, provision for the six year period to be extended where the overpayment is the consequence of a mistake. Under section 32 LA 1980, the time would not start to run until the mistake was discovered or could with reasonable diligence have been discovered.
- The High Court has recently decided that the cut-off date for limitation purposes is the date of receipt by the Ombudsman of the respondent's written response to the notice of complaint¹. SCC's formal response to Mrs N's complaint was received by the Ombudsman on 16 June 2015. For the purposes of LA 1980 this is the date at which time ceased to run. The question is whether SCC made their claim for repayment within the applicable limitation period and are able to recover the overpayments from Mrs N. That question will turn upon at which date the limitation period started to run.
- SCC have said that they only became aware of the overpayment in 2012 and time started to run from then. On that basis, they consider they had until 2018 in order to make a claim for the recovery of the overpayment (applying section 32 LA 1980). Their response to Mrs N's complaint was received by the Ombudsman within this timeframe. The question arises, however, whether, by exercising reasonable diligence, SCC could have discovered the error at an earlier date. Mrs N argues that this is indeed the case and that, had SCC's review criteria been more robust, they could have seen that she was both an active employee and a pensioner.
- The LGPS regulations require a member who is in receipt of a pension to inform a new LGPS employer of this. There is, therefore, a responsibility for the member to take steps to ensure they are not overpaid pension when they take up new LGPS employment. However, it would not be reasonable to expect members to be familiar with the details of the LGPS regulations. This responsibility would have to be pointed out to Mrs N. SCC took reasonable steps to do so by including the explanatory notes with their 14 December 1995

¹ *Webber v Department for Education and another* [2016] EWHC 2519 (Ch)

letter. Mrs N had said the letter had been opened before she received it. However, SCC have no record of being asked to send the letter to an address other than her home address. In addition, the letter itself refers to the notes. Had they been missing, Mrs N would have been alerted to this and could have asked for copies. SCC's process for informing members of the responsibility to inform them of re-employment was reasonably robust in 1995.

- Mrs N did write to SCC when she was first re-employed in 1998. In her letter, she says she is doing this "as a matter of courtesy". This is a curious way of putting it. Mrs N may not have remembered the exact contents of the notes she was sent. However, her action in writing to SCC indicates that she felt she should be notifying them of her re-employment. She asked (among other things) if her pension would be affected, which suggests she was aware this might be the case. SCC's response, dated 4 February 1998, explained that Mrs N's pension would not be affected and asked her to let them know if any of a list of events occurred, including a change in her hours.
- Mrs N says she did not receive this letter. There was a minor error in the post code but it was not of a magnitude to prevent the letter reaching Mrs N. In addition, Mrs N had asked for information about the effect re-employment would have on her pension. If she had not received a response, it would be surprising if she had not chased it up, since this was clearly a concern for her. Mrs N had said she would not have realised the significance of the letter if she had received it because of her work situation. However, the letter is very straightforward and simply asks Mrs N to notify SCC if certain events occurred. SCC had taken reasonable steps to alert Mrs N of the need to notify them if her circumstances changed.
- Rather than review all instances when an individual appeared on both employee and pensioner payrolls, SCC applied a filter so that only individuals who exceeded a given threshold were reviewed. The alternative was for SCC to review all such cases. Given that, under the LGPS regulations, the member is responsible for notifying SCC in case of re-employment and they had taken steps to make members aware of this, SCC's review process was reasonable.
- In the circumstances, the limitation period should start to run from 2012.
- The fact that SCC are not prevented by the LA 1980 from seeking to recover the overpayment is not the end of the matter. There are circumstances in which the recipient of an overpayment is not required to repay all or part of the sum involved. These are referred to as defences against recovery. The two which arise most often in pension cases are "change of position" and "estoppel by representation". A change of position defence arises where the recipient has so changed his/her position that it would be inequitable to require him/her to repay money paid to him/her in error.

- A change of position defence is unlikely to succeed in Mrs N's case because she had been made aware that the amount of pension she could continue to receive whilst re-employed would be affected by the rate of her new salary. SCC had confirmed that her pension was not affected when she first became re-employed but, at that time, she was only working part-time. Mrs N could reasonably have been expected to realise that this position changed when she started working full-time for SCC or she could have known had she made reasonable enquiries; as she had done previously.
- A defence of estoppel by representation is unlikely to succeed in Mrs N's case because there was no clear representation or promise by SCC that she could continue to receive her pension in full whilst working full time for them.
- Mrs N has made the point that recovery of the overpayment will cause her financial hardship. However, SCC offered her a number of options for repayment plans which she failed to respond to. Having not heard from Mrs N, SCC implemented the least onerous of these. This did not amount to maladministration on their part.

35. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs N for completeness.

Ombudsman's decision

36. Mrs N is adamant that her retirement cheque was delivered to her home address by her then head of department. SCC say they have no record of being asked to send correspondence for Mrs N to her work address and would not have done so. It would indeed be highly irregular for the pensions team to send a member's retirement cheque to an address other than their home address unless requested to do so by the member themselves. Setting that aside, I note that the cheque was for Mrs N's lump sum and the first pension payment. The calculation of the amount to be paid was set out in the covering letter. On balance of probabilities, I consider it unlikely that Mrs N was simply handed a cheque with no covering letter. Or, if she had been, that she would not have made enquiries to ascertain she had been paid the correct amount. The covering letter referred to a set of notes and asked Mrs N to read them. If these had been removed from the envelope, it would not be unreasonable to expect Mrs N to have requested copies so that she could comply with the request to read them.
37. In 1998, Mrs N informed SCC that she was re-commencing employment. She provided details of her hours of work and her salary, and asked them if her pension would be affected in any way. She also asked if her pension would be paid separately or combined with her new salary. Mrs N said she did this as a matter of courtesy and has referred me to the dictionary definition of "courtesy"; "favour as opposed to right".

Mrs N is of the view that this indicates that she was unaware that she was required to inform SCC of her re-employment. Nevertheless, Mrs N's letter indicates that she had some idea that her pension might be affected by a return to work. This would be a reasonable assumption to make since she had taken ill health retirement on the basis that she was unable to work; particularly when she began working full time.

38. SCC's response to Mrs N asked her to notify them if (amongst other things) her hours changed. Mrs N does not recall receiving this letter and has pointed out that the post code was incorrect. This is true. However, the post code relates to an adjacent street and it is more likely than not that it would have been delivered to Mrs N since the rest of the address was correct. If not, it is not unreasonable to expect Mrs N to have chased up a response to her queries. That she did not is strongly indicative of her having received the letter.
39. The fact remains that Mrs N has received more by way of pension than she was entitled to. SCC are seeking to recover this overpayment. I find that they commenced to do so within the six years provided for under section 32 LA 1980. Mrs N was offered various options for repaying the outstanding sum but did not respond to these. SCC implemented the least onerous repayment option. I do not find that this amounts to maladministration on their part.
40. Therefore, I do not uphold Mrs N's complaint.
41. Mrs N has pointed out that SCC initially asked her to repay the net amount. She says they later changed their minds. In fact, SCC found they were unable to recover the net amount because of HMRC requirements. Mrs N considers SCC to be better placed than herself to deal with HMRC. However, this is not something which SCC can be asked to do. Mrs N will need to contact HMRC herself on the matter of the tax element of her overpayment.

Anthony Arter

Pensions Ombudsman
23 January 2017