

## Ombudsman's Determination

<b>Applicant</b>	Mr Davies
<b>Scheme</b>	Local Government Pension Scheme (the <b>Scheme</b> )
<b>Respondent</b>	North West Leicestershire District Council (the <b>Council</b> )

### Complaint summary

1. Mr Davies' complaint, which is against the Council, is as follows:
  - a. they failed to notify him of his appeal rights when they gave him the initial decision in October 2014;
  - b. their process has been in contravention of the Scheme's internal dispute resolution procedure (**IDRP**) guidelines;
  - c. their process has been in contravention of the rules of natural justice in that the decision makers were neither impartial nor independent as they had previous involvement in the matter;
  - d. they failed to review their regulation 30 policy;
  - e. they overestimated the cost of paying him an unreduced pension early;
  - f. the decision they reached when they reconsidered whether to release his pension benefits early from July 2010.

### Summary of the Ombudsman's determination and reasons

2. The complaint should be upheld against the Council to the extent that they failed to inform him of his appeal rights; appointed two decision makers who were previously involved in this matter; and there were flaws in their decision.

## Detailed Determination

### The relevant regulations

3. Under regulation 30 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (**2007 Regulations**), a member who leaves local government employment is entitled to the immediate payment of benefits from the Scheme once he has attained age 55. If the member is less than age 60, the employing (or former employing) authority's consent must be obtained before the benefits can be paid. The pension paid must be reduced by the amounts shown as appropriate in the guidance issued by the Government Actuary. However, the employing authority may decide on compassionate grounds that the pension paid should not be reduced.
4. Under the Local Government Pension Scheme (Miscellaneous) Regulations 2012 (SI 2012/1989) (**2012 Regulations**), which came into force on 1 October 2012 but have retrospective effect from 1 April 2008, if a member satisfies the 85 year rule their pension and grant shall not be reduced in accordance with regulations including 30(4) or 30A(4) of the Benefits Regulations.
5. Regulation 75 of the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (**2013 Regulations**) says, in respect of the first stage decision under the Scheme's internal dispute resolution procedures (**IDRP**), that the adjudicator must give written notice of a decision to the applicant, the scheme employer and the administering authority, before the expiry of two months beginning with the date on which the application is received. However, if no such notice is given before the expiry of that period, an interim reply must be sent immediately to the applicant setting out the reasons for the delay and an expected date for giving the decision.
6. Regulation 77 of the 2013 Regulations says, in respect of the second stage decision under IDRP, that the administering authority must give notice of its decision after considering the adjudicator's decision, given under regulation 75, to the applicant and to the scheme employer.

### Material facts

7. Mr Davies resigned and left the employment of the Council in July 2010. His wife who was ill at that time died in August 2010.
8. Mr Davies first requested early payment of his deferred benefits on compassionate grounds, soon after he left the Council. He submitted a second request in January 2012. Both of his requests were denied.
9. Mr Davies' eligibility for early payment of his deferred benefits under the 2007 Regulations was the subject of two previous complaints to the Ombudsman. The first determination (82819/1) was in December 2011 (the **2011 Determination**), and on

that occasion the Ombudsman upheld Mr Davies' complaint and remitted the decision to the Council for reconsideration.

10. The second determination (PO-2995) was in October 2014 (the **2014 Determination**), and once again the Ombudsman upheld Mr Davies' complaint and remitted the decision to the Council for reconsideration. On that occasion, the Ombudsman found that it was unclear from the Council's decision that both discretions, i.e. the discretion to pay a reduced pension and then the discretion as to whether to waive the reduction on compassionate grounds, were exercised. The Ombudsman commented that the approach adopted by the Council deprived Mr Davies of the possibility of having reduced benefits paid on early retirement under regulation 30. Consequently, the Ombudsman directed that the Council to give further consideration to the early payment of Mr Davies' benefits and due consideration to the option of consenting to the payment of reduced benefits from July 2010, as an alternative to waiving the actuarial reduction on compassionate grounds.
11. In December 2012, on reaching the age of 60, Mr Davies started to receive his benefits, unreduced, from the Scheme.
12. Following the 2014 Determination, the Council reconsidered Mr Davies' application for early payment of his pension on compassionate grounds. On 24 October 2014, the Council wrote to him saying:

"Reduction of Benefits

I have given consideration as to whether you should be paid reduced benefits from July 2010 as directed. I have concluded that the Council is not lawfully able to pay you reduced benefits.

You benefitted from 'the rule of 85' in July 2010 because your number of years of service, and your age, added up to more than 85 (see attached calculations).

On 1 October 2012, paragraph 1 of schedule 2 of the *Local Government Pension Scheme (Transitional Provisions) Regulations 2008* was replaced (by virtue of the *Local Government Pension Scheme (Miscellaneous) Regulations 2012*)...

The Council has obtained legal advice and I understand this amendment had retrospective effect from 1 April 2008, meaning that any application under Regulation 30 made after 1 April 2008, should be determined with reference to this provision. Accordingly, because you benefit from "the rule of 85", the Council is not able to pay you reduced benefits if it is minded to pay your pension early. It is important to note that the Council does retain its discretion as to whether or not to agree to early release of your full pension.

Early Payment of Benefits

As set out above, the changes to the legislation which mean that the Council cannot pay you reduced benefits if it is minded to agree to early release of your pension under Regulation 30, does not deprive it of its discretion as to whether or not consent to early release of your full pension.

The Pensions Ombudsman did not criticise the Council's decision in relation to whether or not your pension should be paid early on the basis of early payment of your full pension. Having considered your further submissions...and concluded that nothing stated within them is substantially new or different than previous submissions made, and in light of the fact that the Council is not lawfully able to pay you reduced benefits, I adopt in full the decision reached by [Mr N] in his decision of 28 February 2012, and his reasoning, and conclude that it is not reasonable or in the best interests of the Council or the wider Council Tax payers of the District to agree to your request.

Given that [Mr N's] decision was in part based on the cost to the Council of paying your full pension early (£64,284), I enclose a set of calculations demonstrating the basis for considering that this would be the cost to the Council/tax payers."

13. On 23 December 2014, in an email to the Council, Mr Davies appealed the decision given in their letter of 24 October 2014.
14. On 23 January 2015, the Council responded saying that the only decision they are entitled to review is the one given following the 2014 Determination, which is that they consider the payment of reduced benefits. They said that they declined to make the payment because in their opinion they could not lawfully comply with it. They added that they had requested legal advice and he would be contacted for his submission. The timescale would be set in order that they could conclude his appeal within the three month period as required under the Scheme's internal dispute resolution procedure (**IDRP**), i.e. 23 March 2015.
15. On 11 March 2015, the Council wrote to Mr Davies saying that the legal advice they had taken confirmed that they were unable to offer payment of the reduced benefits, because any new ruling by them would have to be made in accordance with the regulations now in force and not that which was in force at the time he applied. Consequently, they could not comply with the directions in the 2014 Determination. They informed him that he had a right to appeal against the decision that they had given and, if he wished to do so, he should do so in accordance with IDRP.

16. Mr Davies appealed against the decision given by the Council in their letter of 11 March 2015. The matter was escalated to stage two IDRPs and on 23 April 2015, Leicestershire County Council (**LCC**), the administering authority for the Scheme, wrote to him upholding the Council's decision.
17. As he was unable to resolve his complaint with the Council, Mr Davies brought his complaint to us.

**Summary of Mr Davies' position**

18. The Council took six weeks to advise him of his right of appeal, and took four months to deal with it, causing him further distress. There has been no apology for this delay.
19. The Council attempted to dictate the content of his appeal, contrary to the IDRPs guidelines and rules of natural justice.
20. His complaint about the IDRPs process is much broader than regulation 75. The Council has consistently failed to operate an IDRPs process that is 'fit' for purpose. They have had over six years to review, update and improve the IDRPs process, but failed to do so.
21. The individuals at the Council who made the decision were neither impartial nor independent. They were previously involved in the decisions about his regulation 30 claim. This is contrary to the IDRPs guidelines and the rules of natural justice.
22. The Council once again failed to review their regulation 30 policy prior to considering his claim, notwithstanding comments by the Ombudsman in the 2011 and 2014 Determinations.
23. The Council has overestimated the net cost of paying his pension early. They failed to take into account the saving achieved following his decision in 2009 to refuse a salary increase that he was contractually entitled to. They did not even consider the very significant savings they achieved following the deletion of his former post in September 2010.
24. The Council was prepared to take into account changes that have taken place since 2010, e.g. the 2012 Regulations, when it suited their purpose. Other changes such as savings and their own policy review have simply been ignored.
25. The Council failed to take all relevant factors into account when they reconsidered his application following the 2014 Determination. They fettered their discretion when they dismissed his claim on the basis of an extremely narrow, highly technical and essentially myopic legal argument. There is an argument that as they believe that it was unlawful to pay the reduced benefits, then there was even more reason for them to consider what they could do, given that the discretion is so broad.

### Summary of the Council's position

26. They have fully complied with the directions in the 2014 Determination. It is unclear why Mr Davies believes that their response to the 2014 Determination would entitle him to unreduced benefits from July 2010.
27. The 2014 Determination states that they must give further consideration to pay Mr Davies reduced benefits as an alternative to waiving the reduction on compassionate grounds. They considered, after taking legal advice, whether they should pay him reduced benefits and concluded that they were unable to do so. The reason for this is explained in their letter of 24 October 2014 to Mr Davies.
28. They agree that following the 2014 Determination, the two individuals from the Council who considered the matter were previously involved in the decisions about Mr Davies' regulation 30 claims. However, as the consideration of the application and the appeal turned on a specific legal point, which had not been previously considered, it was felt that both these individuals would be able to approach the matter fairly and impartially. Furthermore, when deciding the appeal, the individual concerned had the benefit of independent and external legal advice and their decisions were reviewed by LCC as part of the IDRPs process.
29. They have a Pensions Discretions Policy (the **Policy**) which assists them when exercising their discretion in relation to the Scheme. As they last reviewed the Policy in June 2014, they felt that it was unnecessary for them to conduct a further review in the period between the date the 2014 Determination was issued and their decision on 24 October 2014.
30. They accept that the decision given in October 2014 made no reference to his right of appeal. The reason for this was because of an initial view that they could not legally pay him reduced benefits and therefore they were not considering his application in the normal sense – consequently, the normal IDRPs process was not available to him.

### Conclusions

31. The Council's decision as to whether to consent to Mr Davies' request for early payment of his deferred benefits is an exercise of a discretion and, they are expected to follow certain well-established principles in making it. Briefly, they must:
  - a. take into account all relevant matters and no irrelevant ones;
  - b. direct themselves correctly as to the law (in particular, interpret the regulations relating to the Scheme correctly);
  - c. ask themselves the correct questions; and
  - d. not to come to a perverse decision.

*The Council failed to notify him of his appeal rights when they gave him a decision in October 2014*

32. The Council accept that the decision they gave in October 2014 made no mention of his right of appeal. The reason they have given is that they could not legally pay him reduced benefits and therefore IDRPs were not available to him. I cannot agree with this.
33. The fact that the Council considered they could not legally pay him reduced benefits, does not mean that he had no right to appeal that decision. A member has a right to appeal any decision irrespective of the legality of the decision. The Council's failure to notify him of his appeal rights is maladministration and therefore I uphold this part of the complaint against the Council.

*The Council's process has been in contravention of the IDRPs guidelines*

34. Mr Davies says that his complaint about the Council's IDRPs process may be broader than regulation 75 of the 2013 Regulations; however, I can only consider their process in line with this regulation.
35. Regulation 75 says that the first stage IDRPs decision must be given within two months of date on which the application is received. It also says that if the decision is not given within this period, the applicant must be informed of the reasons for the delay and the expected date when the decision will be given.
36. Mr Davies' application to have his complaint considered under IDRPs was given on 23 December 2014. Therefore, he should have received a decision under the first stage of IDRPs by 23 February 2015. The Council informed to him, on 23 January 2015, there was a three month period under IDRPs to conclude his appeal, which was incorrect. However, they told him that they were seeking legal advice and would let him have a decision by 23 March 2015. In fact, he was given a decision on 11 March 2015.
37. Therefore, although the Council had informed him of the incorrect period for a first stage IDRPs decision to be issued, they did indicate that they were seeking legal advice and gave him a deadline. The decision was issued before that deadline. Therefore, I am unable to find that there has been maladministration on the part of the Council in respect of this part of the complaint.

*The Council's process has been in contravention of the rules of natural justice in that the decision makers were neither impartial nor independent as they had previous involvement in the matter*

38. The Council accept that the decision makers who considered the matter were previously involved in the decisions about Mr Davies' regulation 30 claims. However, in their view, there was nothing wrong in this because the matter the decision makers were considering turned on a specific legal point, which had not been considered

previously. They also say that the decision makers had received independent and external legal advice, and their decisions were reviewed by LCC.

39. The issue under consideration was Mr Davies' claim for early payment of his deferred benefits on compassionate grounds. This is the same issue that was previously considered. The fact that there was a change in the regulations (as a result of the 2012 Regulations) in the meantime does not mean that issue under consideration has changed.
40. As the decision makers were involved in the previous decision, in my view, it would not have been appropriate for them to continue to be involved in the latest decision, irrespective of the fact that they received independent legal advice, or that their decision was reviewed by LCC. I therefore find that there has been maladministration by the Council and uphold this part of the complaint.

*The Council failed to review their regulation 30 policy*

41. The Council say that the Policy was last reviewed in June 2014. I agree that there was no requirement for them to review the Policy in the period between the date the 2014 Determination was issued and their decision of 24 October 2014. Consequently, I do not uphold this part of the complaint against the Council.

*The Council overestimated the cost of paying Mr Davies an unreduced pension early*

42. Mr Davies says that the Council should have taken into account the savings achieved following his decision in 2009 to forgo a salary increase, and also the significant savings they achieved following the deletion of his former post in September 2010.
43. If Mr Davies was granted an unreduced pension from the date he left service, 1 July 2010, there would be a cost which the Council would be required to pay into the Scheme. I do not consider that salary increases that Mr Davies has forgone in the past or the fact that his former post was subsequently made redundant, are relevant factors that the Council needed to take into account. Therefore, I do not uphold this part of the complaint against the Council.

*The Council's decision when they reconsidered whether to release his pension benefits early from July 2010*

44. The conclusion of the 2014 Determination was that it was unclear that the Council had exercised both discretions; and that Mr Davies was deprived of the possibility of having reduced benefits under regulation 30. The direction in the 2014 Determination was to give further consideration to the early payment of his benefits and due consideration to the option of consenting to the payment of reduced benefits from July 2010.
45. Therefore, what the Council should have considered was whether: first, they wish to consent to the early payment of Mr Davies' reduced benefits; and second, they wish to pay him his benefits unreduced on compassionate grounds.



46. The Council decision was that it would not be lawful for them to pay him reduced benefits because of the 2012 Regulations. In addition, it was not reasonable or in their best interest to provide with unreduced benefits because of the cost involved.
47. I would agree that if Mr Davies was making a request now for the early payment of his deferred benefits to be backdated to July 2010, the 2012 Regulations would prevent the Council from considering paying him unreduced benefits. However, Mr Davies first made his request in 2010 and second request in January 2012. The delay in deciding the matter was due to the flaws in the Council's two previous decisions resulting in the matter being remitted to them for reconsideration twice. If they had considered his requests properly earlier, a decision would have been made before the 2012 Regulations came into effect.
48. Therefore I find that in reconsidering Mr Davies for early payment of his benefits, the Council were wrong to consider him under the 2012 Regulations. This constitutes maladministration and I uphold this part of the complaint against the Council.
49. Bearing in mind this matter has been remitted to the Council twice already, I have to decide whether to remit it back to them once again for reconsideration or to decide the matter myself. Even though I have found flaws in the Council's decision making process, I have not found that their decision was perverse. In addition, I have taken into account the fact that Mr Davies is now in receipt of his full pension and the option to take reduced benefits from an earlier date may not be one he wishes to pursue. I have therefore decided to again remit the matter back to the Council for reconsideration.
50. I recognise that Mr Davies has suffered considerable distress and I find that it is appropriate that he receives compensation in recognition of this.

### **Directions**

51. I direct that within 14 days of the receipt of this determination, the Council will write to Mr Davies and ask him whether he wishes to pursue his application to receive reduced benefits from July 2010.
52. I direct that, within 28 days of receiving Mr Davies confirmation that he does wish to pursue his application the Council will reconsider the early payment of his benefits from July 2010. In doing so, they will:
  - a. decide the matter under 2007 Regulations as they stood in July 2010; and
  - b. ensure that the individuals appointed to decide the matter have had no previous involvement with his case.
53. Within 14 days of having reconsidered the matter, the Council will write to Mr Davies with their decision.

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54. Within the 14 days, I direct that the Council shall pay Mr Davies £500 in recognition of the significant distress he has suffered as a consequence of their maladministration.

**Anthony Arter**

Pensions Ombudsman  
14 September 2016