

Ombudsman's Determination

Applicant	Mr N
Scheme	Scottish Teachers' Superannuation Scheme (the Scheme)
Respondents	Dundee City Council (the Council) and Scottish Public Pensions Agency (the Agency)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Council and the Agency.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N's complaint, against the Council and the Agency, is about the death benefit that was paid to him in respect of his late wife's entitlement under the Scheme.

Background information, including submissions from the parties

4. Mrs N, Mr N's wife, was employed by the Council from 23 August 1971 to the time of her death on 17 October 2013.
5. Mrs N was an active member of the Scheme from August 1971 to November 2012.
6. On 29 July 2012, Mrs N contacted the Agency asking for confirmation that she had accrued 40 years' reckonable service in the Scheme. The Agency confirmed this. She indicated her intention to stop paying contributions to the Scheme as she had completed 40 years' reckonable service.
7. Mrs N sent the Agency a completed form 'STSS: OPT OUT' (the **Form**), dated 5 November 2012, indicating that she wished to opt out of the Scheme. On the first page of the Form, under the section headed 'WHY SHOULD I BE A MEMBER OF THE SCHEME?', there are six points, one of which states: "We will pay a death grant if you die before you retire and may also pay children and dependants' pensions subject to qualifying service".

8. Part B of the Form contained the following declaration:

“I confirm that I have read the guidance and in full knowledge of the potential benefits available to me as a member of the Scottish Teachers’ Superannuation Scheme, I elect;

a. Not to join the Scheme

b. To terminate my membership of the Scheme as from the start of the next pay period.

In making this election I acknowledge that, other than my rights, options and benefits which may have accrued to me in the Scottish Teachers’ Superannuation Scheme prior to the effective date of this election I will have no claim on the Scheme in respect of any period on or after the date of this election. I understand that I can opt to join the scheme at any time.”

9. Mrs N ticked option b and signed and dated part B of the Form. Part C of the Form was completed by the Council confirming that she would be opting out of the Scheme with effect from 30 November 2012. The Form was accompanied by a note from Mrs N which said:

“Having checked with [the Agency] recently, I was informed that I will have completed 40 years of superannuation contributions as from 7th December 2012.

Therefore it is my intention to terminate my membership of the Scheme as from that date (or the nearest appropriate date).”

10. On 7 January 2013, the Agency wrote to Mrs N referring to the Form and pointing out that the maximum years of pensionable service she could accrue under the Scheme was 45 years. They said that if she wanted to continue making contributions to the Scheme, she should complete an ‘Opt In’ form.
11. Under the Teachers’ Superannuation (Scotland) Regulations 2005 (as amended) (the **2005 Regulations**), if a member dies whilst in pensionable employment, the death benefit payable is a lump sum of three times their salary. However, if the member dies without becoming entitled to payment of their retirement benefits and is not a member of the Scheme (because the member had either left service or opted out of the Scheme), the death benefit is based on 3/80ths of pensionable salary multiplied by the reckonable service they had completed.
12. On Mrs N’s death Mr N received £67,453. Mr N’s representative, the Educational Institution of Scotland (**EIS**), say that had she been contributing to the Scheme at the time of her death, an additional sum of £64,610 would have been payable.
13. Mr N made a complaint about the amount of the death benefit he received from the Scheme on his wife’s death. The complaint was dealt with under the Scheme’s

internal dispute resolution procedures (**IDRP**). The decision under stage one IDRP, which was given by the Agency, was not to uphold Mr N's complaint. The reasons given by the Agency for its decision were:-

- The opt out form Mrs N had completed included a declaration which confirmed that she had read the guidance and acknowledged that, other than the rights options and benefits accrued prior to the effective date of her election to opt out, she would have no claim on them in respect of any period or after that date.
 - Information about the benefits for both active and preserved members is available on its website and included in the Scheme's Member's Guide.
 - Following her election to opt out of the Scheme, Mrs N was also notified that, should she wish to, she could continue her membership within the Scheme up to a maximum of 45 years, but she did not opt to re-join.
 - Provisions exist in the 2005 Regulations for a death in preservation to be treated as death in service, but this only applies for a limited period of two months following the date of opt out and Mrs N died more than two months after opting-out.
14. Mrs N's complaint was considered under stage two of IDRP and was, once again, not upheld by the Agency.
15. EIS on behalf of Mr N say:
- Mrs N's membership did not cease when she opted out of the Scheme. Arguably, the six points listed on the Form under the heading 'WHY SHOULD I BE A MEMBER OF THE SCHEME?' applied to Mrs N, as a deferred member, following election to opt out of active membership. On that basis, after signing the Form, a death grant was payable. How could she have been aware that by signing the Form and opting out of active membership a reduced death benefit would be payable?
 - The employer's duty of care, as outlined in the case of *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, applies to this case. In a recent case - Ms Bennett (PO-7182), the Pensions Ombudsman determined that an employer's failure to provide information to his employees regarding a transfer club deadline was a breach of contract. In that determination the Ombudsman held that, despite a pension scheme booklet being provided at the outset of membership, which provided details of a transfer club deadline, the problem would not have arisen but for Ms Bennett's employer's failure to draw her attention to the terms at the appropriate time.
 - During a meeting with the Council in mid-November 2013, it advised Mrs N's son and Mr N that on receipt of the completed Form from Mrs N, it should have

contacted her and advised her of the implications of opting out. The action that it took was therefore contrary to its standard practice.

- It appears probable that the letter sent in January 2013, by the Agency was never received by Mrs N. In any case, even if the letter was received, in the absence of an understanding of the implications of opting out of active membership relative to the death grant payable, it is unlikely that a terminally ill individual would be hugely concerned regarding losing a few months of pension accrual.
- Mrs N knew that she was terminally ill and was under the clear impression both that she had accrued the maximum entitlement under the Scheme and a death grant of three times salary.

16. Mrs N's son has submitted a witness statement saying:-

- In November 2012, his mother attended tests for her illness. She was worried about her health, but did not discuss her concerns at this time.
- His mother intended to work on until 2015 in order that her mortgage was repaid. He tried to persuade her to take early retirement; she could have used the lump sum from her retirement benefits to repay the mortgage. However, she was adamant that she wanted to work on until the mortgage was cleared.
- He located and recognised the Agency's letter of 7 January 2013, which he discussed with his mother in mid-January 2013. The letter merely acknowledged his mother's letter regarding stopping contributions and confirmed that this would be actioned from 30 November 2012. He did not see another letter dated 7 January 2013 from the Agency.
- In September 2013, he visited his mother in hospital. She told him that she was dying, but that his father would be financially provided for because three times her salary would be paid to him as a death grant.
- If his mother had been informed that stopping her contributions to the Scheme would have substantially reduced the death grant payable, she would not have done so.
- Around mid-November 2013, he and his father met with Mr M, the Business Support Manager at the Council. During the course of the meeting, Mr M said that his mother's case was very unusual as in normal circumstances if an opt out form was received by the Council, in respect of a teacher with 40 years' service, the Council's HR department would have made contact with the individual and made sure that the employee understood the implications of opting out.

17. The Agency confirmed that two letters were issued to Mrs N on 7 January 2013. It said that one letter confirmed that her opt out election had been processed, and the second letter drew her attention to the fact that the Scheme provided for a maximum

of 45 years' service. They added that the member of staff who issued the letters has left its service, but there was no reason why both letters could not have been issued on the same date.

18. The Council says that it does not administer the Scheme and would not give advice on the implications of an opt out from the Scheme. It also says that Mr M has confirmed that it would not be his practice to advise that the Council would make members aware of the opt out implications.

Adjudicator's Opinion

19. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council or the Agency. The Adjudicator's findings are summarised briefly below:

- As Mrs N was a deferred member of the Scheme at the time of her death, under the 2005 Regulations the death benefit payable is a lump sum of 3/80th of her pensionable salary times the reckonable service she had completed. Therefore, the benefit paid was correct because it was in accordance with the 2005 Regulations.
- The Agency has a duty to administer the Scheme in accordance with the 2005 Regulations, which in this case it has done.
- The provision of information in line with statutory requirements lay with the Agency. The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (SI 1996/1655) (as amended), sets out in detail the kind of information to be provided and in what circumstances.
- Section 1 of the Employment Rights Act 1996, requires employers to provide employees with a written statement setting out the terms of their employment contract which includes "pensions and pension schemes". This information can be very basic and would not encompass the kind of information Mr N is suggesting should have been given to his wife.
- It is clear from the Form that if a member opted out of the Scheme, a death grant would not be paid if they died before they retired. If Mrs N was unclear about this, she could have queried it with the Agency or the Council but she did not.

Ombudsman's decision

20. EIS say that the six points listed under the heading 'WHY SHOULD I BE A MEMBER OF THE SCHEME?' on the Form can be applied to Mrs N. Therefore, the death grant should be payable on her death. I am not persuaded by this argument and my reasons are:

- The points are listed to inform members of the benefits of remaining active members. Admittedly, some of the points would also apply to deferred members but that does not mean that all points do.
 - I would agree four of the six points listed could be said to apply to both active and deferred members as they refer to the index-linking of accrued pensions; the option to commute part of the member's pension for a tax free lump sum; the application to take the pension early due to permanent ill health; and the right to transfer the pension from the Scheme to another scheme. However, there are two points which would not apply to a deferred member and these are: the facility to pay extra contributions for additional pension benefits; and the payment of a death grant if the member died before retirement.
21. EIS say that the Council had a duty of care, as outlined in the *Scally* case, to Mrs N. It has also pointed to the recent case of Ms Bennett (PO-7182) which was determined and upheld.
 22. Dealing first with *Scally*, in that particular case the employees had a right to purchase additional pensionable service but were required to exercise that right within a prescribed period of time. This was not brought to their attention in time for them to exercise the right.
 23. Subsequent cases have indicated that this implied duty is to be narrowly defined. In other words, it is only a duty to take reasonable steps to inform an employee about any contractual rights. For example, in *University of Nottingham v Eyett & another* [1999] IRLR 87, the employer failed to advise Mr Eyett that his chosen retirement date was financially disadvantageous to him; had Mr Eyett retired in the following month, his retirement benefits would have been calculated at a higher rate. Mr Eyett knew about his early retirement rights and could have worked out the financial implications for himself from a handbook supplied to him. The court found that the employer did not have a duty to advise Mr Eyett that he might be making a mistake. In *Outram v Academy Plastics* [2000] IRLR 499, the court decided that there was no general implied duty on an employer to provide information and/or advice to an employee about a pension scheme in order to prevent economic loss.
 24. The first step to determining whether a *Scally* type duty existed should be to consider whether the option to opt out of the Scheme could be said to be a contractual right. The extent to which a contractual right to benefits under a pension scheme (as opposed to the right to join the scheme) exists is a grey area. Assuming that the option to opt out of the Scheme is a contractual right, the question is whether the specific circumstances for a *Scally* type duty exists. Mrs N's contract of employment was not negotiated with her and she was required to take some action in order to opt out of the Scheme. It remains, therefore, to consider whether she could reasonably have been expected to know about the consequences of opting out unless it was brought to her attention by the Council.

25. As previously stated, one of the six points on the first page of the Form states that an advantage of being active member is that a death grant is payable in the event of death before retirement. In addition, in signing part B of the Form Mrs N confirmed that she had read the guidance and knew the potential benefits available to her as a member of the Scheme; and the Agency say that the information about the benefits for active and deferred members was on its website and in the Scheme booklet. Therefore, Mrs N ought reasonably to have known. The information which explained the consequences of opting out of the Scheme was readily accessible, and the Council had no need to bring it to her attention.
26. I now turn to the case of Ms Bennett which can be distinguished from Mrs N's case. Ms Bennett had been given information in 1994 which clearly stated that she had to make an application for transferring within 12 months of joining the NHS Pension Scheme. She left the NHS in 1998 but re-joined in 2000. The information she was given in 2000 made no reference to the 12 month time limit for requesting a transfer. It was found that just because a time limit of 12 months applied in 1994, it did not mean that it still applied in 2000. Consequently, the complaint against her employer was upheld.
27. Unlike Ms Bennett, there has been no inconsistency in the information given to Mrs N. It is clear from the information given at the time Mrs N applied to opt out of the Scheme that the death grant would not be payable if she died before retirement.
28. EIS say that it appears Mrs N did not receive the Agency's letter of 7 January 2013. However Mrs N son, in his witness statement, acknowledges that his mother did receive a letter. He says that it only confirmed receipt of his mother's letter about stopping her contributions and that this would be actioned from 30 November 2012. The Agency has confirmed that two letters were issued on 7 January 2013 – one acknowledged receipt of Mrs N's letter. The other one was to draw her attention to the fact that she was allowed a maximum of 45 years' service in the Scheme; and that she could continue to make contributions, but needed to complete an opt-in form. The only copy letter we have confirms receipt of the opt out form and advises Mrs N that she is allowed a maximum of 45 years in the Scheme, and could therefore make contributions additional contributions and increase her pensionable service.
29. I do not dispute that Mrs N may have believed that her husband would receive three times her salary on her death. However, I do not consider that this was due to anything that the Council or the Agency had told her. The information regarding the consequences of her opting out of the Scheme was available to her. Whether or not she accessed this information or fully understood the implications was not the fault of the Council or the Agency.
30. Mrs N's son refers to a meeting, in mid-November 2013, he and Mr N had with Mr M, the Council's Business Support Manager, at which he says, Mr M had told them that the Council should have informed his mother of the implications of opting out of the Scheme. However, the Council denies this and says that Mr M has confirmed that it

was not his practice to advise that it makes members aware of the opt out implications. There is no evidence that shows that the Council had a policy of advising members who elect to opt out of the implications of their actions.

31. For the reasons given above, I am unable to find maladministration on the part of the Council and the Agency. Therefore, I do not uphold Mr N's complaint against them.

Anthony Arter

Pensions Ombudsman
18 August 2016