

Ombudsman's Determination

Applicant	Mr D
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Middlesbrough Council (Middlesbrough) Kier Group plc (Kier) (Administrators)

Complaint Summary

Mr D has complained that Kier failed to calculate interest payable as a result of the late payment of his LGPS pension in accordance with the relevant regulations.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Middlesbrough because it is responsible for ensuring that Mr D receives the benefits he is entitled to under the LGPS, including any interest due.

Detailed Determination

Material facts

1. Mr D joined the LGPS in June 1978. He reached his normal pension age, his 70th birthday, in April 2000. However, he did not draw his benefits at this time and eventually retired on 30 April 2014. His benefits were paid in June 2014.
2. In 2008, Kier (then called Mouchel Business Services Limited) wrote to Mr D regarding the legislative changes to the pensions tax regime introduced by the Finance Act 2004. Amongst other things, Kier said, in order that Mr D's lump sum could be paid to him free of tax, entitlement to it had to arise before his 75th birthday. In correspondence with Mr D's solicitors, Kier asked for agreement to the proposal that his effective date of retirement from the LGPS would be 4 April 2006. It said it would calculate his benefit entitlement based on service and pensionable pay to that date.
3. In 2011, Kier wrote to Mr D's solicitors in relation to his pension entitlement. It said Mr D had a statutory entitlement to interest for late payment on both his pension and lump sum. Kier also said it was awaiting the solicitors' agreement to an "effective date of retirement" of 4 April 2006. There was further correspondence between Mr D's solicitors and Kier concerning other matters relating to the calculation of Mr D's benefits.
4. Mr D retired in April 2014. He received £244,649.81 arrears of pension for the period 5 April 2006 to 31 May 2014; £7,988.65 interest on the arrears of pension; and £21,293.00 interest on his tax-free cash sum. Kier provided a breakdown of its calculation of the arrears of pension on 27 June 2014.
5. Mr D's solicitors submitted complaints on his behalf, under the internal dispute resolution (**IDR**) procedure, one of which related to the calculation of interest. The IDR procedure was completed in February 2015. Mr D's complaints relating to the calculation of interest were not upheld. On 23 April 2015, Kier provided Mr D's solicitors with a breakdown of its calculation of the interest on his pension.
6. On 17 June 2015, Mr D's solicitors wrote to the Pensions Ombudsman (**TPO**) saying they had undertaken the IDR procedure and were engaged in further correspondence with Kier. They said they wished to give notice of Mr D's intention to bring a complaint to TPO. Mr D's solicitors submitted an application form on his behalf on 8 August 2016.
7. The relevant regulations are the Local Government Pension Scheme Regulations 1997 (SI1997/1612) (as amended) (the **1997 Regulations**). These regulations have subsequently been revoked and replaced. However, they were in force at the time of Mr D's agreed "effective date of retirement" of 4 April 2006.

8. Regulation 82(2) provided:

“Interest under ... regulation ... 94 must be calculated at one per cent. above base rate on a day to day basis from the due date to the date of payment and compounded with three-monthly rests.”

9. Regulation 93(1) provided:

“The first period for which any retirement pension which is payable immediately on a member leaving any employment is payable begins with the day after the date with which his employment ends.”

10. Regulation 94 provided:

“(1) Where all or part of a pension or lump sum payment due under these Regulations or the 1995 regulations is not paid within the relevant period after the due date, the appropriate administering authority must pay interest on the unpaid amount to the person to whom it is payable calculated from the due date as provided in regulation 82(2).

(1A) The relevant period -

- (a) in the case of a pension is one year;
- (b) ... and
- (c) otherwise is one month.

(2) In the case of a pension the due date is the date on which it becomes payable.

(2A) In the case of a retirement grant, the due date is the date on which it is payable ...”

This provision has been carried forward in the much the same form in subsequent sets of LGPS regulations.

11. Regulation 20 provided for the calculation of benefits. Regulation 20(5) provided:

“Unless otherwise indicated, references to the amounts of pensions are to their annual rate.”

12. Regulation 20(7) provided:

“Periods are measured in years and fractions of a year ...”

13. Regulation 135 provided for modifications to the LGPS regulation in respect of coroners. The modifications largely related to the later normal retirement age for coroners and did not affect regulations 82, 93 or 94 above.

Summary of Mr D's position

14. Mr D submits (via his solicitors):-

- Regulation 94 applies to “all or part of a pension”. Kier (on behalf of Middlesbrough) has failed to pay interest on Mr D’s annual pension due over a number of successive years from 2007.
- The “relevant period” in the case of a pension is one year. Interest has been paid for the first year but has been ignored for subsequent years. Interest should be paid for the years after 2006 on the accumulated unpaid pension. A separate calculation of interest should be undertaken for each year that his pension or any part of his pension was not paid.
- Kier has been asked to explain why each annual pension for the years after 2006 has not attracted interest. It has been asked to provide the authority within the LGPS regulations on which it has relied. It has failed to respond adequately.
- Mr D is seeking reimbursement of his legal costs. He required legal representation, guidance and advice in relation to the interpretation of regulations, legal argument and submissions.
- Mr D wishes to rely on regulation 17 of the Coroners Allowances, Fees and Expenses Regulations 2013. This requires the relevant authority to indemnify a coroner for any costs which he reasonably incurs in connection with proceedings in respect of anything done in the exercise of his duties, in taking steps to dispute any claim made under such proceedings, or in connection with any reasonable settlement of such claim. The correct payment of pension due to a coroner arises directly as a consequence of the exercise of his duty. As part of his duty, Mr D paid contributions in expectation of correctly calculated benefits. His entitlement to these benefits is a direct consequence of his role as a coroner.
- Mr D’s case was considered under the IDR procedure. The arguments advanced concern the legal interpretation of regulations and the enforcement of national agreements. The preparation of a detailed submission and evidence was necessary. The statutory basis of the IDR procedure suggests that it is something which a coroner engages in as a result of the exercise of his duty and it is, therefore, covered by regulation 17. Furthermore, the Ombudsman would not have taken jurisdiction unless and until the IDR procedure had been exhausted.
- The Ombudsman has the power to direct the payment of interest under section 151A of the Pension Schemes Act 1993 and regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. If

interest is not calculated under regulation 94 (see above), the Ombudsman has the power to award interest.

- Mr D is seeking compensation for distress and inconvenience to reflect the extensive losses he has sustained. It is argued that his case should fall within the category of “highly exceptional” on the grounds of its complexity and Kier’s failure to engage in attempts to resolve the matter.
- Mr D’s complaint is one of principle; whether, as a matter of principle, interest is payable at all in respect of the 2007/08 and later payments. There is no basis upon which any distinction can be drawn between the lump sum and 2006/07 payment, and the later payments. Both attract interest under regulation 94.
- Regulation L15 of the Local Government Superannuation Regulations 1974 provided for the age of compulsory retirement to be 65, with the option for the employer to extend this. This was subsequently amended, with regard to coroners, so that age 70 was to be substituted for age 65, or the age at which the coroner completed 45 years’ reckonable service.
- Regulation 25 of the 1997 Regulations introduced a normal retirement age, which was generally 65. Regulation 9 (as amended) provided:

“(1A) A person who remains in service after his 65th birthday as referred to in regulation 25A(1) may not count as a period of membership any period of service between age 65 and the date of his retirement from service but he shall be treated as an active member for the purposes of ... (surviving spouse’s or civil partner’s and children’s pensions).”

Thus, the requirement that such a person must “cease to hold his employment” at the age of 65 was relaxed.

- There was a further amendment to the 1997 LGPS regulations from May 1999. The effect of which was to change the reference to age 65, in regulation 9, to age 70 for coroners.
- Regulation 25A (added to the 1997 regulations with effect from May 1999) provided:

“(1) A member who with the consent of his employing authority remains in service after his 65th birthday is entitled to a pension and retirement grant when he retires from service.

(2) The pension and retirement grant are payable immediately on retirement.”
- Regulation 25A was amended with effect from 6 April 2006 and provides:

- “(1) A member who remains in service after his 65th birthday is entitled to a pension and retirement grant when he retires from service.
- (2) The pension and retirement grant are payable immediately on retirement or, if earlier, on the day before the member’s 75th birthday.
- (3) A member is not entitled to count any period of service on or after the day before his 75th birthday as a period of membership and is not an active member after that day.”

This plainly envisages work beyond the age of 75 and the payment of pension and retirement grant during continued employment after the age of 75.

- Prior to 5 April 2006, regulation 35 provided:

- “(1) Retirement benefits under this Chapter may not be paid to a person before he has retired from the employment in which he was a member.
- (2) But they must begin to be paid not later than the member’s 75th birthday even if he has not retired ...”

Regulation 35(2) was amended, with effect from 6 April 2006, to read:

- “(2) In any event, retirement benefits under this Chapter must begin to be paid not later than the member’s 75th birthday even if he has not retired ...”

- The overall effect of the above provisions is that an individual was entitled to remain in employment for as long as the employer was willing to employ them. Normally, no entitlement to benefits arose until the employment ended but there was a “long-stop” on the day before the individual’s 75th birthday. At this date, the benefits became payable and the employee ceased to be a member of the LGPS.
- Notwithstanding the above regulatory provisions, Mr D held a freehold office for which there was no retirement age. He was entitled, irrespective of the consent of the local authority, to remain in office until he chose to retire or was otherwise removed from office.
- Mr D accepts that he could not contribute to the LGPS beyond his 75th birthday. He asserts he could have taken his benefits but did not do so.
- Regulation 93 is simply to clarify the precise date upon which the “first period” begins in the simple case of an individual retiring at the end of their employment.
- Regulation 93 does not apply when regulation 35(2) requires payment of a pension to begin on an employee’s 75th birthday even if the individual is still in

employment. Regulation 93 only applies to “any retirement pension which is payable immediately on a member leaving any employment”.

- Otherwise, on Mr D’s 75th birthday, regulation 93 required his benefits should “begin to be paid” but he would not have acquired any entitlement to payments of pension until he retired. This would mean that the 2006/07 and later payments should not have been made. However, the obligation to make them has been both recognised and discharged.
- If regulation 93 does not apply and regulation 35(2) is applied as contended, the 2007/08 payment and later payments were not paid within the relevant period under regulation 94. Payment of interest is, therefore, mandatory.
- Regulation 94 is simply worded and sensibly capable of literal application. If an underlying rationale is required, it can be articulated as: when payment is not made in a timely manner, the pensioner has not received the monies due as the fund still has it. In Mr D’s case, the LGPS held amounts representing his 2007/08 and later payments until 2014 and he did not.
- Mr D also relies on the agreement, with Kier, that such payments of interest would be made.
 - It gave a warranty that contractual interest calculated by reference to regulation 94 would be paid. In consideration of such, Mr D continued to work until 2014 and desisted from seeking payment of his benefits until he retired.
 - It gave a representation to this effect and is thereby estopped from relying upon any argument in relation to interest which depends for its validity upon the absence of any obligation to pay the principal sums or any contrary interpretation of the law to that stated by it in the relevant correspondence.
 - Mr D had a legitimate expectation in public law that interest would be paid on his lump sum and annual pension payments in the manner provided for in regulation 94.
- Mr D was advised by Kier that, as entitlement to payment had arisen before 6 April 2006 and his effective date of retirement was 4 April 2006, no liability to tax arose.
- The retirement date from the LGPS was set by agreement as the date when the amending regulations came into effect. In any event, the benefits were not paid until after 30 April 2014 and were not offered or asked for prior to this.
- It is not accepted that entitlement to pension benefits arose before 6 April 2006.

- Mr D did not fail to respond or to provide information. He queried his benefits forecast on genuine grounds and continued to work as was customary for coroners. He did not agree with the incorrect calculation of the proposed benefits nor require them to be paid.

Summary of Middlesbrough/Kier's position

15. Kier administers the LGPS on behalf of Middlesbrough. It has provided the formal response to Mr D's complaint. The key points are summarised below:-

- It disagrees that interest payments on Mr D's pension have been calculated incorrectly. It has provided its calculation of the interest payments broken down into three-monthly rests and showing annual pension increases.
- The wording of regulation 94(2) stipulates that the due date is one month [*sic*] after the amount becomes payable. It does not go further and stipulate that it should also then be any subsequent anniversary or other prescribed interval. Had this been the intention of the regulations, there was a period of 10 years in which the 1997 Regulations could have been amended to reflect this. No subsequent set of LGPS regulations has ever incorporated such a provision.
- As Coroner for Teeside, Mr D arranged his own payment and was not part of Middlesbrough's payroll or any other employer payroll which reported membership and contribution details to the Teeside Pension Fund (**TPF**) (the relevant administering authority). Kier only became aware of Mr D's membership of the LGPS when he made enquiries about his pension after his 75th birthday.
- From that point on, Kier and Middlesbrough have made every effort to bring Mr D's benefits into payment at the earliest opportunity.
- An effective date of retirement of 4 April 2006 was agreed so that Mr D was not placed in a position whereby punitive tax charges would apply. Using the earlier date of his 75th birthday would have resulted in a lower pensionable pay figure being used to calculate his benefits.
- Interest for late payment was applied from 4 April 2006 to 2014, which is when Mr D finally consented to supply the required documentation to facilitate the payment of his pension.
- Any loss of enjoyment of pension payments which Mr D and his counsel may perceive he has suffered has flowed from Mr D's own actions. He repeatedly refused to accept his pension and provide the necessary documentation for the Fund to make payment. The LGPS regulations do not provide for the pension to be paid in escrow. The Fund was being forced to incur liability by way of interest, at an amount considerably over base rate, because of Mr D's actions.

- Its requests for the details necessary for the payment of Mr D's benefits date back to 2008. Mr D was in dispute with Middlesbrough regarding, amongst other things, his pensionable pay. He was told that, should the dispute be found in his favour, his pension would be retrospectively amended.
- At the time, TPF's policy was to apply full abatement; that is, a pound-for-pound reduction in pension for any amount by which continued remuneration plus pension exceeded remuneration in the former post. This policy was rescinded with effect from 1 August 2009 and pensions subject to abatement had the reduction removed. A copy of the original policy is not now available. It has not applied any adjustment to its calculation of the interest payable for those periods which could have been subject to abatement.

Conclusions

16. Mr D's complaint is, in essence, that Kier, acting on behalf of Middlesbrough, has not calculated interest due on his pension in accordance with the 1997 Regulations.
17. Mr D's situation is unusual. He was not directly employed by Middlesbrough and it was not involved in the cessation of his employment. He was, nevertheless, a member of the LGPS and both he and Middlesbrough (as the relevant employing authority) are subject to the 1997 Regulations. I note Mr D's reference to the Coroners Allowances, Fees and Expenses Regulations 2013. However, his complaint arises in connection with his membership of the LGPS and the relevant regulations are the 1997 Regulations.
18. As at the date of Mr D's 75th birthday, regulation 35(2) required payment of his benefits even though he had not retired. Kier has not explained why it was agreed that an effective retirement date of 4 April 2006 would be used; other than to say it protected Mr D from punitive tax charges and enabled a higher pensionable pay figure to be used. It has not explained under what authority regulation 35(2) was set aside and agreement to defer payment reached. It has been suggested that the requirement to pay the pension from Mr D's 75th birthday was introduced by amending legislation in 2006. In fact, regulation 35(2) was included in the original 1997 statutory instrument (1612) and remained unchanged up to and beyond Mr D's 75th birthday. Furthermore, regulation 35(2) was not subject to modification under regulation 135, which made adjustments to certain of the LGPS regulations when applied to coroners.
19. Kier has explained that Mr D failed to provide it with the necessary paperwork for it to pay his benefits until 2014. This may or may not have been the case but it does not change the fact that, under regulation 35(2), Mr D's benefits should have been paid from his 75th birthday. Kier and Middlesbrough have acknowledged that arrears of pension were due to Mr D but have calculated these from the agreed effective retirement date; 4 April 2006.

20. I find that Mr D's pension was payable from his 75th birthday. It should have been calculated by reference to his service and pensionable pay as at that date. Any arrears should also have been calculated from that date.
21. Kier has explained that, at the time of Mr D's 75th birthday, TPF operated a policy of pound-for-pound abatement; that is, a pension in payment was reduced by an amount equivalent to the excess of pension plus remuneration over remuneration in the member's former post. Regulation 109 of the 1997 Regulations required an administering authority to formulate a policy on abatement. This was defined as:

"... the extent, if any, to which the amount of retirement pension payable to a member from any pension fund maintained by them under the Scheme should be reduced (or whether it should be extinguished) where the member has entered a new employment with a Scheme employer ..."
22. One of the factors TPF was required to take into account when formulating its policy was "the extent to which a policy not to apply abatement could lead to a serious loss of confidence in the public service". In other words, it was required to be mindful of the general public's view of LGPS members receiving both pension and salary out of the public purse. That being said, I note that regulation 109 referred to a member entering a new employment. Mr D did not enter a new employment after his 75th birthday; he simply carried on in his existing role. I acknowledge that the same concerns relating to the payment of both pension and salary out of public funds might have arisen in his case but it is not clear that TPF's abatement policy could have been applied in Mr D's case.
23. There is then the question of whether and to what extent interest should be paid on the arrears of pension.
24. As at Mr D's 75th birthday, regulation 94 stated:

"Where all or part of a pension or lump sum payment due under these Regulations or the 1995 regulations is not paid within the relevant period after the due date, the appropriate administering authority must pay interest on the unpaid amount to the person to whom it is payable calculated from the due date ..."
25. The "relevant period" is one year. In Mr D's case, the due date was his 75th birthday, as per regulation 35(2), and each payment date thereafter.
26. I note Kier's argument that regulation 94(2) does not stipulate that interest should be paid on any subsequent anniversary or other prescribed interval. It has suggested that, had this been the intention of the regulations, there was a period of 10 years in which the 1997 Regulations could have been amended to reflect this. It argues that no subsequent set of LGPS regulations has incorporated such a provision.
27. In my view, regulation 94 did not require amendment in order to provide that interest would be due on all subsequent payments of a pension paid more than one year after they were due. Regulation 94 simply stated that the due date was the date on which

the pension was payable. Once a pension has commenced, it is payable for the lifetime of the recipient and the “due date” is the date on which each instalment would otherwise be paid. Where a pension is paid in monthly instalments, the due date is the day of the month on which payment would otherwise have been made.

28. This interpretation of regulation 94 is logical and does not place any strain on the language of the regulation. Kier’s alternative interpretation leads to the rather odd situation whereby a member may receive interest only for the late payment of his first year of pension but nothing thereafter; regardless of any subsequent delay. There is no logical reason why the late payment of subsequent instalments of a member’s pension should not qualify for the same recompense as the first.
29. I can understand there may be a reluctance to pay large sums of interest when these may have accumulated, at least to some extent, through a lack of co-operation on Mr D’s part. However, as I have said both he and Middlesbrough are subject to the 1997 Regulations. I find that Kier has not calculated the interest due on Mr D’s pension in accordance with regulation 94 of the 1997 Regulations (now regulation 81 of the 2013 regulations). I uphold his complaint.
30. Mr D is seeking reimbursement of his legal fees. Whilst I acknowledge that the subject matter of Mr D’s case is technical in nature and not something he could necessarily be expected to have any detailed knowledge of, access to my office and the then Pensions Advisory Service were available to him free of any charge. I am not, therefore, directing either Kier or Middlesbrough to reimburse Mr D’s legal fees.
31. I note Mr D’s claim for compensation for distress and inconvenience to reflect the “extensive losses” he has sustained. Recalculation of the interest due under regulation 94 will address any financial loss Mr D has experienced. I can, and do, consider claims for non-financial injustice; commonly referred to as “distress and inconvenience”. In Mr D’s case, the late payment of his pension arose largely as a result of his own choices and actions. In view of this, I do not consider it necessary or appropriate to direct payment of recompense for non-financial injustice.

Directions

32. Within 28 days of the date of my final decision, Kier shall recalculate Mr D’s pension as at the date of his 75th birthday, together with any appropriate adjustments to contributions overpaid. It shall then recalculate the interest due on any instalment of the pension paid more than one year after it fell due to be paid.

Anthony Arter

Pensions Ombudsman
28 September 2018