

Ombudsman's Determination

Applicant	Mr E
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Amersham & Wycombe College (The College) Buckinghamshire County Council (BCC)

Complaint Summary

1. Mr E has complained that BCC and the College are not willing to honour the pension which was promised to him when he agreed a severance package with the College on 16 September 2014.
2. Mr E says, but for these pension figures, he would not have accepted the severance package offered to him.

Summary of the Ombudsman's Determination and reasons

3. The complaint should be upheld against the College because:-
 - Mr E and the College have entered into a contract and the College is bound to the terms of that contract. The College should take all necessary steps to bring the contract into effect. That is, the payment of Mr E's unreduced pension benefits.
 - The complaint against BCC is not upheld.

Detailed Determination

Material facts

4. Mr E had previously been made redundant by the College in November 2006. Following this initial redundancy he was then re-employed in the College's Learning Resource Centre (**LRC**) as an 'E-assistant'. Mr E elected not to re-join the LGPS at that time and so was classed as a deferred member.
5. On 3 July 2014, the College wrote to employees of the LRC outlining its plans to amend the headcount across its various campuses by carrying out a restructuring exercise.

6. As part of this restructuring, the College elected to delete certain posts within its LRC. This necessitated the creation of a new role, on a lower salary point, with different hours to that of E-assistants.
7. Mr E was offered one such role. However, he declined this new role, as he did not feel it met his requirements. As he declined this role the College wrote to Mr E on 5 September 2014 offering a suitable severance package.
8. Between 1 September 2014 and 3 September 2014, the Head of Student Services and the Associate Director of Human Resources exchanged several emails regarding Mr E's employment situation. These emails confirmed that Mr E had submitted a proposal for remaining in employment with the College but on very specific terms which were not acceptable to the College. This counter proposal was declined by the College. It is clear from these exchanges that Mr E had not accepted redundancy on any terms and that an impasse of sorts had been reached.
9. After negotiation with Mr E, the College decided to explore the possibility of paying Mr E's benefits unreduced, in addition to the original severance offer.
10. As Mr E was 56 at the time, and a deferred member of the LGPS, the College asked BCC, as the pension scheme administrator, to provide indicative figures for "Early payment of deferred benefit" payable to Mr E from 30 September 2014, and the associated cost (known as the pension strain) to the College for providing this amount.
11. Had Mr E had been an active member of the LGPS, the College would have been obliged to meet the pension strain upon making Mr E redundant. However, the granting of unreduced benefits for a deferred member after age 55 would require the consent of the employer who would also need to meet any pension strain cost payable.
12. On 9 September 2014, The College wrote to Mr E acknowledging a conversation with him regarding early access to his pension. The College informed Mr E that "a statement in respect of early payment of your deferred pension" had been requested.
13. The indicative figures were provided to the College by BCC, via email, on 11 September 2014. The pension strain quoted was "£0.00". The College has said that as a result of these figures it made Mr E a new severance offer, which included the payment of an unreduced pension on the basis of employer consent being granted. The College provided a copy of the retirement quote to Mr E dated 11 September 2014.
14. Mr E accepted this offer on 16 September 2014. The College then notified BCC on 19 September 2014, that Mr E had accepted the offer of early retirement and that the College gave its consent to this.
15. BCC would normally issue a full retirement pack to the member once notified by an employer. While Mr E's retirement pack was being produced, BCC noticed that an error

had occurred. If Mr E took unreduced early retirement, a pension strain of £19,496.04 would be payable by the College.

16. On 6 October 2014, BCC contacted the College to acknowledge the error and ask for confirmation that the College was content to meet the pension strain. The College responded that it had only made its offer to Mr E on the basis in doing so it would incur “no cost”. Consequently, it informed BCC that it was unwilling to meet the pension strain.
17. On 9 October 2014, BCC wrote to Mr E and explained that payment of his unreduced benefits could not be made as the College was unwilling to meet the pension strain. BCC also explained that although the mistake was caused by human error, this did not change the fact that it could not authorise payment from a “publically funded scheme without the relevant cost” being met by the College.
18. BCC subsequently wrote to Mr E on 24 December 2014. BCC again acknowledged that it had provided incorrect information to the College and offered Mr E £500 compensation in recognition of the inconvenience caused to him. BCC also reiterated its point that payment could not be made without payment of the pension strain and the consent of the College. This “consent” could not be said to be given if the College did not pay the pension strain.
19. On 10 February 2015, the College wrote to Mr E in reply to his formal request for a review of its decision not to meet the pension strain. This letter confirmed the College’s position regarding its decision not to meet the pension strain and also said:

“...the College is suffering poor financial health which requires that we examine every spend carefully.”
20. Mr E requested that his complaint be reviewed by a formal grievance hearing. This hearing was held on 15 June 2015, and was chaired by a panel of College Governors.
21. The outcome was ultimately the same, with the panel confirming that the offer of unreduced benefits was only made on the basis of the incorrect information provided by BCC. The College also placed the onus on BCC to rectify the situation.
22. A follow up letter was issued to Mr E by the legal team on 10 September 2015. This letter explained that despite the unusually short turnaround time between the College’s original request for retirement figures and the processing of the leaver notification, the error was picked up within “just over three weeks”. The same letter also said:

“...I consider that any reliance by you to your detriment is on the College’s consent to you on 17 [sic] September 2014 to retire with employer consent.”
23. On 26 October 2015, BCC wrote to Mr E to say that it was not possible for BCC to meet the pension strain. BCC sympathised with Mr E but could offer no further help and explained the issue lay with the College.

24. A protracted exchange of correspondence followed, none of which materially changed the position of the parties to this complaint.
25. Both BCC and the College therefore maintain that the liability for meeting the relevant pension strain should be met by the other, and as such, Mr E says he has been without access to his unreduced benefits since September 2014.

Summary of Applicant's Position

26. Mr E has said he only accepted the offer of severance on the basis he would receive payment of his unreduced pension benefits. Had he not received this part of the offer he would have stayed with the College and sought other roles.

Summary of the College's Position

27. BCC caused the original error and should provide any remedy or redress as the College passed on the information it had received to Mr E in good faith.
28. The College maintains it has done everything it can to help Mr E but due to its financial situation it will not meet the pension strain.
29. The figures provided by BCC on 11 September 2014, represent an enhanced pension and the College had no intention of offering any such enhancement as part of the severance offer.
30. Upon being informed by BCC that no pension strain was payable an offer was made on the assumption that BCC had correctly actioned the request for a retirement quote with the relevant actuarial reduction.
31. The College at no time told BCC to provide an estimate without actuarial reductions. Any blame therefore must fall on BCC.
32. Mr E took the decision to accept redundancy on 3 September 2014, prior to receiving an estimate of his retirement benefits on 11 September 2014, and he cannot therefore argue that his decision to accept redundancy was based solely on the incorrect retirement quote.

Summary of BCC's Position

33. BCC has agreed that an incorrect pension strain was quoted to the College and subsequently to Mr E. However, it maintains that any reliance by Mr E to his detriment was based on the College's consent to Mr E on 17 September 2014.
34. BCC has also said that although the mistake was caused by human error, this did not change the fact that it could not authorise payment from a "publically funded scheme without the relevant cost" being met by the College.

Conclusions

35. A scheme is only bound to pay benefits correctly calculated according to the scheme rules. However, unlike active members, the regulations governing the LGPS do not oblige the College to automatically pay any pension strain that might be payable when a deferred member is made redundant after having reached minimum retirement age.
36. There was nothing in the letter to Mr E from the College which said that it was referring to the member's benefits "under the scheme rules". Mr E has merely been offered retirement, with the College's consent and the benefits specified in the letter.
37. Mr E has argued that he would not have accepted redundancy had the payment of his pension benefits, unreduced, not formed a part of his redundancy.
38. I have therefore considered whether a contract exists between the College and Mr E in respect of Mr E's benefits. In order to establish this it would need to be shown that the key elements needed for an enforceable contract were present. These include:
 - Offer
 - Acceptance
 - Consideration
 - Intention to create legal relations
 - Certainty of terms
39. The pension figures sent on 11 September 2014, by the College to Mr Lee, setting out the level of benefits and consenting to the payment of his pension, constitutes the College's offer to Mr Lee (the **Offer**). That is the payment of his benefits, unreduced, with the College's consent.
40. The Offer was accepted by Mr E on 16 September 2014. His acceptance of the offer was final, unqualified and corresponded exactly with the terms of the offer made on 11 September 2014, with no variation. This offer established the level of benefits payable, provided the last day of service, and confirmed that the College consented to an unreduced payment of his benefits, which was necessary in order for BCC to pay his pension benefit unreduced.
41. Mr E's acceptance of redundancy was conditional on his pension payment and represents his consideration of the contract. Mr E had declined previous severance offers and only later accepted redundancy on the basis of the agreement with the College that it would consent to his early retirement.
42. Upon his acceptance, the College notified BCC on 19 September 2014 that consent had been granted for early payment of unreduced pension benefits so that it could pay Mr E's pension. It follows that there is no dispute that all parties agreed Mr E

would take early retirement; on the basis that he would do so; and that the College had consented. The agreement between Mr E and the College therefore satisfied all the necessary criteria to be considered as an enforceable contract.

43. By granting its consent on 19 September 2014, the College entered into a contract with Mr E that, as part of his severance offer, he would receive unreduced early access to his pension. A consequence of the College granting its consent is that any pension strain payable must be met by the College in order to meet the contract terms, namely the payment of Mr E's unreduced pension benefits.
44. The College has said that it was not made aware of the true cost of the pension strain by BCC prior to its Offer to Mr E and, furthermore, that whatever it said to Mr E was in good faith and on the basis of what it understood from BCC. However, there was nothing in the letter to Mr E from the College which said that it was consenting on the basis that the pension strain was £0. Its offer was unconditional. Mr E has merely been offered retirement by the College with payment of the benefits specified.
45. In order for the contract to become void one of the following would need to apply:
 - Common mistake: Where the mistake is shared by both parties, is fundamental and directly affects the basic definition of what the parties are contracting for. It would need to show that the contract was robbed of all substance.
 - Mutual mistake: Where the parties are at cross-purposes with one another. If, from the parties' words and conduct, only one possible interpretation of what was agreed can be deduced, the contract will still be valid; otherwise it will be void.
 - Unilateral mistake: Where one party is mistaken and the other knows or ought to have known of the mistake. If the mistake relates to the fundamental nature of the offer the contract can be voided.
46. I am not persuaded that the contract falls into any of these categories. Firstly, because the error did not form any part of the contract between Mr E and the College. Indeed no mention of a pension strain was made to Mr E until the error had been spotted by BCC, in October 2014. Mr E had no way of knowing that a pension strain was payable by the College and had simply entered into an arrangement with his employer on the basis of information provided to him by his employer. Mr E could not reasonably have known, as a layman, that any pension strain was payable. Conversely, the College having knowledge of such matters and being reasonably diligent should have ensured the information on which it was basing its decision to consent to Mr E's early retirement was correct. The College was aware, when it received the quote from BCC, that Mr E was over 55 and a deferred member of the LGPS, it should have been apparent then that something had gone awry when no pension strain was quoted.
47. Regardless of the error by BCC, it is clear that the College entered into a contract with Mr E, on precise terms. I see no legal basis on which the College can argue it is not bound by the terms of the contract it entered into. The College have suggested

that the information supplied by BCC represented an enhancement to Mr E's benefit which was not its intention. I do not agree.

48. The College has attempted to argue that Mr E had accepted redundancy in advance of receiving the retirement estimates on 11 September 2014. I can find nothing to support this assertion. In fact it is clear from emails exchanged between the Head of Student Services and the Associate Director of Human Resources from 1 September 2014 to 3 September 2014, that on the contrary discussions, though fruitless were ongoing and Mr E had certainly not accepted redundancy on any terms. I therefore do not agree that Mr E had accepted redundancy before the pension figures were received.
49. In any case, by not checking the retirement figures before passing them onto Mr E and including them in a formal offer of severance it would also appear that the College has failed in its duty of care to Mr E. For completeness, I should add that it is clear that Mr E also has a claim in negligence. This is because the information provided to him by the College represented a negligent mis-statement upon which Mr E relied to his detriment.
50. Mr E accepted an offer of severance with the College based on the representation by the College that he would receive his unreduced pension benefits, regardless of what the College intended to offer him. However, I have not had to consider this further given that Mr E's complaint centres on the promise he says was made to him by the College, to pay his pension benefits, and I find that a contract was formed between Mr E and the College.
51. I therefore uphold the complaint against the College.
52. I have next considered whether Mr E's complaint against BCC can be upheld. However, despite providing incorrect information to the College, a contract was not formed between BCC and Mr E. The College may however chose to pursue this matter with BCC separately but I make no finding in this regard because the complaint I have is in relation to Mr E and not between the College and BCC.
53. I note BCC has already paid Mr E £500 in respect of the distress and inconvenience caused by the misinformation he received; this seems reasonable in the circumstances.

Directions

54. Within 14 days of the date of this determination the College is to arrange for BCC to provide Mr E with the necessary documents to claim payment of his unreduced pension with effect from 30 September 2014.
55. Once Mr E completes and returns the necessary documents the College must then, within 28 days of the pension strain notification, arrange payment to BCC. Once the payment has been made BCC is to commence payment of Mr E's unreduced pension, with arrears and interest.

PO-12597

56. The interest to be calculated at the base rate for the time being quoted by the reference banks from the due date that would have applied if the pension and lump sum had come into payment at the date of the Applicant's retirement.

Anthony Arter

Pensions Ombudsman
31 October 2017