

## Ombudsman's Determination

<b>Applicant</b>	The Estate of Mr Y
<b>Scheme</b>	Northern Ireland Local Government Officers Superannuation Committee ( <b>NILGOSC</b> )
<b>Respondent</b>	Belfast City Council ( <b>the Council</b> )

### Complaint Summary

Mrs Y, as the administrator of the late Mr Y's Estate, has complained about the Council's handling of Mr Y's retirement. Mrs Y considers that the Council had reason to bring forward Mr Y's retirement date and had it done so he would have passed away having retired. Consequently, the death benefits paid out by the Scheme would have been greater.

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

The complaint should be upheld against the Council because:-

- Mrs Y, on Mr Y's behalf, had contacted the Council to enquire about the option of taking some or all of Mr Y's pension benefits in advance of his termination date.
- Over the course of that call the Council should have given Mrs Y the option of bringing forward Mr Y's termination date. Had it done so it is more likely than not that Mr Y would have brought forward his termination date and would ultimately have died in retirement.

## Detailed Determination

### Material facts

1. In late 2012, Mr Y was diagnosed with what was described as an aggressive form of cancer. Over the course of December 2012, Mr Y underwent chemotherapy.
2. On 23 January 2013, Mr Y met with Dr Black, a counsellor appointed by the Council to meet with and assist families during difficult circumstances. A follow up email from Dr Black to the Council confirmed that he had explained the distinction between death in service and death in retirement for pension purposes, and the financial implications. Dr Black, in that email, stated:

“[Mr Y] to date has had a positive attitude towards his cancer. His clinicians believed that [Mr Y] would be in a much worse state than he currently is. They have declared his cancer inoperable. It is described as a stage 4 cancer – that is, advanced and only expected to respond in a limited way to treatment. My task today was to present [Mr Y] with his options in relation to his pension – to succumb in service or out of service. [Mr Y] and his wife [Mrs Y] have decided to wait until they have more information gleaned from a planned scan at the end of March. I explained that if things take a turn for the worse that the NILGOSC and BCC [the Council] will pull out the stops to arrange the paperwork to accommodate what will be necessary to provide the best possible financial option for [Mr Y] and his family at that time.”
3. On 25 March 2013, following a PET scan, Dr Vallely reported:

“There is no evidence of FDG-avid lymphadenopathy in the neck.

Tracer uptake elsewhere on the scans is within normal physiological limits with no evidence of metastatic disease.”
4. On 26 March 2013, Dr Stewart reported:

“No lymphadenopathy in the neck and no distant mets, which is good news.

Patient and family are aware that he has had a very good response to treatment...

He certainly had very advanced disease to begin with and his prognosis was always poor. Thankfully, he has had a very good response to treatment, but his prognosis is still very guarded.”
5. On 17 April 2013, Dr Cheyne reported to the Council:

“At this stage the consensus is that this is palliative, though [Mr E] remains optimistic of a better outcome.”

6. On 19 April 2013, Dr Black met with Mr and Mrs Y. Dr Black recalls:

“It appeared at this point that [Mr Y] was having some periods of relief from pain and as [Mr and Mrs Y] reported, the tumour was not growing with any significance. It was also apparent that [Mr Y] was experiencing some kind of stability or ‘plateau’ in relation to his cancer.”

7. On 24 May 2013, Mr Y was recommended by the Council for retirement on the grounds of permanent ill health. It was proposed and agreed that his 12 week notice period would start on 26 May 2013 and end on 17 August 2013. Dr Black and Mrs Y confirm that at the end of the meeting they spoke. Mrs Y was told that if Mr Y was to pass away having retired she would be entitled to significantly more than if he passed away whilst employed. Dr Black said that if Mr Y’s condition deteriorated she should inform the Council and request that his retirement date be brought forward to allow early payment.
8. On 14 June 2013, Mr Y’s application for ill health retirement was referred to NILGOSC for consideration. The Council’s request was accompanied by the medical reports referred to above which were provided by his GP. The application was subsequently accepted and would come into payment at the end of Mr Y’s notice period.
9. On 8 July 2013, Mrs Y says Mr Y was admitted to a hospice to improve his pain management.
10. On 22 July 2013, Mr Y had a further PET scan.
11. On 24 July 2013, Mr and Mrs Y were informed by his physicians that his cancer had spread and his diagnosis was terminal. In relation to this Mr Y’s consultant Oncologist has confirmed to this Office:

“I can confirm that [Mr Y] and his family were only made aware of the terminal nature of his cancer of the maxillary sinus after a PET CT scan which was carried [sic] on the 22<sup>nd</sup> July 2013. This is clearly stated in my letter from 29 July 2013 after meeting with the patient and his wife at the Royal Victoria Hospital with ENT surgeon Mr Ramzan Ullah. Unfortunately, the patient’s condition deteriorated very rapidly in a matter of weeks from secondary disease in the bone chest and liver. The patient and his wife were not aware of this progression as he previously had had an excellent response to radical chemotherapy and radiation as confirmed on previous PET CT scan a few months before on 25<sup>th</sup> March.”

12. Later that day Mrs Y contacted the Council by telephone. The content of the call is disputed (**the disputed call**), and there is no recording or notes relating to it. In summary, Mrs Y asked for some or all of Mr Y’s pension/lump sum to be brought forward enabling him to go on a break away before undertaking further treatment.
13. On 14 August 2013, Mr Y passed away.

14. On 16 August 2013, the Council completed Mr Y's leaver's form for submission to NILGOSC. This confirmed Mr Y's last day of service as 14 August 2013, three days short of the termination date, as such, he died in service. Death benefits were paid to Mrs Y on that basis. As Mr Y's beneficiary, Mrs Y received a death grant of £51,540.18 and a spouse's pension of £4,139.69 per year.
15. NILGOSC has provided hypothetical figures had he retired prior to passing away. Mr Y would have received a retirement grant of up to £45,557.19, depending on the level of commutation, and a pension of £6,833.58 per year. On his death as a pensioner, Mrs Y would have received a death grant of £68,092.41 and the spouse's pension of £4,139.69.
16. In February 2014, Mrs Y wrote to the Council to complain about the way his retirement had been handled. She set out her recollection of the disputed call, stating:

“On [Mr Y]'s release from hospital on the 24 July I rang [the Council] in the wages department of the Belfast City Council, who was the contact [Dr Black] had given me and whom I had spoken to myself previously. I informed [the Council] that the cancer had spread and since [Mr Y] wanted to fulfil some of his wishes prior to beginning chemotherapy on 13 August, such as our family spending a weekend away while he was still able to do so, could [Mr Y]'s retirement date be brought forward and his lump sum paid earlier than originally planned.

Despite [Dr Black] informing me previously that this would be possible and had been done previously for numerous Belfast City Council employees who were terminally ill, [the Council] informed me that this was not possible and we would just have to wait to get the money through on 17 August 2014 as originally planned.

We were disappointed and upset that we were unable to access [Mr Y]'s retirement money early to allow us to do the things he wanted to do prior to resuming chemotherapy on 13 August, particularly as I knew others, some of which had only been ill for a few weeks prior to their death, were afforded this opportunity.”
17. On 18 February 2014, Dr Black was asked to comment on the events. In relation to the disputed call, he said:

“I was aware that [Mrs Y] had rung [the Council] in late July 2013 to see if [Mr Y] could access part of his superannuation lump sum to assist toward the cost of the family going on holiday. [the Council employee] had discussed this with me at the time. I was not aware of how rapidly [Mr Y] was deteriorating.”
18. On 12 March 2014, Mrs Y met with the Council to discuss the matter. It summarised the meeting in a letter and declined the complaint, providing the following account of the disputed call:

“[the Council employee]’s account of the call is that you had requested part release of the lump sum to allow a family holiday. I understand [the Council employee] advised you that this was not possible and, as your husband was placed on notice, any pension payable would be released on 17 August 2013. As you referred to a family holiday and further treatment for [Mr Y], which was to start on 13 August 2013, unfortunately we were unaware that [Mr Y]’s death would be imminent. Had the Council been aware of this, we would have done anything possible to bring forward his termination date.”

19. Following this there was further correspondence between Mrs Y and the Council.
20. Over the course of the investigation by this Office several points were made about Dr Black’s involvement following Mr Y’s death.
21. In June 2018, the Council employee that Mrs Y spoke to provided a statement outlining his account of the call.

### **Summary of Mrs Y’s position**

22. Mrs Y says that during the disputed call she had told the Council that Mr Y’s cancer had spread and it was now terminal. She informed the Council that Mr Y would be undergoing further treatment and requested that his lump sum/pension benefits be brought forward so that they could fulfil some of his wishes. She says that the Council said that it would not be possible for the pension to be brought forward and Mr Y would need to wait for his termination date.
23. Mrs Y says that it was only shortly before this call that she and Mr Y had been informed that his cancer was terminal, and it was this discovery which prompted the call. Mr Y’s consultant oncologist’s recent submission confirms this position and it is incorrect for the Council to argue that Mr and Mrs Y were aware of the terminal diagnosis prior to July 2013. The word terminal was only used once it was known the cancer had spread, following the scan of 22 July 2013.
24. Mrs Y says that Dr Black was never informed that Mr Y’s condition was terminal as they had not been told that themselves. Mrs Y says Dr Black has drawn incorrect conclusions about Mr Y’s condition on the basis of assumptions. On learning of Mrs Y’s call to the Council, Dr Black ought to have contacted her to see if she needed any assistance.
25. Mrs Y says that she was previously informed that the retirement date could be brought forward, but, having just been informed of the terminal diagnosis, Mrs Y accepted what she was told by the Council over the course of the disputed call and did not challenge it. On this point Mrs Y states:

“I had been told during the phone call to [the Council] that it was not possible so why would I doubt his word!! Bear in mind we had just been told my husband was dying He [sic] said it wasn’t possible, even saying words along

the lines of “sure you’ll be getting it in a couple of weeks anyway[sic]. What more was I supposed to do!!!”

26. Mrs Y highlights that the letter from Mr Y’s GP, which the Council seeks to rely upon, was not an up to date assessment of Mr Y’s circumstances and specifically mentions that Mr Y was awaiting the result of a significant PET CT scan. Additionally, although the GP refers to palliative care, Mrs Y asserts that palliative care is not solely in respect of terminally ill patients, and highlights a definition which states, “...it can be provided along with curative treatment.”
27. The Council’s comments about Dr Black’s attendance following her husband’s death were irrelevant.

### **Summary of the Council’s position**

28. The Council has argued that the employee was fully aware of the process of waiving the notice period and there is no reason why he would not have done so if that is what Mrs Y had asked to happen.
29. The Council accepts that the disputed call happened, that further treatment was mentioned and that Mrs Y had asked if it was possible to access part of the lump sum for Mr Y and his family to go on a break. The Council say that Mrs Y was correctly informed that this was not possible and Mr Y would receive his benefits on 17 August 2013. The Council disputes that it was given reason to think Mr Y’s condition had deteriorated to the extent that he might pass away at such short notice.
30. The Council states that no request was made for Mr Y’s notice period to be waived and that Mrs Y only asked for part of the lump sum to be brought forward. Had Mrs Y requested the notice period be waived, the Council would have agreed to it, and would have taken the necessary steps to implement it. There was no reason for such a request to be refused.
31. The Council says that Mr Y’s terminal diagnosis had been established some time earlier. It was the terminal nature of the diagnosis which had prompted Dr Black to first meet with Mr Y and for his application for ill health retirement to be progressed. The Council cannot reconcile this position with Mrs Y’s argument that it was not until July 2013 that Mr Y was specifically informed of the terminal diagnosis. The Council highlights Mr Y’s GP letter, Dr Black’s comments and reference to the “consensus opinion” that the care going forward would be palliative to support its stance that the terminal nature of Mr Y’s illness was known before July 2013. The Council consider it is necessary to have access to Mr Y’s GP notes and records to properly establish this.
32. The Council reiterates that Mrs Y was aware of the option to bring forward Mr Y’s retirement date from her conversations with Dr Black. These conversations included an explanation as to the benefits in event of Mr Y’s death. Had she wished for the

termination date to be brought forward, she would have requested it during the disputed call.

33. The Council adds that its employee had made Dr Black aware of the disputed call, and informed him that Mrs Y had requested part of the lump sum to allow the family to take a break. Had Mrs Y made the Council aware of Mr Y's deterioration this would have been made known to Dr Black, but he has confirmed that this was not conveyed to him.
34. Dr Black found it surprising that Mrs Y had requested part payment as he had explained the difference between death in and out of service to Mr and Mrs Y previously.
35. The Council states that the employee had dealt with several similar circumstances and there is no reason to think he would not have started the process if Mrs Y had been clear in highlighting the terminal nature of Mr Y's illness.
36. The Council employee's recollection was that the disputed call was short, non-confrontational and that the request for part of the lump sum was not conveyed in the manner put forward by Mrs Y.
37. Subsequent to these representations, the Council employee who spoke with Mrs Y provided a statement describing the call:
38. "My recollection of the telephone call was as follows, [Mrs Y] stated that they had received an updated medical report on [Mr Y's] condition, the ongoing prognosis was not good, and indeed [Mr Y] would not recover. [Mrs Y] mentioned it was her intention to arrange a holiday for the family including [Mr Y], and enquired was it possible to get part payment from Nilgosc early, to help pay for the cost of the holiday. I informed [Mrs Y] that Nilgosc did not make part payments, and all monies would be payable after [Mr Y] retired. I further stated that in his final pay with Belfast city council, [Mr Y] would receive a substantial payment of holiday pay, again I stated this would be paid in his final payment upon retiring. At no time during the conversation did [Mrs Y] enquire of the possibility of waiving notice, there was no indication of [Mr Y]'s situation being critical, ie that he had days, weeks months left to live. The phone call lasted a few minutes and was cordial."
39. The Council made several points about Dr Black's actions prior to and following Mr Y's death: -
  - Dr Black made no financial decisions on behalf of Mr or Mrs Y, although he did provide contact details for local financial advisers which would have offered their services free of charge given Mr Y's circumstances.
  - Dr Black met with Mr and Mrs Y several occasions. He would have responded had additional requests for meetings been requested, but he was anxious not to be seen as

intrusive and potentially unhelpful, particularly given Mr Y had access to counselling services from other agencies.

- Dr Black met with Mrs Y on three occasions following Mr Y's death, offered support with paperwork, liaised with undertakers and offered to write to NILGOSC to explain the circumstances around his death. Mrs Y did not take Dr Black up on his offer to write to NILGOSC.

## Conclusions

40. Mrs Y's complaint hinges on the content of the disputed call. In the absence of a call recording, or any contemporary notes, I am required to decide what was said on the balance of probabilities. These are the facts that are not in dispute: -
  - Mrs Y enquired about some or all of Mr Y's pension benefits being brought forward;
  - She mentioned family time away;
  - She informed the Council that Mr Y would be undergoing further treatment;
  - She was told that it would not be possible to provide what Mr Y had requested.
41. What has been disputed is whether Mrs Y conveyed the deterioration of Mr Y's condition and whether she asked for his retirement date to be brought forward as opposed to part of his lump sum.
42. Having compared the Council employee's statement with Mrs Y's recollections, I am satisfied that there are no contradictions between them on the question of Mr Y's health. Mrs Y did convey a change to Mr Y's condition and the fact that his condition was terminal. The Council may dispute whether this was known to Mrs Y previously, but Mr Y's physician's evidence is clear on this point. I consider the Council employee must have been aware that there had been a change in Mr Y's condition given he describes "an updated medical report".
43. But regardless of what information Mrs Y provided to the Council about Mr Y's condition, I am not persuaded that is what the complaint turns on. Mrs Y made contact on Mr Y's behalf to enquire about the possibility of bringing forward some or all of Mr Y's pension benefits and was told that this was not possible. I conclude it is likely she asked for a part payment of benefits, because that is what was required in order for the family to go away. But, whether or not this was a request for full or partial payment of benefits, the Council has confirmed that Mr Y's benefits could have been put into payment sooner through waiving his remaining notice.
44. On receipt of Mrs Y's request, and although she did not specifically refer to waiving Mr Y's remaining notice period, I conclude that enough had been said for the Council to make a decision whether to waive the remaining notice period and bring the pension into payment earlier. I do not fault Mrs Y for not asking in the right technical

terms. If the individual Mrs Y spoke to could not make that decision, he ought to have escalated it to the individual who could.

45. The Council highlights that Mrs Y had been made aware of this option previously and so questions why, given those previous assurances, she had not challenged the stance that it would not now be possible. Under normal circumstances I would agree with the Council's argument that Mrs Y could have been expected to challenge what she was being told or refer to Dr Black. But I cannot agree these were normal circumstances. As I have said, the date of the call was very shortly after the terminal diagnosis had been communicated to Mr and Mrs Y. In these circumstances, and having accepted Mrs Y's evidence that she spoke about the deterioration in Mr Y's condition, I find it hard to envision her challenging the stance of someone in a position of knowledge and authority as the Council employee was. I accept the Council's submission that the employee was relatively junior, but he was the person to whom Mrs Y had been directed so it is difficult to see how she could be expected to take that factor into consideration. Mrs Y was reasonably entitled to rely on the information she was provided with, even if this contradicted what she had previously been told.
46. The Council also stresses that Mrs Y only requested payment of part of the lump sum, and it was that request which the employee responded to, explaining that it was not possible, which is correct. It may be the case that this is all that was requested, but even if Mrs Y only asked for part of the lump sum, in this context, I would have expected the individual to have discussed the option to waive the remaining notice period in order for the pension to be put into payment and so achieve the specific request for some money to be made immediately available.
47. I also find it significant that following the disputed call Mrs Y made no further attempts to bring forward the end of Mr Y's notice period despite his further deterioration over the following weeks prior to passing away. Given the Council argue she was aware of this option, it would be reasonable to think she would have chosen to implement it. The fact that she did not contact the Council again leads me to conclude that she had been informed by the Council employee that this was not possible, and relied upon what she was told.
48. Of course, had the option been put to Mr and Mrs Y it is possible that they may have opted not to bring forward the termination date. However, it is clear from the fact that the call happened that Mr and Mrs Y wanted access to funds prior to undergoing further treatment, and given the short period before that treatment the need was acute. In these circumstances I think it is more likely than not Mr and Mrs Y would have opted to bring forward the termination date even if that meant the loss of a period of pay due to the reduced notice period.
49. There have been some additional arguments raised about events following Mr Y's death. I am not persuaded that these issues are of relevance to the complaint

submitted to this Office and have only arisen because of contentious correspondence over the course of the investigation. As such I will not comment on them.

50. I consider the telephone conversation was of a nature where the Council employee ought reasonably to have enquired as to whether Mr and Mrs Y wished to waive the remaining notice period in order to get access to some money, even if she had not specifically worded the request as such. Had the Council done so it is more likely than not Mr and Mrs Y would have chosen to take up the opportunity and Mr Y would have died in retirement. It would necessarily have taken the Council some time to authorise a decision to abridge notice and notify the scheme of the revised date of termination, but in a situation of urgency such as this was, I can see no reason why that activity need have taken more than 48 hours. I bear that timeframe in mind in making the direction below.
51. It is clear that Mrs Y will also personally have been caused considerable distress at a difficult time. Strictly she can only bring this complaint as Mr Y's personal representative rather than personally. I am therefore recommending (rather than directing as I would have done if she had complained personally) that the Council pay her £500 to compensate her for her personal distress. Please note that my recommendation cannot be enforced in accordance with the provisions of the County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993 (SI 1993/1978) and their equivalent in Northern Ireland. It follows that Mrs Y will not be able to take action to enforce my recommendation through the Courts, should that step prove necessary to enforce the direction below.
52. For the reasons above I uphold the complaint.

### **Directions**

53. Within 21 days of this Determination, the Council will calculate and pay the difference between the death benefits paid to Mrs Y to date, and those Mr Y and Mrs Y would have received had Mr Y's service been terminated on 26 July 2013 . The Council may offset the additional income Mr Y was paid as earnings between 26 July 2013 and the date he passed away.
54. For any loss suffered, in addition, the Council will pay to Mrs Y simple interest at the base rate for the time being quoted by the reference banks.

**Karen Johnston**

Deputy Pensions Ombudsman  
26 July 2018