

Ombudsman's Determination

Applicant	Mr N
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Cardiff Council (the Council)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Council.

Complaint summary

2. Mr N complained that the Council refused to exercise its discretionary power to apply the "Rule of 85" to his pension. Applying the Rule of 85 would have protected some of Mr N's pension from having an early retirement reduction factor applied to it, thereby increasing its overall value.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mr N was born in November 1963. On 18 February 2001, Mr N became employed by the Council.
5. Between February 2001 and June 2020, Mr N was an active member of the Scheme, which is a public sector defined benefit occupational pension scheme.
6. As result of having joined the Scheme in 2001, Mr N could potentially benefit from the Rule of 85. This was a test, set out in regulations, that would determine whether a member's benefits would be reduced if they were to retire prior to their normal retirement date. However, that would depend on when and the circumstances in which that member retired. Notably, different provisions would apply depending on the member's age at the date he requested early retirement, together with the amount of pensionable service accrued. The Scheme is governed by the Local Government Pension Regulations 2013 (**the Regulations**).
7. Regulation 30(7) of the Regulations states:

“(7) Where an active member who has attained the age of 55 or over is dismissed from an employment by reason of redundancy or business efficiency, or whose employment is terminated by mutual consent on grounds of business efficiency, that member is entitled to, and must take immediate payment of —

(a)retirement pension relating to that employment payable under regulation 16 (additional pension contributions), adjusted by the amount shown as appropriate in actuarial guidance issued by the Secretary of State; and

(b)any other retirement pension relating to that employment payable under these Regulations, without reduction.”

8. Separately, the Rule of 85 automatically applies in full where benefits are voluntarily drawn by the member under the Regulations when aged 60 or over as provided for in Schedule 2 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014 (**the 2014 Regulations**).

9. It is also possible for the Rule of 85 to apply in full where benefits are voluntarily drawn by the member under the Regulations on or after age 55 and before age 60 but, importantly, only if the employer agrees that it should be applied, as provided for in Schedule 2 of the 2014 Regulations. The relevant extracts of the 2014 Regulations are set out in the Appendix.

10. The Council has a policy document entitled Voluntary Early Retirement/Flexible Retirement and Voluntary Redundancy Policy and Procedure (**the Policy**). The Policy contains information about the requirements to satisfy the Rule of 85 and the Council’s exercise of discretion. Relevant sections of the Policy are detailed in the Appendix.

11. On 4 January 2020, Mr N unfortunately suffered a heart attack. He said that this was part of the reason why he decided to retire early.

12. On 1 April 2020, Mr N sent a resignation letter (**the Letter**) to the Council. He asked to leave his employment at midnight on 30 June 2020, at the age of 56. He stated:

“I wish to provide three months’ notice, with a view to leaving Cardiff Council’s employment at midnight on 30 June 2020...

I would be grateful if consideration could be given to:

1. Employer’s discretion in waiving pension reduction for early retirement or
2. Discretion to allow me to leave within the Rule of 85 provision as I meet the age and service requirement, but I am not yet 60 years of age.”

13. On 30 April 2020, the Council informed Mr N by email that it would not exercise its discretion to waive the reduction of his pension. It said that it was not prepared to

bear the financial cost of supplementing Mr N's pension income to limit the reduction to his pension. It also said the Rule of 85 did not apply to him.

14. On 12 May 2020, Mr N informed the Council that he would like to receive his early retirement pension without the Rule of 85 applying to it, so that he would be able to receive an income in July 2020.
15. Subsequently, there were exchanges of correspondence between Mr N and the Council concerning why Mr N believed the Rule of 85 was applicable to him, and why the Council believed it was not. Mr N said that he would take further advice on the application of the Rule of 85 and decide whether to apply to The Pensions Ombudsman (**TPO**) regarding the matter.
16. On 30 June 2020, Mr N's employment with the Council ended.
17. On 7 July 2020, Mr N submitted a complaint to the Council under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). His complaint concerned the Council's refusal to apply the Rule of 85 or to waive the early retirement pension reduction. To support his complaint, Mr N submitted copies of correspondence between himself and the Council concerning his request for the Council to apply the Rule of 85 to him. He also attached a screenshot of activity from the online HR database and a copy of the Letter.
18. On 12 October 2020, the Council responded to Mr N's complaint under stage one of the IDRP. The Council said it was satisfied that Mr N's request for it to apply the Rule of 85 had been fully considered. The Council said it had no obligation to bear the costs of applying the Rule of 85 to Mr N, and that its policies permitted its refusal to do so.
19. On 13 October 2020, Mr N made a complaint under stage two of the IDRP. He contended that the stage one IDRP response was too brief, delayed, made by a person unlikely to be impartial, and made on the incorrect basis that he had requested entirely unreduced pension benefits. He contended that the evidence supplied had not been sufficiently considered and the response to his stage one IDRP complaint had not been sufficiently explained.
20. Mr N's complaint was referred back to the stage one IDRP decision-maker by the IDRP stage two decision-maker, the Principal Pensions Officer of the Council. This was because the Principal Pensions Officer was of the opinion that the stage one IDRP complaint response did not provide enough detail, evidence or explanation for the complaint outcome.
21. On 10 November 2020, the IDRP stage one decision-maker issued a full response to Mr N's complaint, stipulating the evidence relied upon. She said that:-
 - As Mr N was under the age of 60 when he retired, the Rule of 85 did not apply to him.

- The Council's acceptance of Mr N's resignation did not amount to an approval of his retirement. The wording of the Policy did not mean the Rule of 85 should apply to him.
 - There is no automatic entitlement to voluntary early retirement, as the employment in such cases is ended by mutual agreement between the employer and the employee. An employee should not assume that "employer's consent" retirement will be granted in each case, because the Council must make a financial decision regarding the matter in each instance. According to the evidence, Mr N was not granted voluntary early retirement.
22. Mr N was dissatisfied with the updated stage one IDRPs decision. So, he progressed his complaint to stage two of the IDRPs.
23. On 24 November 2020, the Council issued its stage two IDRPs response to Mr N. It did not uphold his complaint. The stage two decision-maker said:-
- The Council had not exercised its discretion to agree to a "mutually agreed termination and waiver of any reductions".
 - Mr N had not retired under any of the circumstances under which the Policy applied.
 - The stage two decision-maker agreed with the stage one IDRPs decision not to waive any of the reduction to Mr N's pension.

Summary of Mr N's position

24. By refusing to apply the Rule of 85 to him, the Council failed to adhere to the Policy.
25. His retirement was approved, this approval was recorded on the HR database, and it was not due to redundancy or efficiency considerations. So, his employment was terminated by mutual agreement, and he fulfilled the Policy conditions for "employer's consent" retirement.
26. The Council's refusal to apply the Rule of 85 to him caused him financial loss. This is because if the Rule of 85 were applied to him, the part of his pension accrued until 31 March 2008 would not have been reduced.
27. The wording of the Policy was not adequately addressed in the Council's responses to his complaint.
28. He would like:
- the Council to apply the Rule of 85 to him;
 - his pension lump sum to increase in line with the application of the Rule of 85;

- payment to make up for the reductions applied to his pension from when he retired on 1 July 2020; and
- compensation for the stress caused to him through negotiating with the Council, going through the IDR process and referring his complaint to TPO.

Summary of the Council's position

29. There is no automatic entitlement to voluntary early retirement, as it is something a person must seek approval from their employer for. The employment is in such cases ended by mutual agreement. Approval for voluntary early retirement was not given to Mr N. The Council did not exercise its discretion to agree to a "mutually agreed termination and waiver of any reductions".
30. Mr N did not retire under any of the circumstances listed in the Policy under which the voluntary early retirement policy applies.
31. If an employee wants to leave employment on the basis of "employer's consent", they should not assume that the Council will grant the option, as it requires the Council to make a financial decision in each instance. Acceptance of Mr N's resignation did not amount to an approval of retirement.
32. The Council has no obligation to bear the costs of applying the Rule of 85 to Mr N.

Adjudicator's Opinion

33. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised in paragraphs 31 to 35 below.
34. The Rule of 85 is not a reason for a member to access their benefits from the Scheme. It is only used to determine whether or not to apply reductions in the event of a member's early retirement.
35. Regulation 30(7) of the Regulations refers to employment being terminated by mutual consent. The Council did not terminate Mr N's employment on this basis. Mr N tendered his resignation from his employment with the Council, which the Council accepted. That did not amount to his employment being terminated by mutual consent. So, in the Adjudicator's opinion, Regulation 30(7) did not apply to Mr N, and he did not have an automatic right to an early retirement pension without reduction.
36. The Council's agreement for Mr N to end his employment with it at his requested date did not change the fact that it was Mr N's decision, not a joint decision between Mr N and the Council, for his employment to end. Mr N decided to end his employment due to health concerns. The Council did not have any input into this decision. So, in the Adjudicator's opinion, Mr N's employment did not end as a result of a mutual decision between him and the Council.

37. The application of either “employer’s consent” retirement or the Rule of 85 could in Mr N’s case have been made only through the exercise of the Council’s discretion. Mr N informed the Council of his plan of “...leaving Cardiff Council’s employment at midnight on 30 June 2020...” and this request was accepted. There was no communication from the Council to Mr N suggesting that it had agreed to his additional requests for it to use its discretion to waive the reduction to his benefits for early payment under “employer’s consent” retirement or for it to apply the rule of 85 to his benefits. As the Council did not express its acceptance of either request, it was not, in the Adjudicator’s view, appropriate for Mr N to have assumed that he was entitled to either being applied to him. This is because discretion is a power to decide whether or not to do something, not a responsibility to honour a person’s expressed wishes.
38. The Adjudicator took the view that the Council had acted in accordance with the Regulations and followed its Policy so the complaint should not be upheld.
39. Mr N did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr N provided his further comments, which I have noted but they do not change the outcome. Mr N said in summary:-
- After sending the Letter, he was instructed to request retirement on the electronic portal. That request was approved. So, in his view, the Council gave consent for him to retire.
 - The Local Government Pension Scheme factsheet he received states “The ability to apply the 85 year rule to voluntary retirement between age 55 and 60 is at the discretion of the Employer. Your Employer will have a policy on this matter”. So, the Policy must contain a section applicable to his personal circumstances. Of the types of retirement the Policy lists, the only one which fits his circumstances is “employer’s consent” retirement.
 - Before the legislation underpinning the Rule of 85 was amended, employees who had the required number of years of service were allowed to retire under the Rule of 85. He retired under similar circumstances, so the Policy must apply to him.
 - The Policy states “where the rule of 85 is met before the age of 60... there will be a cost to the pension fund”. It does not specify that there will be a cost to the service only if the Council exercises its discretion to waive reductions.

Ombudsman’s decision

40. Under the Regulations, a member of the Scheme can elect to receive his pension if he is over the age of 55 (but before his normal retirement age) if the member is no

longer in the employment to which that pension relates. In the normal course that pension is subject to an actuarial reduction¹.

41. However, in general terms, under the 2014 Regulations, where the member has reached 60, and the Rule of 85 is otherwise satisfied, that reduction will not apply to benefits accrued before a relevant date. Furthermore, where the member is aged between 55 to 60, the reduction is also not applied if the employer, in its discretion, agrees.
42. Mr N has complained that the Council refused to exercise its discretion to apply the Rule of 85 in full to the relevant parts of his pension and waive the early retirement pension reduction.
43. Where a person retires before their normal pension age, as Mr N did, it is not unusual for their pension to be reduced. This is because the pension is paid to the individual for a longer period than was originally intended when the pension commenced. So, the pension fund would bear the liability for a longer period.
44. It was clear that Mr N understood that if he took early retirement, his pension would be reduced unless the Council stated otherwise. It is understandable that given his health issues, Mr N hoped the Council would choose to waive the early retirement reduction to his pension. However, the Council did not have an obligation to do so. The discretionary power the Council had to waive the early retirement reduction did not mean that it had to apply its discretion in Mr N's case. In the circumstances, I consider that it was not reasonable for Mr N to assume that he had an entitlement to having the early retirement reduction waived.
45. Mr N also points to the Policy. He says that this sets out the circumstances in which the Council will exercise its discretion and argues that his situation sits within the "Employer's consent retirement" section of the Policy. Mr N contends that the Council's 'approval' of his resignation request amounted to it giving consent for him to retire under this "employer's consent retirement". I do not agree with Mr N's contention. The Council did not specify in any correspondence to Mr N, subsequent to his resignation request, that this was the case. Rather, the Council had informed Mr N, prior to him claiming his benefits, and in response to his Letter, that it would not waive the early retirement reduction to his pension. I consider it was unreasonable for Mr N to have interpreted the Council's resignation acceptance as provision of consent for him to retire under "employer's consent" retirement.
46. Furthermore, I do not find that Mr N's situation fits squarely with the section of the Policy he points to, and that it then gives him an entitlement to receive an unreduced pension. For example, Mr N gave notice and resigned from his employment, following his unfortunate health issues, and elected to receive a pension, as was his right when he was no longer in employment. I do not characterise that as a 'mutual'

¹ It is common ground that Mr N was not leaving employment by way of redundancy or on the grounds of business efficiency, and so Regulation 30(7), which also provided for an unreduced pension, would not apply.

termination of employment. Even if it was possible to characterise it as a mutual termination, I do not agree that the “Employer’s consent retirement” section then gives him a clear and unambiguous right to receive an unreduced pension, as if the employer discretion had been exercised. For example, that section of the Policy states that there will be a cost to the pension fund if a member of the Scheme meets the Rule of 85 before the age of 60. Mr N said it does not specify that this will only be where discretion is exercised to waive the early retirement pension reduction. I do not agree with Mr N’s assertion, as page seven of the Policy also states: “where it is agreed to waive the pension reduction, there will be a cost to the pension fund”. Further, the Council specifically stated that it chose not to exercise its discretion to waive Mr N’s pension reduction.

47. Accordingly, I consider that the Policy was not applicable to Mr N, as he did not retire under any of the categories it applies to, which are listed on page five of the Policy.²
48. I consider that the Council was within its rights under the Regulations and the Policy to deny Mr N’s request for it to waive the early retirement reduction. So, I find that the Council’s refusal to do so did not amount to maladministration.
49. I do not uphold Mr N’s complaint.

Dominic Harris

Pensions Ombudsman
4 May 2023

² See the Appendix

Appendix

The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014

Schedule 2

1.—(1) Paragraph 1(3) applies where a member of the description in paragraph 3(1) or (2) makes a request to receive immediate payment of retirement benefits under—

(a) regulations 30(1) (choice of early payment of pension) or 30A (choice of payment of pension: pensioner member with deferred benefits)(1) of the Benefits Regulations;

(b) regulation 30(5) (retirement benefits: early retirement) of the 2013 Regulations if the member was aged 60 or over at the date of making the request;

(c) regulation 30(5) (retirement benefits: early retirement) of the 2013 Regulations if the member is aged 55 or over but aged under 60 at the date of making the request and the Scheme employer agrees that paragraph 1(3) of this Schedule should apply; or

(d) regulation 30(6) (retirement benefits: flexible retirement) of the 2013 Regulations.

(2) Paragraph 1(4) applies where paragraph 1(1)(c) would otherwise apply, but the member's Scheme employer does not agree that paragraph 1(3) of this Schedule should apply.

(3) Where this sub-paragraph applies—

(a) if the member satisfies the 85 year rule, that part of the member's retirement benefits which is calculated by reference to any period of membership before the relevant date shall not be reduced in accordance with regulations 30(4) or 30A(4) of the Benefits Regulations or regulation 30(5) or (6) of the 2013 Regulations; and

(b) if the member does not satisfy the 85 year rule, that part of the member's retirement benefits which is calculated by reference to any period of membership before the relevant date is reduced by reference to the period between the date of the request and the date the member would satisfy the 85 year rule, or age 65 if earlier.

(4) Where this sub-paragraph applies—

(a) if the member satisfies the 85 year rule, that part of the member's benefits which is calculated by reference to any period of membership before the relevant date is reduced by reference to the period between the date of the request and age 60; and

(b) if the member does not satisfy the 85 year rule, that part of the member's benefits which is calculated by reference to any period of membership before the relevant date is reduced by reference to the period between the date of the request and the date the member would satisfy the 85 year rule, or age 65 if the member would not satisfy the 85 year rule before that time, or age 60 if later...

4.—(1) For the purposes of this Schedule, a member satisfies the 85 year rule if the sum of—

(a) the member's age in whole years on the date the request is made under paragraph 1;

(b) the member's total membership in whole years;

(c) in a case where the request is made after the member's local government employment ends, the period beginning with the end of that employment and ending with the date the request is made; and

(d) in the case of a person who was a member of the 1995 Scheme immediately before 1st April 1998, any qualifying period counted by virtue of regulation 123 of the 1997 Regulations (rights as to service not matched by credited period) which was awarded before 1st April 2008,

is 85 years or more.

Relevant sections of the Policy

Page 5:

"The policy applies in any of the following circumstances: a. employment is terminated by reason of redundancy b. employment is terminated in the interests of the efficient exercise of the employing authority's functions c. employment is terminated by mutual agreement, but there is not a case for redundancy or "interests of the efficiency" retirement, herewith referred to as an "employers consent" retirement. d. flexible retirement is agreed."

"Although employees may apply for voluntary early retirement, flexible retirement or redundancy, approval of any applications will be at the sole discretion of the Council in accordance with the provisions of this scheme."

Page 7:

"“Employers Consent” will apply where there is not a business reason for the retirement but the employee wishes to retire for personal reasons. ...as the employee is receiving their pension early it is likely to be subject to a reduction. ... Under the regulations the Council has the discretion to waive such reductions but should only do so in exceptional circumstances. (e.g. on compassionate grounds)

"Although in some cases employers consent retirement will be cost neutral, where the rule of 85 is met before the age of 60, or where it is agreed to waive the pension reduction, there will be a cost to the pension fund which will have to be met by the directorate..."

Page 13:

“With effect from 1 April 2010 any employee aged 55 or over, with 3 months or more pensionable membership may request retirement. Where the member is under 60 it is at the employers discretion whether to approve the request or not. Pensions paid under these circumstances may be subject to a reduction depending on the total pensionable membership accrued. The employer may waive the reduction on compassionate grounds.”

Page 20:

“The 85 year rule is satisfied where an employee’s age and service (in whole years) added together equates to 85 or more. ... Employees who meet the 85 year rule before the age of 60 will receive accrued benefits with no reduction and therefore there will be an additional cost to the pension fund.”

“It is possible to waive a pension reduction in appropriate cases.”