

## Ombudsman's Determination

Applicant	Mr L on behalf of The Estate of Mr N
Scheme	Local Government Pension Scheme – Wandsworth Borough Council Pension Fund ( <b>the Scheme</b> )
Respondents	Wandsworth Borough Council ( <b>the Council</b> ) Pensions Shared Service ( <b>PSS</b> )

## Outcome

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

## Complaint summary

2. Mr L has complained that the Council should have calculated Mr N's death grant (**the death grant**) based on the value of his pension at the time of his death, not at the date of his retirement.
3. He wants Mr N's estate to receive an amount of £6,006.97, plus interest, representing the additional amount of the death grant based on the higher pension amount, less the amount of pension that had been paid to Mr N's bank account after his death.

## Background information, including submissions from the parties

4. Mr N was a member of the Scheme, a defined benefit pension arrangement. PSS was the Scheme's administrator. The Council was the Scheme's administering authority (**the administering authority**). Mr L was Mr N's uncle.
5. On 19 March 2011, Mr N retired. He started to receive a pension of £11,911.56 per annum from the Scheme.
6. On 13 June 2019, Mr N died intestate. He was 66 years old.
7. On 18 September 2019, PSS wrote to Mr N asking whether there had been a change in his circumstances. It said that his pension had been suspended with effect from 1 October 2019.

8. On 28 November 2019, Mr N's death certificate was issued, and on 3 January 2020, Mr L informed PSS of Mr N's death.
9. On 26 March 2020, Mr L was appointed as Mr N's administrator.
10. On 26 June 2020, Mr L informed PSS of his appointment as administrator and asked if there was a lump sum due from the Scheme.
11. On 10 July 2020, PSS informed Mr L about the death grant and enquired about Mr N's beneficiaries, which Mr L replied to on 28 July 2020.
12. On 30 November 2020, PSS confirmed that the death grant had been approved.
13. On 7 December 2020, PSS told Mr L that Mr N's pension had been overpaid from the date of his death to 31 August 2019. The total net overpayment was £2,615.55. Mr L was requested to pay it back, but this remains outstanding.
14. On 11 December 2020, the death grant of £25,690.51 was paid to Mr N's estate.
15. On 13 December 2020, Mr L requested the calculation of the death grant and pension overpayment amount.
16. On 17 December 2020, Mr L wrote to PSS saying that its calculation of the death grant was lower than it should have been. Mr L's calculation of the death grant was as follows:-
  - $10 \times \text{Mr N's pension at date of death of } £14,215.75 = £142,157.50.$
  - Total pension received by Mr L up to the date of his death was £107,419.45.
  - So, the death grant was  $£142,157.50 - £107,419.45 = £34,738.05.$
  - As PSS had calculated the death grant as £25,690.51, there had been a shortfall of £9,047.54.
  - As Mr N's pension had continued to be paid after his death, an overpayment of £3,040.57, including £425.02 of tax, needed to be deducted from the death grant.
  - The total amount due to Mr N's estate was £6,006.97.
17. On 18 December 2020, PSS replied to Mr L's calculation request. It said that the death grant was determined by multiplying Mr N's pension by 10, and then reducing it by the total amount of pension that had been paid to him. As Mr N's pension had been in payment for eight years and 86 days, the balance of 10 years was one year and 279 days. As Mr N's pension at his date of death was £14,215.72, the death grant was  $1 + (279/365) \times £14,215.72 = £25,081.99.$  An inflationary increase and interest were then added.
18. On 22 December 2020, Mr L wrote to PSS saying that its calculation was not in accordance with the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007: Regulation 35 (**Regulation 35**).

19. On 22 January 2021, PSS replied, saying that the payment had been made in accordance with Regulation 35.
20. On 19 February 2021, PSS emailed Mr L a link to Regulation 35, which was in force on the date that Mr N had retired.
21. Regulation 35 stated:

“Death grants: pensioner members

  - (1) If a pensioner member dies before his 75<sup>th</sup> birthday, a death grant is payable.
  - (2) The administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member’s nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.
  - (3)(a) The death grant is the member’s pension in payment multiplied by 10, ignoring any reduction where abatement has been applied under regulation 71 (application of abatement policy to individual cases) of the Administration Regulations; but
  - (b) the amount so calculated is reduced by the amounts of any retirement pension paid to the member, or that would have been paid had the member’s pension not at any time been abated under regulation 71.”
22. On 21 February 2021, Mr L explained why he considered PSS was incorrect and he requested details of the administering authority’s adjudicator appointed under the Local Government Pension Scheme Regulations 2013: Regulation 74 (**Regulation 74**).
23. On 25 February 2021, PSS restated its calculation of the death grant. It said that it appeared that Mr L had interpreted “pension in payment” in Regulation 35 to mean the final annual rate of pension. However, when the Government inserted “in payment” under the Local Government Pension Scheme (Amendment) Regulations 2008 (**the Amendment Regulations**), the Department for Communities and Local Government had issued a letter explaining that the amendment was for clarification purposes, and it did not change the substantive meaning of Regulation 35. It was clarifying that the pension used in the calculation of a death grant should be after any commutation had been taken into account.
24. On 8 March 2021, PSS informed Mr L of who he could complain to under Stage One of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).
25. Mr L has stated that PSS never provided details of the administering authority’s adjudicator appointed under Regulation 74. He has said that this was a clear breach of the Council’s duty under the Local Government Pension Scheme Regulations 2013: Regulation 73(5).
26. On 27 March 2021, Mr L requested details of the IDRP.

27. On 19 May 2021, Mr L submitted his complaint under Stage One of the IDRPs.
28. On 11 August 2021, the Council responded to Mr L's Stage One complaint. It set out Regulation 35 and its calculation of the death grant. It said that the "pension in payment" did not change throughout the period that a pension was being paid. This differed to Mr L's view that the death grant should be calculated based on Mr N's pension at the time of his death.
29. The Council's calculation of the death grant was as follows:-
- 10 x Mr N's pension at date of retirement of £11,911.47 = £119,114.70.
  - Mr N's pension had been in payment for 8 years and 86 days, so he had received pension payments of 8 years and 86 days X £11,911.47 = £98,098.30.
  - The death grant was £119,114.70 - £98,098.30 = £21,016.40.
  - Under the Pensions Increase (Review) Order 2019, the death grant was entitled to pensions increases, so the amount was multiplied by 1.1934 = £25,081.99.
  - Following the Pensions Increase (Review) Order 2020, an inflationary increase of 0.28%, £70.23, was added, together with interest of £538.29.
  - So, the total death grant was £25,690.51.
30. The Council did not uphold Mr L's Stage One complaint.
31. On 31 August 2021, Mr L submitted his complaint under Stage Two of the IDRPs.
32. On 3 September 2021, PSS received advice on the calculation of the death grant from the Local Government Association (**the LGA**).
33. The LGA set out Section 7(4) of the Pensions (Increase) Act 1971 (**Section 7(4)**):
- "Except as provided by subsection (3) above or by Schedule 3 to this Act, an increase of a pension under this Act shall not be treated as part of the pension for the purposes of any provision made by or under any enactment; and in calculating the rate of a derivative pension, any increase under this Act of the principal pension shall be disregarded."
34. The LGA's interpretation of this was as follows:
- "Pensions increase is paid under the Pensions (Increase) Act 1971. It is not payable under the LGPS Regulations themselves. Therefore, the pension in payment referred to in Regulation 35 does not include any pensions increase amount. Section 7(4) of the Pensions (Increase) Act 1971 provides that the pensions increase amount is not treated as if it were part of the pension, and Regulation 38 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 simply provides for any pension increase due under the Act to be paid from the pension fund.

Therefore, you calculate the death grant payable without a pensions increase amount and then add a pensions increase to the result in accordance with Section 9 of the Pensions (Increase) Act 1971.”

35. On the same date, the Council responded to Mr L’s Stage Two complaint, which it did not uphold due to the advice it had received from the LGA.

36. Mr L has stated his position as follows:-

- The calculation provided by PSS on 18 December 2020 did not bear any relationship to what Regulation 35 stated.
- A more realistic reason for having Section 7(4) was to ensure that indexation was not double counted.
- If the Council’s interpretation of Regulation 35 was correct, it could have been more simply written. If Regulation 35 had meant the calculation was to be based on the member’s original pension, it would have said so, or it would have referred simply to pension, and relied on Section 7(4).
- Inserting the words “in payment” in the Amendment Regulations meant that Regulation 35 should mean something different to simply stating “pension”, or that the amount used for the calculation was the amount of pension actually being paid.
- The term “pension in payment” should be given a consistent interpretation when taking into account commutation and inflation. If the Council had been correct in stating that Regulation 35 meant the original pension, then this would require commutation to be disregarded as well. The only reason why commutation could be taken into account was that the words “in payment” focused attention on what was actually being paid.

## **Adjudicator’s Opinion**

37. Mr L’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council or PSS. The Adjudicator’s findings are summarised below:-

- As Mr N was a pensioner and had died before his 75<sup>th</sup> birthday, his estate was entitled to receive a death grant calculated in accordance with Regulation 35 in force at the date of Mr N’s retirement.
- PSS interpreted “pension in payment” and “retirement pension paid” in Regulation 35 as referring to the amount of Mr N’s pension when he retired. However, Mr L submitted that the terms included inflationary increases. So, “pension in payment” meant the amount of pension Mr N was receiving on the date of his death, and “retirement pension paid” was the total amount of pension Mr N had been paid.

- Mr N's pension had started at £11,911.56 per annum when he retired and increased to £14,215.72 per annum when he died. So, his pension had increased by 19.34% over the period, and this was included in the initial part of Mr L's calculation of the death grant. PSS also took the pension increase of 19.34% into account, but it was added after the calculation of 10 x pension in payment less the pension paid.
- Mr L's calculation resulted in a higher death grant because he had multiplied 10 by the higher final pension, and then deducted the lower pension amounts that had been paid, while PSS had offset each year by the pension amounts paid in each year. In other words, PSS' method guaranteed the payment of Mr N's pension for 10 years, and the death grant would have been zero if Mr N had survived 10 years, while Mr L's method guaranteed the payment of Mr N's pension beyond 10 years.
- It was clear from Section 7(4) that the terms "pension in payment" and "the amounts of any retirement pension paid" in Regulation 35 did not include pension increases resulting from the Pensions (Increase) Act 1971, and that the calculation of a derivative pension, such as the death grant, should not include pension increases.
- While PSS, in its letter to Mr L on 18 December 2020, did not use the calculation set out in Regulation 35, the outcome of the calculation that it did use was the same as if it had followed the calculation in Regulation 35. This was shown to be the case in the calculation PSS provided on 11 August 2021, in its response to Mr L's Stage One complaint.
- The term "pension" in Regulation 35 was amended to "pension in payment" in the Amendment Regulations to make it clear that a death grant calculation removed the value of any commutation that had been paid before the pension was multiplied by 10. Any commuted value would not be included in "the amounts of any retirement pension paid to the member", and therefore this part of Regulation 35 did not need to be clarified in the Amendment Regulations.

38. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. His relevant comments are summarised below:-

- Both Regulation 35 and PSS' letter to him on 10 July 2020 supported his basis of the calculation.
- There had been no documentation issued by the Scheme or PSS informing members about the alternative calculation set out in PSS' letter to him on 18 December 2020. If there had been, PSS' letter to him on 10 July 2020 should have mentioned it.
- There was no definition of pension in payment other than pension in payment at the date of death, that would allow the amount calculated to be reduced by the amounts paid to the member.

- He did not accept that any change in legislation was ever intended to be interpreted in the complicated way used by PSS. If it was, members should have been informed.
- In December 2020, he had proposed a resolution of his complaint to PSS, but it had not responded.

39. I have considered Mr L's comments, but they do not change the outcome. I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

40. I appreciate that the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, and in particular, Regulation 35, do not define the term "pension in payment". Mr L interpreted it to mean Mr N's pension at the date of his death. However, as advised by the LGA, Section 7(4) confirms that pension increases are not included in calculating derivative pensions, such as Mr N's death grant, when being considered within Regulation 35.

41. But Mr L was correct to point out that PSS' calculation, in its letter to him on 18 December 2020, did not follow the methodology set out in Regulation 35. However, I agree with the Adjudicator that the calculation it did use obtained the same result, and so the different methodology had no impact on the value of the death grant paid to Mr N's estate.

42. Mr L has submitted that any change in legislation would not have been intended to be interpreted in the way that PSS had interpreted it. However, the Amendment Regulations did not change how Regulation 35 was to be implemented. The words "in payment" were added to Regulation 35 to make it clearer that the multiplication by 10 did not include any commutation that may have been paid to a member as a lump sum at retirement.

43. I do not uphold Mr L's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman  
10 October 2023