

Ombudsman's Determination

Applicant	Mr C
Scheme	Invensys Pension Scheme (the Scheme)
Respondent	The Trustee of the Invensys Pension Scheme (the Trustee)

Outcome

1. Mr C's complaint against the Trustee is partly upheld. To put matters right, the Trustee shall:
 - pay Mr C £500 for the significant distress and inconvenience he has suffered because of the overpayment error; and
 - recalculate the sum that it is asking for Mr C to repay so that it is based on the net pension payments he received during the period from 25 November 2013 to 31 August 2018.

Complaint summary

2. Mr C is unhappy that the Trustee has asked him to repay part of the benefits that he was paid in error from the Scheme. He says that the fault does not lie with him and so he should not be expected to make the repayment

Background information, including submissions from the parties and timeline of events

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 C is represented by his son (**the Representative**).
5. From 1 May 1974 to 15 March 1988, Mr C was an active member of the BTR Group Pension Scheme (**the BTR Scheme**).
6. On 9 August 1991, BTR Pensions wrote to Mr C confirming the completion of the transfer of his benefits to Standard Life as part of a buy-out. It said that there were no longer any benefits due to him or his dependants from the BTR Scheme.

7. On 6 April 2000, the BTR Scheme merged with the Siebe Pension Scheme to form the Scheme. The Scheme is managed by the Trustee and administered by PSAL Pensions Administration (**PSAL**) who later became XPS Administration (**XPS**).
8. In 2006, the administrators of the Scheme contacted Mr C to notify him of the benefits he was entitled to from the Scheme with effect from his 65th birthday in August 2006. It confirmed that these were a tax-free cash sum of £23,045.00 and an annual pension of £5,551.93. These benefits were then put into payment.
9. On 30 July 2018, Standard Life wrote to PSAL in response to a letter it had sent requesting details of Mr C's pension. Standard Life confirmed that Mr C was in receipt of a pension from Standard Life on behalf of the BTR Scheme.
10. On 23 August 2018, PSAL wrote to Mr C concerning benefits that had been paid to him in error. It said:-
 - Standard Life had confirmed that the transfer of his benefits from the BTR Scheme had taken place. The transfer value was £11,293.45. As a result, he was not entitled to any benefits from the Scheme.
 - The Trustee was obliged to take steps to recover part of the overpayment. In total £65,370.96 had been paid to him in error, including £23,045.00 of tax-free cash.
 - A repayment of £16,822.06 was requested, in respect of the overpaid net pension for the six years from 1 September 2012 to 31 August 2018. It confirmed that his pension payments from the Scheme would cease.
11. On 31 August 2018, Mr C's pension payments from the Scheme ceased.
12. On 6 September 2018, Mr C wrote to PSAL. He maintained that he was not liable for mistakes made by other parties.
13. On 12 September 2018, PSAL wrote to Mr C. It said:-
 - There had been no indication on his electronic record, that it had inherited from the previous administrators, that he had transferred out his benefits.
 - The error only came to light when undertaking a guaranteed minimum pension reconciliation exercise (**the Exercise**) with HM Revenue & Customs. As a result, it located documents confirming that the transfer had taken place.
 - He may wish to make an application to the Trustee for his case to be reviewed on the grounds of financial hardship. He could also consider raising a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
14. On 25 September 2018, Mr C wrote to XPS. He said:-
 - Those responsible for the error should be held liable.

- He had accepted the pension in good faith and its attempt to recoup part of the overpayment should be abandoned.
 - He did not have the funds available to repay the amount requested.
15. On 2 October 2018, XPS wrote to Mr C and asked him to respond by 16 October 2018. It said:-
- It was obliged to correct the error that had been made.
 - The Trustee was willing to consider any repayment proposal that was reasonable.
 - The IDRPs were available to him should he wish to raise a complaint.
16. On 19 October 2018, XPS sent a reminder to Mr C as he had not responded to its communication of 2 October 2018.
17. On 23 October 2018, the Citizens Advice Bureau telephoned XPS on behalf of Mr C to request an extension to the deadline.
18. On 26 October 2018, XPS confirmed to Mr C that the deadline for responding to its letter of 2 October 2018 had been extended to 21 November 2018.
19. On 23 November 2018, XPS notified Mr C that an IDRPs form it had received from him did not state the basis of his complaint. It asked him to complete the form by 7 December 2018.
20. On 10 January 2019, XPS reminded Mr C that it needed his completed IDRPs form. It said that this had originally been requested by 7 December 2018 and it had now extended the deadline to 25 January 2019.
21. On 17 April 2019, XPS wrote to Mr C. It confirmed that it needed a completed IDRPs form for the Trustee to consider his case. It confirmed that, if this was not received by 21 May 2019, court action would be considered.
22. On 7 May 2019, Mr C completed the IDRPs form. He said:-
- He believed he was entitled to both the benefits from Standard Life and those from the Scheme. This was because the Company Secretary at the firm he worked for at the time, Baird's Sawmills, had told him that it had topped up his pension.
 - He should not be held responsible for the overpayment as it was an administrative error by XPS.
 - Making the repayment would cause him and his wife financial hardship.
23. On 12 June 2019, the Chairman of the Scheme's Pensions Governance Committee provided his stage two IDRPs response following the escalation of Mr C's complaint direct to stage two. He did not uphold the complaint. He said:-

- That the Trustee apologised for the error.
 - The Trustee was obliged to pay benefits in accordance with the rules that governed the Scheme (**the Rules**). Where an error was discovered, it was obliged to take steps to correct the error and seek recovery of any overpaid amounts.
 - One possible way of making the repayment was for a charge to be made against Mr C's property. He could also consider other methods of repayment such as by lump sum or instalments.
 - If no response was received by 7 August 2019, it would start the process of putting a charge against Mr C's property. This would not require Mr C to provide his consent.
24. On 2 July 2019, Mr C raised a complaint with The Pensions Ombudsman (**TPO**).
25. On 25 November 2019, TPO received the Trustee's response to the complaint.
26. On 26 April 2022, the Trustee said that it had invited Mr C to provide details of his income and outgoings so that it could assess whether he had a claim for hardship. It confirmed that Mr C had declined to provide this information. As it was unable to agree a repayment method with Mr C, no recovery action was taken.

My position on the recovery of overpayments

27. In general, money paid in error can be recovered, even if the party responsible for the error has been careless. The trustees or managers of a pension scheme can only pay the benefits specified in the scheme rules. However, there are circumstances where the recipient may not be required to repay some or all of the overpayment; those circumstances are where a defence against recovery applies. I will consider whether any defence applies, however, each case will turn on its own facts.

Adjudicator's Opinion

28. Mr C's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustee. The Adjudicator's findings are summarised below:-
- There is no dispute that an overpayment has occurred. The Adjudicator considered whether Mr C had any defences available to the recovery of the overpaid funds requested by the Trustee.
 - The Trustee is seeking to recover the overpaid funds covering the period from 1 September 2012 to 31 August 2018. The Adjudicator considered whether Mr C had a statutory defence to repayment under the Limitation Act 1980 (**the Limitation Act**).

- The Limitation Act provides timescales by which an action must have commenced where a breach of the law has occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued.
- Section 32(1) of the Limitation Act: “Postponement of limitation period in case of fraud, concealment or mistake”, states that:
 - “(1) ..., where in the case of any action for which a period of limitation is prescribed by this Act, either -
 - (a)...
 - (b)...or
 - (c) the action is for relief from the consequences of a mistake;
the period of limitation shall not begin to run until the plaintiff has discovered the...mistake...or could with reasonable diligence have discovered it.”
- Under section 32(1)(c) of the Limitation Act, the limitation period is extended in the case of an action arising as a result of a mistake. The Courts have said that a claimant must show that they could not have discovered the situation without taking exceptional measures which they could not reasonably have been expected to take. Applying this to the facts of Mr C’s case, the Adjudicator’s view was that the limitation period did not start to run until the Trustee could, with reasonable diligence, have discovered the mistake. This being the payment of benefits to Mr C to which he was not entitled. In the Adjudicator’s opinion, it was not until the middle of 2018 that the Trustee had all of the relevant information required to know that Mr C was not entitled to benefits from the Scheme.
- The Adjudicator’s rationale for this was that PSAL said that there had been no indication on its electronic records, that it had inherited from the previous administrators, that Mr C had transferred out his benefits. It was only after the Exercise in 2018 that PSAL, and the Trustee, became aware that there might be an issue. PSAL located documents confirming that the transfer had taken place and confirmed with Standard Life in July 2018, that Standard Life was paying Mr C a pension on behalf of the Scheme.
- In the most recent case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for the purposes of the Limitation Act was the date when Teachers’ Pensions brought its claim during the course of the Pension Ombudsman’s complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman of Teachers’ Pensions’ response to Mr Webber’s complaint.
- For the Trustee to be able to recover the part of the overpayment from 1 September 2012 to 31 August 2018, its claim would have had to have been made within six years of September 2012 (applying section 32(1) of the Act). In fact, the Trustee’s claim was made on 25 November 2019, the date TPO’s Office received

the Trustee's response to Mr C's complaint. It follows that the Trustee is only able to recover the overpayment from Mr C for the period from 25 November 2013 to 31 August 2018.

29. The Adjudicator then considered the more substantive defences available against the recovery of overpaid funds. He said:-

- The most common defence against the recovery of an overpayment is referred to as "change of position". That is, the recipient has changed their position such that it would be unjust to require them to repay the overpayment; either in whole or in part. Change of position is a defence to a claim in unjust enrichment. To make out a change of position defence, certain conditions must be satisfied. Briefly, the recipient must be able to show that, on the balance of probabilities:-
 - their circumstances have changed detrimentally;
 - the change of circumstances was caused by receipt of the overpayment; and
 - they are not disqualified from relying on the defence.
- With regard to the last point, a change of position defence is not available to an individual who did not act in good faith when changing their position.
- To meet the good faith test, Mr C must not have had actual knowledge of the overpayment. The good faith test would not be considered as having been met if the recipient of the overpaid funds had doubts over the accuracy of the information provided. In other words, the recipient was aware that they might not be entitled to a pension, or to the amount of pension quoted. However, they then failed to make enquiries of the scheme before spending the money (this is often referred to as having "Nelsonian knowledge"). This includes situations where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of an overpayment cannot turn a blind eye. Bad faith does not, however, include acting negligently; so, a careless recipient might still be able to invoke a change of position defence.
- Mr C was notified by BTR Pensions on 9 August 1991 that his benefits in the BTR Scheme had been transferred to Standard Life. He was told that there were no longer any benefits due to him or his dependants from the BTR Scheme. Mr C has explained that he believed he was entitled to benefits from both Standard Life and the Scheme because he was told that his pension was being topped up.
- Having considered Mr C's explanation, the Adjudicator's view was that Mr C's intentions in claiming both pensions were honest. However, in the Adjudicator's opinion, Mr C had the knowledge to, at the very least, be aware that he might not be entitled to the benefits from the Scheme. The Adjudicator said this as Mr C had been notified that he was no longer entitled to benefits from the BTR Scheme. This should have alerted Mr C to a possible error, which was worth querying,

given that he did not have any written details of how his pension had been “topped up”.

- So, in the Adjudicator’s view, the good faith test was not satisfied. Mr C did not have a change of position defence available to the recovery of any part of the overpayment.

30. The Adjudicator then considered the defence of estoppel and whether a contract existed, before summarising his opinion on the case. He said:-

- Looking at the defence of estoppel, there are three requirements that need to be satisfied in order to establish estoppel by representation: (1) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act; (2) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and (3) after the act has been taken, the claimant must be able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
- For the same reasons as those given to address change of position, the Adjudicator did not consider that Mr C’s reliance on the pension benefits from the Scheme that he was first quoted in 2006 was reasonable. Mr C had the requisite information to know that there might be an error. Similarly, because of the knowledge Mr C had, it cannot be argued that there was a common assumption between the parties that Mr C would receive the benefit he was wrongly receiving. This is necessary to establish a defence of estoppel by convention. Consequently, the Adjudicator did not consider that Mr C has a valid estoppel defence.
- Finally, the Adjudicator was not able to identify the necessary elements for a contract to exist. That is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, he could not see that there was any intention on the part of the Trustee or PSAL to enter into a legal relationship with Mr C beyond his entitlement under the Rules.
- Mr C said that the repayment of the pension that was paid to him in error would result in financial hardship for him and his wife. The Adjudicator noted that he had been given the opportunity to submit evidence of his income and outgoings so that the Trustee could assess whether he had a claim for hardship. Mr C did not submit any evidence. Should he wish to now do so, he should submit the evidence to the Trustee for consideration. In addition, the Trustee had given Mr C the opportunity to suggest a repayment plan for it to consider. He has not done this.
- Although Mr C did not have any defences available to the recovery of the part of the overpayment relating to the period from 25 November 2013 to 31 August 2018, the error was nonetheless very unfortunate. It should be recognised that it had caused Mr C unnecessary distress and worry. Mr C would have been distressed at learning in 2018 that the benefits that he had been paid from the

Scheme since 2006 had been paid in error. Moreover, that he faced a significant repayment sum covering the last six years of payments. The Trustee should make an award to Mr C in recognition of this.

31. Mr C did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.
32. The Representative provided his further comments which do not change the outcome. In summary, he said:-
 - Mr C had not worked in financial services and could not have been expected to have identified that he was not entitled to the pension he was receiving from the Scheme.
 - As far as Mr C was concerned, the cessation of the pension was remediation for the error that had been made and no further action should have been necessary.
 - It was not Mr C's fault that he had been paid benefits to which he was not entitled.
 - He did not see how Mr C could afford to pay any of the money back. Mr C was suffering from ill health and the request for repayment of part of the overpayment is causing him additional stress.
33. I note the additional points raised by the Representative, but I agree with the Adjudicator's Opinion.

Ombudsman's decision

34. Mr C's complaint concerns a request made by the Trustee for him to repay part of the benefits that he was paid in error from the Scheme. He says that the fault does not lie with him and so he should not be expected to make the repayment.
35. The Representative said that Mr C had not worked in financial services. Consequently, he could not have been expected to have identified that he was not entitled to the benefits he was paid from the Scheme.
36. Mr C had been provided with clear information which could have enabled him to realise that he was not entitled to the benefits he had been paid by the administrator of the Scheme. He had received a letter in August 1991 from BTR Pensions confirming the completion of the transfer of his benefits to Standard Life. This correspondence advised that there were no longer any benefits due to Mr C from the BTR Scheme.
37. The test for good faith in a change of position defence is a subjective one. So, it is not enough to show that Mr C possessed documents that would have alerted him to the error. It needs to be clear that, on the balance of probabilities, Mr C spotted the error and appreciated, or at least suspected, its implications.

38. From the feedback provided by the Representative, I am satisfied that Mr C is, in pensions terms, a lay person and I have kept that in mind. The message in BTR Pensions' letter of 9 August 1991 was that Mr C was no longer entitled to benefits from the BTR Scheme. I consider that this message would have been understood by a lay person.
39. It was 15 years after the transfer that Mr C was incorrectly contacted by the Scheme's administrator to arrange payment of the benefits to which he was not entitled. In the interim period the BTR Scheme had merged with another scheme to form the Scheme. While the merger may have complicated the position for Mr C, I consider it reasonable for him to have had a basic understanding of the schemes from which he was entitled to benefits. So, he had the opportunity in 2006 to question whether it was correct that he was entitled to benefits from the Scheme.
40. While I am not suggesting that Mr C behaved in a dishonest way, he has not met the good faith test. So, a change of position defence against the recovery of the overpayment is not applicable. For the same reason I find that the less common defence against repayment of estoppel also does not apply in this case. Furthermore, for the reasons identified by the Adjudicator in his Opinion, I do not consider that a contract existed between either the Trustee or PSAL and Mr C.
41. Mr C does not have a defence against the recovery of at least part of the benefits that were paid to him in error. I shall now consider how much of the benefits should be repaid. Recovery of an overpayment via repayment is subject to the Limitation Act. The Trustee is seeking to recover all payments made to Mr C in the period from 1 September 2012 to 31 August 2018.
42. However, I agree with the analysis of the Adjudicator in this respect. The period for which a repayment can be requested is the six years leading up to the date I received the Trustee's response to Mr C's complaint. The response was received by me on 25 November 2019.
43. So, Mr C can only be asked to repay so much of the repayment which relates to the period from 25 November 2013 to 31 August 2018. This latter date being the date when pension payments from the Scheme ceased.
44. The Representative said that it was not Mr C's fault that he had been paid benefits to which he was not entitled. While this may be the case, the Trustee is responsible for ensuring that members are paid the benefits to which they are entitled under the Rules. In general, it should look to recover any money paid in error, subject to any of the possible defences for recovery and the terms of the Limitation Act.
45. The Representative has questioned Mr C's ability to pay back what is due. I note that, in its letter of 12 September 2018, PSAL suggested to Mr C that he may wish to make an application to the Trustee for his case to be reviewed on the grounds of financial hardship. Furthermore, the Trustee has more recently invited Mr C to provide details of his income and outgoings so that it could assess whether he had a claim for hardship. Mr C chose not to provide this evidence.

46. Given the concerns that the Representative has expressed, I would suggest that he considers helping Mr C provide the evidence that the Trustee has requested when looking to agree a repayment plan with it.
47. Finally, I agree that the Trustee must be held accountable for the significant distress and inconvenience caused to Mr C. It should make an award in recognition of this.
48. I partly uphold Mr C's complaint.

Directions

49. Within 28 days of the date of this Determination, the Trustee shall:
 - pay Mr C £500, for the significant distress and inconvenience caused to him by the error. It shall offer Mr C the opportunity to have the award paid directly to him or offset from the part of the overpayment that is recoverable; and
 - have the overpayment re-calculated based on the net pension payments made to Mr C during the period from 25 November 2013 to 31 August 2018. This figure to be adjusted, if necessary, in respect of the above Direction. The Trustee shall arrange for contact to be made with Mr C, via the Representative, to agree a mutually acceptable repayment plan. My position is that the recovery period offered shall be at least as long as the period over which the overall overpayment occurred.

Anthony Arter

Pensions Ombudsman
14 June 2022