

Ombudsman's Determination

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| Applicant | Mr N |
| Scheme | Golley Slater Group Pension Scheme (the Scheme) |
| Respondents | Golley Slater Group Ltd (the Employer) Pi Consulting (Trustee Services) Ltd (the Trustee) |

Complaint Summary

Mr N has complained that the Trustee has wrongly reassessed his benefit entitlement, which has led to him being paid a lower pension.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against the Trustee and Employer as a contract is in place for Mr N's benefits to be paid on a years and months basis.

Detailed Determination

Material facts

1. Mr N began his employment on 1 December 1994.
2. A condition for membership of the Scheme was that employees were required to have completed one year's service before being eligible to join. In Mr N's case, this was waived by agreement of the then trustees and the Employer. Hence, Mr N was permitted to join the Scheme from when he commenced employment. This was confirmed in a letter dated 4 January 1995.
3. On 4 October 1996, Mr N was made redundant. He negotiated the settlement terms for his departure with the Employer. Mr N has said that part of this settlement involved his pension being calculated on a years and months basis, as opposed to a 'years only' basis.
4. In a letter dated 8 October 1996, the Employer outlined the redundancy terms which applied in full and final settlement of Mr N's employment. This listed four points and in addition said: "your pension options are set out in a separate letter."
5. On 17 October 1996, Mr N was sent a letter, (**the options letter**), in relation to his pension entitlement. This said:

"Further to my letter of 8 October...I am able to finalise the outstanding matters with you.

In respect of your pension you have the following options, assuming that you have opted for the deferred pension at 60 years of age which is as follows:-

a) 22 months of £40,000 = £1,200 p.a. approximately at today
60 years
= £1,800 p.a. at 60 years old

b) AVC (including interest) £6,600 gross to £12,000 at 60 years old
= 1,200 per annum"
6. On 21 October 2004, Mr N signed a retirement claim form selecting the maximum tax-free lump sum allowed and the resulting reduced pension, plus his Additional Voluntary Contributions (**AVC**) pension. Mr N says that on 11 November 2011, he received a letter from Prudential showing that he was due to receive a pension of £2,251.44, which included his AVC pension.
7. On 19 June 2013, Claremont Pension Trustees Limited (**Claremont**) was appointed as the trustee of the Scheme.
8. On 4 March 2014, Prudential wrote to Claremont saying that it had identified a potential discrepancy in how benefits had been calculated for certain members of the

Scheme. It referred to the Scheme Rules (**the Rules**) which stated that a member's pension should be calculated for each complete year of pensionable service, but said that certain members' entitlement had been calculated on a years and months basis. It said:

"Before we make any adjustments, it is possible that the benefits for all or some of these members should actually be based on years and months, because the Trustees endorsed this method of calculating Pensionable Service or exercised their discretion to pay a higher level of benefits.

I would be grateful if you could review and confirm whether this is the case for any of the members on the schedule.

In particular the one affected pensioner, [Mr N], may require special consideration because he originally left service in October 1996 having completed less than 2 years' Qualifying Service."

9. On 16 May 2014, Claremont wrote to Mr N saying that its assessment of the pensions being paid had shown that an error took place when he left pensionable service in October 1996. The calculation of Mr N's benefits had allowed for one year and ten months of pensionable service, when the correct entitlement was for only one complete year to apply. It said that Mr N's correct entitlement was an annual pension of £1,660.68; an immediate reduction in benefits was applied. It said it must also recover the amount paid in error, which totalled £6,374.20.
10. Mr N queried this and explained the agreement in place, providing a copy of the options letter.
11. On 4 November 2014, Mr N further chased the matter. He asked Claremont to reinstate the pension to the amount previously being paid.
12. On 21 November 2014, Claremont responded under stage one of its Internal Disputes Resolution Procedure (**IDRP**). It said: -
 - Although there was a facility for non-standard terms to be applied, as was the case with Mr N's pensionable service beginning on his first date of joining the Employer, no records had been found which suggested that incomplete years were to be considered as part of Mr N's pensionable service.
 - Claremont was satisfied that the correct pension was now in place.
 - Claremont was required to recover, from Mr N, the amount paid in error.
13. On 24 November 2014, Mr N responded saying Claremont had failed to take the options letter into account. This confirmed the basis of the settlement agreed when he left the company. He highlighted that the terms in this letter had been understood, as Prudential paid his benefits on this basis.

14. In a letter dated 3 December 2014, Mr N said he had no influence on how the agreement was put into effect. However, Prudential had paid this level of benefits for just under ten years, and would have done so on someone's instructions rather than of its own accord.
15. On 2 March 2015, Claremont wrote to Mr N saying Prudential had paid the Scheme an amount equal to the overpayment of pension instalments which had been made to Mr N since retirement. It said it would no longer seek to recover the overpayment from Mr N and future pension instalments would continue at what it considered to be the corrected level.
16. On 19 March 2015, Mr N forwarded the options letter to the Employer and asked it to request Claremont to reinstate his pension.
17. On 14 August 2015, Prudential wrote to Claremont saying it had reviewed new evidence which Mr N submitted along with information held on its current files. Its conclusion was that instructions were given to calculate Mr N's benefits on a years and months basis. It asked Claremont to reconsider the matter and take into account that it was not unusual for trustees of smaller schemes to implement such changes without formally documenting the decisions. It referred to a section of a 1996 memorandum, which also indicated poor record keeping. It also enclosed documents which suggested that the Employer was paying in excess of the recommended contribution rate at the time, which might have covered the cost of augmentation.
18. On 20 August 2015, Prudential sent Mr N its final response on the matter. Prudential said it accepted that Mr N had provided evidence to demonstrate that a decision had been made to award his pension on a years and months accrual. It had written to Claremont with this but its position remained unchanged. Prudential said it could not change the level of benefits it was paying to Mr T without Claremont's authorisation.
19. On 28 August 2015, Claremont wrote to Mr N to confirm that he had exhausted the IDRP.
20. In April 2016, the trustees for the Scheme changed from Claremont to the Trustee (Pi Consulting (Trustee Services) Ltd).
21. On 2 March 2017, Prudential responded to an information request made by this Office. It said the evidence which Mr N had submitted was compelling, which it had reviewed along with its own records. It provided the documents which formed the basis of its conclusions; those of significance being: -
 - A telephone note dated 4 October 1996 between Prudential and the Employer saying that Mr N was to leave service. It said "he will require leaving service options (pup TV and refund – service only amounts to 1 year and 10 months)."
 - A letter from the Employer to Prudential dated 14 October 1996 saying that it had omitted to tell Prudential that Mr N had been paying AVC's, which needed to be taken into account when his quotation was issued.

Summary of Mr N's position

22. The Employer's then Financial Director had allowed his pension to be paid on a years and months basis in accordance with Mr N's status as a senior executive and in line with the decision for the pension to start from his date of appointment.
23. The letter of 17 October 1996 was a binding contract between him and the company.
24. If it was the case that the wrong information had been given by Prudential, which was doubtful, then Prudential should provide the Employer redress for the error, rather than penalising him.
25. At his time of leaving the Employer, the Scheme was administered in-house. The Financial Director would have played a leading role in this.
26. When the redundancy terms were being agreed, the Financial Director had sought confirmation from a colleague, who was on holiday at the time. There was no mention of Prudential needing to be approached.

Summary of the Trustee's position

27. The Trustee's understanding from discussions with the Employer was that the information given to Mr N in the options letter, dated 17 October 1996, was "merely a pass through of incorrect information from Prudential and there was no intention to grant special terms." Prudential was informed by the Employer what period of service, as opposed to pensionable service, Mr N had served and asked for details of his options on this basis. Prudential confirmed that Mr N could either have a deferred pension or a refund of contributions. The deferred pension option included years and months of service; Mr N was then given this information. The then trustee had relied on information and advice from Prudential.
28. There was no written evidence to indicate that special terms were agreed or that Mr N would otherwise have served a notice period.

Summary of the Employer's position

29. The options letter was purely administrative in nature. There was no evidence of this being an agreement between the parties. The information within this would have been provided by Prudential.
30. The options letter did not imply that an agreement was made to enhance Mr N's pension entitlement.
31. The Employer had spoken with the Financial Director concerned, and he confirmed that this reflected his recollection.

Conclusions

32. When leaving employment, Mr N received two letters setting out the terms of his departure. One of these was dated 8 October 1996 and the second was the options letter.
33. The 8 October 1996 letter began by saying: “Further to our meeting today in which we agreed the following terms in respect of your redundancy...” and towards the end, said that Mr N’s pension options would be set out in a separate letter. As this letter was drafted with specific reference to the verbal agreement made, I find it unlikely that Mr N’s pension options would have been mentioned had an agreement contrary to the standard position not been reached.
34. These two letters, read together, served as a written contract between Mr N and the Employer, providing for the pension to be paid on a years and months basis.
35. In determining the construction of the wording on Mr N’s entitlement in the options letter, Lord Neuberger’s approach in the case of *Arnold v Britton*¹ is of particular relevance. Lord Neuberger outlined the following considerations when ascertaining the meaning of the words in a contract. This was: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense.
36. The options letter cited 22 months of service as the basis of Mr N’s pension entitlement; the natural and ordinary meaning of this would lead one to conclude that Mr N’s pensionable service was as set out in the letters.
37. The purpose of the clause and the Options letter was to provide Mr N with some detail on the pension, which formed part of the overall package of his redundancy. This certainty was important in confirming what Mr N and the Employer had agreed.
38. I take the view that upon reading the options letter, commercial common sense would render Mr N’s pension entitlement as being on a years and months basis.
39. In the same case, Lord Neuberger said that the subjective evidence of any party’s intentions should be disregarded, hence, I place a greater emphasis on the details of the contract than I do on the Financial Director’s recollection, which takes an entirely contrasting position.
40. In considering the contemporaneous information available, I am persuaded by the telephone note which Prudential provided, dated 4 October 1996. This stated that Mr N’s service amounted to 1 year and 10 months. The options letter combined with the

¹ *Arnold v Britton* [2015] UKSC 36

telephone note is strong evidence that the arrangement put forward by Mr N does exist.

41. Claremont had argued that its records, or lack thereof, failed to demonstrate that such an arrangement was in place, but I consider Prudential's experience of smaller schemes' record keeping a noteworthy insight. It is possible that the arrangement in question could be agreed without being substantially documented. Furthermore, the Employer, it appears, had a regular contact at Prudential, therefore, it is plausible that Prudential deemed the telephone call of 4 October 1996 as a valid instruction.
42. Although Claremont and the Trustee have not been able to find any such records, this does not negate the value of Mr N and Prudential's evidence, which is compelling.
43. Mr N has said that if his pension was to be calculated on a complete years basis, he would have worked his employer's notice period. This is not a conclusive point alone but in conjunction with all of the points set out above, supports the years and months basis argued.

Directions

44. Within 21 days of the date of this determination, I direct the Trustee to: -
 - i) Reinstate Mr N's benefits to the level paid previously, which was on the basis of 22 months of pensionable service.
 - ii) Pay the arrears owed to Mr N as a result of him receiving a lower pension following the Trustee's decision to decrease this, along with interest using the base rate for the time being quoted by reference banks.
 - iii) Pay Mr N £500 in recognition of the significant distress and inconvenience he has suffered.

Anthony Arter

Pensions Ombudsman
27 September 2017