

Ombudsman's Determination

Applicant	Mr P
Scheme	Individual Pension Plan (the Plan)
Respondent	Clerical Medical

Outcome

1. I do not uphold Mr P's complaint and no further action is required by Clerical Medical.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr P is unhappy because Clerical Medical did not follow his instruction and contract him out of the State Second Pension (**S2P**) for tax years 2008/09 to 2011/12.

Background information, including submissions from the parties

4. S2P was an earnings-related scheme which could be paid into on top of the basic state pension up until 6 April 2016. Employees who were members of an occupational pension scheme were allowed to contract out of S2P and contribute into an alternative scheme. In exchange for lower National Insurance contributions, they gave up the additional state pension.
5. If the alternative, contracted-out scheme was a defined contribution scheme, which the Plan was, then employees had to contract-out by 6 April 2012.
6. Clerical Medical has accepted that it made an administrative error. In particular, it has said that Mr P ought to have been contracted-out for the tax years 2008/09 to 2011/12, but that it made an error and consequently failed to contract him out. However, its calculations indicated that Mr P would receive more benefit from contributing towards S2P, than if he had been contributing towards the Plan for this period as a contracted-out member.
7. Prior to the complaint reaching our Office, Clerical Medical offered Mr P redress. In particular, it offered Mr P £1,626.30 for the loss of tax relief he will incur, as a result of not being able to access 25% of the relevant benefits tax free. It also offered a further £750 to recognise the lost flexibility with the relevant benefits.

8. Clerical Medical highlighted that its offer was in line with a Determination on a similar matter (reference PO-221) that was issued by our Office in 2012. As such, it believed its offer was fair.
9. Mr P does not believe Clerical Medical can confirm at this point whether he will be better off as a result of being contracted-in to S2P for the years in question. Instead, he has requested that Clerical Medical rework his pension benefits within the Plan, to reflect what his pension benefits would have been worth, had the maladministration not occurred. Clerical Medical said this would have the effect of Mr P being both contracted-in and contracted-out for the same period, and benefitting from his contributions twice. As such, it believed Mr P would be unjustly enriched, and so it did not amend its offer.
10. Mr P did not accept Clerical Medical's offer and instead raised the complaint with our Office. In doing so, he highlighted that the government has introduced Pension Freedoms and corresponding legislation since PO-221. He added that, under Pension Freedoms, there is an emphasis on individuals having more control of pension benefits from defined contribution schemes.
11. Mr P has iterated that he will not have the same level of control over his S2P benefits, as he would have had with the relevant contracted-out benefits. He has emphasised that this is due to Clerical Medical's error, and he should not have to suffer a loss because of its maladministration.
12. Since the complaint has been with our Office though, Mr P has acknowledged that he cannot benefit from the same contributions twice. Also, HMRC, has confirmed that he cannot be retrospectively contracted-out so, Mr P cannot receive a refund of the relevant National Insurance contributions and waive the corresponding S2P benefits.
13. However, Mr P believes that this should not prevent him from receiving benefits from the Plan, as though he had been contracted-out during tax years 2008/09 to 2011/12, and he has offered to pay the additional contributions into the Plan that would have been required, but for the maladministration.
14. Mr P wishes to be allowed to contribute towards the Plan retrospectively, and have his benefits under it reworked as if he had been contracted-out during tax years 2008/09 to 2011/12. This is despite of being unable to waive the relevant S2P rights and receive a refund of the corresponding National Insurance contributions.
15. Clerical Medical has considered allowing Mr P to retrospectively contribute towards the Plan, and have his pension benefits reworked within it accordingly. However, it said it would only do this if HMRC allowed Mr P to waive the corresponding S2P rights. Mr P does not believe this is reasonable and says that Clerical Medical will not be in a worse position in agreeing to his proposal.
16. In justifying its position, Clerical Medical has said that there have been Determinations issued by our Office since Pension Freedoms were introduced in 2015, which are in line with the approach taken by the Ombudsman in PO-221. In

particular, it has referenced two Determinations issued by our Office since 2016: references PO-14400 and PO-7401.

Adjudicator's Opinion

17. Mr P's complaint was considered by one of our Adjudicators who concluded that no further action was required by Clerical Medical. The Adjudicator's findings are summarised briefly below:-
- Clerical Medical has accepted that it did not contract Mr P out of S2P when it ought to have done. However, its initial offer of redress was reasonable and in line with previous Determinations issued by our Office.
 - Mr P's comments concerning Pension Freedoms were acknowledged. However, our Office's approach has remained consistent with PO-221 since the introduction of Pension Freedoms. For example, the Ombudsman has taken a similar approach in more recent cases, PO-14400 and PO-7401, as highlighted by Clerical Medical.
 - Clerical Medical also said it would have allowed Mr P to retrospectively contribute towards the Plan and recalculate his benefits, had HMRC agreed to refund the corresponding S2P contributions. This goes above and beyond that which our Office has previously required respondents to do in previous, similar cases. Clerical Medical is not responsible for HMRC's refusal to allow this.
 - Mr P believes his current proposal is reasonable. However, if he contributes towards the Plan retrospectively, as he suggests, then he will effectively have been contracted-in and contracted-out for the same period. Obviously, this is not a position that would have been permitted in practice and it would also place him in a better position as a result of the maladministration. As such, his counter-offer is not reasonable.
18. Mr P did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

Ombudsman's decision

19. There is no dispute regarding whether maladministration has occurred. Instead, the dispute concerns how the matter ought to be remedied.
20. It is unfortunate that HMRC has not agreed to retrospectively contract Mr P out of S2P for the relevant tax years. However, Clerical Medical cannot be held responsible for this decision and its response is reasonable.
21. Mr P is asserting that he should be allowed to retrospectively contribute towards the Plan for tax years 2008/09 – 2011/12. He believes that otherwise he will suffer a loss of opportunity, caused by Clerical Medical's maladministration.

PO-12110

22. However, I cannot see that Mr P has suffered a loss which is not being addressed, and so a loss of opportunity has not resulted in an injustice. In line with previous Determinations issued by this Office, the only financial loss that Mr P will suffer as a result of not being contracted-out for the relevant period, is a loss of tax relief. This has been calculated and paid to him.
23. There is a loss of flexibility, but at this stage Mr P does not know how he might use his Plan benefits. He is therefore unable to demonstrate the impact, if any, of having less of his benefits provided under the Plan with more under S2P.
24. Mr P ought to have been allowed to choose whether he was contracted-out or not, and the maladministration has effectively taken this choice away from him. However, I believe the award of £750 offered by Clerical Medical for its administrative error, is reasonable.
25. I do not agree that Mr P should be allowed to contribute towards both the Plan and S2P in respect of the same period. Historically, individuals either paid National Insurance contributions into S2P, or they contracted-out and their benefits were provided by an alternative scheme. Both options, could not occur simultaneously, an individual was either contracted-in or out, and so could not benefit as though both arrangements were in place.
26. The redress that has been awarded in previous Determinations has placed the complainants in those cases broadly back into the same position they would have been in, but for the maladministration, I see no reason to apply a different approach in Mr P's case.
27. I do not uphold Mr P's complaint.

Anthony Arter

Pensions Ombudsman
22 March 2018