

Ombudsman's Determination

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| Applicant | Mr Y |
| Scheme | Principal Civil Service Pension Scheme (PCSPS) |
| Respondents | MyCSP Cabinet Office |

Outcome

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

Complaint summary

3. Mr Y's complaint is that MyCSP and the Cabinet Office have incorrectly determined that part of the gross pay paid to him in 2014/15 was not pensionable. Mr Y says he has suffered a financial loss which is still continuing, as he received a lower tax free lump sum and pension as a result of the incorrect calculation of his final pensionable earnings. Mr Y also complains that the Cabinet Office did not adequately address the points he raised in his appeal for a stage two decision, under the PCSPS' internal dispute resolution procedure (**IDRP**).

Background information, including submissions from the parties

1. Mr Y joined the PCSPS on 5 September 1977.
2. On 19 May 2014, Mr Y's employer, the Foreign and Commonwealth Office (**FCO**) informed him that it was making him compulsorily redundant. The FCO informed Mr Y that he would receive one month's salary for each year of service, up to a maximum of six months and that as he was only required to work until 30 June 2014, he would also receive a payment in lieu of the notice period. It further confirmed that Mr Y would be immediately entitled to his pension benefits.
3. The FCO paid Mr Y the compensation on 31 July 2014.
4. On 22 August 2014, MyCSP sent Mr Y a pension benefit statement and the relevant claim forms. Based on his last day of service being 30 June 2014, MyCSP said Mr Y

had reckonable service of 36 years and 299 days. The final pensionable earnings used was £98,884 and this secured an annual pension of £45,506 and a lump sum of £136,531.11.

5. Mr Y returned the completed claim forms on 1 September 2014. However, he disputed the pensionable earnings amount and provided MyCSP with a copy of a Certificate of Earnings from the FCO. This confirmed that Mr Y's gross taxable earnings for the year 2014/15 was £117,950.83. He also submitted that the tax-free compensation payment of £30,000 that he received under the Civil Service Compensation Scheme (**CSCS**), should also be included.
6. Mr Y's pension benefit was put in payment on the basis of the figures that had been previously provided to him. However, an exchange of correspondence followed between Mr Y, MyCSP, and the FCO.
7. On 17 March 2015, in response to a query from MyCSP, the FCO confirmed that the pensionable pay figure of £98,884 was correct. It said:

“...please disregard the certificate of earnings presented [by Mr Y]. As clearly stated on the certificate this is taxable pay and not pensionable pay. It is an all inclusive figure containing salary, allowances and bonuses which are all taxed but not all pensionable and as such it does not give an accurate reflection of his pensionable pay and should not be used for pension calculations. Please instead use the pensionable pay figures which we have previously agreed with yourselves.”
8. Mr Y complained under the IDRP on 9 June 2015. The first stage decision was issued by MyCSP on 15 January 2016. MyCSP said it is the employer's responsibility to ensure that the data provided to it is correct. The FCO confirmed that the correct pensionable earnings was £98,884, despite the information on the Certificate of Earnings it issued to Mr Y. Mr Y's complaint was not upheld.
9. Mr Y appealed for a stage two decision on 13 February 2016. He said the stage one decision “did not seek to engage with the substantive question” as to whether the amount he received in excess of the £98,884 was pensionable. He explained that Rule 1.6a and Appendix 1 of the 1972 Section of the PCS Rules were the relevant legal provisions. Mr Y then provided reasons why in his submission, the whole of the £147,950.83 he received constitute salary and pensionable emoluments and requested that his pension and lump sum be recalculated using the higher pensionable earnings figure.
10. The reasons provided by Mr Y can be summarised as follows.
 - Case law has defined “emolument” as an advantage or benefit paid in addition to a salary and payments similar to the sum paid to him under section 9 of the CSCS have previously been treated as emoluments.

- Rule 1.6a refers to the word “pay” in several places as a synonym for salary and emoluments and under EU Treaty, payments similar to the CSCS payment are treated as “pay”.
 - Rule 9.2 of the CSCS says payments are to be treated as equivalent to remuneration so there’s a presumption that the payment he received forms part of “emoluments”.
 - It is not stated anywhere that sums paid under section 9 of the CSCS are non-pensionable. Therefore, the presumption must be that such payments are to be treated as pensionable, in the absence of an express provision saying otherwise. This presumption is strengthened by the Treasury’s consistent practice of specifying when and if particular payments are not pensionable.
 - If it had been intended that sums paid under section 9 of the CSCS should not be pensionable, there is an expectation that it would have been included in the paragraph 3 of Appendix 1 of the PCSPS.
 - Cabinet Office’s assertion that the onus is on him to show such payments are pensionable is untenable in light of the Treasury’s consistent practice referred to above.
 - Later pensions schemes have referred to the term “basic pay” so there is an assumption that using the word basic might more appropriately exclude certain additional sums which have been paid.
11. The second stage IDRP decision was issued on 4 July 2016. Cabinet Office said it did not agree with Mr Y’s interpretation. It said pensionable earnings was not determined by using the taxable earnings received in a specific financial year. Further, MyCSP had made numerous enquiries to the FCO to check Mr Y’s pay history and all the responses it received back were consistent – the pensionable earnings figure of £98,884 was correct. In the circumstances, MyCSP fulfilled its duty to check Mr Y’s pay and exhausted all reasonable lines of enquiry. Cabinet Office did not uphold Mr Y’s complaint and said he should pursue the matter with the FCO directly if he still disagreed with the information the FCO had provided.

Adjudicator’s Opinion

12. Mr Y’s complaint was considered by one of our Adjudicators who concluded that no further action was required by MyCSP and Cabinet Office. The Adjudicator’s findings are summarised briefly below.
- The payment made to Mr Y under the CSCS is effectively a severance payment. Such payments, by their nature, are for a ‘loss of office’ and will only be paid at the end of an employment contract. It cannot be said that such payments are made permanently, or with regularity during the course of one’s employment. Therefore, under an occupational pension scheme it would not be considered pensionable.

However, the Adjudicator did not dispute the possibility that there are individual circumstances which may be exceptional and exist to make such a payment pensionable.

- The scheme administrator, MyCSP, can only calculate a member's retirement benefits in accordance with the relevant rules, based on information it receives from the member's employer. It follows that, in the absence of an express provision, it is for the employer to determine what elements of the member's pay will be pensionable.
- The FCO confirmed to MyCSP, on a number of occasions, that Mr Y's pensionable earnings were £98,884. In its email of 17 March 2015, it expressly informed MyCSP to "disregard" the Certificate of Earnings as it "did not give an accurate reflection of his pensionable pay and should not be used for pension calculations". Consequently, the Adjudicator agreed with the Cabinet Office that MyCSP fulfilled its duty to check Mr Y's pay. In calculating Mr Y's final pension benefits using the pensionable earnings figure of £98,884, the Adjudicator did not consider that there had been maladministration by MyCSP.
- The Adjudicator considered that through the queries raised by MyCSP, the FCO would have had the opportunity to review Mr Y's employment contract and determine what payments constituted pensionable emoluments. Further, any relevant terms, which had been agreed with Mr Y prior to his compulsory redundancy, would have been highlighted at the time. The Adjudicator did not dispute Mr Y's assertion in relation to the Treasury's consistent practice of specifying when something is not pensionable. However, in the absence of an express agreement with him on his departure, the Adjudicator did not agree that his compensation payment is pensionable.
- Redundancy payments do not usually form part of pensionable earnings because there are generally no pension contributions associated with severance payments. It is a payment to compensate for loss of employment, not accrued pension rights. Or to put into context, Mr Y had not 'earned' the additional redundancy payment throughout the course of the year so it follows it cannot be treated like pensionable pay. The emoluments listed in Appendix 1 are benefits provided in exchange for the performance of duties – in the same way as a salary is paid. Mr Y's severance payment was not. The Adjudicator did not agree with Mr Y's interpretation of rule 9.2 as it provides for the amount of a payment in lieu of notice to be equivalent to the salary which would have been paid for that period; not that the payment itself should be considered equivalent to salary.
- The practical effect of Mr Y's request would be to inflate his pensionable earnings amount by almost 50%, applying it to his entire reckonable service of over 36 years and providing him pension benefits on that basis. The Adjudicator did not consider that the compensation payment could be viewed as "pay" or "salary"

which is pensionable, for the purposes of the actual past service accrued by Mr Y in the PCSPS, prior to him being made redundant.

- It was the Adjudicator's view that MyCSP (and Cabinet Office) had followed the rules and paid Mr Y the correct pension benefits based on pensionable earnings notified by the FCO. If Mr Y disputes this, he can raise this issue with his former employer.

13. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr Y for completeness.

14. Mr Y disagreed with the Opinion for the following reasons.

- It failed to deal with his alternative submission that the actions of FCO and Cabinet Office constitute maladministration. In particular, Cabinet Office failed to address his arguments concerning whether sums paid under the CSCS can be pensionable; the Opinion also failed to address this.
- He remains of the view that the compensation payment made under the CSCS is pensionable.
- After not disputing the Treasury's consistent practice of specifying when a payment is not pensionable, the Adjudicator failed to follow this logic. The general statements made about the nature of severance payments and redundancy payments are not relevant to the interpretation of the PCSPS, or applicable in this particular context of the Civil Service.
- The provisions of the PCSPS have to be read in their particular context, namely, in the light of the consistent practice referred to above, which the Adjudicator did not dispute, and in light of the fact that there is no provision stating that sums paid under the CSCS are not pensionable.
- No authority was provided for the assertion that there is a requirement for an "express agreement" of any kind, and this view is clearly wrong.
- To clarify, his position is that rule 9.2 of the CSCS makes it clear that there is a connection between such payments and the officer's salary, which in turn suggests that such payments are pensionable under the PCSPS. His view was not that such payments are to be considered salary.
- Taking all the above into consideration, the conclusion must therefore be that compensation payment paid to him should be pensionable.

Ombudsman's decision

15. I have noted Mr Y's additional comments. However, I do not agree with his position.
16. In determining the benefits that are payable on retirement and following redundancy, it is the rules of the PCSPS and the CSCS that are applicable. Both are statutory schemes and MyCSP do not have the discretion to vary the application of the provisions of the rules.
17. Rules 1.6a and Appendix 1 do not include compensation payments made under the CSCS in the definition of pensionable earnings, or an explanation of pensionable and non-pensionable emoluments.
18. I agree with the "general statements" made by the Adjudicator in relation to the usual nature of severance and redundancy payments. Further, I agree with the Adjudicator's findings in relation to Mr Y's complaint. I do not consider that the relevant rules need to be considered in light of a practice that Mr Y says is long-standing, and established. They are clear in their own right and have been correctly applied by MyCSP.
19. I will now address Mr Y's submission in relation to the Cabinet Office's IDRP stage two decision dated 4 July 2016.
20. I consider that the Cabinet Office gave due consideration to the points raised by Mr Y under stage 2 of the IDRP. I am satisfied that the requirements of section 50 of the Pensions Act 1995 were followed in relation to his complaint and I agree with the Cabinet Office conclusions. I do not find that there has been any maladministration on the part of FCO or the Cabinet Office.
21. Therefore, I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman

6 March 2017

Appendix

Rule 9.2 of the CSCS

“Where a civil servant who is a servant of the Crown is dismissed without notice in circumstances where, in accordance with the notice provisions of the Civil Service Management Code, notice would normally in practice be given, he will receive a payment equivalent to the remuneration to which he would have been entitled, if he had been given the notice normally in practice be given by his department (referred to as “the notice period”)...”

PCSPS 1972 Section – Section 1 Definitions

“1.6a Subject to rules 1.6aa, 1.6b and 2.33(iv), "pensionable earnings " means salary (or wages), including London weighting where appropriate, and pensionable emoluments in whichever of the last three years of reckonable service gives the highest figure (see rule 1.7).”

PCSPS 1972 Section – Appendix 1 Pensionable Emoluments

1. As a general rule only permanent emoluments are pensionable. It is not possible to draw up an exhaustive list of pensionable emoluments, since whether or not an emolument is pensionable often depends on individual circumstances. The following paragraphs list the main emoluments which are regarded as pensionable or non-pensionable.

2. The following emoluments are pensionable:

- (i) Substitution pay or deputising allowance.
- (ii) Sunday duty pay.
- (iii) Night duty and shift duty allowances for work performed in the course of normal duty.
- (iv) Additional emoluments paid for extra responsibility and granted on a permanent basis, eg:
 - (a) allowances in lieu of promotion;
 - (b) private secretaries' allowances;
 - (c) typing grade allowances;
 - (d) allowances for supervision;
 - (e) allowances for performing the duties of deputy to the head of a branch.

(v) Free rations, free laundry and uniforms which are expressly provided on a pensionable basis. (The pensionable value of such uniforms is taken to be 2% of salary, excluding emoluments.)

(vi) Free official residences or quarters, fuel and light, or allowances in lieu of these, granted to civil servants stationed in the United Kingdom (unless they are expressly granted on a non-pensionable basis). But:

(a) the pensionable value of a free official residence or quarters (or of cash allowances in lieu of these) may not exceed one-sixth of pensionable earnings;

(b) the pensionable value of all emoluments under this sub-paragraph may not exceed one-third of pensionable earnings.

(vii) Free official residences or quarters abroad are pensionable only if the grade in question or a corresponding grade is employed in the United Kingdom, and if the employee in question would be entitled to similar emoluments if he were serving in such a grade in the United Kingdom.

(viii) Recruitment and retention allowance 1.

(ix) Non-consolidated pay schemes designated in whole or in part as pensionable by the Minister.

3. The following emoluments are not pensionable:

(i) Gratuities.

(ii) Allowances intended to meet special expenses (eg subsistence allowances, cost of living allowances and other foreign service allowances).

(iii) Fluctuating emoluments including overtime pay and bonus payments other than those designated as pensionable pursuant to paragraph 2 (ix) above (and see paragraph 5).

(iv) Other payments or allowances for casual or intermittent duties.

(v) Recruitment and retention allowance 2.

(vi) Free uniforms which are expressly provided on a non-pensionable basis.

4. Where there are special circumstances the Minister may agree to count as pensionable an emolument which is normally non-pensionable.

5. Where authorised by the Minister, staff appointed before certain dates have reserved rights to count some non-pensionable emoluments as pensionable. In particular, certain staff in post on 1 March 1965 may count overtime pay as pensionable if it is drawn continuously and regularly and if they remain in a grade or post in which overtime pay was pensionable on that date.