

Ombudsman's Determination

Applicant	Mr E
Scheme	Civil Service Injury Benefit Scheme (CSIBS)
Respondents	The Cabinet Office (CO), MyCSP

Outcome

1. Mr E's complaint is upheld and to put matters right the CO should cease the deduction of Employment Support Allowance (**ESA**) from his Injury Pension and refund to him all ESA deductions that have been made to date, with interest.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint is that MyCSP has been deducting an amount equal to his ESA benefit payments from his Injury Pension.

Background information, including submissions from the parties

4. Mr E joined the Civil Service on 20 January 1992. He took ill-health retirement on 11 December 1999 and was awarded an Injury Pension under the CSIBS.
5. MyCSP wrote to Mr E on 26 November 2015, enclosing a form which required him to indicate whether he was receiving Incapacity Benefit/ ESA.
6. On 1 December 2015, Mr E replied that he had ceased receiving Incapacity Benefit in June 2013, and that he was now in receipt of ESA. In response, MyCSP explained that an amount equal to his ESA benefit payments would have to be deducted from his Injury Pension.
7. Mr E wrote to MyCSP on 6 January 2016, requesting evidence that the rules governing the CSIBS permitted it to offset ESA from his Injury Pension.

8. MyCSP accepted that the CSIBS rules do not say ESA will be deducted from an Injury Pension award. However, it pointed out that they do state that Incapacity Benefit may be offset against such an award. Since ESA replaced Incapacity Benefit, MyCSP considered that the payments Mr E received in respect of that benefit were deductible from his Injury Pension.
9. Mr E submitted a complaint to MyCSP on 12 April 2016, in accordance with stage 1 of the internal dispute resolution procedure (**IDRP**). He argued that, since the CSIBS is a statutory scheme, MyCSP had no discretion to vary the application of the rules so that ESA was substituted for Incapacity Benefit.
10. On 10 June 2016, MyCSP responded that the CSIBS rules do not make any reference to ESA because they were written before that benefit replaced Incapacity Benefit. MyCSP reasoned that ESA served the same purpose as Incapacity Benefit and, as a result, any payments of that benefit had to be deducted from Mr E's Injury Pension.
11. Mr E submitted a stage 2 IDRP complaint to the CO on 13 June 2016. He maintained that, since the CSIBS rules did not provide for the deduction of ESA from his Injury Pension, MyCSP was not entitled to reduce his pension. In support of his argument, Mr E made a comparison with the Police Pension Scheme (**PPS**). It had been decided that ESA could not be offset against an Injury Pension until the Police (Injury Benefit) Regulations 2006 (**the 2006 Regulations**) had been amended so they permitted deductions of that benefit.
12. On 21 September 2016, the CO responded that the provisions of the 2006 Regulations and the CSIBS rules differ substantively. The CO explained that Schedule 3 of the 2006 Regulations says any incapacity benefit mentioned in section 30A of the Social Security Contributions and Benefits Act 1992 (**the Act**) may be deducted from an Injury Pension. Section 30A of the Act referred to Incapacity Benefit, but did not mention ESA. As a result, it was reasonable to conclude that police services were not entitled to offset ESA against a claimant's Injury Pension.
13. The CO noted that, on the other hand, rule 1.8(iii) of the CSIBS mentions Incapacity Benefit, but does not define the term. The CO submitted that it is therefore reasonable to read the reference to Incapacity Benefit in this rule as meaning any benefit for incapacity. Since ESA is such a benefit, the CO reasoned that it is deductible from Mr E's Injury Pension. A relevant extract from the CSIBS rules is provided in Appendix 1 and a relevant extract from the 2006 Regulations is provided in Appendix 2.

Adjudicator's Opinion

14. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by MyCSP. The Adjudicator's findings are summarised briefly below:-

- Rule 1.8(iii) of the CSIBS provides that Incapacity Benefit, as a distinct allowance, may be deducted from an Injury Pension. However, it does not say that any state benefit paid in relation to incapacity may be deducted from such an award.
 - Rule 1.8(iii) of the CSIBS and Section 3 of the 2006 Regulations do not differ substantively. Neither of them permit replacements for Incapacity Benefit to be offset against an Injury Pension.
15. The CO did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The CO provided its 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 the CO for completeness. In summary, these are:-
- Schedule 3 of the 2006 Regulations provided that only benefits defined in section 30A of the Act may be offset against an Injury Pension. On the other hand, the CSIBS rules simply say that "industrial disablement benefit, sickness benefit, invalidity pension or incapacity benefit" may be deducted from an Injury Pension. The CO submitted that the absence of any further definition of "incapacity benefit" under the CSIBS rules means that the term should be taken to mean any benefit for incapacity, rather than a particular incapacity benefit.
 - The intention of rule 1.8(iii) of the CSIBS is to ensure that a claimant does not receive a state benefit for their qualifying injury alongside their Injury Pension, since this would effectively constitute a duplicate payment.
 - The CO argued that rule 1.8(iii) of the CSIBS strongly suggests that MyCSP is permitted to offset any benefit awarded for incapacity from an Injury Pension. MyCSP submits that, due to this, Parliament's intention should be given significant weight when assessing the merits of Mr E's complaint.

Ombudsman's decision

16. I agree that the drafting of CSIBS is different to the drafting of the 2006 Regulations and it is the construction of the CSIBS rules which is relevant to this complaint. In my view those rules look for specific benefits and ESA is not included among them.
17. The Welfare Reform Act 2007 (the Act) introduced ESA, a benefit designed to give financial support to people who have difficulty finding a job because of a long-term illness or disability. The Act makes no mention of ESA forming a replacement for what was previously known as incapacity benefit, nor does the Act stipulate that ESA should supplant any previous references to incapacity benefit.
18. The CSIBS rules came into force in 2002; six years before ESA was introduced. Accordingly, ESA is not included in rule 1.8(iii) of the CSIBS, which lists the specific benefits that may be offset against an Injury Pension; those are any of the national insurance benefits specified in rule 1.8(iii).

19. I do not agree with the CO's argument that rule 1.8(iii) strongly suggests MyCSP is permitted to deduct any benefit for incapacity from an Injury Pension. The wording of rule 1.8(iii) does not look forward to unknown future conditions of entitlement to similar benefits. It does not say "any benefit for incapacity" or "any replacement for incapacity benefit" is deductible from such a pension. The wording is in my view designed to capture only the particular benefits specified, which were in existence at the time when rule 1.8(iii) was drafted. As such, I conclude that the rule does not permit MyCSP to offset ESA from Mr E's Injury Pension.
20. I do not consider that it can reasonably be claimed that the meaning of this rule is unclear. Accordingly, the question of Parliament's intention when it drafted the CSIBS rules does not arise as far as determining the outcome of Mr E's complaint is concerned. MyCSP cannot ignore what the legislation says.
21. Therefore, I uphold Mr E's complaint.

Directions

22. In the July 2017 payroll, MyCSP will cease the deduction of ESA from Mr E's Injury Pension.
23. In the August 2017 payroll, MyCSP will pay Mr E the total amount of ESA deducted from his Injury Pension, plus simple interest at the rate for the time being declared by the reference banks from the date each deduction was made to the date of payment to Mr E.

Karen Johnston

Deputy Pensions Ombudsman
20 July 2017

Appendix 1

The Civil Service Injury Benefit Scheme Rules

24. Rule 1.6 provides:-

“Subject to the provisions of this part, any person to whom this part of this scheme applies whose earning capacity is impaired because of injury and:

whose service ends before the pension age and who does not fall within paragraph (ii) below, may be paid an annual allowance and lump sum ...

25. Rule 1.7 provides:-

“Subject to rule 1.9a, the annual allowance under rule 1.6 will be the amount which when added to the benefits specified below, will provide an income of not less than the guaranteed minimum ... and appropriate to the circumstances of the case.

The benefits to be taken into account are:

any occupational pension payable to him out of public funds or for which all or part of the contributions are so payable

any of the national insurance benefits specified in rule 1.8(iii) which are payable to him”.

26. Rule 1.8 says:-

“The pensions and benefits referred to in rule 1.7 are taken to be of the following amounts as at (as the case may be):

The date of retirement, or ...

(iii) the annuity value or the annual value, as appropriate, of any rights which have accrued or probably will accrue from the injury by way of industrial disablement benefit, sickness benefit, invalidity pension or incapacity benefit; except that no account will be taken of any increase of the disablement pension payable under section 104 of the Social Security Contributions and Benefits Act 1992 (increase of a disablement pension where constant attendance is needed) or under section 105 of the Social Security Contributions and Benefits Act 1992 (increase of disablement pension in cases of exceptionally severe disablement); and no account will be taken of so much of an unemployability supplement as represents an increase payable under paragraph 3 of schedule 7 of the Social Security Contributions and Benefits Act 1972 (early onset of incapacity for work)”.