

Ombudsman's Determination

Applicant	Mr Y
Scheme	B&CE Lump Sum Retirement Benefit Scheme (the Scheme)
Respondents	B&CE Financial Services Limited (the Trustees)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by B&CE Financial Services Limited.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr Y has complained because the Trustees of the Scheme have not agreed to pay him a lump sum benefit from the Scheme.

Background information, including submissions from the parties

4. Mr Y was employed as a construction worker when he joined the Scheme in 1982. Shortly after joining, Mr Y was blacklisted by several construction companies and this prevented him from obtaining work for several years. In 2016, Mr Y, along with other employees, received a financial settlement from the construction companies who had admitted to blacklisting them.
5. In 2016 Mr Y applied to the Scheme, as he believed he was entitled to a lump sum payment. The Trustees informed him that, he did not have the required amount of stamps to be entitled to a lump sum. He needed 80 stamps but only had 78.
6. Mr Y responded to the Trustees and explained that he had not obtained enough stamps as he was unable to work due to the blacklisting. He said if he had not been blacklisted he would have obtained a sufficient number of stamps. Consequently, he made a complaint to the Scheme through stages 1 and 2 of its internal disputes resolution procedure (IDRP).
7. The Trustees responded to Mr Y but did not uphold his complaint at either stage of its IDRP. In summary, it explained that Mr Y needed 80 stamps to qualify for the lump sum benefit and said that although the Scheme benefits are for workers within the

construction industry, the Scheme is not owned by the construction industry employers. Therefore, any potential loss should have been considered in the action against the employers and included in the settlement.

8. Dissatisfied with the Trustees' response, Mr Y referred his complaint to this service.

9. In response to Mr Y's complaint, the Trustees have said:

- they have acted correctly in terms of their fiduciary duty to Scheme members and to legislative requirements;
- Mr Y did not accrue enough reckonable weeks under the Scheme Rules to be entitled to a lump sum retirement benefit from the Scheme;
- they considered Mr Y's circumstances but decided they could not use their discretion to pay him the lump sum benefit;
- not all employers within the construction industry participated in the Scheme; the individual had to be working for an employer participating in the Scheme and it was those participating employers who paid the contributions that funded the Scheme;
- they were not certain that Mr Y would have been employed by an employer participating in the Scheme...and that he would have earned additional weeks of Reckonable Service;
- as the outcome of the Construction Industry Blacklist litigation had been in Mr Y's favour, the settlement should have fully considered the loss that Mr Y suffered as a result of the blacklisting; and
- the Scheme is separate from the construction industry employers involved in that litigation.

10. Mr Y said:

- he did not receive any compensation for missing stamps as no such claim was made in court. The court case was based on blacklisting and not stamps;
- he thinks the Scheme Rules are invalid and should be amended;
- he was forced to accept the settlement without a right to argue his case; and
- he thinks the Scheme Rules are invalid and should be amended.

Adjudicator's Opinion

11. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised briefly below.
12. The Ombudsman cannot change the rules of a scheme, nor can he set aside a discretionary decision made by scheme trustees unless the trustees have:
 - taken irrelevant considerations into account;
 - failed to take any relevant considerations into account;
 - committed some other procedural impropriety; and
 - acted in such a way that no reasonable body of trustees, properly directing themselves, could act.
13. There was no dispute that Mr Y was part of the construction employer blacklisting that resulted in him being unable to work for several years. While the adjudicator appreciated Mr Y's frustration, she did not consider the Trustees were responsible for the actions of the construction companies. She considered the Trustees' role is to ensure the Scheme is administered in accordance with the rules that govern it.
14. Rule 22 provides details of the lump sum benefits and states:

"Lump Sum Retirement Benefits will be payable only upon an operative reaching age 65 years or upon his early retirement in the circumstances set out in Clause 22.2..."
15. The Scheme's Appendix sets out how the lump sum retirement benefit should be calculated. It says:

"Lump Sum Retirement Benefit" means $A \times B$

"A is Reckonable Service SUBJECT TO Reckonable Service being equal to or greater than 80 Reckonable Weeks (unless the Trustees in its discretion decides to accept less than 80 Reckonable Weeks); and

B is the Retirement Benefit Rate applicable at Retirement Benefit Date or if earlier the date of death."
16. The Trustees have confirmed that they considered Mr Y's circumstances to decide whether or not he should be paid the lump sum benefit, despite not having the required stamps. Unfortunately, on this occasion, they did not consider they could do so. This is because "it was agreed that there was no way to establish whether Mr [Y] would have gained the qualifying service had he not been blacklisted. Therefore, to deviate from the 80 week rule would set a precedent which would open the Scheme to unknown liabilities."

17. In the Adjudicator's Opinion, the Trustees appropriately considered Mr Y's circumstances before concluding he was not entitled to the lump sum benefit. Therefore, the Adjudicator did not consider the Ombudsman would set aside their discretionary decision and direct them to pay Mr Y a lump sum benefit.
18. The Adjudicator appreciated this situation has been quite upsetting for Mr Y. However, in her opinion, the Trustees were not responsible for Mr Y having insufficient stamps. Mr Y has said he accepted a financial settlement from the employers who admitted blacklisting him. In her view, it was reasonable for the Trustees to consider that the accepted settlement would or should have included payment for lost pension benefits.
19. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by Mr Y for completeness.

Ombudsman's decision

20. I appreciate that this situation is frustrating for Mr Y as he believes he would have achieved sufficient stamps to qualify for the lump sum benefit, had he not been blacklisted, as he would have continued to work for the companies that were part of the Scheme. However, the Trustees were not responsible for the blacklisting, it was the construction employers. Therefore, I consider it was reasonable for the Trustees to believe that the issue of stamps would have been included in any settlement accepted by the blacklisted employees.
21. The role of the Trustees is to administer the Scheme in accordance with its Rules. In my view, the Trustees appropriately considered Mr Y's circumstances prior to deciding that they could not exercise their discretion to award him a lump sum benefit. Consequently, I will not direct them to reconsider and pay Mr Y a lump sum.
22. Therefore, I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
6 September 2017