PO-15804

Ombudsman's Determination

Applicant	Mrs T
Scheme	ACAL Group Employee Pension Scheme (**the Scheme**)
Respondents	The Trustees of the Scheme (**the Trustees**)

Outcome

1. I do not uphold Mrs T's complaint and no further action is required by the Trustees.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T has complained that the Trustees of the Scheme failed to collect the Profit Share Contribution that should have been paid and disputes their interpretation of the amount required.

Background information, including submissions from the parties

4. Mrs T worked for an electronics company which was acquired by Acal plc (**Acal**) and was a member of the Sedgemoor Group Pension Scheme (**the Sedgemoor Scheme**), a defined benefit scheme. In March 2000 Acal closed the Sedgemoor defined benefit scheme and members were offered membership of the Scheme, a defined contribution arrangement.

5. In addition to the normal contributions Acal said that members would receive a Profit Share Contribution (**PSC**). The PSC was described in an Announcement from the then Chairman of the Scheme dated 6 March 2000 and said:

   "You are invited to join the Acal Group Employee Pension Scheme as from 6 April 2000. A booklet is enclosed. However since its publication in 1996 we have made a number of benefit improvements and these are brought to your attention below. Please read this announcement in conjunction with the booklet, a revised version will be issued later this year…

   …

   Contribution Range

In addition we have extended the regular contribution range referred to on page 11.

What you pay	What we pay (x contributory salary
%	%
2.5	3.5
3.0	4.0
3.5	4.5
4.0	5.0
4.5	5.5
5.0	6.0
5.5	6.5

If you elect to pay 5.5% of contributory salary, the total going into your personal account will now be 12%. You may pay more than 5.5% of contributory salary if you wish but this will not be matched by a further company contribution.

Profit Share Contribution

Finally we have agreed to introduce a further company contribution which will not be guaranteed and depend on future profitability.

If the operating profit before tax of the participating companies less head office costs increases by more than 10% from the highest previously reported profit, an additional company contribution will be made equivalent to 10% of the increase in profit above 10% up to a maximum level of 40%. The base year for profitability is 1999/2000. The additional contribution assuming the maximum qualifying profit of 40% will be calculated thus:

$$\text{Profit } 40\% = \frac{40-10}{10} = 3\%$$

Having established the level of profit share contribution it will be applied to your account in proportion to your regular contribution paid in the previous scheme year i.e. if you pay a regular contribution of 4.5% and the profit share contribution is 3% as shown above, your profit share contribution will be:

$$\frac{4.5}{5.5} \times 3\% = 2.45\%$$”

6. Mrs T says that in preparation for her retirement in 2016 her financial adviser asked Acal for statements of her pensions and it was at this point she realised that the PSC had not been paid. The financial adviser also assisted Mrs T in applying for Lifetime Allowance protection during the 2015/16 tax year.

7. Mrs T contacted the Trustees of the Scheme regarding the non-payment of the PSC. On 15 April 2016 the Trustees wrote to Mrs T enclosing a letter from the Scheme's solicitors, Pitmans, setting out their interpretation of the PSC. Pitmans confirmed that the Trustees had not been aware of the PSC prior to Mrs T's enquiry and noted that, with hindsight, the description in the Announcement could have been much clearer. In summary the conclusions reached were:

   - Members who received the Announcement do have a right to receive PSC if the criteria were satisfied.
   - The profits of all the participating companies in the Scheme should be aggregated for the purposes of determining if a PSC is payable.
   - The Announcement sets out that the maximum additional PSC is 3%. But it then goes on to say that the proportion of the 3% that any member would receive would be in proportion to their regular contribution paid in the previous Scheme year. An example is given of a member who paid a 4.5% regular contribution with pro-rating applied with reference to the 5.5% level of regular contribution which attracted the maximum employer contribution.
   - Mrs T paid regular contributions greater than 5.5% but the maximum PSC should be limited to 3%.

8. Mrs T did not accept the conclusions reached and via her solicitors argued that the PSC should be based on the profitability of the electronics company she worked for and that she paid regular contributions of 15%.

9. On 15 June 2016 Pitmans responded on behalf of the Trustees and confirmed that they stood by the advice provided in their letter of 15 April 2016. Mrs T did not accept the Trustees response and invoked the Scheme's internal dispute resolution procedure (**IDRP**) on 7 October 2016. The Trustees replied on 9 January 2017 and confirmed that it was their interpretation that the profits of all the participating companies should be aggregated to determine the PSC and that the maximum PSC contribution was 3%. The Trustees also enclosed a summary of the PSC due to Mrs T based on a number of assumptions and without any deduction for head office costs in the PSC formula.

10. Mrs T did not accept the Trustees' IDRP response and brought her complaint to this office.

Adjudicator's Opinion

11. Mrs T'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 Trustees have agreed that Mrs T is due a PSC, however, Mrs T is dissatisfied with the conclusions reached by the Trustees and argues that the PSC should be based on the electronics company's profitability and a different interpretation of the contribution percentage due.

13. Mrs T has referred to a meeting that was held on 7 March 2000 to explain the change and her notes and recollections of what was said at that meeting to argue her case. The Adjudicator considered that given the length of time that has elapsed since that meeting it is impossible to say with any certainty what was said and it would be inequitable to base a decision on that meeting. Therefore, the only reliable source for the intent behind the PSC is to look at the Announcement issued on 6 March 2000.

14. The Announcement was issued not only to members of the Sedgemoor Scheme but also to members of two other pension schemes (Radiatron and Townsend Coates) presumably as part of a bigger reorganisation of pension within the Acal group.

15. Looking firstly at the contribution issue, it says that the regular contribution range has been extended up to a maximum member regular contribution of 5.5% and for which the employer would pay 6.5%. Mrs T was paying a contribution of 15% of her contributory salary but the Adjudicator did not consider that this was her regular contribution. She was paying a regular contribution of 5.5% and an additional voluntary contribution of 9.5%. Although Mrs T may argue that she paid this additional voluntary contribution on a regular basis, she could at any time reduce this but she would need to continue to pay the 5.5% regularly to get the employer contribution of 6.5%.

16. Turning next to the contribution rate due under the PSC, Mrs T argues that as her regular contribution was 15% then the PSC for her, if the maximum profitability were achieved, should be:

$$\frac{15.0}{5.5} \times 3\% = 8.18\%$$

But the Adjudicator considered that this argument was illogical as the Announcement quite clearly stated that the maximum additional contribution, if maximum profitability was achieved, was 3%. The maximum PSC contribution would then be pro-rated if the member was not paying the maximum regular contribution of 5.5%. The Adjudicator did not consider, on the balance of probabilities, that there was any intent by Acal to pay a PSC of more than 3%.

17. On the question of which company or companies the PSC should be based, the Announcement says:

> "If the operating profit before tax of the participating companies less head office costs increases by more than 10% from the highest previously reported profit, an additional company contribution will be made equivalent to 10% of the increase in profit above 10% up to a maximum level of 40%."

The Adjudicator considered that as the Announcement was addressed to members of three different pension schemes then it would be logical for the PSC to be at least based on the profitability of the companies they were employed by. But the term "participating companies" is also a recognised pension term and means all of the companies that participate in the Scheme. Therefore it was not unreasonable for the Trustees to have based the PSC on the aggregated profits of all the participating companies in the Scheme.

18. Acal and the Trustees have offered to pay the PSC to Mrs T as she has transferred her benefits out of the Scheme and filed for lifetime allowance protection. The PSC terms offered by Acal seem reasonable and in addition Acal have offered Mrs T £500 for any distress and inconvenience she has experienced whilst this matter has been ongoing. The Adjudicator considered this was a reasonable compromise and Mrs T should contact Acal direct if she wished to take up this offer.

19. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T has provided her 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 Mrs T for completeness.

20. Mrs T says that the Announcement was badly written and this has mislead the Adjudicator. Mrs T has referred to the Scheme booklet she received which says that members can choose to pay regular contributions up to a maximum of 15% and that once a member has chosen a level of contribution they must pay these for at least 12months. She did pay regular contributions of 15% and as the PSC was calculated on an annual basis so the PSC should be calculated on an annual basis.

Ombudsman's decision

21. Mrs T argues that as she paid regular contributions of 15% then, in effect this should be taken into account when calculating the PSC. Although I acknowledge that the Scheme booklet does make reference to regular contributions of up to 15%, the booklet also makes it clear that those members paying contributions between 5.5% and 15% will still only receive an employer contribution of 6.5%. I therefore disagree that the level of Mrs T's contributions at 15% should somehow lead to a higher level of PSC.

22. The description of the PSC is quite clear and from this it can be deduced that it is a three stage process as follows:-

- firstly the company, Acal, decides if a PSC is due;
- secondly, Acal determines the PSC due, that is, whether it is the maximum of 3% or a lower amount;
- thirdly, Acal pays the PSC (that is 3% or a lower amount if the maximum contribution is not achieved) for all those employees paying contributions of

5.5% or more, and reduces the PSC for those paying contributions of less than 5.5%.

There is no scaling up the contribution for those employees paying more than 5.5%. To do so would be contrary to the Announcement.

23. Acal have offered to pay Mrs T the PSC direct to her on terms which seem reasonable and in addition Acal have offered Mrs T £500 for any distress and inconvenience she has experienced whilst this matter has been ongoing. Mrs T should contact Acal direct if she wishes to take up this offer.

24. I do not uphold Mrs T’s complaint.

Karen Johnston

Deputy Pensions Ombudsman
1 September 2017