

Ombudsman's Determination

Applicant	Mr N
Scheme	Police Pension Scheme (the Scheme)
Respondents	Capita Devon and Cornwall Police (D&CP)

Complaint Summary

1. Mr N's complaint is that Capita and D&CP led him to believe that he was purchasing additional service which would bring forward his retirement date to an earlier date of 4 July 2017.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against Capita only because it misinformed Mr N about the way the purchase would operate. Mr N relied on this misinformation to make the decision to buy added years in the Scheme with a lump sum payment.

Detailed Determination

Material facts

3. The Scheme is a final salary arrangement, meaning that benefits are based on the amount of service accrued and salary. For every year of service, the Scheme provides $1/60^{\text{th}}$ of the members' pay. To calculate this, total pensionable service is divided by 60 then multiplied by average pensionable pay. Once members have achieved 20 years' service, pensionable service is accelerated and doubled for every year thereafter. Members' benefits are capped at a maximum of $40/60^{\text{ths}}$ multiplied by average pensionable pay.
4. Members who achieve less than 40 years' service had scope to purchase additional service. The additional service would then increase the pensionable service up to the maximum $40/60^{\text{th}}$ at the date of normal retirement. The Scheme also allowed members to retire once they had achieved 25 years' service, which meant that some members could retire before reaching the Scheme's normal retirement age of 55. A further

explanation on purchasing “added years” can be found in the Scheme member’s guide (see Appendix I).

5. Mr N joined the Scheme in 1999 and transferred in service from his previous employment. In 2012, he contacted the then administrators, D&CP, to enquire about purchasing additional service. Mr N was sent a letter dated 21 June 2012 explaining the contribution rate he would need to pay in addition to his regular contributions. The letter also explained that the Scheme’s normal retirement age was 55 and:

“At normal retirement age you will have 27 years 261 days police service (after deducting the 75 days break in service for unpaid leave) and to calculate your pension benefits, service over 20 years doubles. Therefore, at normal retirement age your pension will be calculated as $35.4301/60 \times$ Average Pensionable Pay. As the maximum pension permissible is $40/60 \times$ Average Pensionable Pay you will be able to purchase some service to increase your pension.”

6. Mr N elected to pay additional contributions and this was confirmed in a letter dated 26 September 2012. The letter stated that the additional contributions would purchase “additional pensionable service of 340 days if you retire at age 55”. It explained that retirement at an earlier date would result in prorating of the additional pensionable service.
7. On 20 May 2013, Mr N wrote to the new administrators, Capita, asking for details/advice regarding his pension. He told them he was already purchasing additional service and said:

“as I understand it I am therefore eligible to buy a year more?

Can you please advise me at what point over the age of 50 I will currently reach 25 years pensionable service.

Also the cost of 1 additional year.”

8. On 27 June 2013, Capita sent Mr N an email telling him he was unable to purchase additional service and he would reach 25 years’ service on 18 October 2018. Mr N challenged that response by return email and asked whether his existing added years’ contribution had been considered in the calculation. Capita replied, also by return email, that, including his maximum added years purchased of 340 days, Mr N will have 25 years’ service on 13 November 2017.
9. On 29 September 2013, Mr N wrote to Capita and said that it was his intention to retire as soon as he reached 25 years of “pensionable service” at which point he would be over 50. He set out his full service history and explained his added years’ contract. He

enclosed copies of the information which he had received by email, which he called “slightly misleading and inaccurate” and asked:

“Can I please request formal notification in writing of the following points:

- (1) The date at which I will be able to retire with 25 years pensionable service, taking into account my break in service and additional contributions – assuming no further breaks or change of circumstances
- (2) - the cost of purchasing an additional year’s service and the impact that would have on my retirement date from (1) above.”

10. On 17 December 2013, Capita replied:

“You reach your 25 pensionable date on 31 May 2018, this consists of 24 years 150 days pensionable service and an additional 215 days from your added years contract (this will be pro rated) ... we are unsure if you can proceed with buying an additional years service and are currently investigating this for you.”

11. On 22 May 2014, Mr N sent an email acknowledging a call from Capita about the cost of purchasing an additional year. In it he quoted the email above and asked; “can you please provide me with an updated date of when 25 years pensionable service date would be reached and what pension would actually be due on that date (obviously at today’s pay scales).”

12. On 23 May 2014, Capita wrote to Mr N stating that it had received confirmation that a lump sum could be used to purchase additional service (£9,899.63) and asked him to confirm in writing if he would like to proceed with this option. Mr N was also provided with an estimate of benefits should he retire on 4 July 2017; “Please be aware that this would be the date you reach 25 years’ service if you were to purchase an additional year by way of lump sum”.

13. On 16 July 2014, Mr N wrote to Capita saying that he had emailed but received no reply. He continued:

“I would like to therefore confirm in writing, that I wish to purchase an additional year’s pension ... Please can you advise me the procedure in which to facilitate this matter?”

My understanding is that on completion of this purchase, I would be able to retire on 04/07/2017 with 25 years pensionable service.”

14. On 2 September 2014, Capita emailed Mr N an option form and told him to sign it and send it with a cheque if he wished to proceed. The form said; “I wish to make a lump

sum payment of £9,899.63 which I understand will buy me one additional year's service. I understand that the decision to buy benefits is irrevocable."

15. On 24 September 2014, Mr N wrote to Capita with a cheque for the lump sum payment. He said; "Cashing this cheque is authorised only to allow completion of the purchase of an additional year's pension allowing me an earliest retirement date of 04/07/2017 with 25 years pensionable service." Capita replied the next day and confirmed that the payment "has bought you one year additional service into your pension benefits". No mention was made of the retirement date of 4 July 2017.
16. On 6 July 2016, Mr N wrote to Capita telling it he would reach 25 years' service on 4 July 2017 and intended to retire on or around that date. He requested a pension forecast.
17. On 26 July 2016, Capita sent Mr N an estimate of benefits based on a retirement date of 1 January 2019.
18. On 10 August 2016, Mr N raised a complaint with Capita that it was his understanding that his retirement date was 4 July 2017. He explained the history of his service and his purchase of "additional days as a percentage of my pay". He complained that recent correspondence did not apply the days he had purchased as "reckonable service as they should". He went on to cite his understanding of the 1987 Scheme regulations; that a policeman may retire with an Ordinary Pension when he reaches at least 25 years' reckonable service and has attained 50 years of age. He asked whether he had been misled over the last four to five years or if the recent communication was wrong.
19. On 5 September 2016, Capita confirmed that Mr N's retirement date was 1 January 2019:

"With regards to your comments about the Police Pensions regulations 1987 I regret to advise you that your interpretation is not wholly correct. Whilst the purchase of added years does indeed entitle a Police officer to increased benefits it does not allow an officer to use additional years to reduce their retirement age. Additional years was introduced to enable officers that could not achieve their maximum number of years' service before their normal retirement date to increase their number of years, not bring forward the actual date they could take their benefits."
20. Mr N remained dissatisfied and raised a complaint under the Scheme's internal dispute resolution procedure (**IDRP**). Neither D&CP nor Capita uphold the complaint under the IDRP. Both asserted that the earliest Mr N could retire was 1 January 2019 and that the purchase of additional service did not provide for an earlier retirement date.

21. Mr N remained unhappy with the IDRPs responses and made a complaint to this service.

Summary of Mr N's position

22. Mr N argues that the Scheme Regulations¹ are unclear and should be applied to allow his retirement from 4 July 2017. It does not say that additional contributions cannot be used in the calculation of his 25 years' service and he questions whether Capita's interpretation of them is correct.
23. If the Scheme Regulations are correct, Mr N argues that his communications with the scheme show that he entered into a binding legal contract outside of pensions legislation. In relation to breach of contract, Mr N argues that his situation fulfilled the requirements of offer, acceptance, consideration and the intention to enter into legal relations. He says that Capita considered his request, including taking advice from the Home Office, before replying and that "Capita acknowledged my purchase/letter, and did not see fit to detail my purchase, and it is reasonable to assume there was no need for them to do so."
24. Mr N says that it was his underlying belief that he was purchasing time to allow him to retire early and that the member's guide in relation to this (in particular, the lack of a definition of "service" and its reference to fractions and "additional years") was misleading, as was the information provided by Capita.
25. In relation to the letter from D&CP dated 21 June 2012, Mr N says he inferred that "length of period" and "service" referred to "time" and not calculation of additional benefits.
26. In relation to the information Mr N received about the lump sum purchase in 2014, he says he did not know that it was incorrect and he could not have been expected to doubt what he was told. He made his plan to retire on 4 July 2017 clear and unambiguous.
27. Mr N would like to be able to retire on 4 July 2017 according to his original plan, but appreciates that he cannot expect to receive anything that the Scheme Regulations do not allow for. He says that if the additional benefits do not allow him to retire on 4 July 2017, then that is not what he thought he agreed to. Therefore, he would want a full refund of the contributions paid, including the lump sum and the original added years contract. He considers that the increased benefits to the financial award he will get when he finally retires will not adequately compensate him for the loss he has actually incurred.

¹ See Appendix II

28. However, he would not want a refund of contributions if receiving it placed him in a 40% tax bracket.

Summary of D&CP's position

29. In D&CP's formal response to this service, it said:

“Devon and Cornwall Police are of the view that the letter of 23rd May 2014 is the key document, which appears to have left Mr N to believe that he is eligible to retire on 4th July 2017. He is, unfortunately, not able to do so – to retire on that date would result in a deferred pension only accessible at age 60. The letter of 23rd May 2014 included a final caveat relating to the contents of the letter, and the date of 4th July had not been confirmed subsequently. The letter does not confirm expressly that he may retire without having served the required number of years (25), even though this may be disingenuous or ambiguous as the figures given are for a full pension. With regard to the disclaimer, it is unequivocal and binding. The provisions and requirements of statute must stand and cannot be defeated by an error within a letter.

As previously advised to Mr N the regulations do not allow the purchase of additional pension service, purchases merely increase the benefit of the pension to be received.

30. D&CP also made an offer to MR N to refund the lump sum contribution, but said that Mr N had declined the offer on the basis that he wished to retire on 4 July 2017.

Summary of Capita's position

31. In Capita's formal response to this service, it reiterated that Mr N is not entitled to retire before he had accrued 25 years' service (on 1 January 2019) and that the purchase of “added years”, (more exactly, additional 60ths bought under the Purchase of Increased Benefits Regulations 1987) is not to bring forward his retirement date. Additional 60ths that are purchased are not included in the calculation of qualifying pensionable service under Regulation B1 of the Police Pensions Regulations 1987.

32. The letters dated 21 June and 26 September 2012 do not at any point state that the purchase of additional service will bring forward an early retirement date, nor is it implied, as all calculations were done to age 55.

33. In 2014, Capita advised at the time of the lump sum purchase, that Mr N's retirement date was 4 July 2017 and agree that this was an error.

34. As part of the investigation, Capita commented on D&CP's offer to refund the lump sum. Capita did not feel that this was possible due to the relevant regulation stating that once a contribution is made, it was irrevocable. However, Capita later changed its submission to state that as the lump sum contribution was made more than 12 months after Mr N joined the police service, it should have been refused under the Police Pensions (Purchase of Increased Benefits) Regulations 1987² and therefore has no legal standing. Capita's view is that as the lump sum is held within the Scheme, D&CP should be responsible for refunding the lump sum, and it should pay Mr N an amount to recognise his distress and inconvenience.

Conclusions

35. I am satisfied that the Regulations governing the purchase of added years work on the basis that the purchase enhances accruals to age 55. If a member retires before age 55, the additional accrual is prorated. The pro rata principle holds good whether the purchase is made by periodic payments which ceased when the member retires, or whether the additional service is bought by payment of a lump sum. The Regulations make no distinction. Therefore, I find no fault with the way that D&CP and Capita have interpreted the Regulations. Mr N is not entitled to count the additional 60ths bought by instalment or lump sum to bring forward his retirement date.

36. I find that there was no contract created entitling Mr N to retire on 4 July 2017. As scheme administrators, Capita's intention would have been to operate within the Scheme Regulations, not to create a contract outside them which it has no power to do.

37. Turning to the way Mr N offered his cheque to Capita. It was offered on a conditional basis, drawing attention to the answer which Capita had provided to the second question in Mr N's 29 September 2013 letter. Capita knew, or should have known, that the Scheme Regulations did not permit it to honour the statement it had provided in response to Mr N's position. It did not acknowledge what he told it and I conclude there was no meeting of minds sufficient to form a contract, even if it had had the power to form it (which I have already found it does not).

38. I turn now to the effect of the information which was provided to Mr N and whether his election to purchase added years is binding upon him. The information provided to Mr N in 2012 explained how the added years contract worked including the pro rata principle. It said nothing explicit about whether or not the purchase of added years could bring a retirement date forward. I do not consider the information in 2012 to be misleading.

² See Appendix III

39. However, Capita have admitted that the communications about the lump sum misled Mr N about the effect of his intended purchase in 2014. In 2013 and 2014, Mr N received information from Capita repeatedly seeking to understand the extent to which his added years' contract had been fully factored into his projected retirement age. Plainly he thought there was a relationship between added years and retirement dates and he made it clear to Capita that he thought this. At no point did Capita tell him that his added years would not bring his retirement date forward. Rather, it adjusted the retirement date repeatedly, reinforcing Mr N's belief that there was a connection between the two issues. I find that it made a series of misrepresentations that the purchase of added years brought Mr N's retirement date forward. Mr N maintains that if he had known that it made no difference to the date on which he could retire, he would never have made the lump sum purchase. I accept that submission. It is clear from Mr N's enquiries that the date on which he could retire was driving his decision whether to purchase the added year. In tendering his cheque and making an election under the Scheme Regulations, Mr N relied on the misinformation to his detriment. He informed Capita explicitly that he was relying on the information it had repeatedly given him and it still did nothing to correct it.
40. Capita should have given Mr N an accurate explanation of what he would get in exchange for his money before accepting it and should have confirmed that afterwards. It did not, and I find that its conduct amounted to misrepresentation and maladministration.
41. Capita have suggested that the value of the purchase will be reflected in reckonable service when Mr N reaches retirement age and argue there is no financial loss in any event. I agree that that would be the case if Mr N intended to work until his normal retirement age. However, he made it quite clear before he applied to buy the additional year by lump sum that he did not wish to work until his normal retirement age. He told Capita that his plan was to retire as soon as he had 25 years' service. At that point he will not be credited with an additional year, but with a pro rata share. He has therefore paid a fixed lump sum for a benefit which was only due at age 55, a benefit which he never intended to realise.
42. I have considered whether Mr N should have understood the nature of the agreement, even though the evidence shows that he in fact did not. I have taken account of the fact that Mr N had previously been told in 2012 that any additional benefit would be prorated if he retired before he was 55. However, that explanation was given in the context of a decision to purchase additional benefit by regular payment. Those regular payments will stop earlier if he retires before he is 55. Therefore, he will pay pro rata to the benefit received. The lump sum purchase works differently in that the price is fixed even if the member retires early with the result that the benefit is prorated. That is counterintuitive and requires a very clear explanation before I would conclude a member should be taken to understand it. Capita repeatedly told Mr N that his 25 years' service would be affected by the purchase of the additional year by way of lump

sum. That was different to the prorating methodology that was explained in 2012, but it was logically consistent with the idea of paying a lump sum for a fixed benefit. I can therefore see no reason Mr N should have been aware that the Regulations did not work in the way Capita said they did.

43. I have therefore considered what Mr N would have done if Capita had explained the correct position to him at the point when he tendered the cheque. Given his stated intention of retiring as soon as he had 25 years' service, his repeated attempts to clarify how the purchase would affect that date, and the clarity of his instruction that "cashing of this cheque is authorised only to allow completion of the purchase of an additional year's pension allowing me an earliest retirement date of 04/07/2017 with 25 years pensionable service", I consider it unlikely he would have made an election under the Increased Benefit Regulations and unlikely he would have paid the lump sum.
44. I therefore conclude that Mr N is entitled to be put back into the position he would have been in had the misrepresentation not been made to him, i.e. he should be entitled to the repayment of his lump sum with interest. As a result of the repayment, he should not be entitled to any corresponding benefit and Capita should adjust his accrual record accordingly. Mr N has recently said that he would not wish to take a refund if the result would be to tip him into a higher tax bracket. I have no jurisdiction to bind HMRC's treatment of the refund. Mr N must take his own advice about whether he wishes to pursue this remedy.
45. I consider that a refund with interest is a complete remedy for that part of the complaint which is upheld and make no further award for distress and inconvenience associated with bringing the complaint. I consider that it would have been brought in any event to challenge the interpretation of the Scheme Regulations, as part of the complaint which was not upheld.
46. I conclude that there was no maladministration in relation to D&CP, therefore my directions only relate to Capita.
47. My direction is not intended to apportion any responsibility between D&CP and Capita as I do not have sufficient facts to allow me to do so. However, my intention is that Mr N is entitled to a refund of his lump sum back from Capita to whom he tendered it and whom accepted it (even though it now says this should not have occurred). It is now up to Capita and D&CP to decide whether the Scheme should pay the amount back to Capita.

Directions

48. Within 21 days of the date of this decision, Capita shall repay Mr N his lump sum contribution (£9,899.63) with interest and make arrangements to adjust his accrual record accordingly.

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49. For the purposes of these directions, simple interest is to be calculated at the base rate for the time being declared by the reference banks.

Karen Johnston

Deputy Pensions Ombudsman
18 April 2018

Appendix I

The Police Pension Scheme 1987 – Members' Guide (2006 edition)

8.1 Purchase of increased benefits through 'added years'

If you do not qualify for a maximum pension because you are unable to complete 30 years' pensionable service by the age of compulsory retirement, you may be able to purchase extra service to increase your PPS benefits on retirement. This will be more expensive than the normal contribution rate because your police authority, which pays towards your basic PPS benefits, does not contribute to added years purchases. You will have to pay the full cost of the additional benefits, currently assessed as 37.1% of salary.

Accrued service in PPS, plus increased benefits purchased within the scheme, cannot exceed 40/60ths. You cannot purchase added years to cover career breaks, if, on your return, you are able to accrue 30 years' by age 55.

The purchase of 'added years' normally entails a long-term commitment to pay contributions until you retire or leave PPS. Your contributions for increased benefits are calculated as a percentage of your pay and, accordingly, increased every time your pay increases as do the benefits provided by the purchase. Your contributions for increased benefits will be deducted from pay before tax.

If you decide to purchase 'added years' within 12 months of joining or re-joining the force you have the choice of paying additional contributions by deduction from pay or by making a lump sum payment. The option to pay regular contributions can be taken up at any time while there are at least two years between the next birthday and compulsory retirement age. If you pay by lump sum, you will only obtain tax relief up to the total of your taxable earnings in the tax year.

...

Any increased benefits you purchase will count when determining the level of your PPS pension, whether payable to you or your survivors, but they will not enable you to qualify for any type of award or enhancement to which you would not otherwise be entitled.

If you retire before your planned date of retirement, or cease to serve with a deferred pension or with a transfer value, you will be credited with an appropriate proportion of the increased benefits that you were purchasing.

Appendix II

The Police Pension Scheme 1987

Reckoning of service for purposes of awards

A9 – (1) Subject to paragraph (3), for the purpose of calculating an award payable to or in respect of a member of a police force by reference to any period in years (including a period of pensionable or other service) –

- (a) that period should be reckoned in completed years and a fraction of a year;
- (b) a part of a year shall be taken to be that fraction of a year whereof the denominator is 365 and the numerator is the number of completed days in that part and, accordingly, a part of a year which includes 29th February in a leap year and comprises 365 days shall be treated as a whole year.

(2) Where, for the purpose of calculating an award to or in respect of a regular policeman or for the purposes of regulation G6,

- (a) it is necessary to determine his pensionable service reckonable by reason of service or employment before or after a particular date, and
- (b) by virtue of the receipt by a police authority of a transfer value, or a certificate which has been furnished on or under Regulation F8A(2) he is entitled to reckon a period of pensionable service by reason of service or employment for a period which includes the date in question, then that part of the said period of pensionable service shall be deemed to be reckonable by reason of service or employment before or after the date in question which bears the same proportion to the whole of that period as the part of the previous service or employment before, or as the case may be after, that date bears to the whole thereof.

(3) Paragraph (1) has effect subject to paragraphs 1, 2 and 3 of Part IV of Schedule J.

Aggregate pension contributions for purposes of awards

A10 – (1) For the purposes of calculating the amount of an award by reference to the aggregate pension contributions of a regular policeman in respect of the relevant period of service, the relevant period of service shall be taken to be the period ending in the retirement, dismissal or death on which the award is payable and the beginning with the date on which he became a regular policeman in the force from which he retired or was dismissed or in which he died or, if he has more than once been a regular policeman in that force, the date on which he last joined that force otherwise than as a serviceman resuming service in his former force within a month of the end of his period of relevant service in the armed forces. Provided that, in the

case of a regular policeman who has made an election under Regulation G4(1), the relevant period of service shall be taken to be the period, or last period, during which pension contributions were continuously payable by him under Regulation G2(1) since the date on which, had no such election been made, the relevant period of service would be taken to have begun.

(2) for the purpose of aforesaid the aggregate pension contributions in respect of the relevant period of service shall be taken to be the sum of the following amounts

—

(a) the aggregate of the pension contributions (including additional, further or special contributions) made in respect of that period by the person concerned to the police authority by whom the award is payable and any rateable deductions made in respect of that period by that authority from his pay under the former Acts;

(b) any additional, further or special payment by way of a lump sum made during the relevant period by that person to that police authority;

(c) the amount of any sums paid by the person concerned to the said police authority (including sums paid in pursuance of an undertaking) as a condition of being entitled to reckon pensionable service or, as the case may be, approved service, by reason of service before the said period;

(d) where the person concerned has transferred to the force of the police authority by whom the award is payable, any sum which had he retired instead of transferring would have been calculable under this paragraph as aggregate pension contributions at the time of transfer;

(e) where the person concerned, while a member of the force of the said police authority, became entitled, in the circumstances mentioned in Regulation F3(1)(d), (e) or (f), Regulation F6 or Regulation F7, to reckon pensionable service by reason of a period of previous service or employment otherwise than as a member of a police force, the amount of any award by way of return of contributions or of any analogous payment which would have been made to him at the end of that period of previous service or employment had he voluntarily retired therefrom in circumstances entitling him to such an award or payment under the superannuation arrangements applicable thereto, and

(f) where the person concerned previously retired with a health pension from the force of the police authority by whom the current award is payable, that person was terminated in whole or in part under Regulation K1 or any corresponding provision of the former Regulations and he rejoined the force, any sum which would have been calculable under this paragraph as aggregate pension contributions at the time of the previous retirement.

(g) all payment made by him to a police authority in accordance with an election under Regulation 3 of the Police Pensions (Purchase of Increased Benefits) Regulations 1987.

(3) The reference in paragraph (2)(a) and (b) to additional, further or special contributions or payments are references to such contributions or payments made in pursuance of an election under any of the provisions mentioned in Regulation 57(2), under Regulation 58 or under Regulation 61A of the Regulations of 1973 subject, however, to regulations F4(3) and F5(2)(c) (previous reckonable service on payment or at discretion of police authority).

(4) If the regular policeman is a pension debit member, the amount of his aggregate pension contribution under this Regulation is reduced by such amount as is assessed in accordance with guidance issued by the Government Actuary.

Policeman's ordinary pension

B1 – (1) Subject to paragraphs (2), (4) and (6), this Regulation shall apply to a regular policeman who retires or has retired when entitled to reckon at least 25 years' pension service unless Regulation B3 (*policeman's ill-health award*) applies in his case.

Reckoning of pensionable service

F1 – (1) The pensionable service reckonable by a member of a police force at any date (in these Regulations referred to as the "relevant date") shall be determined in accordance with the succeeding provisions of these Regulations: Provided that there shall not be reckonable by a regular policeman –

...

(c) Any other period of unpaid leave falling on or after 27 February 1986 except such a period taken by a person who ceased to serve as a regular policeman before 1st September 1988.

Appendix III

The Police Pensions (Purchase of Increased Benefits) Regulations 1987

Part II

Purchase of Increased Benefits

Lump sum payments

4.- (1) An eligible policeman who is serving as a regular policeman and in respect of whom pension contributions are payable under Regulation G2(1) of the principal Regulations may, within 12 months of-

(a) the date on which he last became a regular policeman, or

(b) 1st February 1988,

whichever is the later, elect under Regulation 3 to make payment by a lump sum calculated in accordance with paragraph 1 or 3, as the case may require, of Part 1 of the Schedule.