

## Ombudsman's Determination

Applicant	Mr N
Scheme	Royal Mail Statutory Pension Scheme ( <b>the Scheme</b> )
Respondent	The Royal Mail Statutory Pension Scheme ( <b>RMSPS</b> )

## Outcome

1. Mr N's complaint should be partly upheld in that RMSPS should write off the overpayments which are subject to a limitation defence. RMSPS is able to recover the overpayment which occurred from 13 March 2011 onwards.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N is unhappy that RMSPS mistakenly paid him a pension, which it is now asking him to repay.

## Background information, including submissions from the parties

4. On 15 October 1979, Mr N joined the Post Office Girobank (**the Employer**), and became a member of section B of the Post Office Staff Superannuation Scheme, now known as the Scheme.
5. During this employment, Mr N transferred in £5,281.60 from his previous employer's pension scheme, the employer being Strathclyde Regional Council, which bought him a service credit of 5 years 116 days in the Scheme.
6. On 10 February 1984, Mr N left the Employer and became a deferred member of the Scheme.
7. On 12 December 1984, a transfer value of £21,448.54 was paid from RMSPS to the Trustees of the Pension and Assurance Scheme for the Northern Rock Building Society.
8. Between 1985 and 2006, Mr N incorrectly received annual statements in relation to deferred benefits in the Scheme.

9. On 16 February 2005, Mr N wrote to the Pensions Service Centre (**PSC**), which acts on behalf of the managers of the RMSPS, requesting a quote of the benefits payable to him at age 60.
10. On 8 November 2006, as Mr N was approaching age 60, the PSC sent Mr N a benefit options letter.
11. On 24 November 2006, Mr N returned his benefit options form, electing to receive a higher pension and a lower lump sum.
12. In January 2007, Mr N received his first pension payment.
13. On 31 May 2016, RMSPS wrote to Mr N saying that following a reconciliation exercise where its records were checked against HMRC's, it had realised that Mr N transferred his benefits to the Northern Rock Pension Scheme in December 1984. Therefore, RMSPS had discharged its liability to pay Mr N a pension and he had received benefits to which he was not entitled. This letter also said Mr N's monthly net pension of £502.63 would be stopped with effect from 1 June 2016 and that the PSC was bound to seek recovery of the overpayment.
14. On 2 June 2016, Mr N wrote to RMSPS expressing his disappointment and surprise at the situation. He said the monthly payments he received since age 60 had been an integral part of his financial planning.
15. On 10 June 2016, RMSPS replied having completed its investigation into the error. This found that, "historic records held on microfiche were not correctly migrated when automated systems were introduced." When Mr N's benefits were put into payment, they were calculated using reckonable service of 4 years and 119 days from the Scheme and transferred in service of 5 years 116 days. The amount paid in error totalled £58,273.65. It put forward a repayment plan whereby Mr N would pay £515.70 per month for 112 months, with a final payment due of £515.25.
16. Mr N subsequently asked for his complaint to be dealt with under the Scheme's two stage Internal Dispute Resolution Procedure (**IDRP**).
17. On 15 July 2016, RMSPS provided its stage one IDRP response, concluding that the RMSPS can only pay the level of benefits rightfully due to a member. However, RMSPS agreed that it had made an administrative error by not updating Mr N's membership status when he transferred out of the Scheme. It offered £500 in respect of this.
18. Mr N appealed this decision.
19. On 14 December 2016, the Cabinet Office, the Scheme Manager of the RMSPS, sent Mr N a stage two IDRP response. This said: -
  - It was not able to consider Mr N's change of position defence as he had not sufficiently evidenced his expenditure of funds from the overpayment.

- There were no discretionary powers which would allow the Scheme to write off the overpayment. However, RMSPS accepted that it should not seek recovery of the full amount that had been overpaid due to the Limitation Act 1980 (**the Limitation Act**). Therefore, it was limiting its recovery to the amounts overpaid from 1 June 2010.
  - The PSC should arrange recovery of the last six years of pension overpaid to Mr N by a suitable monthly repayment plan with Mr N's circumstances taken into account such as the decrease in income he had experienced, and extended repayment terms should be permitted.
20. On 11 January 2017, the PSC confirmed to Mr N that, in light of the Limitation Act, the net amount for recovery was £34,662.48.
21. Mr N subsequently referred his complaint to this Office.
22. On 13 March 2017, the Cabinet Office, provided its formal response. This said: -
- Although it was accepted that the administrator was at fault, Mr N should accept some responsibility in having knowledge of his pension provisions and have not relied entirely on information given by the RMSPS.
  - Mr N should have been aware that he transferred benefits out of the RMSPS, particularly when a communication was sent to him following this.
  - RMSPS did not intend to cause financial hardship and was willing to reach a repayment arrangement which suited Mr N's financial circumstances.
  - In terms of Mr N's change of position defence, Mr N needed to have received the funds in good faith. However, Mr N had worked in the financial sector and would have been responsible enough to understand his pension provisions, having made a conscious decision to transfer between the schemes. He had in effect benefitted from a pension for the same period of employment from more than one scheme.
23. On 18 October 2017, in response to questions asked during the Adjudicator's investigation, Mr N provided a letter detailing the expenditure undertaken because of the overpayment, along with receipts and other evidence. In this letter, he said: -
- After working for Northern Rock, he was employed by Lloyds Bank. He transferred pension rights from the former to the latter.
  - When taking pension benefits from Lloyds Bank, he assumed that these consisted of benefits from it and Northern Rock, rather than also including benefits which were transferred from the Scheme to Northern Rock. He had understood his entitlement from the Scheme to be separate and additional.
  - Having bought his home 30 years ago, as retirement approached he itemised the necessary steps to prepare his home for the years to come. He had planned a programme of specific, careful expenditure which avoided the use of credit. Instead, he waited until savings allowed for these plans to be realised.

- The largest expenditure was the refurbishment of his kitchen, costing £25,000. The deposit for this was billed to him on 24 March 2016; had he known that he was to lose approximately 20% of his monthly income and that he would be asked to repay the Scheme nearly £60,000, he would have cancelled the work.
- In 2015, to enhance the security of his property, he upgraded his garage doors at a cost of £1,880 and put in place stronger fencing for £2,818. Similarly, in 2012, stronger external doors were put in place, costing £1,924.
- In 2011, again bearing in mind future years, he and his wife had a new bathroom installed for £3,577.
- In 2007, they replaced a patio door at a cost of £1,230.
- All of the above spending was undertaken when each stage of it could be afforded, funded by pension income. As with the kitchen, the spending was undertaken to adjust their lifestyle to being fully retired.
- To his knowledge, he had not received any pension statements from Northern Rock.
- Had he not been given repeatedly wrong information by RMSPS, he would have adjusted his financial arrangements and continued working rather than opted for retirement in 2007.

## **Adjudicator's Opinion**

24. The complaint was considered by one of our Adjudicators who concluded that Mr N's complaint was partly upheld in that RMSPS was unable to recover the overpayment which occurred prior to 2011. The Adjudicator's findings are summarised briefly below: -

- Mr N had a limitation defence and as such, RMSPS is unable to recover part of the overpayment.
- The Adjudicator felt that RMSPS could have discovered the mistake with reasonable diligence before paying benefits to Mr N. She said there was no suggestion that RMSPS would have needed to take excessive or exceptional measures in order to do this and it had sufficient time to carry out the reconciliation exercise which uncovered the error.
- For the purposes of the Limitation Act, time started running from the date that the overpayment first occurred in 2007 and when each subsequent overpayment occurred after that (having regard to sections 5 and 32 of the Limitation Act).
- Mr N therefore had a limitation defence for the recovery of any overpayments made more than six years before the relevant date when the limitation period is to be regarded as having stopped (the cut-off date).
- In the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for Limitation Act purposes was the date on which The Pensions Ombudsman received Teachers' Pensions' response to Mr Webber's complaint.

- RMSPS would need to have made its claim by 2013 in order to recover the whole overpayment from 2007 onwards. However, it was not made until 13 March 2017, when The Pensions Ombudsman received RMSPS' formal response to Mr N's complaint. This date had been established as the cut-off date for the purposes of the limitation period.
- As Mr N had a limitation defence in respect of the period from 2007 to part of 2011, RMSPS was unable to recover the overpayment amount that occurred during this period (because it occurred more than 6 years before the relevant cut-off date). The overpayment for the period from 2011 to 2016 was recoverable because RMSPS made its claim within the required limitation period.
- Mr N wished to rely on the defence of "change of position" in respect of the remainder of the overpayment, which required him to have received the funds in good faith. The Adjudicator considered that Mr N voluntarily transferred the benefits in question but also said that had Mr N realised this error, one would expect him to have queried it when he received an annual statement from RMSPS in 1985, or the years that followed.
- Although the Adjudicator felt it was difficult to definitively say whether Mr N was acting in good faith, in taking into account annual statements and other reassurances received from the Scheme, she said it was likely that by 2006, Mr N reasonably believed that he was entitled to benefits from the RMSPS. Accordingly, the good faith requirement was met.
- She assessed the expenditure which Mr N undertook with the overpaid funds, and said these expenses appeared to be repairs, upgrades or replacements, which she felt were costs Mr N would have incurred regardless of the overpayment.
- Mr N had said "bearing in mind future years" he installed a new bathroom. The Adjudicator deemed it likely that he would still be approaching retirement with the view to make improvements for the coming years, had he not received the overpayment. Hence, she did not find this expenditure to be exceptional.
- In respect to Mr N's kitchen improvements, his largest expenditure, the Adjudicator found it plausible that the consistent and sizable income from the Scheme contributed to his planning and decision-making for this. However, Mr N had said this made up 20% of his overall income. Mr N had also suggested that these improvements were also carried out to help him adjust to retirement. Bearing these points in mind, the Adjudicator concluded that expenditure could not be considered as exceptional and said Mr N would need to repay the overpayment for the period concerning 2011 to 2016.
- Lastly, the Adjudicator said an award for distress and inconvenience would not be appropriate as a matter of public policy, where the Limitation Act had meant that RMSPS' claim fell on a technicality.

25. RMSPS accepted the Adjudicator's Opinion and made no further comments. Mr N did not accept the Adjudicator's Opinion and said the following: -

- Greater recognition needed to be given to the number of times he checked his understanding of his entitlement with RMSPS by phone or letter; the consistency of its advice over a two year period gave him confidence in the information received.
  - RMSPS' tardiness in identifying shortcomings in its administration meant that he had a far greater problem to deal with now.
  - Other possible defences to recovery in such cases included the principle of estoppel. The expenditure he had undertaken had been to his detriment.
  - The monthly pension from the Scheme of £500 was put into savings and enabled the expenditure outlined. Over the years, other routine maintenance costs had been incurred such as decorating, replacing a boiler etc. but the additional spending he had itemised was distinct from this and would not have taken place if these savings had been unavailable.
  - He could give his strongest assurance that had he known of the impending 31 May 2016 letter notifying him of the overpayment, he "absolutely would not have" commissioned work on his kitchen.
  - The prolonged anxiety of the past 18 months had been stressful; a token of recompense for this would not be out of place.
26. The Adjudicator maintained her position so the complaint has been passed to me to consider. Mr N emphasised that a fair settlement should more fully reflect the "financial injustice arising" and highlighted some of the points made previously.
27. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

### **Ombudsman's decision**

28. I do not doubt that the error caused by RMSPS has been problematic for Mr N; from the initial shock at the demand for repayment to having to reconcile his financial and general retirement planning without this income. I also understand that Mr N carried out the expenditure outlined with careful planning and that he approached this with an attitude whereby he spent within his means.
29. However, whilst I have considerable sympathy for the position Mr N is now in, I am unable to make a finding that he has changed his position. The expenditure outlined by Mr N, with the exception of the work carried out on his kitchen, appear to either be routine repairs, upgrades or general spending in preparation of his retirement years which was not excessively high. I do not view these expenses as exceptional spending; I deem it more likely than not that this spending would have happened in any event.
30. Turning now to the refurbishment work on Mr N's kitchen, whilst I accept that this can be distinguished from what I have described above as routine repairs and modest spending on home improvements, Mr N's pension from the Scheme only amounted to

20% of his monthly income. I am not persuaded that but for this income stream, Mr N would not have sought such works to be carried out.

31. Mr N has suggested that the doctrine of estoppel should apply as a defence to recovery. The form of estoppel most relevant to this case would be estoppel by representation. Specifically, it could be suggested that the information provided to Mr N on his pension entitlement by RMSPS when he applied for benefits amounted to a misrepresentation.
32. In order to establish estoppel by representation, in summary, it would need to be proved that RMSPS made a representation to Mr N which it is now seeking to contradict. This representation would need to have been made by RMSPS with the intention of inducing Mr N to rely upon it. I am satisfied that these three elements have been met.
33. The fourth element is: Mr N needs to have changed his position in reliance upon the representation and would suffer a detriment if RMSPS were permitted to resile from this representation. As I do not agree that Mr N has changed his position, my view is that estoppel by representation does not apply here.
34. I do not consider that Mr N has a valid defence to the recovery of the remainder of the funds.
35. Therefore, I partly uphold Mr N's complaint.

## **Directions**

36. Within 21 days of the date of this determination, RMSPS shall notify Mr N that it will only recover the overpayment amount for the period from 13 March 2011 onwards.
37. RMSPS will liaise with Mr N to agree mutually acceptable terms for the recovery of the overpayment which remains outstanding.

**Anthony Arter**

Pensions Ombudsman  
7 February 2018