

Ombudsman's Determination

Applicant	Miss A
Scheme	Police Pension Scheme (the Scheme)
Respondents	Capita Office of the Police and Crime Commissioner for Wiltshire & Swindon (Wiltshire Police)

Outcome

1. Miss A's complaint against Capita, the Scheme administrator, and Wiltshire Police is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, Capita shall pay Miss A £500 for significant distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss A's complaint against Capita and Wiltshire Police is about their refusal to award her benefits under her late partner's membership of the Scheme.

Background information, including submissions from the parties

4. Mr D was a member of the Police Pension Scheme 1987 (**the 1987 Scheme**).
5. In April 2006, the Police Pension Scheme 2006 came into force (**the 2006 Scheme**).
6. Under the governing regulations, The Police Pensions Regulations 2006 (**the 2006 Regulations**), the 2006 Scheme was an "opt in" scheme for 1987 Scheme members who wished to opt into it. Members were able to make a transfer election under the 2006 Regulations. The relevant parts are outlined in the Appendix below.
7. In October 2006, Mr D signed a form (**the Choice Form**), stating, "I wish to join the new pension scheme and convert my service in the 1987 scheme to new scheme service".

8. In January 2007, Wiltshire Police emailed all officers. It stated: -

“As you may know, a new pension scheme for the police service - the New Police Pension Scheme 2006 (NPPS) - came into effect on 6 April this year. This email reminds [you] that you only have a limited time in which, if you wish to join the NPPS, you can transfer your service on special terms... Last month we sent your individual options pack consisting of a personal benefit statement, comparing the benefits you could expect to receive under the two schemes and other information to help you decide whether to join the new scheme. Please let us know as soon as possible if you did not receive your pack... The pack also contained a choice form for you to complete. It is in your interests to consider carefully whether you wish to join the NPPS and to make an informed choice... Remember that you must return the form to us by 31 January 2007 if you wish to join the NPPS and transfer your service across on the special terms.”
9. About three years later, Mr D left Wiltshire Police and became a deferred member of the 1987 Scheme.
10. On 6 March 2016, Mr D died.
11. Later, Miss A contacted Capita. She informed it of Mr D’s death and enquired about receiving a survivor’s pension. She said she and Mr D had been together for about 22 years and they had two children and a mortgage but never married.
12. In May 2016, Capita wrote to Miss A and said she was not entitled to a survivor’s pension as she was not married to Mr D, and Mr D did not opt into the 2006 Scheme.
13. In July 2016, Miss A wrote to Capita. She said she wished to appeal its decision and mentioned the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).
14. Between April 2016 and January 2017, Miss A corresponded, by phone, email and letter, with representatives of Capita regarding the benefits she and her daughters were entitled to under Mr D’s scheme membership. She discovered the Choice Form and sent it to Capita to support her claim that Mr D opted into the 2006 Scheme, or intended to. During this time, Capita lost paperwork regarding her children’s benefits, and failed to provide information about the Scheme’s complaints process.
15. In January 2017, Capita wrote to Miss A, in response to her appeal against its original decision. It said she was not entitled to a survivor’s pension under the 2006 Scheme as Mr D did not return the signed form requesting a transfer. Also, the 1987 Scheme only provided survivor’s benefits to married spouses/civil partners, so neither was she entitled to survivor’s benefits under the 1987 Scheme, and Wiltshire Police had no discretion to change members’ scheme rules.
16. In February 2017, the Supreme Court decided a case brought by a Denise Brewster, the surviving cohabitee of the deceased member of a public-sector pension scheme.

Miss A contacted Capita and asked if the Brewster case changed matters and, if so, whether she could further appeal Wiltshire Police's decision.

17. In March 2017, Miss A contacted this Office about her complaint. The key point was, the Choice Form was correctly completed and returned, in around October 2006, so Mr D should have been opted into the 2006 Scheme; Wiltshire Police's case was, no form was received, so Mr D remained a member of the 1987 Scheme.
18. In June 2017, this Office told Miss A she needed to complete the IDRPs. She wrote to Capita, outlined the details of her complaint, and expressed concern that she was not properly informed about the appeals process. She told Capita she wished to make a complaint under the IDRPs without further delay.
19. In October 2017, Capita responded to Miss A's complaint under stage one of the IDRPs, but did not uphold it. Miss A appealed under stage two of the IDRPs.
20. In November 2017, Wiltshire Police issued its response under stage two of the IDRPs. It quoted its administrators, Kier, who stated, "...as the officer did not submit his election to transfer, his benefits must be paid out of the 1987 scheme. As he was not married the regulations do not permit payment to his partner". Its own comments were, "Based on this I am sorry to say that I cannot alter the original decision and reject your complaint".
21. In April 2018, Wiltshire Police provided its formal response. It said, no Choice Form was received in respect of Mr D. And, whilst it had considered accepting his application post-death, its information was that there was a three-month window for members to transfer to the 2006 Scheme, which ended on 31 January 2007. Mr D would have received written confirmation if he had transferred to the 2006 Scheme, which did not happen. And he should have known, by looking at his annual statements, that he had not opted into the 2006 Scheme.
22. In May 2018, Miss A provided her further comments. She said Mr D's Choice Form was submitted within the window. There was no evidence he wished to remain in the 1987 Scheme, and there were only two options. An opt-out approach under the 2006 Scheme would have been more sensible to protect families' financial interests. Moreover, the burden of proof was on Capita/Wiltshire Police to show Mr D did not intend to opt into the 2006 Scheme, rather than the other way around.

Adjudicator's Opinion

23. Miss A's complaint was considered by one of our Adjudicators, who concluded that further action was required by Capita, but not Wiltshire Police. The Adjudicator's findings are summarised briefly below: -
 - The "Police Pension Scheme 1987 - Members Guide" (**the Guide**) states, "Officers who started their police service before 6 April 2006 will have joined PPS, unless they opted not to do so. The New Police Pension Scheme 2006 [NPPS] came into effect for

new entrants on that date. Members of PPS can remain in their current scheme, although they will have had an opportunity to join and transfer their PPS service to NPPS under special terms, if they wished, during a pensions 'options exercise' conducted between 1 November 2006 and 31 January 2007."

- The 1987 Scheme was an "opt out" scheme, but the 2006 Scheme was an "opt in" scheme for members of the 1987 Scheme who wanted to transfer into it. Looking at the Police Pensions Regulations 2006 (**the 2006 Regulations**), there was no dispute that Mr D was eligible to make a "transfer election". But the election had to be made in line with Schedule 3(1)(a) of the 2006 Regulations, which stated: "Where a regular police officer wishes to make a transfer election in accordance with regulation 6(8) he shall do so by giving written notice to the police pension authority— (a) in the case of an officer to whom these Regulations apply by virtue of regulation 6(2)(a)(iv) or (v), or to whom regulation 6(6) or (7) applies, or is such as is mentioned in regulation 6(8)(c), within such period of three months beginning no later than 1st January 2007 as the Secretary of State may determine, or such longer period as the police pension authority may, by reason of exceptional circumstances in that officer's case, in their discretion allow..." The required that written notice be given to Wiltshire Police within three months beginning no later than 1 January 2007, as the Secretary of State may determine; or, in exceptional circumstances, a longer period, at Wiltshire Police's discretion. The Guide also states, under part 1 ("Introduction") that "Members of PPS can remain in their current scheme, although they will have had an opportunity to join and transfer their PPS service to NPPS under special terms, if they wished, during a pension 'options exercise' conducted between 1 November 2006 and 31 January 2007..."
- Wiltshire Police accepted that Mr D may have intended to join the 2006 Scheme, and Miss A said he signed and returned the Choice Form. But no evidence had been provided that the form, or any other written notice, was sent to Wiltshire Police as required by the 2006 Regulations. Capita, the administrator, said the form was not returned. As a result, Mr D remained an active member of the 1987 Scheme, until he became a deferred member sometime later.
- Miss A suspected that Capita had lost the form, as it more recently lost paperwork in relation to her benefits. But she could provide no further evidence of that. Nor could she provide any evidence from the time of the alleged election, in October 2006, e.g. related communications between Mr D and Capita/Wiltshire Police, indicating that instruction to opt into the 2006 Scheme was received and lost, or received but not acted upon.
- Without such evidence, it was equally possibly that Mr D completed the form and forgot about it, or changed his mind about opting into the 2006 Scheme.
- Wiltshire Police said Mr D would have received confirmation of the transfer from Capita, if the election had been made. And it had provided evidence that, in January 2007, officers were reminded about joining the 2006 Scheme. It was also open to Mr D

to contact Capita/Wiltshire Police, after October 2006, to confirm the Choice Form had been received, and ask whether any further action was required.

- His annual pension statements would have shown which scheme he was in. And, he remained employed in the service for three years after January 2007, but there was no evidence that he queried why his membership had not been transferred. Miss A said the distinction would not have been apparent from the annual statement. However, it was reasonable to expect Mr D to review his statements, to determine whether his benefits were correct, and to ask if he was unsure about this.
- In the absence of further evidence, it was not possible to ascertain if the Choice Form was sent but lost, or not sent because Mr D forgot about it or changed his mind about opting into the 2006 Scheme. Whilst Miss A said it was for Capita/Wiltshire Police to show that Mr D did not intend to opt into the 2006 Scheme, the Adjudicator disagreed. He said it was for her to show that Mr D correctly submitted the form, or otherwise gave written notice, in order to opt into the 2006 Scheme, so the burden of proof was on her.
- Ms Brewster's case, which Miss A had referenced, was that it was unfair (discriminatory) that her partner was required to have completed a nomination form in her favour, when a married partner in the same position would not have been required to complete the same in favour of his wife. But Miss A's case was different. She had not been turned down for the claimed benefits under the 2006 Scheme because she was not married to Mr D; she had been turned down for them because there was no evidence that Mr D had ever opted into the 2006 Scheme in the first place.
- The 2006 Scheme required a transfer election to be made to Wiltshire Police by giving notice in writing. It did not seem to be disputed that Mr D had completed and signed a Choice Form. But there was insufficient evidence that he submitted it. So, on balance, he did not elect to become a member of the 2006 Scheme as required under the 2006 Regulations. Therefore, his survivors had no entitlement to benefits thereunder.
- It followed that Miss A could only rely on the 1987 Scheme for potential payment of dependant's benefits, there being no doubt that Mr D was a member of that scheme when he died. The 1987 Scheme mainly paid benefits to widows, widowers, civil partners and children, but not surviving cohabitants. But Wiltshire Police could consider whether any payments were due under Regulation 3 of Part E of the 1987 Regulations. Under 5.3 (Gratuity - estate) of the Guide, it stated, "If, when you die, the various awards payable under [the 1987 Scheme] (excluding the lump sum death grant) are less than your total pension contributions, an extra award equal to the balance of those contributions will be paid to your estate."
- Before the Adjudicator issued his Opinion, Wiltshire Police confirmed that no gratuity was considered as it was unaware of the option at the time. The Adjudicator said this was understandable. Miss A's complaint was that she was incorrectly turned down for a survivor's pension under the 2006 Scheme; she had not specifically complained about being turned down for benefits under the 1987 Scheme. So, neither Capita nor

Wiltshire Police had made an administrative error by not considering this payment. But Miss A could contact Wiltshire Police now, to make further enquiries about this.

- There were no errors of administration by Wiltshire Police as part of Miss A's claim for benefits and complaint. But there was evidence she mentioned the Scheme's IDRPs, when she wrote to Capita in July 2016. Capita ought to have known that it was required to provide a stage one response, or arranged for Wiltshire Police to do so. Had it done so, Miss A's complaint would have been answered sooner, and the overall delay would have been shorter.
 - There was also evidence that Capita had mislaid some documents, which it admitted in its email of 7 October 2016. Miss A would have experienced significant distress and inconvenience as a result of this, and the lengthy/avoidable delay, therefore it should pay her £500 in recognition of this.
 - Wiltshire Police did not need to take further action, but should assist Miss A if she decided to claim benefits under the 1987 Scheme.
24. After the Adjudicator had issued his Opinion, Wiltshire Police clarified that there were two children's pensions in payment. And, the reason a gratuity was not considered was that it believed these children's pensions would have to be deducted from any gratuity due.
25. Both Capita and Wiltshire Police accepted the Adjudicator's Opinion. Miss A did not accept the Opinion and provided her further comments.
26. Miss A says her complaint was previously based on her assertion that Mr D correctly submitted the Choice Form, to opt into the 2006 Scheme, but that Capita mislaid it. However, having accepted that her complaint on that basis has now "run its course", she now wishes to appeal on the basis that her case has "striking" similarities to the Brewster case considered by the Supreme Court in February 2017.
27. Miss A (who is not legally represented) says that in the Brewster case, the Supreme Court found that the requirement by the pension administrator, for the co-habiting partner to be expressly nominated by the pension holder for the surviving partner to be eligible for the benefits of the deceased partner's pension, was found to be an infringement of the surviving partner's Human Rights (article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), when read in conjunction with article 1 of the First Protocol (A1P1) to ECHR). She asserts that Brewster sets a precedent for the Ombudsman's decision in her complaint and draws attention to the following similarities to her own situation:
- Like her deceased partner, Mr McMullan was a public sector employee who had paid into a Pension Scheme for many years.
 - Both couples had been in their respective relationships for a long period of time (over the required 2 years) with both couples being financially interdependent; including each

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sharing ownership of a family home – indeed her partner and she also had two daughters who were aged 10 and 14 years at the time of his death.

- Unfortunately, Mr McMullan died suddenly and unexpectedly, as did her partner.
 - At the time of his death Mr McMullan was not married to Ms. Denise Brewster, as was the case for her partner and herself.
 - Ms. Brewster believed that Mr. McMullan had transferred to a new scheme, where benefits would be paid to her, should she be the surviving partner. This was the case for Miss A; she also believed that her partner, had opted into the 2006 Scheme (evidenced by a copy of his signed Choice Form requesting the transfer).
 - Upon the unfortunate death of her partner, Ms. Brewster was denied the benefits from her partner's pension, as has been the case with Capita / Wiltshire Police's refusal to provide pension benefits to myself.
 - In both cases the reason provided by the pension administrators was that as neither could evidence that the transfer to the new scheme had occurred (2009 Scheme in the case of Mr McMullen, 2006 Scheme in the case of Miss A's partner).
 - In both appeals the Pension Administrators refused on the basis that the surviving partner was not married to the pension scheme holder and so, under the conditions of the existing pension scheme, benefits could not be paid to the surviving partner.
28. She asserts that with these material similarities between the two cases, and with the Supreme Court Judgment finding in favour of Ms. Brewster, based on the February 2017 Judgment, it was unlawful for Capita / Wiltshire Police to have required her partner to opt in to the 2006 Scheme.
29. Wiltshire Police responded that in their view Brewster does not apply as PPS1987 has never provided for the payment of pension to a surviving cohabiting partner.
30. I agree with the Adjudicator's Opinion and deal with the additional points not addressed by it below..

Ombudsman's decision

31. I disagree that Miss A can rely on the Brewster case to claim benefits under Mr D's membership of the Scheme. Whilst there are similarities between Miss A's case and Ms Brewster's, there is an important distinction. The crux of the Supreme Court's judgment was, the failure by a member of a local government pension scheme (Mr McMullan) to nominate his partner (Ms Brewster) for a surviving cohabitee's pension, did not preclude her from receiving such a pension following his death, where she otherwise satisfied the scheme's conditions. That is, it was found that Ms Brewster was being discriminated against because she and her partner were being forced to something which married couples satisfying the scheme's conditions would not have had to do.

32. Brewster does not, in my view, assist Miss A as it concerned the lack of justification for a discriminatory hurdle imposed on unmarried couples where the scheme in question was set up to benefit unmarried couples, as well as married ones. In Brewster the pension provision of the relevant scheme did cover cohabitants, but it unfairly imposed an extra administrative hurdle for cohabitants to overcome, which did not apply to married couples.
33. That is not the case here because Miss A's partner was not a member of a scheme which made pension provision for cohabitants. A cohabitee was simply not within the class of beneficiaries provided for by the 1987 Scheme.
34. I have also considered Miss A's argument that it was unlawful for Capita and/or Wiltshire Police to have required Mr D to opt into the 2006 Scheme rather than opt him in automatically and then allow him to opt out. But I do not find it was for the following reasons.
35. The joining process is a feature of the Scheme Regulations and it was a legal requirement that a police officer wishing to make a transfer election had to do so by giving written notice to the police pension authority. Under the 2006 Regulations, Mr D was eligible to make a "transfer election" if he wished to join the new scheme rather than remain in the 1987 Scheme, but the election had to be made in line with Schedule 3 of the 2006 Regulations, which specifically required written notice to be given to Wiltshire Police. Wiltshire Police was required to follow the transfer in process as set out in the Regulations. So, I do not find that Capita or Wiltshire Police acted unlawfully, or that they otherwise made an administrative error, by requiring Mr D to opt into the 2006 Scheme, rather than opting him into it by default then allowing him to opt out again.
36. I understand Miss A to be arguing by analogy with the decision in Brewster that the opt in process somehow created a discriminatory effect on her as a cohabitee, but Mr D would still have been required to opt into the 2006 Scheme even if he and Miss A had been married. I can therefore see no basis to conclude that that the opt in caused Miss A to be discriminated against because she was not married to her partner.
37. The 2006 Regulations did more than introduce rights for cohabitants. They changed the benefit structure of the scheme and the cost of being a member. The opt in was not an additional evidential formality in the way that the nomination form was regarded in Brewster. The opt in required a substantive choice by members and an administrative response from the Scheme and employer.
38. Turning to Capita, I agree it made administrative errors. First, it failed to refer Miss A to the Scheme's IDR in July 2016, which delayed the resolution of her complaint. Second, it mislaid some documents in relation to her claim. I find that these errors and omissions would have caused significant distress and inconvenience, for which an award of £500 is appropriate.

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39. I make no finding about the issue of whether Miss A should have been considered for a gratuity under the 1987 scheme as this did not form part of her complaint.
40. Therefore, I uphold Miss A's complaint in part.

Directions

41. Within 21 days of the date of this Determination, Capita shall pay Miss A £500 for significant distress and inconvenience.

Karen Johnston

Deputy Pensions Ombudsman
24 January 2019

Appendix

The Police Pension Regulations 2006 (Schedule 3; Para 1)

1. Where a regular police officer wishes to make a transfer election in accordance with regulation 6(8) he shall do so by giving written notice to the police authority—

(a) in the case of an officer to whom these Regulations apply by virtue of regulation 6(2)(a)(iv) or (v), or to whom regulation 6(6) or (7) applies, or is such as is mentioned in regulation 6(8)(c), within such period of three months beginning no later than 1st January 2007 as the Secretary of State may determine, or such longer period as the police authority may, by reason of exceptional circumstances in that officer's case, in their discretion allow, or

(b) in the case of an officer—

(i) to whom these Regulations apply by virtue of regulation 6(2)(a)(ii),

(ii) to whom these Regulations apply by virtue of regulation 6(2)(a)(iv) or (v) and who re-joined his force or joined another force on a date after that on which the period of three months mentioned in sub-paragraph (a) commenced,

(iii) who, for the purposes of regulation 6(6)(b), is treated as continuing to serve notwithstanding his dismissal or requirement to resign and whose reinstatement following a successful appeal occurs on a date after that on which the period of three months mentioned in sub-paragraph (a) commenced, or

(iv) who is such as is mentioned in regulation 6(8)(c), and who re-joined his force on a date after that on which the period of three months mentioned in sub-paragraph (a) commenced, within the period of three months beginning on the date on which he first so re-joined his force or joined another force or, as the case may be, was reinstated (or such longer period as the police authority may, by reason of exceptional circumstances in that officer's case, in their discretion allow).