PO-17446

Ombudsman's Determination

Applicant	Mrs N
Scheme	Principal Civil Service Pension Scheme (**the Scheme**)
Respondents	Department for Work and Pensions (**DWP**) MyCSP

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by DWP or MyCSP.

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

Complaint summary

3. Mrs N's complaint concerns the total reckonable service she accumulated when employed by DWP. Mrs N has said that after she re-commenced employment with DWP following a period of leave, it was her understanding that her pensionable service would be continuous from her original start date of 24 May 1999. However, Mrs N later discovered that DWP had not recorded the period of leave in question as reckonable.

Background information, including submissions from the parties

4. Mrs N began employment with DWP on 24 May 1999, as an administrative officer.

5. On 22 February 2001, Mrs N began long-term paid sick leave due to work related stress. During this period of leave, Mrs N applied to transfer to another department of DWP.

6. Mrs N exhausted her sick pay entitlement on 22 February 2002. DWP subsequently arranged for Mrs N to receive sick pay at pension rate (**SPPR**) from this date.

7. Mrs N was unable to secure a transfer to another department, so wrote to DWP tendering her resignation with effect from 29 July 2002.

8. Following her resignation, Mrs N took DWP to an employment tribunal regarding the treatment she received whilst employed by it. The dispute was brought to the Advisory Conciliation and Arbitration Service (**ACAS**) to reconcile the matter between

Mrs N and DWP before being brought to a tribunal. It was agreed that the two parties would sign a COT 3 agreement (**the agreement**) to settle the dispute.

9. On 16 May 2003, prior to signing the agreement, Mrs N received a letter from DWP stating:

> "the terms and conditions of your contract of employment, which started on 25 May 1999 will still stand"
>
> ....
>
> "With regards to your request to return to the Pension Classic Scheme, this has been agreed and we are currently in contact with Pensions to arrange this for you, I can also confirm that your pensionable service date will remain at 25 May 1999".

10. The agreement was signed by Mrs N in June 2003, and by DWP in July 2003. The agreement included the following terms in respect of Mrs N's start date:

> "2) The [DWP] will regard [Mrs N] as having been re-engaged by the [DWP] in the capacity as an administrative officer (AO) and the applicant will be treated as having been continuously employed by the [DWP] as from 25 May 1999.
>
> 3) [Mrs N] will as from the 2 June 2003 be re-engaged by the [DWP] as an AO in the Pensions Department of the DWP, subject to the terms and conditions of that employment which have been notified to her separately in a letter dated Friday 16 May 2003".

11. The period between Mrs N's resignation and her re-employment was 30 July 2002 to 1 June 2003. DWP recorded this period as special leave without pay.

12. On 2 December 2013, Mrs N resigned from DWP.

13. On 20 December 2013, MyCSP wrote to Mrs N with an estimate of her pension benefits. The total period of reckonable service used to calculate the estimate was 13 years and 90 days. As Mrs N believed her employment was continuous from May 1999 and amounted to over 14 years, she queried her the reckonable service figure used by MyCSP to calculate the estimate of her pension benefits.

14. On 15 January 2014, MyCSP provided Mrs N with a breakdown of her total reckonable service, and showed the following periods as non-reckonable:-

    22 February 2002 to 29 July 2002 – SPPR

    30 July to 1 June 2003 – Special leave without pay

    30 November 2011 – Strike day

    10 May 2012 – Strike day

    20 March 2013 – Strike day

15. Throughout 2014 and 2015 Mrs N corresponded with MyCSP, arguing that the length of her reckonable service should be 14 years and 190 days based on her start date of 25 May 1999. Mrs N said that the agreement did not include a term which stated that she would lose any of her reckonable service, and if it did she would have challenged it at the time. Mrs N also sought the assistance of The Pensions Advisory Service (**TPAS**).

16. In July 2016, after a period of correspondence between Mrs N and TPAS, Mrs N invoked MyCSP's Internal Resolution Dispute Procedure (**IDRP**), complaining that the agreement stated that her employment would be continuous from May 1999, which she understood to mean that all of her service would be treated as pensionable.

17. On 22 September 2016 Mrs N formally complained to DWP. She said that upon signing the agreement, she was under the impression that her "service would be continuous for pension purposes" from May 1999. Mrs N did not receive a response from DWP.

18. On 7 October 2016, MyCSP issued its IDRP 1 decision and said:-

    - DWP had confirmed that Mrs N's period of SPPR, special leave without pay and strike days amounted to 1 year and 103 days, and were recorded as non-reckonable.

    - The agreement did state that Mrs N's pensionable service start date would be 25 May 1999, but did not state that any periods of non-reckonable service prior to signing the agreement would be treated as reckonable.

    - MyCSP had calculated Mrs N's total reckonable service to be 13 years and 89 days rather than the original calculation of 13 years and 90 days, because the service start date confirmed by DWP shown on the agreement was 25 May 1999 rather than 24 May 1999, as previously shown.

19. On 1 November 2016, Mrs N appealed MyCSP's IDRP 1 decision, and said that she did not agree that her start date should be amended, or that she was on strike for the three days during her employment with DWP.

20. On 20 December 2016, MyCSP responded to Mrs N with its IDRP stage 2 decision. Regarding Mrs N's start date, it set out that both the agreement and the letter Mrs N received on 16 May 2003 stated that her pensionable service start date was 25 May 1999, and this had been backed by numerous documents it had received from DWP. MyCSP also said it was unable to find payslips showing Mrs N's strike days, but the days in question were recorded as such on DWP's HR system. Mrs N subsequently brought the matter to the Cabinet Office.

21. On 22 March 2017 the Cabinet Office wrote to Mrs N with its IDRP decision, and did not uphold her complaint. A summary of its key points are set out below:-

- MyCSP can only work with the information it receives from DWP, and had made numerous enquiries to DWP to check if Mrs N's service record is correct.
- The Cabinet Office had found a number of "new joiner type records" which were signed and dated 24 May 1999. In light of these records, it had asked DWP to change Mrs N's start date back to 24 May 1999, which it agreed to do. The Cabinet Office also asked MyCSP to re-amend Mrs N's record, so her pension benefits will be based on 3 Years and 90 days.
- The Cabinet Office highlighted that under rule 2.10 of the Scheme Rules, members cannot build up reckonable service during a period of either SPPR or unpaid special leave.
- The letter did not state that all of Mrs N's service from 25 May 1999 would be pensionable; only that this would be her start date for pensionable service. This letter would have come from an agreement between all parties, and agreed to by Mrs N.
- DWP had been able to provide payslips to the Cabinet Office to show that Mrs N's three strike days were correct.
- On the basis of all the evidence the Cabinet Office had received, it was satisfied that Mrs N's reckonable service was 13 years and 90 days.

22. Mrs N brought her complaint to this office, and maintained that her non-reckonable service should be reclassified as reckonable in accordance to the agreement. In summary, Mrs N argued that prior to signing the agreement, she was reassured by DWP that her "continuous service would count from May 1999 and therefore all service would be pensionable as normal" and that "everything would be as if I had not left". Mrs N provided a number of letters she sent to ACAS and DWP prior to her signing the agreement to show that she was questioning how the agreement would affect her pensionable service. Mrs N has also said that the entire matter has had a severe impact on both her mental and physical health.

23. The relevant section of the Scheme Rules can be found in the appendix.

Adjudicator's Opinion

24. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by DWP or MyCSP. The Adjudicator's findings are summarised briefly below:-

- The Adjudicator did not doubt that Mrs N had raised questions regarding her reckonable service before she signed the agreement. Yet, Mrs N still signed the agreement in the knowledge that neither she nor DWP had paid the required contributions for the period where Mrs N was in receipt of SPPR and on special

leave without pay, which was between 22 February 2002 to 1 June 2003 ("**the disputed period**").

- Neither the agreement nor the letter Mrs N received prior to signing it state that DWP ought to treat the disputed period as reckonable service. Therefore, DWP were under no obligation to do so now.

- Mrs N had been provided with a copy of her payslips showing she was unpaid for the three strike days. The Adjudicator did not believe that DWP had to provide anything further to show these days were non-reckonable.

- As the Adjudicator did not consider that DWP were required to treat the period of service in dispute as reckonable, there were no grounds to make an award for distress and inconvenience.

25. After the Adjudicator's Opinion was issued, Mrs N instructed Slater Gordon ("**the legal representative**") to respond to the Adjudicator on her behalf. The legal representative did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The legal representative provided further comments on Mrs N's behalf, set out below, which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points, summarised, for completeness:-

    - On 29 May 2003, before Mrs N signed the agreement, she spoke to a member of staff at DWP. Mrs N made a contemporaneous note of the conversation which says: "yes everything will be as if I had never left – pension/NI hols etc. as soon as I start I will be on the system and I will be notified in writing".

    - A letter from Mrs N to ACAS, dated 30 May 2003, stated she had agreed to the proposed terms of settlement "only on the understanding that my pension and NI contributions will be as if I had never left".

    - On 24 June 2003, Mrs N wrote to DWP saying:

        "I am a little concerned about the rules relating to sick leave. It was agreed that I would have continuity of employment (as if I had never left) before I would agree to vacate the Tribunal Hearing. I made a telephone call on 29 May to Carol Swift and she spoke to Susan Hilton who said everything was as if I had never left, Pensions, NI, holidays, etc. and as soon as I started I would be back on the system".

        And

        "I was told that my pension would be reckonable service and would be just as if I had never left".

- Therefore, Mrs N's legal representative has argued that she was induced by DWP into entering into the agreement on the assurance that the disputed period would be treated as pensionable.

- Mrs N's legal representative said that if it is now not possible for the disputed period to be treated as reckonable, "it was an express and/or implied term of [the agreement] (being implied in order to give the terms practical effect), that DWP would compensate [Mrs N] for the amount of the lost entitlement."

- The legal representative also said that the terms were recorded by the communications between DWP and Mrs N around the time she entered into the agreement and highlighted that the communications consistently referred to the term "continuity of employment", showing that it was important and agreed that the basis of the agreement was that Mrs N would be treated as though all of her employment was reckonable. If the references to "continuity of employment" did not mean that the disputed period would be treated as reckonable, it would have little or no practical effect and would be nonsensical for the parties to have placed so much emphasis on this term.

- The terms are further recorded by the assurances Mrs N was given prior to signing the agreement that her pension and employment would be as if she had never resigned.

- Alternatively, if the terms of the agreement were not incorporated as express terms, they were implied terms being necessary to give the contract business efficacy. If references to "continuity of employment" do not mean that the disputed period would be treated as though it were reckonable, the contract would be built around a clause which has no practical effect.

- Contrary to the Adjudicator's Opinion, Mrs N did not sign the agreement in the knowledge that neither she nor DWP had paid the requisite contributions towards her pension for the disputed period. Mrs N says she was unaware of precisely what had been paid towards her pension.

- DWP failed to ensure that Mrs N was provided with adequate information about her pension rights and entitlements in the context of electing how to enter into re-engaged employment. This is analogous to that in the previous determination of Cherry v The Police Commissioner of South Wales PO-7096 where the Ombudsman upheld the complaint and said "as a responsible employer the Commissioner had a duty to inform Mr Cherry of the tax implications of re-employment on his retirement benefits", and that an employer was required to provide information on the implications of the change.

- Finally, Mrs N disagrees with the Adjudicator's Opinion that nothing in the agreement or the letter states that DWP should treat the disputed period as reckonable. Mrs N says both the agreement and the letter clearly refer to her

request to be put back into the Scheme and have the disputed period treated as though she had never left.

Ombudsman's decision

26. The Scheme Rules do not allow periods of SPPR and unpaid special leave without pay to be treated as reckonable service. Mrs N's legal representative has argued at length that she was assured by a member of DWP staff that the period in dispute would be treated as reckonable.

27. The basis of the argument that DWP induced Mrs N into entering the agreement is a phone conversation Mrs N says she had with a member of staff. The only record of this conversation is a hand-written note made by Mrs N, which refers to her being told that her pensionable service would reflect that she had never left employment with DWP. Mrs N also refers to this conversation in the letters she sent to DWP in May and June 2003.

28. Although these are the only records of the conversation Mrs N had with DWP, I accept that, on the balance of probabilities, a conversation took place between Mrs N and DWP regarding her pensionable service. However, apart from the handwritten note made by Mrs N, there is no further evidence to substantiate that Mrs N was assured by DWP that the disputed period would be treated as reckonable service.

29. The problem with reconstructing a conversation when only one side has been recorded is that the answer given by one party very much depends on the question asked by the other. If, for example, Mrs N had asked DWP what the effect would be on her pension scheme membership, the answer given is perfectly correct; she would be reinstated in the PCSPS as if she had not left. However, this did not mean that her unpaid sick leave or SPPR would be treated as reckonable. Mrs N's note does not suggest that she specifically asked whether the disputed period would be treated as reckonable service. Her note indicates that she made a more general enquiry, which included the effect on her National Insurance and holidays. Thus, I cannot conclude that Mrs N has been mispresented in this respect.

30. Mrs N's legal representative has argued that the agreement contained both an express and implied term that the disputed period would be treated as reckonable service. The legal representative's argument, that the agreement contains an express term, centres on the continued use of the phrase "continuous employment" in the communications between Mrs N and DWP, even though neither the agreement nor the letter contains an express term stating that DWP will arrange for the disputed period to be treated as reckonable service.

31. The letter Mrs N received prior to signing the agreement states that she will be returned to the Scheme with a start date of 25 May 1999, with the agreement stating that she will be treated as if she had been in continuous employment from this date. Continuous employment and continuous reckonable service are not one and the

same; the Scheme Rules set out what employment is reckonable and non-reckonable. So, I cannot agree that the agreement contained an express term of the basis of continuous reckonable service. I note the argument that the reference to continuous employment is redundant if it does not mean the disputed period is to be treated as reckonable service. However, as I am sure the legal representatives are aware, continuity of employment has other implications, such as in the calculation of redundancy payments. It is not uncommon for a reinstatement agreement to make arrangements for continuity of employment for these purposes. And, in Mrs N's case, it also meant that she could remain in the Classic (1972) section of the Scheme.

32. Given the lack of any evidence of a promise by DWP to treat the disputed period as reckonable service and the fact that it would be contrary to the PCSPS Rules, I do not find that there are grounds for implying such a term into the agreement. I do not agree that implying such a term is required to give business efficacy to the agreement

33. Mrs N's correspondence to ACAS and DWP around the time she signed the agreement reflects the fact that she was concerned about what would happen to her pension when she returned to work. Yet, Mrs N signed the agreement which did not include any term stating that the disputed period would be treated as reckonable service. If this had been as important to her then as is now argued, I would not have expected her to have signed the agreement unless it included such a term.

34. Turning to the issue of duty of care, Mrs N's legal representative has argued that her case is analogous with the determination of Cherry v The Police Commissioner of South Wales PO-7096 (**the Cherry case**). Put briefly, this case determined that the Police Commissioner had a duty of care to inform Mr Cherry about the tax implication of re-employment on his retirement benefits. In this case, both parties had already come to an agreement to indemnify Mr Cherry against the tax liabilities suffered as a consequence of reinstatement. The purpose of the determination was to enshrine this agreement.

35. There is no general obligation on an employer to provide advice to its employees, and employers are not authorised to provide financial advice. In the Cherry case, such an obligation was found as there was a clear disadvantage to the employee in taking a particular course of action which indicated that the employer should have provided more information with regard to the tax implications of re-employment. In Mrs N's case any disadvantage would only arise if, at the time of signing the agreement, it is accepted that she could have achieved a better outcome by proceeding to an employment tribunal. Mrs N may have achieved reinstatement into the Scheme. However, on the balance of probabilities, it is likely that Mrs N would have achieved a similar outcome at a tribunal in respect of her reckonable service, given that the Scheme Rules do not allow for the disputed period to be treated as reckonable so I do not conclude that there was a disadvantage for Mrs N entering into the agreement.

36. Therefore, I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
5 June 2018

Appendix

37. Rule 2.10 of the Principal Civil Service Pension Scheme Section II The 1972 Section states:

> “Annual leave and maternity leave on full pay count as reckonable service. Special leave, injury leave and sick absence on full or half pay count as reckonable service, as does maternity leave on statutory maternity pay on or after 23 June 1994; subject to rule 2.10a unpaid absences, unpaid leave and leave at pension rate neither qualify nor reckon except that:
>
> (i) where a civil servant's annual entitlement to paid leave was less than 3 weeks, unpaid leave may reckon to the extent that the entitlement fell short of 3 weeks;
>
> (ii) unpaid special leave for training in one of the reserve forces may reckon to the extent authorised by the Minister ;
>
> (iii) for industrial civil servants in post on 8 December 1967 unpaid special leave of up to 50 days a year granted for trade union and civic duties may reckon; PCSPS – Section II (The 1972 Section) 18
>
> (iv) unpaid special leave taken on or after 1 December 1980 for the purpose of voluntary public service may reckon to the extent authorised by the Minister; (v) unpaid absences taken by part-time staff will qualify to the extent provided under rules 2.7, 2.7a, 2.7b and 2.7c;
>
> (v) unpaid maternity leave granted on or after 6 April 1988 will qualify as full-time service.”