

Ombudsman's Determination

Applicant	Mr S
Scheme	Frederic R Harris Retirement & Death Benefits Scheme
Respondents	Trustees of the Frederic R Harris Retirement & Death Benefits Scheme (the Trustees)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Trustees of the Frederic R Harris Retirement & Death Benefits Scheme.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

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3. Mr S has complained that the Trustees have informed him that he has been overpaid pension benefits and they are seeking to recover the overpayment.

Background information, including submissions from the parties

Background

4. On 30 October 2013, the Scheme administrators, JLT Benefit Solutions Limited (**JLT**), wrote to Mr S in response to his request for a retirement quote as at 24 April 2015. JLT quoted an annual pension of £45,303.30 or a tax free cash sum of £261,910.17 and a reduced annual pension of £39,286.53.
5. Further figures were sent to Mr S on 4 November 2014. JLT quoted an annual pension of £47,088.30 or a tax free cash sum of £311,809.04 and a reduced annual pension of £40,749.43. Mr S retired on 24 April 2015. He opted for the tax free cash sum and reduced annual pension.
6. In April 2016, the Trustees contacted Mr S saying that the tax free cash sum had been overpaid. In a subsequent letter, dated 27 July 2016, the Trustees said JLT had used an inappropriate commutation factor. The Trustees said they should have sought advice from the Scheme's actuary at the time of Mr S' retirement but, instead, JLT had used a commutation factor taken from the market annuity rate. The

commutation factor used was 49:1. The Trustees said it should have been in the range of 15:1 to 20:1, in line with other occupational pension schemes. They also said that JLT had also used an incorrect formula to calculate the maximum tax free cash sum Mr S could take; that is, it had not checked that his tax free cash sum equated to 25% of his total entitlement. The Trustees said they had obtained advice from the Scheme's actuary and the correct amount of the maximum tax free cash sum available to Mr S was £259,797.52 and his annual pension should have been £38,969.43.

7. The Scheme's governing document is the second definitive trust deed and rules dated 9 December 1992 (as amended). Rule 5.4.3 states,

“... the rate at which an amount of pension is to be converted into a cash sum shall be determined by an Actuary ...”
8. The Trustees said they had a duty to seek repayment of the overpaid amounts. They said JLT had not implemented the 6% fixed annual increase to Mr S' existing pension pending resolution of the matter.
9. JLT wrote to Mr S, in November 2016, saying it had been instructed by the Trustees to adjust Mr S' Scheme pension. JLT said it had calculated the overpayment of pension to be £1,783.46, which, it said, would be recovered by three monthly deductions of £594.49. JLT provided Mr S with a spreadsheet showing its calculation of the total overpayment and recovery. Mr S' pension was reduced from £2,612.27 to £2,463.96 for October and November 2016. Following a query from the Pensions Advisory Service (**TPAS**), JLT provided Mr S with a revised spreadsheet taking account of the earlier adjustment to his pension.
10. Mr S invoked the internal dispute resolution (**IDR**) procedure. In their stage one response, the Trustees confirmed their intention to seek repayment of the overpaid tax free cash sum (£52,011.52) in addition to the overpaid pension. They suggested recovering the overpaid cash sum by retaining future pension increases until 2024. Mr S' pension is made of two elements: an amount from the Scheme and an amount from a Friends Life annuity. The Trustees said Mr S would continue to receive increases on his Friends Life annuity and his monthly income would not decrease.
11. Mr S did not agree to the proposed recovery. He invoked stage two of the IDR procedure. The Trustees proposed going ahead with the recovery pending agreement. As at October 2017, they have recovered £940 by withholding increases to Mr S' pension. The Trustees have confirmed that they are willing to reconsider the recovery plan if Mr S provides financial evidence to show that it is not appropriate. In its correspondence with Mr S, TPAS queried whether going ahead with the recovery whilst Mr S was disputing it was contrary to section 91 of the Pensions Act 1995.

Mr S' position

12. The key points raised by Mr S are summarised below:-

- In the 18 months between his retirement and being notified of the overpayment, he had incurred irreversible expenditure on non-essential items. Had he been aware of the error in calculating his pension entitlement, he would not have incurred these costs.
- On receipt of the notification of his entitlement, he and his wife agreed that they would allocate approximately £250,000 towards repayment of their mortgage and in long-term investment. They decided that any amount in excess of this would be spent on travel and improving the quality of their lives.
- The expenditure referred to above consists of: home improvements amounting to £34,038; private medical treatment amounting to £12,522; and holidays amounting to £8,379. In total, the expenditure he incurred which he would not otherwise have done amounts to £54,939. Mr S has provided invoices relating to these items.
- He is not in a position to repay any of the overpaid lump sum.
- The overpayment should be recovered from JLT. It was the source of the error and should have insurance to cover such.

13. Mr S has explained that, of the £250,000 referred to above, £14,091 went to repaying his mortgage and £234,480 went to investments in his and his wife's name, together with advisor's fees.

14. Having seen an opinion from one of our Adjudicators, Mr S made the following further submissions:-

- He would not have allocated a lesser amount for long-term investment.
- There is no further evidence he can provide; other than his stated intention and the evidence of expenditure provided.
- He should not have to repay the overpayment because the funds were expended irrevocably and in good faith.
- If he was required to realise investments, this would significantly and unfairly prejudice his and his wife's future financial security.
- Payment of a sum in excess of £50,000 would surely have a major negative impact on anyone's standard of living.
- He is having to realise investments to cover the shortfall in income. Future repayment should only take account of investments in his name.

Adjudicator's Opinion

15. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Trustees. The Adjudicator's findings are summarised briefly below:-

- The starting point, when there has been an overpayment, is that it is recoverable from the recipient, unless, that is, there is a defence against such recovery.
- The most common defence against recovery of an overpayment of pension is referred to as "change of position"; that is, the recipient has changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part. To establish a change of position defence, certain conditions must be satisfied. Broadly, the recipient must, on the balance of probabilities, be able to show:-
 - (i) he received the overpayment in good faith;
 - (ii) he spent the money on something he would not otherwise have bought and this expenditure is irreversible; and
 - (iii) it would be unjust to require him to repay the money.
- If these conditions are satisfied the Ombudsman may direct that some or all of the overpayment should not be recovered.
- If it is possible that the recipient of an overpayment could or should have been aware that something was amiss, the change of position defence will fail. This includes circumstances where the recipient cannot be sure that there has been a mistake. In such circumstances, he/she is expected to make reasonable enquiries of the paying party.
- The overpayment in Mr S' case arose because an incorrect commutation factor had been used to calculate Mr S' tax free cash sum. This was a technical error and the Adjudicator was satisfied that Mr S could not be expected to be aware of it.
- The Adjudicator noted that Mr S had received a benefits quotation in October 2013. Just over a year later, he received another quotation, which included the incorrectly calculated tax free cash sum. In the interim, the amount of the annual pension quoted to Mr S had increased by 3.9%; whereas the amount of his tax free cash sum had increased by 19%. However, this was only apparent if the percentage increase was compared across the figures. In the Adjudicator's view, this was not a check which a member could reasonably be expected to undertake on receipt of a benefit quotation.

- The Adjudicator noted that Mr S had previously been a trustee of the Scheme. However, she was still of the view that the nature of the error was such that he could not have been expected to notice it. She accepted that he received the higher cash sum in good faith.
- Mr S had provided details of expenditure he incurred between April 2015 and April 2016 which he said he would not have incurred but for the overpayment. It was always difficult to determine what someone might have done if the circumstances had been different. Mr S had explained that he and his wife decided to use £250,000 of his lump sum to pay off their mortgage and for investment. He said they decided to use the excess, amounting to £69,809.04, on holidays and improving their lives.
- Had Mr and Mrs S made exactly the same decision as to the use of the cash sum on the basis of the correct amount, the excess would have been £9,797.52. This amounts to a difference of 86% in the funds Mr S says he would have set aside for spending on holidays and life improvement. A difference of this magnitude would generally be accepted as sufficient to mean that the recipient would have made different plans.
- It was, therefore, possible to say that it is very likely that Mr and Mrs S would have made different plans, had he been given the correct figure for his tax free cash sum. However, it is not possible to say with any certainty that they would simply have spent less on holidays and life improvement. It is equally possible that they may have set less aside for long term investment. The Adjudicator was happy to accept that Mr S had provided details of expenditure he believed he would not have incurred, had he not been paid the incorrect amount of tax free cash sum, in good faith. However, in her view, there was insufficient evidence to find that this would have been the case without the benefit of hindsight.
- It was necessary to consider whether it would be unjust to require Mr S to repay the overpayment. However, Mr S had received more than he was entitled to under the Scheme rules. He had expressed the view that he was not in a position to repay the overpayment, but this was not supported by the available evidence. That part of the cash sum which Mr S used for investments would be considered recoverable to the extent that the investments have a realisable value. Arguably, the investments made in his wife's name could be considered to be gifts and were, therefore, not recoverable. However, the Trustees had not asked Mr S to realise any investments in order to repay the overpayment.
- Instead, the Trustees were seeking recovery over an eight year period, to 2024, by not increasing Mr S' pension. They had pointed out that this meant that Mr S continued to receive his current level of pension and increases on

his Friends Life annuity. Mr S had not put forward any evidence to indicate that such a recovery schedule will cause him undue financial hardship.

- In the Adjudicator's view, the conditions for a change of position defence against the recovery of the overpayment had not been established by Mr S.
- There are other defences to the recovery of an overpayment; for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that this is appropriate.
- The conditions for an estoppel defence are similar to those for change of position. For estoppel by representation, Mr S would have to be able to show that he received an unambiguous promise that he was entitled to the higher cash sum. The benefit quotations provided for Mr S included statements to the effect that they were subject to the Scheme's trust deed and rules. There was no unequivocal promise that he would receive the higher cash sum regardless of his entitlement under the Scheme rules. The Adjudicator noted that the Courts had found that, for the estoppel defence to succeed, it must be considered unconscionable to allow a party to go back on an incorrect statement. This was a quite a high hurdle for Mr S' claim to clear. In view of this, she did not consider that an estoppel defence could succeed in Mr S' case.
- For a contract to exist, there must be offer, acceptance, consideration and the intention to enter into legal relations. Even if it could be said that the benefit quotations constituted an offer, which Mr S accepted, there was no consideration; that is, something given in exchange for the promised benefit. In the Adjudicator's view, no contract existed between Mr S and the Trustees requiring the payment of the higher cash sum.
- The Adjudicator concluded that the Trustees were able to recover the full amount of the overpayment from Mr S.
- Mr S had suggested that the Trustees should ask JLT to compensate them for the overpayment because it was the source of the error. He suggested that JLT should have insurance to cover such circumstances. However, this approach would mean that the Trustees would still have paid, and would continue to pay, Mr S more than his entitlement under the Scheme rules. As a general principle, the Trustees can only pay the benefits which are provided for under the Scheme rules. It was appropriate that they should seek recovery from Mr S in the first instance.
- The Trustees have put in place a recovery plan under which Mr S would not receive an increase on his Scheme pension until 2024. As a rule of thumb, the Ombudsman looks for recovery to take place over at least as long a period as the overpayment accrued. This was only partially relevant in Mr S' case because his overpayment was largely made up of tax free cash sum. The

Adjudicator considered the recovery plan appropriate since it preserved the 2016 level of pension, which minimised the adjustments Mr S would have to make to his expenditure to cope with a lower than expected income.

- It had been suggested that the Trustees' decision to proceed with the recovery plan in advance of agreement from Mr S was contrary to section 91 of the Pensions Act 1995. Section 91 relates to the inalienability of an occupational pension. It covers circumstances where there might be a charge, lien or set-off against a member's pension. Section 91(6) provides,

"... where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff."

- The Trustees had pointed out that there was no dispute as to the amount overpaid to Mr S.
- Section 91 was amended, with effect from April 2005, to allow for the recovery of sums due to a scheme in respect of a pension payment made in error. This would appear to include recovery of an overpayment from future pension payments. An alternative argument has been put forward to say that section 91 does not apply where recovery of an overpayment is sought. The argument being that the effect of recovering an overpayment from future pension payments is to ensure that the member receives the correct entitlement. Whichever argument applies, it is clear that section 91(6) applied where there was a dispute as to the amount of the overpayment. This did not arise in Mr S' case.

16. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

17. Mr S has received more than his strict entitlement under the Scheme rules. As a former trustee, he will appreciate that this is a situation which the Trustees cannot leave uncorrected.
18. The law recognises that, where a member has been overpaid, trustees should be able to seek to recover the monies paid in error. They have a responsibility to the other members of the scheme to do so. However, the law also recognises that there may be circumstances where it would not be appropriate for the member to be asked to repay all or part of the sum in question.

19. I accept that Mr S received the overpayment in good faith. He has put forward evidence in support of the argument that he incurred irreversible expenditure as a result. That expenditure consists of home improvements, private health care and holidays amounting to £54,939. Mr S seeks to separate this expenditure from the £250,000 he used to pay off his mortgage and make long-term investments. The overpayment amounts to £52,011.52.
20. Mr S is adamant that he would always have set aside £250,000 to pay off his mortgage and make long-term investments. He argues that he would not have spent as much on his home improvements and holidays, and his wife would have had her hip replaced via the NHS. The problem he faces is that it is very difficult to evidence such a claim. It is equally plausible that he would have made the home improvements in order to benefit from them immediately; that he would have taken the holidays; and that he would have funded his wife's private treatment.
21. If the overpayment is not recovered, Mr S stands to benefit from the use of the £52,012; either in the form of past expenditure which he continues to enjoy (for example, the home improvements) or in the form of future gain (investment return). If the Trustees proceed with their plan to recover the overpayment by not increasing Mr S' pension, he faces a period of receiving less than he expected by way of income; albeit that the current level of his pension is preserved.
22. On balance, I do not find that it is unjust to require Mr S to repay the overpayment in the way in which the Trustees intend.
23. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
27 November 2017