

## Ombudsman's Determination

Applicant	Mrs S
Scheme	Eternit Pension Plan ( <b>the Plan</b> )
Respondent	Marley Limited ( <b>Marley</b> )

## Outcome

1. I do not uphold Mrs S' complaint. Marley is entitled to seek recovery of the remainder of the overpayment that it has not already decided to write off.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

1. Mrs S has complained about Marley's decision to demand repayment of an overpayment of her pension benefits.

## Background information, including submissions from the parties

2. Mrs S began working for Marley in 1973. She had a break in service of 9 months in 1989, so her pension was calculated in two parts.
3. Upon reaching the age of 60, in December 2009, Mrs S decided to take her retirement benefits from her first period of service. She elected to take the maximum tax free lump sum of £13,919.23 plus an annual pension of £2,087.88.
4. Mrs S continued to be employed by Marley until December 2014, when she reached the age of 65 and started drawing the second part of her pension.
5. In June 2017, during Marley's review of pension increases, it was discovered that, due to an administrative error, annual increases from April 2010 had been applied to the wrong starting pension. Pension increases had been based on a figure of £3,031.56 which was the full annual pension Mrs S would have been entitled to if she had not taken the tax free lump sum in 2009.
6. As a result, an overpayment of £8,006.18 accrued during the period April 2010 to May 2017.

### **Summary of Marley's position**

7. Marley says that Mrs S is only entitled to receive the correct level of benefits from the Plan. So, it reduced Mrs S' monthly pension payments to the correct figure of around £222.
8. Marley has agreed to write off the overpayment accrued during the period 24 April 2010, when the overpayment started to accrue, to 5 September 2011, six years before this office received Marley's claim for repayment, on the basis that this is statute barred by virtue of the Limitation Act 1980. However, Marley says it wishes to seek recovery of the remainder accrued after 5 September 2011.

### **Summary of Mrs S' position**

9. Mrs S has said she cannot afford to make the repayments as this would result in a drastic reduction in her monthly income.
10. Mrs S also said that even selling her car would not provide sufficient money to make good the overpayment. But in any case, this is not viable as her husband, who is in poor health, is dependent on it for transport.

### **Adjudicator's Opinion**

11. Mrs S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Marley. The Adjudicator's findings are summarised briefly below: -
  - Mrs S may have a defence to the recovery of an overpayment, known as a change of position defence, if she can demonstrate that: because of the overpayment, which she received in good faith, she detrimentally changed her position; the money was spent on something she would not otherwise have bought; and the expenditure was irreversible. But the burden is on Mrs S to prove that she has detrimentally changed her position to such an extent that it is now inequitable to require her to repay the overpayment.
  - Mrs S does not have any additional assets as a result of the overpayment. Instead it seems that Mrs S relied on the pension income and has been living according to her means. Ultimately receipt of the overpayment has enabled Mrs S to live a slightly improved and more generous lifestyle than she would otherwise have had without the overpayment. But this spending cannot now be recovered.
  - Thus, Mrs S satisfies the requirement that she has changed her position as a consequence of spending which is irreversible. But, for a change of position defence to succeed, there must also be detrimental reliance in good faith.
  - It is accepted that Mrs S may not have been aware she was receiving an overpayment. But the good faith requirement does not just concern what Mrs S knew at the relevant time, but what she ought to have known. This includes

asking questions if reasonable to do so, for example if the payment received is different to the figures provided previously.

- Mrs S' applied for benefits in February 2010, at which point Marley wrote to her setting out her pension options. Marley's letter dated 18 February 2010, detailed Mrs S' then correct pension entitlement of £173.99 per month based on her taking a reduced pension in order to receive tax-free cash. Shortly thereafter, in March 2010, Marley wrote to Mrs S to inform her that, from April 2010, increases would be applied to her full, unreduced, pension.
  - Although Marley's letter of March 2010 did not, alone, include sufficient information from which Mrs S would have been capable of identifying the error, this was sent very soon after her pension benefits were put into payment. As such Mrs S could, with reasonable diligence, have identified that the figures detailed in the letter dated 24 March 2010, were significantly different to those she was expecting, which were detailed on the retirement application she completed on 15 February 2010.
  - Further, when Mrs S received the first incorrect payment of £255.11, it would have been apparent that this was a marked increase to the amount she had received previously and that which she was expecting to receive when she applied for benefits. Mrs S would, in all probability, have identified this increase and could reasonably have contacted Marley for clarification. Had Mrs S done so, it would have then become apparent that she was in receipt of an overpayment.
  - It would not be particularly onerous to expect Mrs S to have made enquiries, from which she would have been capable of identifying that she was in receipt of an overpayment. As Mrs S did not take these reasonable steps, the good faith requirement is not met.
  - A further requirement for a successful change of position defence is that Mrs S must also prove that it is now inequitable to require her to repay the overpayment.
  - But, taking all of Mrs S' circumstances into account, requiring Mrs S to repay the overpayment over the same period of time as it accrued, or longer as has been proposed by Marley, would not reduce her income to such an extent that it would be inequitable to now require her to repay the overpayment.
12. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her 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 Mrs S for completeness.

### **Ombudsman's decision**

13. Mrs S has said that she was unaware that she was in receipt of an overpayment, because, she says, the letter she received in February 2010 had been filed away by

the time the March 2010 letter arrived, and that she had no reason to question the information Marley had sent her. Mrs S also pointed out that the pension figures she would be expected to compare in order to identify the error were expressed as a monthly value in one letter and an annual amount in the other.

14. Similarly, Mrs S has explained that she is upset that Marley has suggested that she knowingly spent the overpayment knowing that she was not entitled to this, and that Marley has, “the audacity to cast aspersions on [her] character.”
15. However, as the Adjudicator explained, when assessing the good faith requirement, it is necessary to consider not only what Mrs S knew at the relevant time, but what she ought to have known. This includes asking questions if it would be reasonable to expect her to do so. Further, with a change of position defence, the burden is on Mrs S to prove that she has detrimentally changed her position and that it is now inequitable to require her to repay the overpayment.
16. In this case I find that Mrs S could, with reasonable diligence, have identified that the letter dated 24 March 2010, which said, “your total pension will therefore be increased from £3,031.56 per annum to £3,061.32 per annum” quoted a significantly greater starting pension than the application for benefits Mrs S completed on 15 February 2010, in which she elected to take an annual pension of £2,087.88. I do not consider that it would be particularly onerous to expect Mrs S to have identified this discrepancy, or to have sought further clarification from Marley.
17. Additionally, while I accept that Mrs S has spent the money on items which she might not have otherwise bought, I do not find that it would be inequitable to require Mrs S to repay that money. I say this not least as Marley has indicated that it is willing to accept repayment at a rate of around £57 per month over a period of ten years. This represents only around 4.25% of Mrs S’ overall declared income, after allowing for the incorrect pension she was previously receiving to be reduced to that which she is entitled to receive.
18. For these reasons I do not consider that Mrs S had a valid defence against recovery of the overpayment.
19. Finally, Mrs S has also commented that the tax-free lump sum she received was used to repay her mortgage. But I do not consider this to be relevant to the outcome. Generally, paying off a debt will not count as a detrimental change of circumstances because the debt would have to be paid off anyway. However this argument does not apply in Mrs S’ case, as her mortgage was repaid using the tax-free cash to which she was correctly entitled.
20. Therefore, I do not uphold Mrs S’ complaint.

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21. Marley is entitled to seek recovery of the remainder of the overpayment accrued after 5 September 2011, such repayment to be spread over a period of ten years unless Marley agrees with Mrs S to vary the period of repayment.

**Anthony Arter**

Pensions Ombudsman  
27 March 2018