

## Ombudsman's Determination

Applicant	Mr Y
Scheme	The Cooper Consolidated Pension Plan ( <b>the Plan</b> )
Respondents	Barnett Waddingham LLP ( <b>the Administrator</b> ) Trustees of the Cooper Consolidated Pension Plan ( <b>the Trustee</b> )

## Outcome

1. Mr Y's complaint against the Trustee 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, the Trustee shall pay Mr Y £1,000 for the serious distress and inconvenience he has suffered.

## Complaint summary

2. Mr Y contends that the Trustee has made an error about which section of the Plan he is a member of and therefore which benefits he is entitled to. He is unhappy with the assertion by the Administrator and Trustee, that his pension benefits have been overpaid because of an administrative error. He disputes that an overpayment has occurred, and has questioned the calculation of the overpayment.

## Background information, including submissions from the parties

3. In 1986 Mr Y started employment with ASH Technology Group (**ATG**), which formed part of Automated Security Holdings (**ASH**). As a consequence of his employment, Mr Y was a member of the Automated Security Holdings Pension Plan (**the ASH Plan**). ATG subsequently became Scantronic Limited, then Cooper Security Limited, now Eaton Safety Limited. In the context of these corporate changes, Mr Y was given a commitment about the continued accrual of pension benefits equivalent to those provided by the ASH Plan. On 1 December 1988 employees of ASH who were members of the ASH Plan became members of the Cooper Security Limited Retirement Benefits Scheme (**Cooper RBS**). The Cooper RBS was administered by AXA-Sun Life Services PLC (**AXA**).
4. The Plan was established by a Definitive Deed and Rules dated 9 December 1988 with effect from 1 December 1988. On establishment, the Plan was known as the

Cooper (U.K.) Limited Beswick Division Retirement Benefits Scheme. The Plan changed its name to the Cooper Consolidated Pension Plan with effect from 1 January 1996.

5. The Plan consolidated several existing pension arrangements; there are a number of different membership sections under the Plan, providing different levels of benefits. Relevant to this complaint are the 'Ex- ASH' and 'Crouse-Hinds' membership sections.
6. The Crouse-Hinds Section was established with effect from 1 April 2000. This section related to members who were employed by Cooper Crouse-Hinds (UK) Limited after 31 March 2000 and who were accruing benefits under the Weidmuller Plan until 31 March 2000.
7. On 26 September 2003, a Deed of Amendment created schedule 5 known as the ex-Ash schedule. This established a section for ex-ASH members who are defined under the deed as:  
  

“a Member who was prior to 1 December 1988 a member of the Ash Pensions Plan, who became a member of the Cooper Security RBS with effect from 1 December 1998, whose rights under the Cooper Security RBS have been transferred to the Plan and who has been notified in writing by the Principle Company that he is eligible for membership of the Plan under the terms of the Ex-Ash schedule.”
8. The main differences between the annual increases applied to different tranches of pension accrued in these two sections are summarised below:

Tranche of pension	Ex-ASH section	Crouse-Hinds section
Pension accrued prior to 6 April 1997	0% increase	3% per annum increase
Pension accrued from (and including) 6 April 1997	Increased in line with inflation* up to a maximum of 5% per annum	Increased in line with inflation* up to a maximum of 5% per annum, but subject to a minimum increase of 3% per annum
Guaranteed Minimum Pension ( <b>GMP</b> ) accrued after 6 April 1988	Increased in line with inflation, as measured by the Consumer Prices Index ( <b>CPI</b> ) up to a maximum of 3% per annum	3% per annum increase

\*Inflation is measured with reference to the Retail Prices Index (**RPI**) up to and including 1 April 2010, and with reference to CPI thereafter.

9. On 11 February 2004, an inter-office memorandum (**the Memo**) was sent to Mr Y by the Trustee Board. This stated:

“In recognition of the commitment made to you in December 1988 by Scantronic Limited, Cooper Security Limited (“The Company”) has made arrangements with the Trustee of the Cooper Consolidated Pension Plan to provide benefits to you in accordance with the following provisions...The Cooper Consolidated Pension Plan will provide a benefit with respect to your service from 1<sup>st</sup> December 1988 to 31<sup>st</sup> December 2003 equivalent to the benefit which would have been provided by the Automated Security Holdings PLC Group Pension Plan as in effect on 1 December 1988, with an appropriate adjustment made for your [Mr Y] having participated in SERPS while a member of the Cooper Security Limited Retirement Benefits Scheme.”

10. Mr Y signed an agreement which was set out in the Memo on 23 February 2004. A copy of the Memo is provided in Appendix 1.
11. On 25 March 2004, the Trustee Board considered whether to allow Mr Y to join the Plan. The minutes of the meeting record:

“7.2.2 Ex-Ash Transfers

This matter concerned employees participating in the Cooper Security Retirement Benefits Scheme, some of whom had received letters in 1998 referring to a commitment to provide a certain level of retirement benefit. In respect of two individuals, [(first name redacted) and Mr Y], the Company had given a funding commitment to honour the “promises” and Hewitt Bacon & Woodrow [the former Scheme Actuary] had advised on the funding shortfall which would arise if the benefits were to be provided through the Consolidated Plan. The issue facing the directors was whether to allow both members to join the Consolidated Plan in respect of the provision of their benefits. Having considered the matter, the directors were content to allow both members to join the Consolidated Plan contingent on the Company making such contributions as were advised by Hewitt Bacon & Woodrow to fund any shortfall occasioned by such payment.”

12. Although the resolution from the board meeting only mentions two ex-ASH members being admitted to the Plan, it seems to be accepted that there were, in fact, three members admitted.
13. Mr Y has said that on 17 February 2006, all employees at his workplace were sent a letter informing them about the Cooper Industries Retirement Benefits Plan (**CIRBP**), a money purchase arrangement which was to replace the Cooper RBS for future accrual. The sample letter, provided by Mr Y, included the following statement:

“The Company is aware of commitments made to members of the then ASH Pension Plan in relation to the future value of retirement benefits. It is no longer possible to maintain this commitment within the context of the CIRBP.

Accordingly, The Company will make you a payment of £XXX in full and final settlement of any monies that might otherwise become due to you as a consequence of this commitment. The Company will EITHER pay this money directly into the CIRBP should you decide to join this scheme, OR pay it to you directly as a cash lump sum.

Should you decide to join the CIRBP, you will be advised by AXA of your options regarding the accrued funds in the [Cooper RBS] one of which will be a transfer of those funds to the [Plan].”

14. On 22 June 2006, an application, signed by Mr Y, was submitted to AXA, to transfer his accrued benefits from Cooper RBS to the Plan.
15. On 20 February 2007, HS Administrative Services Limited (**HSA**), the former Administrator, wrote to Mr Y to confirm that his benefits had been transferred from the Cooper RBS to the Plan.
16. On 27 January 2008, Mr Y was sent a statement setting out the options to take his benefits.
17. On 11 February 2008, HSA sent Mr Y a letter saying:

“We confirm that arrangements have been made to pay your pension of £6,964.44 per annum into your account...

Your pension will commence on 1 March 2008 and be paid monthly. The first payment will include arrears of £694.85 (gross) in respect of the period from 26 January 2008 to 29 February 2008.”
18. On 5 August 2009 the Administrator took over administration of the Plan from HS Administrative Services. In 2017 the Administrator conducted a review of plan benefits for the purpose of reconciling GMP benefits.
19. On 30 October 2017, at the Trustee's request, the Administrator wrote to Mr Y informing him that his benefits were governed by the ex-Ash section of the Plan's Trust Deed and Rules but due to an administrative error when he retired he had been placed into an incorrect section of the Plan and his pension had been increased in line with the rules applicable to the wrong section. As a consequence, an overpayment of benefits amounting to £5,424 as at the date of the letter, had accrued. The Administrator's letter also said that with effect from 1 December 2017, Mr Y's pension would be reduced from the incorrect amount of £773.74 (gross) per month to the correct level of benefits of £667.57 (gross) per month.
20. On 18 December 2017 Mr Y replied to say that he had been communicating with the Plan Trustee because he believed his benefits were in fact governed by the Crouse-Hinds section of the Plan. Because Mr Y disputed the calculation of the overpayment, the Trustee instructed the Administrator not to reduce Mr Y's pension income, while it investigated.

21. On 29 March 2018, solicitors appointed by the Trustee to represent it (**the Solicitors**), issued an IDRPs decision to Mr Y. This rejected the complaint on the basis that Mr Y was a member of the Ex-ASH section of the Plan rather than the Crouse-Hinds section as he had claimed.
22. Mr Y pursued his complaint to the Ombudsman, contending that he was, in fact, admitted to the Crouse-Hinds section of the Plan. He said that in around 2002, he, and two other former ATG employees, raised concerns about disappointing pension forecasts that had been provided by AXA which led to the Trustees becoming aware of a written contractual promise held by some employees guaranteeing certain pension rights. He said that the Trustees agreed to (1) achieve a 'cost neutral' solution by transferring these members into an existing section of the plan (Crouse-Hinds) and (2) transfer his pension fund from AXA-Sun Life into the consolidated plan and make additional contributions into that plan. In support of this position, Mr Y referred to various documents, such as an annual funding statement prepared by the Plan's Actuary in 2004, and pension increase letters, sent to him since 2008, which he said made reference to him being a member of the Crouse-Hinds section of the Plan.
23. In response to the complaint Mr Y brought to the Ombudsman, the Trustee, acting through the Solicitors, relied upon the IDRPs findings and submitted:
  - Mr Y was formerly a member of the ASH Plan; his benefits were transferred into the Cooper RBS and thereafter from that Scheme into the Plan.
  - The Plan was currently governed by a Replacement Definitive Trust Deed and Rules dated 13 August 2007 as amended by deeds of amendment up to and including the deed of amendment dated 10 September 2015 ("**the Plan Rules**").
  - Mr Y's benefits are to be determined in accordance with the Plan Rules as set out under the ex-Ash section.
  - Mr Y had sought to rely on documents outside the Plan Rules in support of his claim, however the Plan Rules are the legally definitive documents which sets out the benefits payable to members of the Plan. Mr Y fell within the definition of an ex-ASH member, set out in schedule 5 of the Plan Rules.
  - Mr Y had been receiving a pension from the Plan since 25 January 2008 and since that time, receiving pension increases in accordance with the Crouse-Hinds section of the Plan but had been treated, for other benefit purposes, as an ex-ASH member with benefits under the ex-ASH Schedule to the Plan Rules. This included using the Ex-ASH Schedule definition of Pensionable Salary which had a Lower Earnings Limit deductible.
  - The payment of Crouse-Hinds section pension increases had been in error and in breach of the Plan Rules. This error had resulted in Mr Y being overpaid £5,424 (before tax) of pension up to 30 October 2017 and being overpaid £1,326.38 per annum (before tax) in future payments of pension at that date.

- The only available document which related to the terms of Mr Y's joining the plan was the Memo. This indicated that Mr Y was to join the Plan on benefit terms related to those under the ASH plan. It follows that he should be provided with the benefits, including pension increases, under the ex-Ash schedule to the Plan, which was designed to provide benefits equivalent to those under the ex-Ash Plan.
  - Mr Y sought to rely on certain references made in the 2004 actuarial valuation of the Plan, communications from the Plan administrators and summary funding statements. Even if these did support his position, these documents did not override the Plan Rules. In any event, there was no conflict between the 2004 actuarial report and the Plan Rules. Dealing with the references, on page two of the report, it was stated that "Three new members were admitted to the Plan in the year prior to the valuation date, with benefits differing to those of other members." These were referred to as ex-ASH members. It was not clear whether those three members included Mr Y and his transfer request was not signed by him until 2006.
  - There was a reference in the report to two ex-ASH members. If this reference included Mr Y, then he was an ex-ASH member of the Plan.
  - It was also stated in the report that "There are 3 ex-Ash members whose benefits are included in the Crouse-Hinds section." Taking into account the purpose of the report which was to advise on the funding of the Plan, this statement meant that for convenience, for funding purposes (not for benefit calculation purposes) the three ex-ASH members benefits were included in the Crouse-Hinds section for the purposes of the 2004 actuarial valuation.
  - Mr Y had said that he had lever arch files of evidence in support of his position but had not produced evidence other than that already referred to. Specifically he had not produced an employment contract to support his claim.
24. On 23 May 2018, the Trustee wrote to Mr Y and this Office to confirm its intention to reduce, from 1 July 2018, Mr Y's pension payment to what it considers to be the correct amount. However, in relation to the decision to recover or recoup the overpayments of Mr Y's pension, the Solicitors subsequently informed this Office: -
- "Contrary to what is alleged in [Mr Y's] complaint, the Trustee has as yet made no decision to seek recovery of the overpayments of [Mr Y's] pension from the plan. There is accordingly no basis for [Mr Y] to complain on that ground."

### **Adjudicator's Opinion**

25. The complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustee. The Adjudicator's findings are summarised below:-

- There were two broad aspects to this complaint to be decided: 1) is the overpayment calculation correct and 2) if there is an overpayment, can the overpayment be recovered by the Trustee? To establish whether there had been an overpayment of benefits, it was necessary to first establish which section of the Plan Mr Y belonged to. i.e. ex-ASH or Crouse-Hinds.
- It was evident, from the notification sent to employees on 17 February 2006, that the Cooper Industries Retirement Benefits Plan, which was to replace the Cooper Plan, could not provide the same level of benefits as had been assured by Scantronic Limited to former ASH members. The offer, to the majority of members, was to compensate them either with a cash lump sum, or a payment to augment their benefits within the Cooper Industries Retirement Benefits Plan.
- However, it was also apparent that this situation did not apply to Mr Y and that alternative arrangements were made. This was supported by; the fact Mr Y did not receive a personalised mailing dated 17 February 2016, (and has only been able to provide a generic 'template' copy); the resolution passed at the board meeting on 25 March 2004; the terms of the Memo; and, Mr Y's own recollection of events.
- Hence, it was apparent that Mr Y's benefits were dealt with differently to the majority of ex-ASH members (who went on to be admitted to the CIRBP rather than the Plan). However, it did not appear that Mr Y was designated as a Crouse-Hinds member.
- Mr Y was only entitled to benefits prescribed by the Plan Rules, which took precedence over any other document where there may be a conflict. Schedule 5 of the Plan Rules related to ex-ASH members, and Part 2 provided the relevant definitions. From the relevant definitions of an ex-ASH member given in the Plan Rules, it was clear that Mr Y met them.
- The relevant description of a Crouse-Hinds member was defined as follows: "Crouse-Hinds Member" means a Member who is or was employed by Crouse-Hinds after 31 March 2000 who was a member accruing benefits under the Weidmuller Plan on 19 October 1999 and who remained a member accruing benefits under the Weidmuller Plan until 31 March 2000."
- It was not apparent that Mr Y had ever been employed by Weidmuller, nor had he contributed to the Weidmuller UK Group Limited Pension Plan, so it could not be said that the Crouse-Hinds definition applied to Mr Y. Accordingly, for the purpose of calculating his benefits, it was the ex-ASH rules which would apply.
- Although part of the 2004 funding statement concerning the Crouse-Hinds section of the plan made reference to "three ex-ASH members", of itself this did not mean that those ex-ASH members were admitted into the Crouse-Hinds section of the plan. It was far more likely that when assessing the Plan's funding



position, the Plan's Actuary had, for the sake of convenience, pooled the liabilities of the three ex-ASH members with the Crouse-Hinds members.

- This was supported by the fact that the funding statement and actuarial reports made it clear that, included with the Crouse-Hinds liabilities were the ex-ASH members. If the ex-ASH members had the same entitlement to benefits as the Crouse-Hinds members, it would not have been necessary for the Actuary to make such a distinction. Therefore, it could not reasonably be concluded that the statement made in the document conferred any entitlement to Crouse-Hinds benefits.
- Similarly, the letters issued since Mr Y retired, informing him that his benefits would receive Crouse-Hinds increases were, more likely than not, sent in error. If the Trustee and Administrator had made an error by calculating and paying increases on Mr Y's benefits in line with the Crouse-Hinds rules, it was not inconceivable that it also generated erroneous letters.
- In concluding that Mr Y's membership of the Plan fell within the ex-ASH section, it followed that increases ought to be calculated with reference to the rules for ex-ASH members. Hence, Mr Y's benefits were incorrectly calculated leading to an overpayment.
- In regard to whether the Trustee was entitled to seek recovery of the overpayment, the Solicitors had said that the Trustee had not sought to recover the overpayment from Mr Y as yet so Mr Y's complaint on this point was premature. Whilst this was so, the Trustee had indicated that it reserved the right to do so and a meeting of the Board of Directors of the Trustee, held on 28 June 2017, at which the overpayment came to light, confirmed the Trustee Directors had agreed to seek recovery.
- The Trustee's refusal to confirm the position to Mr Y had caused him unnecessary and avoidable distress, since he has been prevented from making counter arguments in response. If the Trustee were to demand repayment, Mr Y would have to invoke a further IDR process to challenge the claim, and its refusal to confirm its position had prejudiced Mr Y's ability to mitigate his loss, for example by reducing his spending in anticipation of making repayment.
- The Ombudsman took the view that in general, money paid in error could be recovered. The trustees or managers of a pension scheme could only pay the benefits specified in the scheme's rules. However, there were circumstances where the recipient may not be required to repay some or all of the overpayment; this being where a defence against recovery applied. The Trustee's refusal to confirm its position regarding recovery had prevented Mr Y from making submissions on whether a defence applied so instead it would be considered whether recovery of the overpayment was statute barred.



- It was unclear how the Trustee proposed to recover the overpayment. The two methods of recovery were repayment of the overpaid money (a claim in restitution), and recoupment (recovery of the overpayment by making deductions from future pension payments). Restitutionary claims were historically based on forms of action found in contract and so the Limitation Act 1980 (**the Limitation Act**) was relevant.
- Under the Limitation Act, the usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment [Limitation Act, section 5]. In the High Court case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch) (*Webber*) the Judge hearing the appeal decided that the cut-off date for limitation purposes (in overpayment cases before the Ombudsman) was the date when the Trustee served its response to the complaint.
- On the facts of this case the Trustees right to recover would appear to be affected by this decision.
- If the Trustee proposes to seek recoupment of the overpayment from Mr Y by making deductions from his future pension payments, different principles apply.
- In *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber*). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future. As such, equitable recoupment was not subject to a six-year limitation period under section 5 of the Limitation Act 1980.
- In respect to whether any further defences were available to Mr Y, the most common defence was “change of position”. However, Mr Y has not been afforded the opportunity to make representations on his change of position (if any). Similarly, other defences could not be considered. Thus the correct course of action was for the Trustee to inform Mr Y whether it proposed to recover the overpayment and, if so, by which method, then consider any submissions Mr Y may wish to make in terms of the available legal defences.
- The Trustee could have identified the error leading to the overpayment sooner. It incorrectly led Mr Y to believe he was eligible for a pension income greater than that he was actually entitled to and the position has been misrepresented over a prolonged period of around 10 years. This was bound to have caused Mr Y serious distress. Further, the Trustee had not confirmed its position regarding repayment of the overpayment. This prolonged the resolution to this dispute, which would exacerbate the distress and inconvenience he had experienced.
- Mr Y’s complaint was upheld in part. It was not possible to conclude that Mr Y was a member of the Crouse-Hinds section of the Plan. However, the Trustee

had caused Mr Y serious distress and inconvenience such that an award, for £1,000, was warranted.

26. The Solicitors, on behalf of the Trustee, accepted the Adjudicator's Opinion and said should Mr Y accept this, it would pay him £1,000 in recognition of his serious distress and inconvenience. It said it had noted comments regarding the Trustee's ability to recover or recoup the overpayment, and after providing Mr Y with a further opportunity to provide evidence of a defence against recovery, it intended to recoup the overpayment by reducing future instalments of Mr Y's pension from the plan over a period of six years. Further, it intended to limit the recoupment to six years, rather than the full ten years of overpayments of pensions, as a gesture of goodwill.
27. Mr Y did not accept the Adjudicator's Opinion and made the following comments:-
- The ex-ASH Trustee who informed the Trustee board of the Scantronic promise provided him with the relevant extracts from the board meeting minutes that he had included in his submissions. On a separate occasion in his office, he was told "they are putting us in a closed American pension scheme."
  - In 2005, he was given a copy of the 2004 actuarial valuation of the Plan as a form of proof that they had been admitted into the Crouse-Hinds section of the Plan. References to a payment by Cooper Security Limited into the Crouse-Hinds section together with footnotes relating to head count, convinced him this was correct. No mention was made by the trustee regarding a temporary arrangement for convenience only.
  - The ex-ASH trustee retired in April 2006 and he had no contact with him after this date. The 2004 valuation report was that trustee's personal copy. As all these matters were pension related, he assumed the trustee was acting in his capacity as trustee. He saw nothing suspicious in the fact he was receiving correspondence relating to the Crouse-Hinds section of the Plan, and assumed it was the closed American scheme he had been told about.
  - It would have prevented a great deal of confusion if the so called "inter-office memo" had gone further and stated where his pension would be paid from, i.e. a new ex-ASH section which the trustees were adding to the Plan. He was the innocent victim of other people's mistakes. He could not see that any request for evidence had been made to support the claim that a historical mistake had been made by the previous administrator. A statement was required from the previous administrator to confirm whether they made a mistake.
  - He objected to the use of entry qualifications related to a defined benefit pension scheme, quoted out of context, to deny him the correct annual increases to his pension. It appeared the Adjudicator was influenced by the definition of a model Crouse-Hinds pensioner; this in his view was unhelpful and a distraction. The rules related to entry restrictions to bar new employees from joining the Crouse-Hinds section could not be taken out of context to justify the claim that a small

number of ex-ASH employees admitted into the Crouse-Hinds section of the Plan could not be treated in the same way as former Crouse-Hinds employees.

- It was his understanding that the former trustees used a Deed of Adherence to admit him into the Crouse-Hinds section, which they orchestrated in the best long-term interests of the Plan. A form of hybrid membership, i.e. membership in name only, was never communicated to him. At this time, the former trustees were facing a previously undeclared pension liability; minor differences in rate of pension increases paled into insignificance in comparison.
- In November 2017, he contacted his ex-ASH colleague, former Cooper Security Operations Director and former trustee of the Plan, regarding the Administrator's overpayment letter of October 2017. It transpired that his ex-colleague had received a very similar letter claiming an overpayment had arisen.
- In order to agree with the Trustee's position, one would have to accept that the industry leading organisation HSA had made two elementary errors in April 2006 and January 2008 when they set up his and his former colleague's pension, and that the equally well-respected Barnet Waddingham made further elementary mistakes when the administration for the Plan changed hands. He assumed that both HSA and the Administrator had robust procedures in place to prevent elementary administrative errors.
- During the call with his former colleague, he was informed that documents did exist which linked their benefits to the Crouse-Hinds section of the Plan. The apparent lack of such a link was recently questioned by the Adjudicator. It must be accepted that he was an ordinary pensioner and did not have copies of all the background paperwork. However, just because he did not have this information, it did not mean that such a link did not exist.
- Further, he had never received any communication from the Trustee which led him to believe he was a member of the ex-ASH section of the Plan.
- Funding was transferred on his behalf by Cooper Security Limited and his own pension fund was transferred by AXA into the Crouse-Hinds section. How could the current board of trustees and their administrator then be content to deny him benefits which the former trustees, and his former employer, were happy for him to contribute into?
- If proving his position required absolute written evidence, this must be recovered from the trustees' archives. The rationale behind the ex-ASH section contained important clues to understanding the present dilemma. Previous administrators should also be contacted to understand why they administered his benefits as they did.
- His understanding was that a new Cooper company operating a final salary pension scheme required a new section to be added to the Plan to manage the assets and liabilities of that scheme. The ASH promise was given to all

employees connected with the ASH facility at Mitcheldean, roughly between 80-100 individuals.

- A payment was required to admit three former ex-ASH employees into the plan. The Cooper Industries Retirement Benefit Plan was later introduced for all staff at the Mitcheldean facility including the surviving ex-ASH employees, with the exception of three former ex-ASH employees who were admitted into the Plan.
- With this in mind, it ought to be investigated why no reference was made in the 2004 actuarial valuation of the ex-ASH section which was added in 2002. This also did not appear in any subsequent evaluations. If this line of enquiry was followed, it would lead to the obvious question of why the former trustees spent time, effort and money setting up the ex-ASH section which was to remain unused? The answer was that the ex-ASH section was no longer required, as the main body of employees were admitted into The Cooper Industries Retirement Benefit Plan and the three ex-ASH employees were admitted into the Crouse-Hinds section.
- The actuarial report showed £20,000 was put into the Plan to fund the membership of three employees in the Crouse-Hinds section.
- He wished to know when the administrators found out about the purported overpayment error and how. He was unhappy that no pension increases had been applied since being notified of the overpayment.
- The Solicitors confirmed that the only item of correspondence which could be found regarding his pension was a copy of the Memo. This document was sent by him to The Pensions Ombudsman after the purported overpayment had been discovered. This prompted the question of what evidence the Administrator used to justify its actions.
- Was it possible that someone employed by the Administrator noticed ex-Ash employees in the Crouse-Hinds section and after checking the ex-ASH section and seeing no pensioners listed, assumed a mistake had been made?
- In the Memo, the decision to admit him into the Plan was restated. The problem was that a condition of confidentiality was attached to this decision, which he believed could affect the provision of his benefits. Confidentiality was not a condition of the ASH promise, which was available to all ex-ASH employees. He assumed the confidentiality clause was put in place to prevent internal friction.
- A document existed confirming the trustees set up a team to determine the number of ex-ASH employees still employed by Cooper Security Limited. Was it possible that the former trustees identified a problem, possibly a shortfall, in the funds held at AXA Sun Life after setting up the ex-ASH section to the Plan and agreeing to admit three ex-ASH employees into the Plan? It was known that a substantial contribution was made by Cooper Security Limited to boost the pension funds of three ex-ASH employees.

- Continuing this line of reasoning, was it possible that the former trustees introduced the CIRBP as a way to overcome a similar problem with the remaining ex-ASH employees?
- Membership of the Crouse-Hinds section of the Plan had been fostered entirely through the actions of the former trustees and perpetuated through the issue of documentation in the name of that section of the Plan.
- He had recently provided documents from the previous administrator [retirement benefit correspondence from 2008], which detailed the level of increases which would be applied, these should in themselves be sufficient to allay any doubt regarding the alleged overpayment.
- He had entered into an agreement with the former trustees and by default the current trustees of the Plan to provide him with a pension in accordance with the pension option he had selected.

28. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr Y for completeness.

### **Ombudsman's decision**

29. In order to decide whether an overpayment from the Plan has occurred, I have to decide whether on the balance of probabilities Mr Y is entitled to membership of the Crouse Hinds or the ex-Ash section of the Plan. He fulfils the criteria for admission to the ex-Ash section and does not fulfil the criteria for admission to the Crouse Hinds section. There is no evidence of a contractual promise of additional benefit outside the rules of the scheme. I conclude that he is entitled to benefits under the rules of the ex-Ash section.
30. There is no contemporaneous documentary record of the 1988 promise made to Mr Y. Mr Y has referred to it and those who he believes signed it but he has not produced a record of what it was. The only documents relating to the agreement to create Mr Y's membership are the Memo and the meeting minutes of 25 March 2004. I have considered these carefully. The Memo sets out that Mr Y's benefit in the Cooper RBS would be transferred to the Plan and that Cooper Security Limited will provide any additional funding for this as required by the then trustees. It does not state that he would be entitled to membership of the Crouse Hinds Section. I agree it would have been helpful if it had been specific, but it was not and therefore does not take the matter any further. Turning now to the Trustee meeting minutes, although these refer to "promises" to provide a certain level of benefit and permission being given to allow both members to join the Plan, it does not make clear what those promises were. There is no evidence that the Trustee intended to accept responsibility to create a membership within the Crouse-Hinds section, or a benefit in excess of that provided for by the ex-Ash section.

31. Administration practice has undoubtedly been out of kilter with the Scheme rules. However it is not true to say that he has been treated as a Crouse-Hinds member. Whilst Mr Y was treated as a member of the Crouse-Hinds section for the purposes of his pension increases, he was treated as an ex-ASH member in terms of the definition applied to his Pensionable Salary. This contradiction reinforces the fact that the matter is not quite as straightforward as a mere misunderstanding exacerbated by a loss of historical documents as Mr Y has suggested.
32. The statements made in the 2004 actuarial valuation report, which Mr Y has referred to in support of his position are consistent with that treatment and his situation being different to that of the Crouse-Hinds members and therefore do not support his argument that he is a Crouse-Hinds member. Even accepting that Mr Y is one of the two/three ex-Ash members referred to in that report, (which is in doubt because the 2004 report itself pre-dates Mr Y's transfer of benefits from AXA into the Plan) the membership basis as understood by the Actuary is not expressly set out.
33. I have also had regard to the 2008 retirement benefit statements which Mr Y has submitted. The information which they contained was incorrect, but the statements do not create a freestanding contractual entitlement to the benefits stated. The benefit entitlement remains that under the rules.
34. Taking account of all the evidence, and particularly the definition of ex-ASH members, the criteria of which Mr Y meets, I consider that Mr Y should be paid benefits in line with that section of the Scheme. I find that discovering that he has been paid the wrong benefit for over ten years will have caused Mr Y serious distress and inconvenience and make a direction accordingly.
35. I note the offer made by the Trustee to limit its recoupment to six years rather than the full ten years of the overpayment duration. I also note its commitment to allow Mr Y to a further opportunity to make any representations and submit evidence about how he may have changed his position in reliance on the incorrect level of benefit payment before seeking recoupment. I make no finding about whether Mr Y has any defence to recovery on that basis as it would be premature to do so.
36. Therefore, I partly uphold Mr Y's complaint.

## **Directions**

37. Within 28 days of the date of this determination, the Trustee shall pay Mr Y £1,000 in recognition of the serious distress and inconvenience he has suffered.

**Karen Johnston**

Deputy Pensions Ombudsman  
21 February 2020

## **Appendix 1**

### **Interoffice Memo**

Date: February 11, 2004

To: [Mr Y]

From: [Mr J]

Subject: Pension Rights

In recognition of the commitment made to you in December 1988 by Scantronic Limited, Cooper Security Limited ("The Company") has made arrangements with the Trustee of the Cooper Consolidated Pension Plan to provide benefits to you in accordance with the following provisions:

- You will transfer your benefit in the Cooper Security Limited Retirement Benefits Scheme (the former Scantronic Limited Retirements Benefits Scheme) to the Cooper Consolidated Pension Plan.
- The Company will provide the additional funding required by the trustees to fund the benefit to be provided by the Cooper Consolidated Pension Plan.
- The Cooper Consolidated Pension Plan will provide a benefit with respect to your service from 1st December 1988 to 31st December 2003 equivalent to the benefit which would have been provided by the Automated Security Holdings PLC Group Pension Plan as in effect on 1 December 1988, with an appropriate adjustment made for your having participated in SERPS while a member of the Cooper Security Limited Retirement Benefits Scheme.
- The Company will no longer contribute to the Cooper Security Limited Retirement Benefits Scheme on your behalf, but shall make any contributions required to fund the benefit under the Cooper Consolidated Pension Plan.
- This agreement is to be effective as at 1 February 2004.
- This Agreement is confidential and, by signing this letter, you undertake not to disclose the contents to any third party, other than your spouse and professional advisers, without the consent of the Company.