

Ombudsman's Determination

Applicant	Mr R
Scheme	Principal Civil Service Pension Scheme (Northern Ireland) (the Scheme)
Respondent	Department of Finance and Personnel (the Department)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Department.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr R has complained that the Department is attempting to recover an overpayment which occurred due to its mistakes. This is through no fault of his, and he is being penalised for its maladministration. Mr R considers the overpayment should be written off.

Background information, including submissions from the parties

4. On 22 July 2009, Mr R took partial retirement from the Northern Ireland Prison Service (**NIPS**) and accessed his lump sum accrued to date.
5. On 31 March 2012, Mr R took full retirement from NIPS on the basis of a Voluntary Early Redundancy Scheme (**VERS**). At this point he received a lump sum of £10,381.91 and an annual pension of £17,487.11 was put into payment.
6. On the same day as the pension was put into payment, Mr R received a Widow's & Dependants' (**W&D**) refund of £1,534.86, paid separately.
7. In October 2014, Mr R contacted the Department highlighting that NIPS had identified 51 miscalculations in the VERS process and asked that his figures be reviewed.
8. On 11 November 2014, the Department responded explaining that the miscalculations he referred to were in relation to departmental costings and that this was not linked to the calculation of his pension benefits, so no review was necessary.

9. In January 2015, following further correspondence, the Department agreed to review Mr R's pension. Having done so, it identified that there had been errors. His pension had been incorrectly increased in April 2012, his W&D refund had been overpaid, and, when calculating his maximum lump sum, the W&D refund had not been properly accounted for. This meant Mr R had breached the HMRC limit on pension commencement lump sums (25% of the overall pension value).
10. The Department said these errors had resulted in a total overpayment of £3,006.63.
11. On 28 January 2015, Mr R queried the overpayment, stating that he had never received a W&D refund as he was married. He also questioned the Department's position on the pension increase for 2012.
12. On 23 February 2015, the Department responded to Mr R's query in an attempt to clarify the reasons behind the overpayment.
13. On 12 October 2015, following further correspondence, the Department issued a further detailed explanation of how the overpayment had happened. It explained:-
 - The maximum allowable reckonable service in the Scheme was 45 years. Mr S' total service was 47 years 55 days, and so he was entitled to a refund of contributions for the excess 2 years 55 days, including a W&D refund.
 - The W&D refund that had been paid at retirement had been incorrect. £1,534.86 was paid when the correct amount ought to have been £1,213.98.
 - Additionally, the W&D refund had been paid separately to the maximum lump sum calculation, and as a result it had not been included in the maximum lump sum calculation. When calculated together with the lump sum already paid, the total lump sum paid to Mr R had exceeded the 25% PCLS limit by 0.28%.
 - This meant that Mr R could not have converted as much of his pension to lump sum as he had. The excess lump sum (0.28%) had to be converted back into pension income. So, whilst an element of Mr R's lump sum would need to be repaid, this would be offset by an increase in the income paid as a pension.
 - However, to complicate matters, a pension increase of 5.2% had been incorrectly applied to Mr R's pension in April 2012, following the pension being put into payment. Although Mr R's pension had been initiated on 1 April 2012, he was not entitled to the 5.2% increase in April 2012 under the Pension Increase (Review) Order (Northern Ireland) 2012. As a result, over the intervening years an overpayment of £1,886.79 had occurred.
 - In total there had been an overpayment of £3,006.63.
14. On 17 November 2015, Mr S complained about the situation and the matter was considered under the Internal Dispute Resolution Process (**IDRP**).
15. On 4 March 2016, the Department issued its Stage 1 IDRP response not upholding the complaint. It was satisfied that the revised position was correct, and the situation was adequately explained in its correspondence of October 2015.

16. On 28 August 2016, Mr R requested that the complaint be referred to Stage 2 of the IDRP, and a straightforward, plain English, explanation of the situation be provided.
17. On 15 December 2016, the Department provided its Stage 2 IDRP response. It again explained what had happened at each stage and it acknowledged the distress and inconvenience caused by offering to write off £500 from the remaining overpayment.

Adjudicator's Opinion

18. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Department. The Adjudicator's findings are summarised below:-
 - Although Mr R had queried why he was due a W&D refund, given he is married, the Adjudicator was satisfied with the explanation provided by the Department that having attained 45 years' service, the additional W&D contributions he had made were unnecessary and needed to be refunded. The Adjudicator was also satisfied that a refund had been paid as the Department could demonstrate the payment through its records.
 - In respect of the pension increase issue, having considered the Pension Increase (Review) Order (Northern Ireland) 2012, the Adjudicator noted that the 2012 increase only applied for each full month that the pension was in payment prior to 9 April 2012. Mr R's pension was put in payment on 1 April 2012, and so was not due any increase for that year.
 - The Adjudicator was satisfied that an overpayment had occurred.
 - The Adjudicator considered possible defences from recovery, including change of position and estoppel.
 - In relation to the possible decision Mr R might have made, not to accept early retirement through redundancy, and gifts he made to his children, the Adjudicator did not believe there was sufficient evidence to support those assertions. There was no evidence provided in relation to the gifts, and the Adjudicator took the view that Mr R would have retired even if he had been given the correct information. If Mr R's current retirement income was now unaffordable, it would be reasonable to expect him to seek new employment to mitigate his loss, but there was no suggestion that Mr R had done so.
 - Mr R provided the Adjudicator with photos of a loft conversion undertaken on his property, but no receipts or invoices were provided. Without those details, the Adjudicator took the view that the evidence was insufficient to uphold a change of position argument. Additionally, the Adjudicator said Mr R had the benefit of the loft conversion as a home improvement and it would have added value to his property. The Adjudicator did not consider this decision had been to his detriment.

- When taking account of the actual amounts Mr R had been overpaid (approximately 10% of the lump sum overpaid, and less than 10% of Mr R's annual pension overpaid), the Adjudicator concluded that it was difficult for a view to be reached with the necessary certainty to say that Mr R would have acted differently.
 - For these reasons, the Adjudicator was not persuaded that a change of position or estoppel argument should be upheld.
 - The Adjudicator also considered whether the Limitation Act 1980 had any applicability to restrict some or all of the overpayment. However, he concluded that as the Department was seeking to recover the overpayment by way of reducing Mr R's future pension (recoupment), and with reference to the judgment in the case of *Burgess & Ors v BIC UK Limited* [2018], equitable recoupment was not subject to the Limitation Act 1980, and therefore this defence was not applicable to Mr R's circumstances.
 - The Adjudicator noted that the Department had offered to write off £500 from the overpayment in recognition of the distress and inconvenience caused and was of the view that this was appropriate in the circumstances.
 - Having considered all the circumstances the Adjudicator advised that the complaint should not be upheld.
19. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R 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 R for completeness.

Ombudsman's decision

20. Mr R suggests that in requiring his overpayment be repaid, he is being discriminated against because there are a number of other overpayments that he has identified that are not being recovered. However, the Department has made clear that the 51 overpayments he refers to, and of which he became aware following a Freedom of Information request, do not relate to the payment of pensions from the Scheme and are instead related to compensation in lieu of notice payments. That is a matter for those individuals' employers to resolve and is separate to the calculation and payment of pension benefits.
21. Mr R has asked why there was a delay in the Department's review of his pension between October 2014 and January 2015. The correspondence shows that initially there was some uncertainty in what Mr R was referring to when he mentioned the 51 miscalculations, but by mid-December 2014 the Department had agreed to undertake a review and by late January 2015, a full review had taken place. Whilst this might have been undertaken earlier, Mr R's pension entitlement was complex, and I do not consider the timescales to be excessive to the point of it being maladministration.

22. I acknowledge that the overpayment was only identified because of Mr R's insistence that a review be completed, and this is likely to have saved the Government money in the long term, but that does not mean that the overpayment does not need to be repaid.
23. Mr R was initially provided with unclear information concerning the payment of the W&D refund, but the Department has since provided the Adjudicator with a screenshot of its systems that show that it was paid to him at the time of his retirement. I agree with Mr R's suggestion that this screenshot could have been provided to him earlier to demonstrate the correct position and try to resolve that issue more quickly. However, I do not find that the decision not to have sent him the screenshot during the course of the IDRPs amounts to maladministration given the information would already have been available to him from his personal banking records.
24. Mr R asserts that his agreement to accept the pension as it was originally paid to him forms a contract to which the Department should be bound. However, Mr R is only entitled to the benefits provided in accordance with the Schemes rules. Where a pension is paid in excess of the entitlement that arises under the Scheme rules, the Scheme can seek to recover the overpayment. That being said, there are possible legal defences from recovery, including change of position, the Limitation Act 1980 and estoppel. Mr R has asserted that he should benefit from a change of position and estoppel, arguments, which I will address below.
25. There is no suggestion that Mr R can have been aware of the overpayment. The miscalculations occurring when his pension was established were complex and required specialist knowledge to identify. In these circumstances Mr R was entitled to believe that the calculations were accurate, and I can only conclude that he was acting in good faith when spending the money received.
26. Mr R has provided additional evidence in support of a change of position defence, that shows shortly after he received his lump sum he had work done on his property to make loft space habitable. I accept that this work was undertaken and given the timing it seems likely that it was done on the basis of the payment of his pension lump sum. The receipts provided show that he spent at least £3,500 on this work and, given its nature, I agree that this is irreversible.
27. However, whilst I accept that the money was spent in good faith and is irreversible, I must also be satisfied that the decision to spend the money would not have been taken had he received the correct pension benefit. As the Adjudicator has said, the initial overpayment arising from the incorrect lump sum amounted to approximately 10%. The Adjudicator outlined, that when the difference is relatively small, such as in this case, it is difficult to say that on the balance of probability Mr R would not have gone ahead with the works even if he had received the correct amount. This is particularly the case as the overpayment only represents a portion of the amount spent on the work undertaken. It is plausible that if the correct amount had resulted in

a shortfall in completing the loft conversion, alternative sources of funding might have been found by Mr R in order to finish it.

28. Additionally, the works will have added value to Mr R's property and he has benefitted from the use of it. It is therefore difficult to successfully make out the requirement that the overpayment has resulted in detriment to him. On the balance of probability, I do not accept that Mr R has a change of position defence.
29. Mr R also highlighted gifts made to his children which he says he would not have made had he been aware of the correct position. He says he is unable to provide evidence of this due to the time which has elapsed since they were made. Whilst I appreciate the difficulty in Mr R evidencing this, the burden is on him to demonstrate the way the money was spent. Without evidence of this, which Mr R has been invited to provide, I do not reach a different conclusion to that reached by the Adjudicator.
30. The Adjudicator commented that an argument based on estoppel would fail for the same reason that a change of position was unsuccessful, in that there is no clear detriment because of the nature of what Mr R spent the money on. Also, it would have to be unconscionable for the overpayment to be required to be repaid. Given that the overpayment amounts to less than 10% of the actual amount to which Mr R is entitled, I am not persuaded that it would be unconscionable for the Department to expect Mr R to repay these amounts over a reasonable period.
31. The fact that the overpayment amounts to less than 10% also makes it difficult for me to conclude that Mr R would not have retired had the correct lower level pension benefit been quoted to him. I acknowledge that Mr R may have limited opportunities to seek alternative employment and mitigate the reduction in income, due to his former role and the security situation in Northern Ireland. However, given the modest level of overpayment and the fact he received a redundancy payment (which may not have been available in the future had he remained in employment), I consider it more likely than not that he would have accepted the correct pension benefit had it been communicated to him.
32. The Adjudicator also referred to the Limitation Act 1980 and whether this was applicable as a possible defence, however, as the Adjudicator said, the Department proposes to recoup the overpayment through a reduction to Mr R's ongoing pension, so the Limitation Act is not an applicable defence.
33. Mr R has suggested that the individual responsible for the error should be disciplined. Whilst I appreciate this reflects Mr R's unhappiness with the situation, mistakes do unfortunately occur, and it is for the Department to decide whether any disciplinary action is merited.
34. Following the Adjudicator's opinion, and in the knowledge that Mr R had the right to appeal, nevertheless, the Department wrote to Mr R and said that the recoupment would start in two months' time. Mr R highlights that this was premature, caused him additional distress and inconvenience, and ignored his right to appeal the

Adjudicator's opinion. I agree with Mr R that this was an error on the Department's part and that it would have been more appropriate for the Department to have waited for the complaint to be Determined or otherwise settled.

35. Mr R has undoubtedly suffered distress and inconvenience when becoming aware of the overpayment and in the course of trying to stop recovery. This includes the costs of postage and materials that Mr R has said was incurred. The Department has offered £500 in recognition of this. Whilst I understand Mr R was further concerned by the Department's later error in prematurely commencing recoupment, I believe that £500 is an appropriate award in the circumstances where significant distress and inconvenience has been caused.
36. If he has not already done so, it is up to Mr R to accept the offer of a £500 reduction in the overpayment by contacting the Department directly.
37. I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
16 May 2019