

Ombudsman's Determination

Applicant	Mrs T
Scheme	Northern Ireland Civil Service Pension Schemes (the Scheme)
Respondent	Department of Finance (the Department)

Outcome

1. I do not uphold Mrs T'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. Mrs T has complained that the Department mistakenly paid her an ill health early retirement (**IHER**) pension and lump sum, and is now requesting the return of these overpaid sums.
4. She is also unhappy that the rules concerning a member's entitlement to IHER were not made clear at the time she opted to transfer to a different section of the Scheme.

Background information, including submissions from the parties

5. Mrs T was a member of the Principal Civil Service Pension Scheme (NI).
6. On 1 October 2002, two new pension arrangements were introduced to the Principal Civil Service Pension Scheme (NI). Members in the existing arrangement, renamed Classic, were given the choice to remain in this or join one of the new arrangements, Classic Plus and Premium.
7. On 20 May 2004, Mrs T completed a 'Choice form' in which she indicated that she wished to join Classic Plus for service from 1 October 2002. She became a Classic Plus member.
8. In early 2014, Mrs T began experiencing symptoms of dizziness and unsteadiness associated with nausea, fatigue and headaches, which rendered her unable to attend work.
9. In May 2014, Mrs T was diagnosed with Functional Ataxia Gait.

10. In April 2015, a new scheme called Alpha was introduced and the Principal Civil Service Pension Scheme (NI) was closed to new entrants. The majority of members in post on 31 March 2015 moved to Alpha from 1 April 2015.
11. Around the same time, Mrs T's application for IHER was under consideration but it was decided that she did not meet the criteria. Her migration to Alpha was effective as of 2 April 2015, once consideration of her IHER application was concluded.
12. On 20 January 2016, Mrs T was dismissed from the Northern Ireland Civil Service on the grounds of inefficiency due to sickness. She received a compensation payment at the time.
13. In June 2016, Mrs T applied for IHER again. Mrs T's application on this occasion was successful and on 31 October 2016, the Department sent her a letter which said:

"I am pleased to tell you that the following award of superannuation allowances has been made to you with effect from 24/06/2016.

1. An annual pension of £12,505.22
2. A lump sum of £20,097.57
3. Arrears of pension of £4,411.56"

14. On 13 December 2016, the Department wrote to Mrs T saying:

"I refer to your award of benefits on the grounds of early payment...

I am writing to advise you that this award of benefits has been made in error and that with immediate effect your pension has been ceased in order to avoid any further overpayment. I regret that the payment of Lump Sum in respect of early payment of deferred benefits on grounds of Ill Health has also been paid in error and is now considered as an overpayment. I sincerely apologise for this error.

Unfortunately at the time of issuing your courtesy letter in respect of your inefficiency on 4th November 2015 the incorrect letter template was used and you were advised that "former members of the PCSPS (NI) may, if they suffer a breakdown in health before age 60 and the breakdown is verified as likely to be permanent, be considered for immediate payment of their preserved pension and lump sum." This was incorrect. As a member of the Classic Plus scheme there is no provision for this early payment of deferred benefits on Ill Health grounds. The only exception to this as per paragraph D.9 of the scheme rules where the member has a life expectancy of less than 12 months.

I regret to inform you that your application was processed as though you were a Classic member...

I can advise an overpayment of lump sum totalling £20,097.57 and net pension of £4,172.60 has occurred."

15. On 4 January 2017, Mrs T wrote to the Department asking a series of questions about the error. The Department responded on 19 January 2017.
16. After making further enquires, on 4 April 2017, Mrs T invoked the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
17. On 4 August 2017, the Department provided its stage one IDRP response. This said that Mrs T was effectively an Alpha member and that the option for the early payment of deferred benefits on the grounds of ill health was only available to Classic members. It said the only ill health early payment of deferred award available to Alpha, Classic Plus, Premium or Nuvos members was where the member had a life expectancy of less than 12 months.
18. On 10 October 2017, Mrs T appealed the stage one decision saying she did not accept the basis on which it was now being asserted that her deferred pension and lump sum should be repaid. She said the entire matter had caused her anxiety, upset and had exacerbated the symptoms of her condition.
19. On 9 February 2018, the Department issued its stage two IDRP response. The additional points to the stage one response were:-
 - Providing Mrs T benefits which she was not entitled to and issuing incorrect letters would have caused upset, anxiety and distress; it wished to offer £1,000 compensation in respect of this.
 - Mrs T had said that at no time prior to the Department's letter of 13 December 2016 was it drawn to her attention that as a Classic Plus member, she would be denied the possibility of a lump sum payment when retiring on ill health grounds. However, this was in the rules of the Classic Plus scheme when she decided to join. She had been sent a detailed guide (**the Pension Choices Guide**) at the time of choosing her options.
 - Mrs T had received the Pension Choices Guide and signed a form in May 2004 which said she understood the changes attached.
 - The compensation payment of £1,000 was unconditional and would be offset against the overpayment. Accordingly, the outstanding balance for repayment was £23,270.17.
20. Mrs T subsequently referred the matter to this Office for an independent review.
21. On 8 May 2018, the Department sent this Office its formal response. It said Mrs T was effectively an Alpha member although she had no Alpha accrual on her record. It had been acknowledged at stage one of the IDRP that previous correspondence only made reference to Classic Plus rules and not Alpha, however, the rules surrounding the payment of deferred benefits on the grounds of ill health were the same for both Classic Plus and Alpha. It added that Mrs T should be paid an award for the distress

and inconvenience she had suffered and it believed its offer of £1,000 was appropriate.

22. On 26 June 2018, Mrs T made the following points:-

- She transferred to Classic Plus in good faith as it was portrayed to be a much more “beneficial” scheme, hence the name Classic Plus. She was therefore willing to pay the increase in contribution.
- However, she had since been informed that had she remained in Classic, she would have been entitled to medical retirement. It was incredulous to think that after opting into a so called upgraded scheme, and paying more, it actually had less to offer. The information provided did not advise of these reduced entitlements.
- It had been stated in the Department’s process that it had four months to reply under the IDRP, however responses were delivered after this deadline.

23. On 15 February 2019, the Adjudicator asked Mrs T’s representative, Mr T, how the overpayment monies were saved or spent, for the period from when it was paid in late October 2016 to when the Department notified Mrs T of the error in December 2016.

24. On 19 February 2019, Mr T replied saying:

“I can confirm that there was no significant change in the amount held in [Mrs T’s] bank account for the period from when it was paid, to when CSP notified her of the error in December 2016. However since this period, (which is now over 2 years and 3 months ago) [Mrs T] has less than half the amount awarded in her bank account. This decrease can be accounted for just every day [sic] living since we now live on benefits which is a significant drop in income. As I hope you are aware, before we commenced the formal NICSP appeals procedure, we had substantial written communication between Pension Branch and ourselves, and then we had to wait more than the stated four months mandatory period for each of the stage 1 and stage 2 appeal process, for a response from NICSP. This is what accounted for the long delay before this case was escalated to the Pensions Ombudsman.”

25. Mr T also highlighted that the disadvantages of Classic Plus were not made clear when Mrs T was making her choice to transfer.

Adjudicator’s Opinion

26. Mrs T’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:-

- The Department had agreed that the error was of its own making and recognised the distress and inconvenience caused, but maintained that the

overpayment must be recovered. It would be considered whether any defence to recovery of the overpayment applied.

- In considering the Limitation Act 1980 (**the Act**), in order for the Department to be able to recover the whole overpayment, which took place in 2016, its claim would have had to have been made within six years of 2016 (applying section 32(1) of the Act), which is when the first cause of action (the overpayment) took place. The Department's claim was made on 10 May 2018, when The Pensions Ombudsman received its response to Mrs T's complaint. Therefore, the Department had made its claim in time to recover the whole overpayment.
- In terms of other defences to recovery, in order to make out a change of position defence, certain conditions needed to be satisfied. Broadly, the applicant needed to have shown that because of the overpayment, which was received in good faith, he/she detrimentally changed their position. However, whilst there was no doubt that the overpayment was received in good faith, as Mrs T could not have known of the error at the time, it did not appear that the funds had been spent in good faith.
- Mrs T had believed that she had an entitlement to these benefits for a relatively short period of time, this being between six to eight weeks, from late October to December 2016, when she was notified of the error. Mr T had not identified specific expenditure entered into during this period, and instead said that the funds were generally spent after the 13 December 2016 letter notifying Mrs T of the overpayment.
- Taking into account the difficult circumstances surrounding Mr and Mrs T, one could appreciate why the funds had been used towards day to day living, particularly as their income had significantly declined. However, the key principle was that Mrs T had received funds to which she was not entitled. Further, Mrs T had spent the overpaid funds in the knowledge that these were not rightfully hers. Therefore, her actions did not meet the good faith requirement needed to make out a successful change of position defence. Similarly, Mrs T could not rely on the defence of estoppel by representation, as this also required there to be good faith on the part of the defendant.
- Mrs T had also raised concerns that she had been disadvantaged by her decision to move to Classic Plus and been misinformed, where the Pension Choices Guide did not fully explain the differences for IHER provision between the Classic and Classic Plus schemes.
- The Pension Choices Guide stated the following under the Classic Plus heading: "If your health breaks down permanently so that you cannot do your job, we may pay your pension early. If you cannot take any employment at all, we may pay you a higher pension than if you can still do some work." A basic reading of this suggested a Classic Plus member could be entitled to IHER benefits. The actual distinction however, which was that an active member would have this

entitlement and not a deferred member, was not clear. A member reading this would most likely not have been aware that Classic offered the option to be paid IHER from deferred status, but in other sections of the scheme they would not have this option.

- However, whilst this point was ambiguous, it was difficult to suggest that had this point been made clearer, Mrs T would have definitely made the decision to remain in Classic instead. Life-changing ill health was not reasonably foreseeable and there appeared to be no reason why Mrs T would have anticipated her illness at the time she elected to move to Classic Plus. Arguably, the other benefits offered by Classic Plus would have been of greater interest to her at that time. Hence, it was not possible to say that the information provided in 2004 led Mrs T to make a decision which she otherwise would not have, which had caused a loss.
- Additionally, Mr T had complained that IDRP responses were received after the four month deadline for a response. The dates on the letters themselves however fell just within this timeframe. It was not possible to comment on why the delivery of these letters was delayed.
- The Department had offered Mrs T £1,000 in recognition of the serious distress and inconvenience which she had suffered as a result of this error. This was in line with the Ombudsman's scale for non-financial injustice. The Department's offer of £1,000 remained available and this amount ought to be deducted from the overall overpayment due.

27. The Department accepted the Adjudicator's Opinion and had nothing further to add. Mr T, on behalf of Mrs T, did not accept the Adjudicator's Opinion and made the following comments:-

- The Adjudicator had said that the information in the Pension Choices Guide regarding IHER was ambiguous, however crucially, no information contained within a document published to help people make an extremely important decision should be ambiguous.
- The Adjudicator had concluded that Mrs T would have made the decision to change schemes anyway on the basis that life-changing ill health was not reasonably foreseeable. He disagreed with this assumption; he and Mrs T were extremely cautious in financial matters and one of their parents had to retire early due to ill health. Had this point been explained as clearly as the advantages of Classic Plus, Mrs T would absolutely not have joined this scheme. This point was only made clear in the Scheme's rules which were never issued with the Pension Choices Guide. Further, it would be unfair to ask potential new scheme members to read and fully understand such a complex legal document.

- There was also the significant issue of both IDRP responses arriving after the mandatory response date set by the Department's own rules. The Department stipulated a four month response timeframe in its procedures which allowed considerable time to collate a response. The Department had failed to fulfil its obligation to reply in good time and breached its mandatory responsibilities.
28. In addition, Mr T provided a picture of a Royal Mail notice concerning a missed delivery, addressed to Mrs T and dated "7/8" (7 August), which he said demonstrated that the first attempt to deliver the stage one IDRP response was on this date, when a response was due on 5 August 2017. He also sent a picture of the envelope for the stage two IDRP response. He explained that when post was collected from the Department's offices it was given a unique number printed on the envelope, corresponding to the day and month the letters were collected from their original location. He said the letters on the envelope indicated that the stage two response was collected from the Department's office on 12 February 2018, when the deadline for a response was 11 February 2018.
29. The Adjudicator subsequently replied to Mr T with the following points:-
- In terms of the information provided in the Pension Choices Guide on IHER under the different schemes, it was difficult, in the circumstances, to find that Mrs T would have definitely made a different decision had the information been clearer. Further, it was not the remit of this Office to prescribe what a Scheme's guidance should contain as this was for internal consideration.
 - Although this Office would make a finding where there was a dispute concerning a clear misrepresentation, this was not the case here, where there was a lack of clarity rather than a misrepresentation.
 - In terms of the late delivery of the IDRP responses, she appreciated how frustrating the length of time for such a response was, so it was more frustrating when an organisation's timescales were not met. However, at most, the Department was a few days outside of the four month timescale, which although dissatisfactory, was not significant enough in itself, in her view, to lead the Ombudsman to make an award for distress and inconvenience in respect of this.
30. Mr T added that during the appeal process, the emphasis appeared to be repayment of the overpaid funds but in addition to this potential loss of money, Mrs T would be deprived of her pension until age 60.
31. The complaint has been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr T for completeness.

Ombudsman's decision

32. I am sympathetic to the difficult circumstances Mr and Mrs T have outlined in relation to ill health and their significant change in income. Further, there is no dispute that the unfortunate error was caused by the Department and could have been avoided. The key issue at hand however is that Mrs T received funds to which she was not rightfully entitled.
33. There are defences which apply to the recovery of overpaid funds. The Act does not apply here because of the timing of the error and when the Department brought its claim to this Office, but there are other defences potentially available to those who have been overpaid funds, for example change of position and estoppel by misrepresentation. Crucially however, Mrs T spent the funds after discovering that these were paid to her in error. Hence, Mrs T's actions do not demonstrate the good faith intrinsic to these defences. Therefore, Mrs T does not have a legitimate defence to the recovery of these funds.
34. Turning now to the Pension Choices Guide, I agree that the information on IHER under the Classic Plus arrangement was limited, but I do not find that this was to the extent that it amounted to a clear misrepresentation. Therefore, the Department has not made an administrative error such that it is misrepresentation.
35. Lastly, it is extremely regrettable if the Department did not meet the four month timescale for a response in its IDRP. However, it appears that any delays would have been a few days outside of this timescale which whilst understandably frustrating for Mrs T, is not sufficient to warrant an additional award for non-financial injustice.
36. Therefore, I do not uphold Mrs T's complaint.
37. I expect the Department to enter into discussions with Mrs T about agreeing an affordable repayment plan over an appropriate period of time.
38. Should Mrs T wish to accept the Department's non-financial injustice award of £1,000, she should contact it directly and make arrangements to do so.

Anthony Arter

Pensions Ombudsman
26 March 2019