

Ombudsman's Determination

Applicant	Mrs Linda Smith
Scheme	Local Government Pension Scheme
Respondent	Department of Work and Pensions (the DWP)

Complaint Summary

Mrs Smith's complaint is that the conduct of the Rent Service (her previous employer, for whose activities the DWP is now responsible) involved maladministration, as it made a pension offer conditional on her signing a draft compromise agreement (the **Compromise Agreement**) which included a clause compromising any claim in relation to underpayment of wages when it was aware that she had an outstanding claim for unpaid wages.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against the DWP because at the time there was no claim for unpaid wages so its conduct did not involve maladministration.

DETAILED DETERMINATION

Background

1. Mrs Smith first complained to my office that the Rent Service had failed to pay her the enhanced pension benefits she was entitled to. She argued that she could not sign the Compromise Agreement (which provided for the enhancements) until her concerns had been satisfactorily resolved. One of her concerns was about the deduction of six days from her length of service due to strike action in 1989 while she was employed by Doncaster Council.
2. The Compromise Agreement was in standard form. The “Employer” was defined as the Rent Service and the recitals mentioned that Mrs Smith commenced employment with the Employer (i.e. the Rent Service) on 1 April 1987.
3. Clause 2 generally provided that the employee accepted that the payments made under the Compromise Agreement were in full and final settlement of various claims. In particular clauses 2.1 and 2.2 provided:

“...For the avoidance of doubt the specific claims raised and compromised under this clause (“the Claims”) are as follows:-

2.2 any claim at common law to have been wrongfully dismissed or in relation to or payment of underpayment of wages or of other monies alleged to be due under the Employee’s Contract of Employment and which arise from the Employee’s employment by the Employer or the termination of that employment and any claim for breach of contract”
4. The Pensions Ombudsman in post at the time, Tony King, did not uphold Mrs Smith’s complaint. In his Determination (dated 3 August 2012) (the **Determination**) he found that: the Rent Service was not at fault in refusing to implement the enhanced terms; although Mrs Smith had concerns about incorrect details being included in the Compromise Agreement they were not all matters for which the Rent Service was responsible; she could have signed the Compromise Agreement while reserving her right to pursue one of her concerns (about the termination date of her employment) given its impact on her pension position; the Rent Service took positive steps to resolve the other outstanding issues to enable her to sign the Compromise Agreement therefore he did not consider that it had failed in its duty towards her as her employer.
5. In September 2012, Mrs Smith lodged an appeal against Tony King’s Determination in the High Court. The appeal was upheld, in part, by Roth J. In his judgment (the **Judgment**) Roth J explained his reasons as follows:

“31. On this appeal, Mrs Smith contends that it was entirely reasonable that she was not prepared to sign the proposed compromise agreement which it was inaccurate in two respects as regards the date of termination and her service record, albeit that it provided for the purchase of an additional six days of service and, therefore, covered the six strike days ...

34 ...because what is clear, in my judgment, is that the signing of this agreement would potentially have prejudiced, and indeed may have precluded, pursuing her claim for the failure to pay her wages or salary for the six strike days. Certainly such a claim comes quite clearly within the scope of clause 2.2 to which I have referred.

35. Accordingly, while the effect of the strike days on her pension was satisfactorily covered in the way that the letter of 22nd June describes, the question of her pay was not dealt with at all. It was indeed outstanding and was only finally resolved a little under one year later. It is notable that it was then found that Mrs Smith was correct. She was also correct, as the Pensions Ombudsman found, regarding the date of termination, but, as I have said, that may be less significant.

36. In the actual decision letter of 3rd August, the Pensions Ombudsman makes a further point, which is that the issue of the six strike days was not a matter for which The Rent Service was responsible, because The Rent Service was not Mrs Smith's employer as at 1989 and was in no way involved with the decision to deduct from her pay. It might be said, therefore, that a claim against another party who had been her employer could not be prejudiced by signing the compromise agreement with The Rent Service.

37. The difficulty about that, however, is that, in the recitals to the agreement, The Rent Service states that it constitutes her employer from 1st April 1987 until the termination date therein inserted of 10th February 2006. It certainly would be well arguable that any settlement in this agreement could not affect the claim against someone else. That is probably right, but the question of who actually was responsible as Mrs Smith's employer, or for the obligations of her employer, and to whom they might have devolved by July 2006, was one that was certainly far from clear. The account that I gave at the beginning of this judgment of the confusion within the DWP as to the assumption of rights for Mrs Smith's prior employment shows that, even among local and central government authorities, these can be matters of some complexity. It seems to me that no one could with comfort consider that signing this agreement might not significantly prejudice their claim for lost wages...

42. The question is whether there was maladministration within the broad categories of maladministration that I set out by The Rent Service in putting forward a compromise agreement with the broad waiver provisions when, as they knew, Mrs Smith was contending in good faith, and as it turned out correctly, that she had a claim for underpayment of wages and not offering to exclude such a claim from the terms of the full and final settlement provision; and then making the acceptance of the enhanced pension proposals in Option B conditional upon her signing such a settlement.

43. Whether or not that should be regarded as amounting to maladministration seems to me a question that is very much within the expertise of the Pensions Ombudsman. I think, therefore, that the appropriate course is for this matter to be remitted to the Pensions

Ombudsman for him to reconsider the complaint about maladministration in the light of this judgment.”

6. On 24 April 2013 Roth J ordered that my Determination be set aside. The Order referred to the following error of law:

“...namely a finding that the Appellant could have signed a draft compromise agreement dated 24 July 2006 (the “Draft Agreement”) provided to her by the Rent Service without prejudicing any claim that she might have had against the Rent Service, in circumstances where one such possible claim related to unpaid wages from her employer for 6 days during which the Appellant had been at work but had erroneously been understood by her employer to have been on strike and the Rent Service was defined in the Draft Agreement as her employer at all material times.”

7. The Order provided that the following matter was to be remitted to me to consider (the **Remitted Matter**):

“...whether in making its offer conditional on the Appellant signing the Draft Agreement including clause 2 thereof, given the Appellant’s particular circumstances, the Rent Service’s conduct involved maladministration”.

8. Roth J also ordered the DWP to pay £1,140 in costs to Mrs Smith.

Material Facts

9. It is not necessary for me to set out all of the material facts relating to Mrs Smith’s complaint as these are contained in the Determination and in the Judgment. However, the following facts are particularly relevant to my consideration of the Remitted Matter.
10. Between 1987 and 1999 (the Judgment erroneously gives the latter date as 1989), Mrs Smith was employed in the Doncaster Council Rent Officer Service (**Doncaster**). With effect from 1 October 1999, the local authority-based service was transferred to “The Rent Service”, an executive agency of the then Department for Environment, Transport and Rural Affairs. Although, the provisions of the Transfer of Undertakings Protection of Employment Regulations 1981(**TUPE**) did not apply at the time to transfers within public administration, the same principles applied where staff transferred in situations such as this. The effect was that the same contractual terms and conditions continued to apply on the transfer of Mrs Smith’s employment to the Rent Service
11. On 18 August 2005, Mrs Smith was sent notice of redundancy, to take effect on 20 February 2006, if no redeployment was available. On 16 January 2006, the Rent Service informed her that it was not possible to redeploy her and that she would be redundant with effect from 10 February 2006, as the Doncaster Office was closing earlier than expected. She was to receive pay in lieu of wages for the period between 10 February and 20 February 2006.

12. The letter set out two options regarding the pension benefits that she could have, calculated on the basis of a length of service of six years and 133 days. She was also offered up to £250 plus VAT to enable her to take legal advice before deciding which option to accept. Mrs Smith responded saying that not all her years of service with Doncaster had been taken into account. Mrs Smith was then sent revised options, with the basic pension calculated on 18 years and 311 days and an enhanced benefit based on six years and 243 days of service.
13. Mrs Smith responded that the calculations were incorrect as the date her employment terminated was 20 February 2006 and not 10 February 2006. However, on 30 January 2006, Mrs Smith signed and returned a non-binding indication that she wished to accept the revised Option B and on 10 February she was sent the Compromise Agreement.
14. On 14 March and 10 July 2006, Mrs Smith wrote to the Rent Service saying that there was no justification in shortening her length of service record because of the alleged strike action. She said that she had submitted proof in the form of her bank statements which confirmed that a refund of salary for the strike days had been made which in turn confirmed that she had not been involved in strike action in 1989. In addition,
15. she said, in her letter of 14 March 2006:

“I now have copies of payslips from Doncaster MBC Collonades, these clearly show as proof money deducted for alleged strike action and money repaid back to me which is highlighted.”
16. She also wrote to Doncaster on 10 July confirming that she had received the refund of salary for the six days strike action saying that “Mrs Ellis our line manager ...arranged to have monies refunded ...”.
17. During this period there was correspondence between the Rent Service and Mrs Smith’s solicitors including a letter from the Rent Service of 22 March 2006. This dealt with the circumstances surrounding her redundancy. It concluded by saying that Mrs Smith was not contractually entitled to receive the level of compensation offered as a result of redundancy and that the Rent Service was using its discretion to ensure that she was getting the best terms available. If she did not feel able to sign the agreement it would arrange for her to have a statutory redundancy payment and the offer of enhanced terms would be withdrawn.
18. It also said that it had contacted its pension administrators regarding the disputed strike days while Mrs Smith had been employed by Yorkshire County Council. It went on to say:

“I understand that the employment records transferred by them to our administrators show 6 days unpaid service and I have been advised that the actual financial difference amounts to £3 off her annual pension and £9 off her retirement grant. Given the very small amount involved I have asked if I have the discretion to waive the unpaid service, and have been advised that I do not have the authority to do

this. Unfortunately, therefore I can only suggest that your client continues to work with Yorkshire CC and the pension fund to reach a solution, although we will forward the payslips your client has sent us to our pension fund administrators.”

19. The Rent Service gave further answers to questions on 5 July 2006, raised by Mrs Smith and made clear that unless she signed the Compromise Agreement, she would not receive the two elements of enhancement.
20. Mrs Smith continued to be dissatisfied on two points in particular. The first concerned the date of termination of her employment. The second concerned the deduction from the length of her service of the six strike days.
21. On 24 July 2006, the Rent Service wrote to Mrs Smith, enclosing a revised version of the Compromise Agreement. There was no change in the termination date of her employment but the Rent Service suggested that she could apply to have six days added to the length of her service (as it could not do so on her behalf) and that it would reimburse her with the estimated cost of purchasing the six days, i.e., £38.39.
22. Although Mrs Smith was happy with the latter suggestion she continued to be dissatisfied about what she regarded as the wrong termination date. She was also unhappy about the decision to make her redundant and appealed against that decision to the Civil Service Appeals Board.
23. Mrs Smith contacted her Member of Parliament, Ms Rosie Winterton, for assistance and on 4 August 2006, the South Yorkshire Pension Authority wrote to Ms Winterton to say that Doncaster's records had been unable to verify that the money deducted for strike action had been repaid to Mrs Smith. As there was no proof that she had not been on strike it could not adjust her records.
24. On 4 January 2007, a retired administrative officer from Doncaster wrote to Doncaster, as she understood that Doncaster required confirmation that Mrs Smith had not been on strike in order for Doncaster “to re-instate her pension rights and re-imburse the back pay owing to her”. She confirmed that no member of the clerical staff, including Mrs Smith, was on strike for any of the days in question.
25. The Rent Service wrote to Mrs Smith on 31 January 2007, to say that it was no longer willing to enter into an agreement with her to provide the enhanced terms. These had been offered at its discretion in full and final settlement of any claims that Mrs Smith had against it. However, as she had refused to sign the agreement and had raised numerous issues and was making a claim against it to the Civil Service Appeal Board (which would cause it to incur significant costs which the Compromise Agreement was intended to avoid) the offer was being withdrawn. The letter also confirmed that the final date of her employment was 10 February 2006.
26. On 29 June 2007, Doncaster wrote to Mrs Smith as follows:

“Reimbursement of Strike Action Deduction.

Please find enclosed a cheque for the value of £77.97, which represents reimbursement of a strike action deduction that was taken

from your salary in August 1989. It has now been ascertained following further investigation that you were not on strike and therefore this deduction should not have been made.

Please accept my most sincere apologies for the length of time that it has taken for this matter to be resolved.”

27. On the same date, Doncaster wrote to the South Yorkshire Pension Authority, informing them of this decision and the earlier error and asking them to correct Mrs Smith's pension record for the 1989-1990 financial year accordingly.
28. On 30 October 2007, Mrs Smith was notified by the LPFA Pension Scheme that her pension benefits were being revised. As a result and following a complaint to this office regarding the termination date of her employment, her service record has been adjusted.

Summary of Mrs Smith's position

29. If mistakes had not been made in the first place the Compromise Agreement would have been signed.
30. She wrongly thought she had been reimbursed with the strike pay which explains her letter of 10 July 2006, to the Rent Service. But she discovered after her employment had terminated that the reimbursement was masked by an annual pay award (several months' pay award arrears paid late) and that she had not received the payment.
31. She learnt of the letter from the Rent Service to her solicitors dated 22 March 2006, as a result of a pre-hearing at Leeds Employment Tribunal in mid-2007. This letter makes clear that the Rent Service knew, at the time, that she had six days' unpaid service for the strike days. At this point the Rent Service could have corrected her pension record and repaid her wages. However the Rent Service chose not to tell her about this and caused her to write and bother other people.
32. In the light of the Judgment she now expects to receive the enhanced benefits that she originally signed up for when she opted for option B.
33. As a consequence of the loss of part of her pension income and lump sum to help ends meet her husband reluctantly found it necessary to take his pension five years earlier than planned with the result that he now receives, and will continue to receive, a lower pension for the rest of his life. He would like to be put back in the position he would have been in had they not been financially affected by the maladministration of the Rent Service.
34. She also asks for compensation for the distress, inconvenience, expense and loss of income that she has experienced as a result of this matter. Specifically she asks for re-imbursement of the cost of obtaining a transcript of the Judgment, the cost of consulting solicitors on the abortive Compromise Agreement plus appropriate indexing from the date of their invoice to the present and indexation for the six days wages from 1989 to the present day.

Summary of the DWP's position

35. According to the information provided to it by Mrs Smith in her letters of 14 March and 10 July 2006, she was reimbursed with the wages wrongly deducted by Doncaster for the six strike days well before she was asked to sign the Compromise Agreement.
36. The only outstanding matter (apart from the date of the termination of her employment) concerned payment to the pension provider of the amount of contributions payable for the six days. As the Rent Service could not make the payment direct to the pension provider it offered to pay her the sum to enable her to deal with the matter.

Conclusions

37. I should begin by observing that any claim that Mrs Smith might have against the Rent Service with regard to interest on the six days' wages from 1989 to the date of payment is purely an employment matter. As it does not relate to the actions of the Rent Service in relation to the provision of Mrs Smith's pension it does not fall within my jurisdiction and is not a matter I can consider.
38. I am required to consider the specific matter remitted to me by the judge, that is, whether the Rent Service's conduct involved maladministration when it made its offer of enhanced pension conditional on the Mrs Smith signing the Draft Agreement including clause 2, given the particular circumstance. The circumstance referred to by the judge was one in which the Rent Service knew that Mrs Smith had, in good faith, made a claim for unpaid wages and yet the Rent Service did not offer to exclude that claim from the Compromise Agreement.
39. For the reasons that follow, I do not think that the circumstance postulated by the judge actually subsisted at the time the Compromise Agreement was proposed.
40. In her letters to the Rent Service of March and July 2006,, Mrs Smith asserted that she had received reimbursement of the wages wrongly deducted by Doncaster in 1989, shortly thereafter. (The judge does not appear to have been aware that Mrs Smith confirmed receipt of the reimbursement in these letters, as they are not referred to in the Judgment, and our further investigations suggest that they were not submitted to the High Court.)
41. Mrs Smith was anxious to show the Rent Service that she had been paid for the strike days to persuade it that she had not been on strike and that these days should be included in her pensionable service. At the time in question Mrs Smith did not believe that she had a claim for repayment of unpaid wages. However, her understanding was inconsistent with the information available to the Rent Service which indicated that she had not been paid for the six strike days. Its position, being that she had *not* been paid because she was on strike, was made clear to Mrs Smith's solicitors in the Rent Service's letter of 22 March 2006, and in its correspondence with Mrs Smith.

42. Nevertheless, as both Mrs Smith and the Rent Service were focussed on resolving the pension aspect of the matter, the Rent Service effectively adopted Mrs Smith's position (i.e. that she had not been on strike and had been paid for the six days) in making the suggestion to pay her sufficient money to enable her to buy the six days' service. This was to Mrs Smith's advantage and was a pragmatic way of resolving the impasse.
43. It subsequently transpired that according to Doncaster's records there was no evidence that the money had been refunded. However, at the time Mrs Smith was asked to sign the Compromise Agreement, the Rent Service had no reason to think Mrs Smith had a claim for unpaid wages. The apparent possibilities at that time were either (a) that Mrs Smith had been on strike and had not been paid, or (b) she had not been on strike, had been reimbursed, and their records were wrong.
44. As Mrs Smith was not asserting any claim to the unpaid wages, it cannot be said that in requiring her to waive any claims against it so far as her wages were concerned, the Rent Service was acting unreasonably or otherwise than in good faith. The Rent Service could not have foreseen that at a subsequent date Mrs Smith might discover that the facts differed from what she had previously believed and raise such a claim.
45. I, therefore, find that the conduct of the Rent Service in requiring Mrs Smith to agree to Clause 2 as drafted in the light of the circumstances at the time, did not involve maladministration.
46. Bearing in mind the passage of time and the changes in the bodies responsible as Mrs Smith's employer, the fact that the Rent Service may technically be regarded as being responsible, as Mrs Smith's employer, for the actions of Doncaster, does not affect this finding. It acted as any reasonable employer in its position could have acted and was not in breach of its obligation of trust and confidence towards her.
47. For these reasons I do not uphold Mrs Smith's complaint.

Anthony Arter

Pensions Ombudsman
7 September 2015