

Ombudsman's Determination

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| Applicant | Mr N |
| Scheme | Principal Civil Service Pension Scheme (the Scheme) |
| Respondents | MyCSP Cabinet Office |

Complaint Summary

1. Mr N's complaint concerns the overpayment of pension he received from the Scheme between 20 June 2013 and 11 March 2018. Mr N does not think he should have to repay the overpayment as the error was not his fault.

Summary of the Ombudsman's Determination and reasons

2. The complaint is partly upheld against MyCSP for the significant distress and inconvenience Mr N has experienced.

Detailed Determination

Material facts

3. Cabinet Office is the Scheme Manager and MyCSP is the administrator of the Scheme, and its role is to administer the Scheme in accordance with the Scheme Rules (**the Rules**), and guidance from the Cabinet Office.
4. Mr N joined the Scheme on 24 August 2009. In 2010, he transferred benefits from two money purchase pension schemes, Aviva and Clerical Medical, into the Scheme.
5. In January 2012, MyCSP wrote to Mr N following a query he made about the annual benefit statement he had received in 2011. MyCSP explained that statements are always dated to 31 March and can only be produced approximately three to four months after the end of the tax year. However, it was able to provide him with a notional benefit statement using the most up to date information provided by his employer. As well as providing a breakdown of his benefits, MyCSP said:

"The 'Total opening balance' of £4238.06 was the value of your pension (including transfers) as at 31/03/11.

The Total Notional closing balance' [sic] of £6803.23 is an estimate of the value of your pension (including transfers) as at 31/12/11."

6. On 5 February 2013, MyCSP sent Mr N a statement. This informed him that the total pension he had built up to 31 March 2012 was £6,925, and the annual pension he could get at retirement was £7,158. The statement also informed Mr N that the maximum tax free cash (**TFC**) he could receive was £30,680 and that after taking this, he would get an annual pension of £4,602.
7. On 4 June 2013, Mr N received a retirement estimate from MyCSP showing the pension benefits he had accrued up to 30 April 2013. This showed that the total annual pension Mr N could receive at retirement was £8,127.75. No details were provided for the option of a pension and TFC.
8. Mr N applied for his benefits on 6 June 2013. He was age 65 at the time and opted to give up some pension for additional TFC. He received £25,000 TFC, and the annual pension put into payment was £6,461.09.
9. In March 2018, as part of a routine check, MyCSP discovered that Mr N had been overpaid because his benefits had been incorrectly overstated when he applied for retirement.
10. That same month, MyCSP wrote to Mr N and said:

"On review of your record, it is apparent that, due to an administrative error, your transferred in service has been included twice in the calculation of your pension benefits. We can only pay you the amount you are entitled to under the scheme rules. On behalf of Civil Service Pensions, I apologise for the inconvenience this will cause."
11. MyCSP also informed Mr N that:-
 - Between 20 June 2013 and 11 March 2018, the Scheme overpaid his pension by £8,917.65.
 - There was no change to his lump sum as he had requested a fixed amount.
 - The amount of annual pension he was entitled to receive would reduce from £6,752.60 to £4,442.84 (less any deductions for income tax).
 - It sincerely apologised for any inconvenience this may have caused him and for the delay in notifying him of the change to his pension.
 - It would like him to repay the overpaid pension.
12. There were further exchanges between Mr N and MyCSP, between March 2018 and December 2018 regarding the overpayment, and how and why it had occurred. During this period, Mr N proposed and agreed a repayment plan with MyCSP, for him to repay the overpayment of £8,917.65 over five years, at £150 per month for 59 months, with a final payment of £67.65 in the 60th month. However, he did not start

the repayment plan. Instead, he raised a complaint through the Scheme's Internal Dispute Resolution Procedure (**IDRP**), as he did not agree that he should repay the overpayment.

13. On 3 December 2018, Cabinet Office responded to Mr N under stage two of the IDRP and did not uphold his complaint. In summary, Cabinet Office said:-
- HM Treasury's Managing Public Money (**MPM**) guidance explains that the law allows for the recovery of overpayments, regardless of how the overpayment happened or who caused them. Only certain legal defences can prevent recovery, and only if the principles of good faith are established.
 - MyCSP had sent Mr N a notional benefit statement in January 2012, which showed opening and closing balance figures for the months of March and December 2011, respectively. This included the amount of £3,483.84 for the Aviva and Clerical Medical transfers.
 - The second table in the notional benefit statement showed transactions throughout the following months, which "clearly showed the repeat entry for the Aviva transfer of £2,047.96."
 - In view of this, Mr N had sufficient information to know that the closing balance was higher than it should have been. There was no evidence that he had questioned the amount at any time.
 - Mr N would be unable to put forward a successful defence against recovery because good faith was not established.
14. Mr N subsequently referred his complaint to my office, and we received Cabinet Office's formal response to the complaint on 15 March 2019.

Summary of Mr N's position

15. Mr N provided a copy of the notional benefit statement he had received in January 2012 and a copy of the statement he had received in February 2013. He also provided one page of the statement he had received on 4 June 2013, and said:-
- He did not know that in 2011, the Scheme had incorrectly entered his transferred in benefits twice, and this was the reason for the overpayment.
 - MyCSP said the notional benefit statement he was sent "clearly" showed the error, but it was not clear to him or his financial advisor.
 - The notional benefit statement he received informed him that his annual pension would be £6,803.23. He queried this figure with MyCSP, and in MyCSP's letter of 30 January 2012, it confirmed that this figure was correct.

- “Obviously” the sum of £6,803.23 would have increased the following year, to the value shown in the statement he received in early February 2013. He also took a lump sum which would have affected his annual pension entitlement.
- He was completely unaware that there was such a huge mistake in MyCSP’s calculations. He based his retirement income on the documents that MyCSP provided and found it difficult to manage with the reduced income. It would be a “double whammy” to have to pay back the excess amount.
- He would like an independent review of the documents. If the error was made by MyCSP, the overpayment should be written off.
- He had not started making any repayments to the Scheme as he was waiting for a “favourable outcome” to this dispute.
- He was not willing to provide details of his income and expenditure.
- He had no knowledge of the mistake and should not be penalised for it.
- His query of the figures gave MyCSP and Cabinet Office the opportunity to check them. “They either did so and found no problem, or didn’t bother to re-check them.”
- He could not have known that there was a problem with their “obscure calculations.”
- He was unaware that he could challenge the amount he was offered, until after a discussion with his brother-in-law, who opted to buy into his own pension scheme, and increased the value of it quite considerably.
- The amount he was offered was small, and had he been advised that he could have negotiated a better offer, he would have done so. There was no information given to him about this.

Summary of Cabinet Office and MyCSP’s position

16. Cabinet Office provided a response to the complaint on behalf of itself and MyCSP, and said:-

- It was sorry that Mr N was upset by the conclusion on the good faith matter. It was not its intention to suggest that he had acted dishonestly in any way.
- The good faith test takes account of what someone could or ought to have known, not simply what they did know.
- Its conclusion was not that Mr N knew exactly what the mistake was, but that he was in a position to have known that there had been a mistake.

- Mr N said that he would have challenged the amount offered but the 2007 Section statutory scheme rules (**the Rules**) do not allow members to negotiate transfer-in credits in the way he suggests.
- The Rules dictate the specific calculation for benefits resulting from a cash equivalent transfer value payment, determined by reference to a number of factors, such as age, pensionable earnings and actuarial factors. The amount of pension a transfer can buy is therefore fixed.

Conclusions

17. In general, money paid in error can be recovered, even if the party responsible for the error has been careless. The trustees or managers of a pension scheme can only pay the benefits specified in the scheme rules. However, there are circumstances where the recipient may not be required to repay some or all of the overpayment. Those circumstances are where a defence against recovery applies. I will consider if any defence applies.
18. The Limitation Act 1980 (**the Limitation Act**) prevents the recovery of an overpayment if the overpayment occurred more than six years before a claim has been made for recovery, or six years from the point it was reasonable for the party making the claim for recovery, to have become aware of the error.
19. In the High Court case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch), the Judge held that the cut-off date for limitation purposes, in overpayment cases before the Ombudsman, was the date when Teachers' Pensions brought its claim during the course of the Pensions Ombudsman's (**TPO**) complaints procedure. That date was identified as being the receipt by TPO's Office of Teachers' Pensions' response to Mr Webber's complaint.
20. Applying this to Mr N's case, Cabinet Office and MyCSP's response to Mr N's complaint was received by TPO's Office on 15 March 2019. For the purposes of the Limitation Act, this is the date at which time ceased to run. So, the question is whether MyCSP made its claim for repayment within the applicable limitation period.
21. Having considered the sequence of events and the information provided, the earliest that time could have started to run was June 2013, when Mr N began receiving his pension.
22. Taking this date, MyCSP had until June 2019 to make its claim for recovery of the overpayment. As MyCSP made its claim on 15 March 2019, it is able to recover the whole overpayment from Mr N.
23. I will now consider if there are any other defences against the recovery of the overpayment available in the circumstances.
24. The most common defence against recovery of an overpayment is referred to as "change of position" that is, the applicant has changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part. To make

out a change of position defence certain conditions must be satisfied. Broadly, the applicant must, on the balance of probabilities, show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. If these elements are satisfied the Ombudsman may direct that some or all of the overpayment may be kept by the applicant.

25. To meet the good faith test, the applicant must not have had actual knowledge of the overpayment. The requirement of good faith would not be satisfied if the recipient of the overpayment had good reason to suspect that a payment had been made in error, (so was aware that he might not be entitled to the higher pension) but then failed to make enquiries of the scheme before spending the money (this is often referred to as having "Nelsonian knowledge"). Mere carelessness or negligence in not identifying the overpayment would not be sufficient to prevent the good faith test from being met.
26. To establish good faith, the Ombudsman would consider if there was anything to alert Mr N to the error, to the point that he may have been aware that something was amiss or could have been expected to make reasonable enquiries.
27. Mr N has said that he was not aware of the error in the calculation of his pension, prior to being notified of this by the Scheme. He asserts that he based his retirement income on the information he had received from the Scheme.
28. Unfortunately, MyCSP, Cabinet Office and Mr N have been unable to provide me with copies of statements Mr N had received prior to 2012. However, both Mr N and Cabinet Office provided a copy of the notional benefit statement he received in 2012, and Mr N also provided copies of two benefit statements he had received in 2013.
29. The notional benefit statement Mr N was sent in January 2012, informed him that the estimated value of his pension was £6,803.23. This statement also provided a breakdown of Mr N's benefits.
30. Cabinet Office asserts that Mr N ought to have been aware of the error as it was "clear" that his Aviva transfer had been counted twice, on the notional benefit statement.
31. I have reviewed this statement and find that it was not clear from the calculations that Mr N's Aviva transfer had been counted twice. Cabinet Office had to confirm to my Office where the two Aviva payments were detailed on the notional benefit statement. So, I find it was reasonable for Mr N not to have noticed that his pension had been calculated incorrectly on the notional benefit statement.
32. Further, I note that Mr N received the notional benefit statement in January 2012 but did not retire until June 2013. This was after receipt of the two benefit statements he had received in February 2013 and June 2013, respectively. I cannot see that the June 2013 statement detailed what his annual pension would be if he took TFC.

However, that statement informed him that the pension he could receive at retirement was £8,127.75. The February 2013 statement informed Mr N that the pension he would get, after taking the maximum TFC of £30,680, would be £4,602 per annum.

33. When Mr N retired he did not take the maximum TFC but instead took an amount of £25,000. His annual pension put into payment at the time amounted to £6,461.09. This was less than the amount quoted on the June 2013 statement assuming he did not take TFC, but more than the figure he would have received had he taken the maximum TFC. Given this, I find that Mr N had no reason to doubt that the pension he was being paid was correct.
34. Mr N was not sent a benefit statement that informed him of the annual pension he would be entitled to if he took TFC of £25,000. So, I find that Mr N received the overpayment in good faith.
35. Although I find that Mr N received the overpayment in good faith, I am not persuaded that he detrimentally changed his position because of the overpayment.
36. Mr N asserts that he based his retirement income on the information he received from MyCSP and that he finds it difficult to manage with his reduced pension from the Scheme. Mr N has not provided details of his income and expenditure or evidence of how he changed his position. Without this information I am unable to conclude that Mr N has detrimentally changed his position because of the overpayment.
37. Because of this, I find that Mr N does not have a change of position defence available to him.
38. There are other defences to the recovery of an overpayment, for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that this is appropriate.
39. Estoppel is a legal principle which provides that if, by statement or action, a person causes another person to believe that a particular set of facts or circumstances are true, then they should not be allowed to draw back from those statements or actions, if it would be unjust or unconscionable to do so. The requirements for estoppel are similar to the change of position defence. However, the person must also demonstrate that they have relied to their detriment either:
 - on a clear and unequivocal statement (representation); or
 - on a mutual assumption of facts or law (convention).
40. In an overpayment case, the effect of an estoppel is that the payer would be held to comply with the incorrect payment. The payer would be estopped from seeking to recover the overpayment. However, the overpayment does not, in and of itself, constitute a representation. I have not been able to identify the kind of clear and unequivocal statement or mutual assumption required for estoppel in Mr N's case. This is because MyCSP did not provide Mr N with a benefit statement on his final benefit entitlement in relation to the option he chose. Therefore, no unequivocal

statement was made by MyCSP. Mr N has also not proven that he has relied on the information from MyCSP to his detriment.

41. For completeness, I have also been unable to identify the necessary elements for a contract to exist, such as offer, acceptance, consideration and the intention to enter into legal relations. I do not consider there was any intention for MyCSP to enter into legal relations with Mr N, beyond the benefits he was entitled to from the Scheme. So, the defences of estoppel and contract do not apply in this case.
42. I find none of the possible defences against recovery apply and the overpayment can be recovered.
43. However, I consider that this situation has caused Mr N significant distress and inconvenience. Mr N was in receipt of his pension for around five years before he was informed of the overpayment, which he had no reason to expect. Furthermore, when he was informed of the overpayment, he was asked to repay the overpaid amount within 28 days.
44. MyCSP shall award Mr N £500 for the significant distress and inconvenience this situation has caused him.
45. I note Mr N's comments concerning him not being aware that he could challenge the amount of pension he received. The Rules of the Scheme determine how a member's benefits are calculated. Mr N would not have been able to challenge or change the amount of pension he was entitled to from the Scheme. I do not uphold this part of Mr N's complaint.

Directions

46. Within 28 days of the date of this Determination, MyCSP shall pay Mr N £500 for the significant distress and inconvenience this situation has caused him. I also recommend that MyCSP contacts Mr N to discuss an affordable repayment plan.

Anthony Arter

Pensions Ombudsman
21 July 2021