

Ombudsman's Determination

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| Applicant | Miss Lynda Davies |
| Scheme | Principal Civil Service Pension Scheme (the Scheme) |
| Respondent | MyCSP |

Complaint summary

Miss Davies has complained that MyCSP have used an incorrect figure for her salary of reference in their calculation of an abatement which has resulted in an overpayment and a lower income for her on re-employment for the relevant period concerned.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld because the correct salary of reference was used in the calculation of the abatement due for the relevant period and the resultant overpayment amount is therefore correct.

Detailed Determination

Principal Civil Service Pension Scheme Rules

“3.25a In respect of a re-employed civil servant whose earlier service ends before 1 April 2007 and who has not exercised an option in accordance with rule 3.25b(ii), references in rules 3.25d to 3.27 to –

(i) “salary” mean the annual rate of salary or wages, excluding pensionable and other additional emoluments, and

(ii) “old salary” mean salary, as defined in paragraph (i), as at the last day of his earlier service.

3.25b Rule 3.25c applies to a person –

(i) whose earlier service ends after 31 March 2007, or

(ii) (a) whose earlier service ends before 1 April 2007 and (b) who has opted by notice in writing in such form and at such time as the Minister requires for rule 3.25c to apply to him.

3.25c In respect of a re-employed civil servant to whom this rule applies, references in rules 3.25d to 3.27 to -

(i) “salary” mean, except in the term “old salary”, the annual rate of his salary or wages and pensionable emoluments, other than any fluctuating emoluments designated by the Minister as pensionable pursuant to paragraph 2(ix) of Appendix 1, and

(ii) “old salary” mean his pensionable earnings as at the last day of his earlier service as calculated for the purposes of rule 3.8 (lump sum on death in service), but without applying rule 1.6b (permitted maximum).

3.25d For the purposes of rule 3.26 a relevant event in respect of a re-employed civil servant is –

(i) a change to the weighting of his Civil Service post,

(ii) a change to the number of his working hours,

(iii) a change to his salary as a result of being on, or returning, from sick leave, or

(iv) in the case of a civil servant to whom rule 3.25c applies, his starting, or ceasing, to receive pensionable emoluments other than any fluctuating emoluments designated by the Minister as pensionable pursuant to paragraph 2(ix) of Appendix 1.

3.26 If a person receiving a pension under rule 3.1 or a preserved pension under rules 3.11...is re-employed in the Civil Service before his 75th birthday at a salary equal to, or higher than, his old salary, the whole of the pension will be suspended. If he is re-employed at a salary lower than his old salary, the pension in payment to him (including any increase under the Pensions (Increase) Act 1971 as amended) will be reduced to the amount by which his old salary exceeds his salary on his first day of re-employment. While he is re-employed, the pension in payment will attract pensions increase but will not be otherwise adjusted unless a relevant event specified in rule 3.25d occurs. In any of those events, the amount of abatement will be increased (or decreased) by the amount of increase (or decrease) in his annual rate of salary resulting from the change...”

“6.2 Where a person in receipt of an annual compensation payment under rule 10.6 or 10.10 of the former section 10 rules or rule 2.3, or 2.6a, or 3.1, or 3.2a of this scheme is re-employed in the Civil Service, the annual payment will be abated under rule 3.26 of the 1972 Section in the same way as a pension under section 3 of the 1972 Section would be abated...”

Material Facts

1. The Scheme and the Civil Service Compensation Scheme (**CSCS**) are made under Section 1 of the Superannuation Act 1972. Rule 1.1 of the CSCS provides for the terms used in the CSCS to have the same meaning as in the Scheme unless otherwise stated.
2. Miss Davies was employed by the Department for Work and Pensions (**DWP**) and its predecessors from 18 September 1968 to 31 August 2005 when she took voluntary early retirement under the CSCS. She was 55 years old and as a result, she was awarded an annual compensation payment which was payable until her 60th birthday. (For the purposes of this Determination, the annual compensation payment will be referred to as a pension.)
3. On 1 July 2005, Capita, the then administrators of the Scheme, wrote to Miss Davies about the payment arrangements for her pension which would be paid from 1 September 2005.
4. On 25 July 2005, Miss Davies called Capita to enquire about re-employment within the Civil Service. On the same day, Capita sent her a letter which, amongst other things, informed her that:
 - re-employment within six months might have an effect on the validity of the lump sum paid;
 - when a member was re-employed, their re-employed salary plus their retirement pension could not exceed their salary on their last day of service at original retirement;

- if the new salary was more, then the pension may need to be suspended or abated;
 - as Miss Davies' pay at the date of retirement was £16,740 (the 'salary of reference' - **SOR**), she would be able to earn an annual salary of £9,471.93 without affecting her annual pension of £7,268.07;
 - if she became re-employed within the Civil Service, Form CSP13 would need to be completed by her new employer and returned so that her pension could be assessed and adjusted if necessary.
5. On 5 April 2006, Miss Davies was employed by the National Assembly for Wales (**the Assembly**) with a full time salary of £13,455.
 6. On 11 July 2006 a form, 'Pension Questionnaire for new entrants' was completed via the telephone and Miss Davies indicated that she had worked for DWP until August 2005, was a member of the Scheme and in receipt of pension benefits.
 7. The Assembly completed a Form CSP13 for Miss Davies with details of her employment from 5 April 2006. The form is undated and Capita have said that they did not receive the form. The Assembly has no proof of posting nor any covering letter.
 8. On 5 November 2007, Miss Davies reduced her hours of work to 24 hours per week.
 9. On 8 June 2010, Capita wrote to Miss Davies about bringing her preserved benefits into payment from her 60th birthday in August 2010. Miss Davies completed the relevant forms on 21 June 2010.
 10. On 22 October 2010, Miss Davies retired from the Assembly. She decided to return to work for the Assembly in June 2012 in anticipation of which the Assembly completed a further form CSP13 with an intended re-employment start date of 1 June 2012. It was faxed to Capita, and marked as received on 25 May. (Miss Davies was not subsequently re-employed by the Assembly for the second time and has remained retired since 2010.)
 11. On 4 July 2012 Capita wrote to Miss Davies and said that her intended second period of re-employment with the Assembly had brought the earlier re-employment to their attention. They said that Miss Davies had contacted Capita in July 2005 and had been told what she could earn before abatement would apply to her pension. Capita explained that having assessed her abatement position, her pension of £7,268 should have been abated to £3,285 from 5 April 2006 to 4 November 2007. This had therefore resulted in a net overpayment of £5,970.48 which needed to be recovered.
 12. Miss Davis made a formal complaint. Capita dealt with the matter at the first stage of the complaint procedure. The Pension Schemes Executive (part of Cabinet Office) dealt with the second stage.

13. After the formal complaint process was complete, on 16 September 2013 Miss Davies emailed Capita and queried the SOR of £16,740 that they had used to calculate the overpayment in their letter of 4 July 2012. She stated that her P60 for the tax year ending April 2005 showed her pay as £17,793.79 and that using the lower amount as her SOR means she was earning less than she did 12 months prior. She asked that the calculation of the overpayment be reconsidered.
14. Capita replied on 17 September 2013. They said that the calculation of the SOR differed depending on whether the member's previous period of service ended before or after 1 April 2007. Miss Davies was provided with details of how her SOR, her pension and the abatement were calculated.
15. Miss Davies' complaint about the SOR and overpayment calculation was considered under the Scheme's IDRP. There was no change to the position outlined in Capita's email of 17 September 2013.
16. Since then the Scheme's administration has been taken over by MyCSP.

Summary of Miss Davies' position

17. She did not query the SOR in 2005 because at the time, she was unemployed and seeking employment. She "would definitely have queried any calculation which resulted in a loss of income on re-employment".
18. She followed the correct procedure when she notified the Assembly that she had previous service in the Civil Service. She expected that at the time of her re-employment, her total income would be comparable to the amount she would have earned in her previous role, namely £17,793. She further had a "reasonable" expectation that this figure would have increased in line with the cost of living. Had her total income reduced to £16,740 in 2006, it would have meant she would not have been able to cover her living expenses as a single householder. This would have caused financial suffering for her.
19. She was not aware of the effect of abatement on her pension due to her expectation of receiving a comparable income.
20. The use of the SOR is unreasonable and the Rules relating to abatement "can result in a reduction of earnings and consequently a lower standard of living".
21. This matter has caused her "a great deal of anxiety and inconvenience" and "the implication that she had not disclosed the relevant information to [the Assembly] was in itself quite humiliating".
22. She would like a revised decision resulting in a fairer calculation of her earnings which ensures that there is no loss of income for 5 April 2006 to 4 November 2007.

23. She was unaware of the overpayment before receiving the letter of 4 July 2012. Had the abatement been applied, she would not have taken two holidays abroad in June 2006 and June 2007 and she would not have spent money landscaping her garden because the reduction in her income would have caused her hardship. She would have had to seek additional employment (outside of the Civil Service) to cover the shortfall. In addition, she would not have made the commitment to sell her house in October 2011 incurring the associated costs. She would also not have purchased her current home which required extensive renovation at a great deal of expense.

Summary of MyCSP's position

24. MyCSP have stated that they see no reason to disagree with Capita's calculation of the overpayment.
25. Information received by Capita:
- Miss Davies' allegation that the calculation of the overpayment is incorrect and is opposed.
 - Miss Davies did not initially refer to the calculation of the abatement in her appeals under the IDRPs. Those appeals centred on her disputing the requirement placed on her to repay the overpaid pension.
 - Miss Davies is only now suggesting that the SOR used in the calculation of the abatement was incorrect and that it has resulted in an incorrect calculation of the abatement.
 - The abatement was calculated in accordance with the Scheme Rules and the SOR that was used complies with the definition set out in the Scheme Rules. The salary shown on her P60 for the year ending 2005 included overtime and bonuses and as a result, it did not fall within the definition of the Rules.
 - The SOR has been explained to Miss Davies on a number of occasions and the overpayment has been correctly calculated.

Conclusions

26. At the outset Miss Davies' complaint was that the onus was on her employer to notify Capita of her re-employment and that she should not be responsible for the repayment of the overpayment. Latterly, she has said that the SOR has been incorrectly calculated.

The overpayment

27. Miss Davies was re-employed on a full time salary of £13,455 from 5 April 2006. This was £3,983.07 more than she could earn before abatement applied to her pension (based on the SOR of £16,740).

28. There is no dispute that an overpayment has occurred. Strictly therefore MyCSP has a right to recover that overpayment. In some circumstances where an overpayment has arisen as a result of a mistake, there will be a defence to an action for recovery. The person who is asked to repay the money may be able to claim a "change of position" defence in reliance on the mistaken overpayment and as a result it might be inequitable for him or her to have to repay the money.
29. Miss Davies says that she would not have spent money in ways that she identifies, including that she would not have moved. But whatever she did, if she should reasonably have known that there should have been an abatement, she can't argue that she relied on the pension at the unabated level. Capita's letter of 25 July 2005 to Miss Davies was clear and unambiguous about the salary she could earn before her pension would be abated, namely £9,471.93. Miss Davies should therefore have been aware that any amount above this figure would trigger the rules of abatement.
30. It is worth noting that it is immaterial, for the purpose of recovery of the overpayment by MyCSP, that a form may have been sent by the Assembly in 2006. Even if Capita had known in 2006 that Miss Davies was likely to be overpaid (I make no finding that they did), but did nothing until 2012, they could still recover at least six years' of overpayments, which would go back to 2006.

The SOR

31. Rule 3.25a applies to members whose service ended before 1 April 2007. Miss Davies is such a person. It says that salary is the annual rate of wages and excludes other emoluments. Those other emoluments account for the difference between £16,740 and the figure Miss Davies has taken from her payslip.
32. The 25 July 2005 letter used the figure of £16,740 as Miss Davies' retiring pay as at the date of her retirement. As has been stated above, this figure has been used as the SOR for the purposes of calculating the abatement which gave the resultant overpayment amount of £5,970.48. Notably, Miss Davies did not query this figure at the time.
33. Miss Davies has however made a number of assumptions about her future earnings and did not seek to clarify the contents of the 2005 letter against her opposing assumptions. She believes that the higher figure should have been used as her SOR instead and that her earnings should have increased in line with the cost of living.
34. Miss Davies' expectation that her income may increase was not unreasonable. The Scheme Rules do allow for increases to a SOR and a pension which is increased in line with the cost of living. When calculating abatement, the SOR may be increased by the proportion by which a pension of that amount would have increased by the date of re-employment.

35. In my judgment, the Scheme Rules relating to the pension increase were correctly applied in this case. It therefore follows that the calculation of the overpayment is correct.

Overall conclusions

36. In summary, Miss Davies should have realised that her pension should have been abated and therefore that an overpayment may arise. She has not claimed a change of position and therefore she does not have a defence to the recovery of the overpayment. In addition the calculation of the SOR has been carried out correctly in accordance with the Scheme Rules.
37. For the reasons given above, I do not uphold Miss Davies' complaint. However, I would expect MyCSP to come to reasonable arrangements for the recovery of the overpayment, so as to avoid any hardship.

Tony King

Pensions Ombudsman
27 March 2015