

Ombudsman's Determination

Applicant	Mrs Anna Horsnell
Scheme	Hewlett-Packard Limited Retirement Benefits Plan (the Plan) - Digital Section
Respondent(s)	The Trustees of the Plan (the Trustees) Equiniti Paymaster (Equiniti)

Complaint Summary

Mrs Horsnell has complained that she was given wrong and misleading advice concerning the tax status of a redundancy payment that was paid into the Scheme.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld to the extent that Mrs Horsnell has incurred some unnecessary fees and distress. However, she has not suffered a direct financial loss.

Detailed Determination

1. On 17 February 2010 I held an oral hearing to take evidence on a particular point from Mrs Horsnell, Mr Horsnell and Mr Edrupt (whose role I describe below). The facts that follow are taken both from the papers and from information I was given at the hearing.

Material facts

2. Since 2007 Mrs Horsnell has been an Isle of Man resident. From then until 2010 she was employed by Hewlett-Packard in the UK as what was regarded as a “mobile worker”- partly carrying out her work in the Isle of Man and partly in the UK. She was liable to pay tax in both jurisdictions.
3. In 2010 Mrs Horsnell was offered the opportunity of redundancy, which she pursued. She says that she had a conversation with Hewlett-Packard’s pensions manager (she described it as a “coffee machine” conversation) in which he said that she would get information (she told me that she is fairly sure he used the word “advice”) about her pension options from Xafinity Paymaster, the Plan’s administrators. Xafinity Paymaster are now Equiniti and I refer to them by the latter name from now on.
4. The person that Mrs Horsnell dealt with at Equiniti was Mr Edrupt, a pensions administrator. At the hearing Mr Edrupt explained that one of his tasks was to deal with pension options following redundancy from Hewlett-Packard. He said that he dealt with roughly half of them and that this amounted to about 40 a year.
5. Mrs Horsnell and Mr Edrupt each agree that there were a number of telephone conversations in the run-up to Mrs Horsnell’s redundancy, which took effect on 30 April 2010. There is no record of the conversations. They were not recorded by Equiniti’s telephone systems and Mr Edrupt told me that he did not routinely make notes (though he generally would if there was anything unusual to record). Mrs Horsnell did not take notes either, apart from some annotations on documents apparently made at the time. Mr Horsnell said that he and Mrs Horsnell had a conference phone at home and so, with Mr Edrupt’s agreement, he participated in the phone calls.
6. One of those calls was on (I think) 16 March 2010. It is referred to in the email quoted from below, and sent on 17 March, as having taken place “this morning”. However a copy of the email provided by Equiniti shows it as having been completed and checked on 16 March, so perhaps it was written on 16 March but not sent until the next day. Nothing turns on the exact date. The email from Mr Edrupt dated 17 March said:

“Further to our telephone conversation this morning, I set out below some details on the payment of pensions and also tax issues.

Your bank account

We can pay into a UK bank account or an IoM bank account.

Paying the pension

The pension is payable in monthly instalments on the 6th of each month...

We are obliged by the Inland Revenue to deduct tax at the rate of 20% and this will continue to apply until such time as we are notified differently by the Inland Revenue...

Exemption from UK tax

If the UK Inland Revenue regard you as a non-UK resident for tax purposes, you may wish to consider obtaining exemption from UK tax.

To obtain exemption from UK tax on pensions in payment, you will need to apply to the Inland Revenue. If you are successful, the Inland Revenue will notify us to pay the pension gross to you. You may or may not have done this already for other payments you receive (if you have, then I would assume that you would not need to apply again)."

7. Mr Edrupt wrote to Mrs Horsnell on 7 April 2010 enclosing an illustration of her benefits. In the covering letter he said,

"The enclosed illustration is our standard communication for requests of this nature. I have also provided an additional quotation section that provides the resultant benefit options based upon augmentation amounts of £145,869.83 (i.e. your maximum redundancy amount less the £30,000 tax-free element and the £16,897.00 PILON [payment in lieu of notice] element)

A helpline has been set up to answer any questions concerning your Severance Statement"

8. The effect of using £145,869.83 of the redundancy payment was to increase Mrs Horsnell's pension. In turn that meant that the maximum cash sum that she could take from the Plan was increased from £127,959 to £177,681 (it is based on a percentage of the pension). The cash payment would be exempt from UK tax.

9. There was another telephone conversation, apparently on 20 April. Mr Edrupt followed it up with an email on that day. He said:

"To confirm our telephone conversation of today:

1. [Mr Edrupt gave details of early retirement factors and future increase rates]

2. With £145,869.83 augmentation paid into the Plan, the maximum amount of PCLS (pension commencement lump sum, which is tax free) is £177,681.81. ...
3. The first £30,000 of the severance money is tax free. If you decide to pay the severance monies into the Plan, HP payroll would pay you the first £30,000 of it, and pass the balance of £145,869.83 to us to put into the Plan's bank account.
4. Your pension will be payable in monthly instalments.
5. We are obliged to deduct tax at the basic rate of 20% until HMRC send us a tax coding to apply to you...

We also went through completion of the various forms.

I think this covers everything we spoke of, but if I missed something out or if you have any further questions then please do let me know."

10. Mrs Horsnell says that the particular form they went through was one headed, "THE HEWLETT-PACKARD LTD RETIREMENT BENEFITS PLAN – THE DIGITAL SECTION SEVERANCE PROGRAMME OPTION FORM".
11. She selected an option headed, "Augmentation", which said (with the first figure inserted in Mrs Horsnell's handwriting):

"I would like to give up £145,869.83 (up to a maximum of your redundancy less the £30,000 tax free element, for a deferred pension/immediate retirement) of my severance payment to augment my pension in the digital section."
12. She also selected the Retirement Option which said:

"I would like to take immediate retirement benefits with a Tax Free Cash Sum of *"

The asterisk was inserted by Mrs Horsnell and referred to a note in her handwriting in the margin which said:

"*An amount equivalent to the augmentation of £145,869.83 together with the Phoenix AVC estimated in the region of £24,431.00"
13. Mrs Horsnell told me that this form was completed at the time of the telephone conversation. She said that the note specifically records her understanding, confirmed with Mr Edrupt on the phone, that the cash resulting from the redundancy payment paid into the Plan would be tax free.

14. Mrs Horsnell's decision to take a cash sum equal to the augmentation payment plus her AVC meant that in effect she had taken as much cash as she could, without commuting any of her defined benefit pension. Her redundancy duly took effect on 30 April and Hewlett-Packard paid the £145,869.83 into the Plan on her behalf.
15. In November 2010 Mrs Horsnell was told by the Isle of Man tax authorities that she was liable to pay 20% tax on the £145,869.83 contribution to the Plan that was diverted from her redundancy payment. This amounted to £29,173.97. The reason was that the Plan was not a registered pension scheme in the Isle of Man.
16. At first there seemed to be some thought that it would suffice if the Isle of Man authorities were shown that the Plan was registered in the UK with HMRC. On 18 November, in response to an email from Mrs Horsnell, Mr Edrupt gave her the HMRC registration details.
17. There was also discussion about arranging for the Plan to be registered in the Isle of Man, but it was established that retrospective registration was not possible. In an email of 20 November 2012 Mrs Horsnell was told that "It is the established policy of the Trustees that the Plan does not seek income tax approval from other jurisdictions outside of the UK. In the interests of being as helpful as possible we did explore the possibility of making an exception to this policy ... provided that this did not create any undue burden on the Plan. However, the Income Tax Authority has given us clear advice that they would not apply any such tax authorisation on a retrospective basis..."
18. Mrs Horsnell engaged a firm of accountants, PKF, to negotiate with the Isle of Man authorities. They were unsuccessful and she says their fees were £2,000.

Summary of Mrs Horsnell's position

19. The main points made by Mrs Horsnell in writing over the course of the dispute, some of which were repeated at the hearing, can be summarised as follows.
20. Hewlett-Packard were aware of her tax status. As evidence she points to her payslips showing no UK tax deduction and them being sent to her Isle of Man address. She assumed that Equiniti had been provided with all relevant information about her. Also she made her dual tax liability clear to Mr Edrupt.
21. There is no clear distinction, to a lay person, between advice on the one hand and information or guidance on the other. She was entitled to assume that the Trustees and Mr Edrupt would conduct themselves with a duty of care towards her.
22. She was never told that the information she had only related to the UK tax position. None of the written documents said that.
23. Mr Edrupt appeared knowledgeable and helpful so she trusted him to act in her best interests. He represented that he understood both Isle of Man and UK tax matters.

24. She told Mr Edrupt that she wanted to minimise her tax liabilities and that she could take advice from PKF, but Mr Edrupt assured her that was not necessary. He told her that he understood that the Isle of Man treated pension augmentation in the same way as the UK.
25. The difference in her financial position between (a) having used all but £30,000 of the redundancy sum as an augmentation payment and (b) if she had taken the redundancy sum in cash is:

Cash		
	(a)	(b)
Redundancy payment	£30,000	£175,869
Isle of Man tax	£29,174	-
UK tax	-	£46,425
Net cash	£826	£129,444

Pension		
	(a)	(b)
From redundancy payment	£5,851	-
Isle of Man tax	£1,170	-
Net pension	£4,681	-

26. She says that in the absence of a clear tax advantage she would not have used the redundancy payment as a pension augmentation. She is not in good health (as she knew at the time) so pension was not of itself more attractive than cash. Mr Horsnell is 12 years older than she is, so the accompanying spouse's pension is of little value.
27. Equiniti should have told her that they could not advise on the Isle of Man tax liability. Had they done so, she would then have gone to her own accountants for advice and they would have pointed out that the Scheme was not approved by the Isle of Man tax authorities. Had approval been sought, there would have been no liability to Isle of Man tax. As additional items of loss, she claims PKF's fee of £2,000 and £5,200 in legal fees arising from pursuing her case.

Discussion

Mrs Horsnell's loss

28. I do not think the comparisons made by Mrs Horsnell are quite correct. (Below I set aside that she took the value of her AVC in cash, which she would have done anyway.) In the table above, Mrs Horsnell has made a comparison between what she says she would have done, and something that she did not do, being to convert the redundancy sum into additional pension. The proper comparison should be between what she says she would have done and what she actually did do.
29. She says that if she had known about the Isle of Man tax liability, she would have taken the whole sum as a redundancy payment. On her calculation above she would then have paid £46,425 in UK tax and been left with a net sum of £129,444.
30. What Mrs Horsnell did do was to take a total lump sum (part as redundancy and part as cash from the Plan) equivalent to the redundancy payment. She did so expecting the whole cash sum to be tax free, but instead had a tax liability of £29,174. The net cash she derived from the redundancy payment was £146,659. She is in fact better off as a result of her decision, by the difference between hypothetical UK tax and actual Isle of Man tax.
31. Her alternative argument is that her loss is the whole of the Isle of Man tax liability, because if she had not relied on Mr Edrupt's expertise she would have taken advice and the Plan would have been able to apply for Isle of Man tax registration. This is a line that she has followed somewhat less forcefully than her argument that she would have acted differently in the manner in which she used the redundancy payment.
32. That argument does not succeed, essentially because it relies on the Trustees of the Plan agreeing to apply for Isle of Man tax approval, then making an application and the Isle of Man approving the Plan in sufficient time for registration to be obtained before Mrs Horsnell was made redundant.
33. The Trustees did explore the possibility, as far as finding out that retrospective approval was impossible. But their policy was not to apply for overseas approval generally – and there was a reservation as to the administrative burden even when there was a possibility of making an exception after the events that led to the complaint. I do not think it likely that the Trustees would have agreed to apply, contrary to policy, before Mrs Horsnell retired. It is more likely that they would have restated the policy and noted that the option of having the redundancy payment redirected to the Plan was simply not as attractive for her as for UK tax payers. And even if they would have agreed to apply, there was a tight timescale for the application to have been made and accepted.

34. Overall I do not find, on the balance of probabilities, that the Trustees would have agreed to apply for Isle of Man approval **and** that if they had, approval would have been given in time. Further, it was by no means a predictable consequence of any failure by Equiniti that a loss arose because Isle of Man approval could have been obtained but was not.

The hearing and conclusions from it

35. The hearing was held in order to take evidence as to the telephone conversations. I do not set out below what each side said in any detail. I am grateful to Mrs Horsnell, Mr Horsnell and Mr Edrupt for their assistance and good conduct during the hearing. I found all three to be credible witnesses giving honest evidence to the best of their recollections.
36. Mr Horsnell made the point that the events were likely to be more fresh in Mrs Horsnell and his minds because Mrs Horsnell's retirement was an important and exceptional event and the sums of money were considerable. Mr Edrupt remembered comparatively little of substance, which was entirely understandable given the frequency with which he deals with similar matters. However, I cannot give more weight to Mrs Horsnell's case than to Equiniti's simply because she remembers events more strongly than Mr Edrupt. Having a strong memory of events does not automatically make the memory itself accurate and what Mr Edrupt has forgotten might have been the opposite of what Mr and Mrs Horsnell remember.
37. I accept that it is not always easy to distinguish between advice and information. The significant difference is that advice will include a suggested or recommended course of action. I do not find that Mr Edrupt gave advice in that sense. I have no doubt from the papers and from the evidence that I heard that he gave information about the options.
38. Mrs Horsnell drew my attention to the inserted note on the option form as evidence of her understanding that she would not be liable to tax on the money that resulted from the augmentation payment. She said that she had specifically drawn her understanding that the money would be tax free to Mr Edrupt's attention. I did not find the note a particularly helpful item of evidence, however. It was true that the money that came out of the Plan was tax free. It has not been taxed either in the UK or the Isle of Man. Mrs Horsnell's note did not refer directly to tax at all, but merely said how much she would like as the "Tax Free Cash Sum" option on the form. And it was indeed tax free.
39. The tax arose on the diverted redundancy payment into the Plan, not on the cash sum emerging from it. It was clear from the hearing that Mr Edrupt did not know that would happen. I accept that – and, having heard his evidence and seen the papers I do not find that he held himself out as knowing about Isle of Man taxation generally.

40. However, I also accept that Mrs Horsnell thought that she had all the information that she needed, so that consulting PKF was unnecessary. I asked Mr Edrupt if he remembered a conversation about her possibly obtaining advice elsewhere. He said (with commendable honesty) that he thought he might, but he could not be sure that he was not remembering later suggestion that it was discussed. Mr and Mrs Horsnell were, however, very clear that they had mentioned that they could get advice and that Mr Edrupt had said it wouldn't be necessary. Having heard the witnesses I am satisfied that Mrs Horsnell and/or Mr Horsnell did mention that they could take advice and whatever Mr Edrupt then said led Mr and Mrs Horsnell to a reasonable decision that they did not need it.
41. But that would not matter if Mr Edrupt did not know there was anything unusual about Mrs Horsnell's case. If she had been a "normal" UK taxpayer then he could reasonably have said that he knew that the cash sum would be tax free and that a tax adviser was not particularly needed to confirm that. He told me that he could not remember exactly what he knew about Mrs Horsnell's residency for tax purposes. He said that he knew that she would be paying tax in the Isle of Man on her future pension and that she had been taxed in the UK in the past, but he could not say what he knew about any overlapping period.
42. On balance, having heard the evidence, I find that Mr Edrupt either knew or ought to have thought it likely that Mrs Horsnell was liable to tax in the Isle of Man. First, the fact (as I have found it above) that the Horsnell's said that they had advisers available makes it likely that they explained the context. Second, although Mr Edrupt may now have forgotten, he must have known at the time that he was corresponding with Mrs Horsnell at an Isle of Man email address (manx.net) and that she lived in the Isle of Man. As evidence, in the 17 March email he talks about her possibly not being regarded as a non-UK resident for tax purposes and obtaining tax exemption in future. Finally, in the 20 April email he refers to being obliged to deduct tax until Equiniti had an accurate tax coding from HMRC, which I take as a clear indication that he knew that Mrs Horsnell expected not to pay UK tax.
43. So I find that Mr Edrupt knew that Mrs Horsnell's tax position was, at the least, not that of a normal UK resident and that he knew that she had a tax adviser, but said or implied that advice would not be needed in relation to the cash sum. I do not find that he said anything about the incoming augmentation payment specifically. It may well be that Mr Edrupt did not connect up the information that he had because the conversations took place over a period of time, or because it simply did not occur to him that a payment that the UK tax authorities would treat as an employer contribution could end up being taxed in the Isle of Man. But I find that he should have done so.

44. In reaching that conclusion I make no criticism at all of Mr Edrupt. Mrs Horsnell was, at the hearing, at great pains to say how professional and helpful Mr Edrupt had been in his dealings with them. The failure to make the connection was no more than a slip, but it was one that meant that Equiniti did not meet the duty of care that, as the Plan administrator, they owed to Mrs Horsnell.

Conclusions

45. In view of my finding that Mrs Horsnell is better off having redirected the substantial part of the redundancy sum as an employer contribution than had she taken it as a redundancy payment, there is no direct financial loss.
46. Mrs Horsnell has said that she paid accountants' fees of £2,000 in an attempt to resolve the Isle of Man tax position satisfactorily. I accept that she would not have needed to do that after the event. However, she says that she would have taken tax advice before making her decision. It seems likely that that would have been quite straightforward so would have cost less, so I find that Equiniti should compensate her for half of the £2,000 spent.
47. As to the legal fees, Mrs Horsnell has been unsuccessful in her complaint that there has been a significant loss. And I would not normally make an award of costs for representation in bringing a complaint to the Pensions Ombudsman Service. I do not therefore consider that her legal costs should be paid by the respondents.
48. I find that Mrs Horsnell will have suffered legitimate distress and inconvenience on discovering that she would have a tax bill of over £29,000 when she was expecting none (even if it was the best outcome she would have opted for had she known).

Directions

49. Within 21 days of the date of this determination Equiniti are to pay Mrs Horsnell £1,750.

Tony King

Pensions Ombudsman
25 March 2015