PO-4565

Ombudsman's Determination

Applicant	Mr Steve Hudson
Scheme	Royal Mail Statutory Pension Scheme (**the Scheme**)
Respondent	Pensions Service Centre (**PSC**)

Complaint summary

Mr Hudson has complained that his tax free lump sum was overpaid by PSC (the Administrator / Managers of the Scheme) and he should not have to repay it.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld to the extent that PSC's maladministration has caused Mr Hudson non-financial loss.

DETAILED DETERMINATION

Relevant Scheme Rules

1. Relevant to this complaint is the Royal Mail Pension Plan Trust Deed and Rules. General Rule 14 (8) deals with the overpayment of benefits:

   "Where there has been an overpayment of pension or other benefit to a Member or other beneficiary under the Scheme, the Trustees in their absolute discretion may recover that overpayment by reducing future instalments of pension or any benefit owed to that Member or other beneficiary."

2. Schedule 1, Clause 7 of the Royal Mail Statutory Pension Scheme Rules (as set out in the Postal Services Act 2011 (Transfer of Accrued Pension Rights) Order 2012) also deals with overpayments and provides as follows:

   "**7**. (1) Where, by reason of an overpayment of pension or other benefit in respect of a Wholly Transferred Beneficiary that occurred under the RMPP on or before the Cut-Off Date, the RMPP Trustees would at the end of the Cut-Off Date have had a right to recover that overpayment from future instalments of the pension in respect of that person, subject to sub-paragraph (3) below the Secretary of State in his absolute discretion may recover that overpayment as if it had occurred under the RMSPS by reducing future instalments of pension or any other benefit owed in respect of that person (and for these purposes any monetary obligation due from the beneficiary to the RMPP as at the end of the Cut-Off Date by reason of the overpayment will be treated as an obligation owing to the RMSPS).

   (2) Where an overpayment of pension or other benefit in respect of any person occurs under the RMSPS after the Cut-Off Date, subject to sub-paragraph (3) below the Secretary of State in his absolute discretion may recover that overpayment by reducing future instalments of pension or any other benefit owed in respect of that person.

   (3) The Secretary of State will only have the power to make recovery from a person as described in sub-paragraphs (1) and (2) above to the extent that—

   (a) the RMPP Trustees may have done so had that person's benefit been retained in the RMPP; and .

   (b) it is permitted under the Surrender and Forfeiture Laws as applied to the RMSPS under Clause 19 (Surrender and Forfeiture Laws)."

Material Facts

3. Mr Hudson was a member of Section B of the Royal Mail Pension Plan (the Plan). His benefits accrued up until 31 March 2012 were subsequently transferred from the Plan to the Scheme. For the purposes of this decision, the Plan will be referred to as the Scheme.

4. Mr Hudson became a member of the Scheme on 26 January 1987. He left service on 31 January 2005 and his benefits were deferred to his 60th birthday on 13 November 2017.

5. On 22 May 2007, Mr Hudson enquired about taking early payment of his deferred benefits on an actuarially reduced basis from his 50th birthday on 13 November 2007.

6. PSC wrote to Mr Hudson on 25 May 2007 and provided the necessary application forms. He was also informed that revised Scheme factors were being introduced with effect from 1 September 2007. Mr Hudson was sent a letter on 20 September 2007 informing him of his options for the payment of his Scheme benefits.

7. Mr Hudson completed the benefit option form on 25 September 2007 and he indicated that he wished to take the maximum tax free lump sum by commuting part of his pension.

8. On 13 November 2007, Mr Hudson's benefits were put in payment and he received a lump sum of £37,705.78 and a residual pension of £5,112 per annum. He received an additional lump sum payment of £791.61 on 7 April 2008 (for indexation).

9. In June 2009, the Scheme auditors discovered that inflated actuarial factors had been applied to the commutation of members' pensions (for tax free cash) in Section B of the Scheme. As a result tax free cash had been paid in excess of HM Revenue & Customs (**HMRC**) limits.

10. Mr Hudson's benefits were reviewed in February 2011 and it was established that his 2007 tax free lump sum was overpaid by £2,881.90 and that as a result, his residual pension had been underpaid by £120.20 per annum. His correct entitlement should have been £35,615.49 (includes indexation) and £5,232.49 respectively.

11. PSC wrote to Mr Hudson about the overpayment on 17 March 2011. He was informed that his monthly pension would be increased, the arrears paid and that they were duty bound to recover the overpayment.

12. Mr Hudson wrote to PSC on 1 April 2011 expressing his surprise about the overpayment. He stated that the overpayment should be written off as he was not responsible for the error and because it had taken three and a half years to bring the overpayment to his attention.

13. A number of letters were exchanged between the parties. Mr Hudson was given the opportunity to repay the overpayment over a ten year period at a monthly rate of £24.02. Mr Hudson however maintained that the overpayment should be written off.

14. PSC asked Mr Hudson to provide evidence about a ‘change of position’ so they could consider whether or not it was inequitable to require the repayment of all or part of the overpayment.

15. Mr Hudson wrote to PSC on 25 September 2011. He stated that he no longer had any of the lump sum that had been paid in 2007 and he provided a breakdown of how he had spent the money:

<u>Breakdown of expenditure</u>

14/11/07	Electric fire	£124
15/11/07	Television home cinema	£1,299
22/11/07	New bathroom deposit	£1,200
22/11/07	Bathroom tiles excess	£421
27/11/07	Car (a gift)	£7,995
17/12/07	DVD player	£150
19/12/07	New bathroom balance	£5,129
14/01/08	New furniture	£2,250
14/01/08	Decorating	£800
23/01/08	New carpets	£477
29/01/08	Computer	£1,000
12/05/08	Air conditioning unit	£180
14/05/08	Ipod	£180
16/06/08	Car (for himself)	£3,890
27/01/09	Glasses	£355
07/04/09	Garden revamp	£445
31/05/09	Notebook computer	£299
12/07/09	Iphone	£180
07/07/10	Vet bill – parrot	£737
28/09/10	Credit card payment	£3,000
21/06/11	Credit card payment	£6,735
2007-11	Minor expenditure	£859
Total		£37,705

16. Mr Hudson did not however provide PSC with a breakdown of his income and expenditure.

17. PSC wrote to Mr Hudson on 14 October 2011 and accepted that he could not have been reasonably expected to notice the error that had been made. PSC explained the duty on a member to mitigate the loss suffered or to consider agreeing to an affordable repayment plan. PSC offered Mr Hudson a compensation payment of £200 in recognition of the distress and inconvenience caused by the situation to be offset against the overpaid sum - reducing the overpayment to £2681.90 and thereby revising the monthly repayment to £22.35.

18. On 16 October 2011, Mr Hudson wrote to PSC registering a Stage 1 formal dispute under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

19. The Stage 1 decision was made on 5 November 2011. It was accepted that maladministration had occurred in respect of the following:

- a failure to identify that the revised factors introduced in September 2007 would have an impact upon the calculation of the maximum tax-free lump sum allowed under HMRC regulations;
- a failure to identify the error on the cases calculated before it was brought to PSC's attention by the auditors; and
- a failure to communicate the error to Mr Hudson in a timely manner.

20. Mr Hudson was awarded a total of £75 for the three counts of maladministration in addition to the £200 that had been offered previously. He was offered the opportunity to offset this against the overpayment in order to further reduce it to £2,606.90.

21. Receiving no response from Mr Hudson, PSC wrote to him on 21 September 2012 confirming the Stage 1 decision. He was offered the opportunity to repay the £2,606.90 over a ten year period in monthly instalments of £21.73.

22. Mr Hudson replied on 5 October 2012 and said that he had not received the IDRP Stage 1 decision. He reiterated the key points from his previous letter of 16 October 2011. He stated that the ongoing issue was causing him undue and unnecessary stress, that he has been subject to a pay freeze but there had been an increase to his pension contributions which means his disposable income has been decreasing over time without any prospect of getting better. He further stated that any further expenditure would deplete his already reducing income and maintained that PSC were to blame.

23. Though his letter fell outside the normal timescales for a Stage 2 appeal, PSC acknowledged Mr Hudson's appeal and provided him with an opportunity to provide further information. Nothing further was received from Mr Hudson.

24. The Stage 2 decision was made on 11 January 2013. PSC did not uphold Mr Hudson's complaint and determined that the compensation and repayment plan offered to Mr Hudson was reasonable.

25. Mr Hudson sought the assistance of the Pensions Advisory service (TPAS). TPAS asked him which particular items he would not have purchased if he had received his correct tax free cash entitlement. Mr Hudson said he would not have spent money on the new bathroom, decorating, furniture and carpets totalling £10,277.

26. TPAS asked PSC if discretion could be exercised not to reclaim the overpayment but the Stage 2 decision was confirmed.

Summary of Mr Hudson's position

27. Mr Hudson says:

- PSC has breached its duty of care in relation to his case;
- their error and failure is solely its own and the overpayment should therefore not be sought from him;
- the Scheme's auditors did not notice the error until 2009 and then he was not notified of the overpayment until 2011, which was too long given the financial impact their findings would have on those concerned;
- he has experienced a 'change of position' and he no longer has any money from the lump sum payment;
- his financial position has decreased over time due to a combination of different factors including a pay freeze since 2009, the increased cost of living and the reduction of his disposable income;
- he "became unemployed on 23 October 2014 and the only monthly income [he] was in receipt of was [his] pension from Royal Mail and the Foreign and Commonwealth Office which equates to, after tax, of £664.52. [His] current monthly expenditure is £1,158.60 giving a monthly deficit of £494.08. From [25 November 2014, he] secured part-time employment for a fixed term until 30 September 2015…The salary for this post is £12,652 per annum."
- though the repayment amount of £21.73 may seem like a small amount, it will further reduce his income and will have a major impact on his finances at a time when he is already under significant financial pressure;
- he has now been placed on risk of redundancy in his current new position from 31 March 2015 due to funding cuts;
- the compensation offered by PSC is not sufficient.

Summary of PSC's position

28. The allegations made by Mr Hudson are not disputed. PSC have acknowledged three counts of maladministration in relation to the errors made.

29. Mr Hudson has not given any reason why he has not tried to mitigate the loss though he has given generic explanations of his economic situation. Mr Hudson has not provided specific reasons why he would not be able to afford the very reasonable repayment plan nor has be provided evidence that it would cause him hardship.

30. PSC considers that the amount of compensation and repayment plan offered to Mr Hudson are reasonable.

Conclusions

31. It is not disputed that the payment of incorrect tax free cash to Mr Hudson in 2007 and the delayed discovery of the error (almost two years after the payment had been made) and notification of the overpayment to Mr Hudson (a further 20 months later) amount to maladministration by PSC.

32. Mr Hudson says he should not have to repay the overpayment because it did not occur as a result of his making, he has spent the tax free cash sum, and the proposed repayment plan will cause him financial hardship.

33. It is an established legal principle that the incorrect calculation of pension benefits does not create an entitlement in itself for the recipient concerned. PSC is entitled to seek recovery of the overpayment made by mistake even if they contributed to the error.

34. However, there are limited circumstances under which the recipient of monies paid in error might not be required to repay the amount overpaid. These are commonly referred to as defences against recovery. For a defence to succeed, the recipient must not have been aware of the error. It is accepted that Mr Hudson could not have known his correct entitlement at that time and had no way of knowing about the error that led to the overpayment.

35. PSC have considered one of the defences against recovery – change of position.

36. For the defence of change of position to succeed, Mr Hudson must be able to show that he has taken irreversible action which he would not otherwise have done such that it would be unfair (unconscionable) to require him to repay some or all of the overpayment. The question is whether but for the overpayment would Mr Hudson have acted as he did. In other words, what expenditure, if any, would he have incurred had there not been an overpayment. Certain expenditure cannot be taken into account, such as the repayment of existing debt, since these would be payable regardless of any overpayment. The expenditure must also be irreversible so that, if Mr Hudson has spent the money on items which he could resell, his defence would only succeed to the extent that he could not recover the payment. For example, the resale value of, say, a car is generally less than the purchase price. Mr Hudson would only be expected to repay up to the resale value.

37. Mr Hudson has provided a list of all his purchases since November 2007. He says if he had received his correct lump sum he would not have spent money on the new bathroom and on other home improvements (totalling £10,277). The question is which, if any, of the purchases made would Mr Hudson not have made had he received £35,615.49 instead of £38,497.39. I acknowledge that he would have been receiving a slightly higher pension over the same period but the difference (£10 per month gross) is not likely to have impacted on his decisions with regard to the purchases listed.

38. In 2007, Mr Hudson made purchases amounting to £16,318. This included his new bathroom (£6,750), a television (£1,299) and a gift of a car (£7,995). He would have been left with a balance of £19,297.49 instead of a balance of £21,387.78. I find that, on the balance of probabilities, it is unlikely that Mr Hudson would not have made the same purchases in 2007 had he received a lump sum of £35,615.49 instead of the £37,705.78 he initially received.

39. In January 2008, Mr Hudson made purchases amounting to £4,527. This included home improvements amounting to £3,527. At the time of these purchases, Mr Hudson would have had a balance of £19,297.49 remaining from his lump sum instead of £21,387.78. In view of this, I find that it is more likely than not that Mr Hudson would still have made these purchases even if he had received the correct lump sum. Mr Hudson received an additional £791.61 from PSC in April 2008. After his purchases in January, his lump sum balance would therefore have been £15,562.10 instead of £17,652.39. In May of 2008, Mr Hudson made two small purchases (£360) which again I find that he would have done even with the lower lump sum. This would have left him with £15,202.10 (instead of £17,292.39). In June 2008, Mr Hudson purchased a second car at a cost of £3,890. This would have reduced his balance to £11,312.10 (instead of £13,402.39). Mr Hudson said he purchased this car due to a health condition. The likelihood therefore is that he would have made this purchase anyway.

40. In 2009, Mr Hudson made purchases amounting to £1,279. Of these, I find he would have purchased glasses costing £355, a computer costing £299 and an iPhone© costing £180 even if his balance had been £11,312.10 and not £13,402.39. I find that it is more likely than not that Mr Hudson would not have spent £445 on a garden revamp had the balance of his lump sum been £11,312.10 and not £13,402.39. In coming to this view, I have taken account of the fact that Mr Hudson has said that he was subject to a pay freeze from 2009. This is likely to have made him more cautious about expenditure on what would be seen as luxuries.

41. In 2010, Mr Hudson paid a vet's bill of £737 and settled a credit card debt of £3,000. I cannot find that Mr Hudson would not have paid his vet's bill had the balance of his lump sum been £10,033.10 instead of £12,123.29. In and of itself, the credit card debt would not count for the purposes of a change of position defence because it is debt which falls to be settled in any event. However, if Mr Hudson is able to break the credit card debt down and show that it includes purchases he would not otherwise have made, he may be able to establish change of position. Any purchases made after 17 March 2011 could not count towards a change of position defence because, by that time, Mr Hudson was aware of the error and the overpayment.

42. I find therefore that Mr Hudson is required to repay £2,151.90 (£2,606.90 less £445).

43. There are other defences to recovery. For example, there is something referred to as estoppel by representation. However, for this to succeed there must have been a clear and unambiguous representation (or promise) to Mr Hudson that he was entitled to the higher lump sum. I do not find that to be the case here.

44. Turning now to the proposed repayment plan, the general rule is that the repayment term must be at least as long as the period over which the overpayment took place and should not cause undue financial hardship.

45. Mr Hudson was first notified of the overpayment almost four years after it had occurred. PSC have proposed a ten years repayment plan to recover it.

46. That would appear to be reasonable, however, Mr Hudson says it will cause him financial hardship and has provided some information about his financial commitments. The net cost to Mr Hudson is £11.73 (£21.73 less the increase to his monthly pension) Whilst the monthly sum repayable is small I am of the opinion that PSC require more information about Mr Hudson’s income and expenditure to establish that their proposal will not cause Mr Hudson undue financial hardship before proceeding with its implementation.

47. Having found that there was maladministration on the part of PSC, I must consider whether this has resulted in injustice to Mr Hudson. I do not find that he has suffered any financial loss as a direct result of the error by PSC. However, I do find that he has been caused distress and inconvenience. Therefore I uphold his complaint against PSC.

48. It would be appropriate for Mr Hudson to receive some modest compensation for the distress and inconvenience he has suffered. Mr Hudson says that the £275 offered by PSC is not enough. PSC disagree. I note that the Scheme auditors discovered the error in June 2009 but it was not until March 2011 that PSC notified Mr Hudson. Where there has been an overpayment of benefits, those responsible for the management of the Scheme should act promptly to minimise the effect this will have on the members affected. I do not find that PSC acted with appropriate urgency. Having said that, the additional period has not had any effect on the amount which Mr Hudson is required to repay (unlike with overpaid pension). In the circumstances, I find that £275 is an appropriate amount of redress and I need not make alternative directions.

Direction

49. Before implementing the ten years repayment plan (to recover the new overpayment amount of £2,151.90) PSC should ask Mr Hudson to provide details of his income and expenditure in order to establish whether or not it will cause him undue financial hardship. If it will, then the repayment plan should be adjusted accordingly so that it does not. If Mr Hudson fails to provide the required information, PCS may proceed with the proposed recovery plan.

Jane Irvine

Deputy Pensions Ombudsman
31 March 2015