PO-5834

Ombudsman's Determination

Applicant	Mr Roger Dennis
Scheme	John Lewis Pension Scheme (**the Scheme**)
Respondent	John Lewis Partnership Pensions Trust (**the Trustee**)

Complaint summary

Mr Dennis has complained about:

- the Trustee's decision to alter the date on which pensions are paid and the choice of the 12th of the month as the new payment date;
- the Trustee's stance on recovering part pension payments corresponding with periods after a member's death.
- He asserts that the Trustee did not act within the Scheme rules when they changed the payment date and the Scheme is making unauthorised payments to the estates of some deceased pensioners.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Trustee because:

- the Trustee has explained why they changed the payment date and the reason that the 12th was chosen;
- Mr Dennis may disagree with the Trustee's decision but the change was made following a valid exercise of discretion;
- the estates of deceased members are not entitled to retain pension payments corresponding to the part of the month after the member died;
- the decision to change the pension payment date took effect on 30 May 2013 at which time the Trustee had express power under the rules to effect the change;
- the Trustee has a policy of recoupment in situations where the risk arises that a payment is unauthorised and there is no evidence of payments being unauthorised.

Detailed Determination

Scheme Rules

1. Rule H6(1) in force as of 2011

> "All pensions and allowances shall be payable monthly in advance, or if the Committee determines, at such times and at such intervals (not exceeding 12 months) as the Committee shall either generally or in any particular case decide."

2. Resolution of 24 July 2012 amending the definition of "Committee" and the Schemes power of amendment:

> "The Committee is a delegated body of the Trustee and to the extent that Rules provide for any role or responsibility to be undertaken by the Committee, or any power, duty or discretion to be exercised by the Committee, the Committee undertakes such role and/or action as a delegate of the Trustee."
>
> "H(1)(a) The Trustee may by resolution…amend the rules with the consent of the partnership board and the Council PROVIDED THAT no such amendment may:
>
> Alter future benefits
>
> Enable that part of the Fund to be paid to a constituent company other than on the winding-up of the Scheme;
>
> Alter the main purpose of the Scheme from providing retirement benefits;
>
> Affect Deferred Pensioners who have left service or Members who have died before the date from which the amendment is stated to be effective, except as provided in the resolution making such amendment;
>
> Contravene the requirements of Section 67 of the Pensions Act.
>
> The Trustee may by resolution…amend the Rules without the consent of the Council but with the consent of the Partnership board PROVIDED THAT no such amendment shall be made under this paragraph if:
>
> It may disadvantage any Member or Members; or
>
> It may contravene any of the provisos set out in (a) above "Resolution of 30 May 2013:
>
> "2.1 for all purposes the word Committee in the Rules substitute "Trustee"; and
>
> 2.2 for all instances of the "Committee's" in the Rules, substitute "Trustee's"".

Legislation

3. Finance Act 2004, Section 165, Pension rule 2 (2013):

> "If the Member dies before the end of the period of ten years beginning with the day on which the member became entitled to a scheme pension or an annuity, payment of the scheme pension or annuity may continue to be made (to any person) until the end of that period. But no other payment of the member's pension may be made after the member's death."

Material facts

4. In 2012 the Trustee decided to reclaim part pension payments from the estates of deceased members. This had not been its practice previously.

5. In March 2013 the Trustee wrote to retired members to explain that:

   a) HMRC were changing their requirements for the reporting and payment of tax, and that pension schemes were now required to do this on a monthly, rather than annual basis.

   b) The Trustee could no longer pay pensions on the first of the month because this could result in two pension instalments falling in the same month, which in turn would result in additional tax liability.

6. From July 2013 pensions would be paid on the last day of the month.

7. To assist pensioners with the change i.e. there being a payment on 1 June but then no payment until 31 July, the Trustee offered an interest free advance, worth up to 80% of July's gross monthly pension. If taken, the advance was repayable from future monthly pension payments during the following two years.

8. A formatting error in the initial communication to members created the impression that there would be eleven payments in the forthcoming tax year rather than the twelve intended. Members wrote in with questions. The Trustee wrote to retired members again on 10 April 2013. The Trustee apologised for any confusion and said that pensioners would be receiving the same amount of pension during the year and it was only the timing of the payments that would change – from monthly in advance to monthly in arrears.

9. The Trustee said it had chosen the last day of the month to comply with HMRC reporting requirements and "to eliminate the Trustee's risk of making unauthorised payments, which arise from pension amounts which are paid in respect of a period after the death of a member. Such payments have to be reclaimed from families at a very distressing and difficult time, otherwise penalty tax charges can arise."

10. The Trustee received member representations about the choice of the last day of the month. The Trustee considered its position in detail at its April and May meetings and wrote again to retired members on 4 June 2013. The Trustee said that it had listened to the concerns expressed and the final decision was to move the payment date to the 12th of the month instead. Further the Trustee said the change would now occur from November 2013. This meant that the November payment would only be 11 days later than usual, but the full month's advance was still available on request.

11. On 31 March 2014 and in response to a request from Mr Dennis, HMRC said:

> "If a thirteenth payment is made in a tax year HMRC treats it as a non-cumulative payment (also known as 'week 1'), meaning that it is treated in isolation as tax is deducted without taking into account previous pay and tax details. Your pension provider would be required to use your tax code on a non-cumulative basis.
>
> It is important to note these payments may result in an underpayment of tax for you due to the extra Personal Allowance (tax free pay) provided to protect the level of take home pay you received in that period."

Summary of Mr Dennis' position

<u>Decision to change the pension payment date and the choice of day on which it should fall</u>

12. Mr Dennis realises that the change in HMRC rules would have resulted in pensioners receiving 13 monthly payments during tax year 2013/14. But the Trustee did not have to change the payment date to ensure that members did not incur additional liability for tax. He contends it is not clear if and when the Trustee agreed this course of action.

13. If the Trustee had consulted HMRC for advice, it would have been told not to change the payment date, and to instead apply non-cumulative tax codes to the thirteenth month's payment. This would have solved the problem without a detrimental effect on pensioner's cash flow. He adds that the Trustee did not consult with HMRC and failure to consult HMRC on this matter is inconsistent with the Trustee's claims of "rigorous standards of governance".

14. The Trustee's letter of 10 April 2013 began with an apology for the March letter, but contained several errors, which, in his view, undermined the Trustee's credibility. The statement "…no one will be losing out during their lifetime as a result of this change…" was inaccurate.

15. The Trustee offered an advance equivalent to 80% of one month's pension payment but this was offered as a loan and so had to be repaid. Therefore, all the Trustee did was spread the effect of the change more thinly over a longer period.

16. The payment date should have been moved to the 6th rather than the 12th of the month. This would have been in pensioners' best interests, would not have affected the amount of tax payable, and would have met HMRC's requirements regarding Real Time Information (**RTI**).

Recovery of pension payment following the death of a member

17. The Trustee said that pension paid in respect of periods after a member's death were unauthorised. Then it said that it was not the key consideration that the payments were unauthorised but that the rigorous standards of governance required the Trustee to reclaim any overpayment.

18. The Trustee does not provide any statutory or regulatory justification for this stance, nor explain how it trumps the best interests of pensioners.

19. It would have been much fairer to amend the rules in this area, rather than covertly change the long-standing interpretation of the Scheme rules. The decision in 2012 to start reclaiming part-month pension payments from the estates of deceased pensioners was unlawful. The new interpretation is detrimental to members and conflicts with the Trustee's duty to act in the best interests of beneficiaries. Mr Dennis asserts that the clawback decision contravenes the principle in Cowan v Scargill (1984). He asserts that the Trustee failed to consider the impact that clawing back the overpayment had on members.

Power to change the payment date under the Scheme rules

20. The Scheme rule that allowed the Trustee to change the payment date was amended on 30 May 2013.

21. The Trustee should disclose the relevant minutes of the meeting in which it decided to change the payment date. If the meeting was before 30 May 2013, the decision was unlawful.

22. The original decision to pay pensions on the last day of the month was improperly made by the Trustee because, at the time, this power lay with the Committee. Mr Dennis alleges that the Trustee had no power to change the payment date.

23. Mr Dennis asserts that the Trustee is making unauthorised payments to members' estates when they die, if the pensioner has been retired for more than 10 years and they die during the first twelve days of the month.

24. Mr Dennis argues that even if the Trustee's decisions were lawful they constituted maladministration.

Summary of the Trustee's position

Decision to change the pension payment date and the choice of day on which it should fall

25. The decision to move the pension payment date was made after significant consideration, as a response to HMRC's switch to RTI. If the change had not been made, some pensioners would have paid more tax, due to receiving 13 monthly payments in the same tax year.

26. The Trustee informed members of the intention to change and, as part of the decision making process, took into consideration a number of representations from members.

27. The Trustee believes that it acted appropriately in accordance with its duties

28. The Trustee was fully aware of the potential impact of the change on members in terms of the gap between payments. This is why interest free loans were offered to members who wanted them.

29. In offering the loan, the Trustee was satisfied that members would not be financially disadvantaged by taking up the offer.

30. The Trustee took advice on its obligations to members and the legal position regarding the switch to RTI. It also considered representations made by the members, which resulted in a change to the intended payment date, from the end of the month to the 12th of the month.

31. The Trustee was advised that the 12th was the earliest fixed due date that would not give rise to an adverse RTI-related tax issue and would not need to be varied from time to time (i.e. if the usual due date fell on a weekend or over Easter there would be no need to make the due date later to avoid risk of late payment; there would be sufficient time for the payment to be made early without risk of it falling before the 6th,).

32. The Trustee did liaise with HMRC, for example the records show that HMRC requested a specific change to one of the letters sent to members.

33. In any event, the Trustee doubted the applicability of HMRC guidance in this area. For example, HMRC's "Dealing with 'week 53'" did not apply where members are paid on a monthly basis. In any case HMRC guidance is not legally binding and is subject to change.

Recovery of pension payment following the death of a member

34. While such payments were not recovered historically, it does not prevent the Trustee from reclaiming them in the future.

35. The legal and regulatory world now requires a much greater degree of rigour from pension schemes in terms of their administrative practices than in previous times.

The Trustee’s decision to start reclaiming part payments in 2012 was part of a governance review of the arrangements affecting the Scheme.

36. The Trustee received legal advice that there was a risk that overpaid pension amounts could be unauthorised payments under Finance Act 2004. Under this Act it is conditional that pensions are paid for the life of the member (see pension rule 2, section 165). The legal advice also said that overpaid pensions could reasonably be recovered.

37. The provisions of the Finance Act 2004 were not the only factor that was taken into consideration. Of greater importance was the need to ensure that members only receive the pension to which they are entitled. There is no Scheme rule, which deals expressly with the cessation of benefits on death.

<u>Power to change the payment date under the Scheme rules</u>

38. Rule H6(1), which was in force in 2011 said that pensions should be paid monthly in advance or at any interval (to a maximum of 12 months) that the Committee shall decide.

39. The resolution of 24 July 2012 meant that:

    a) the Committee’s authority was specifically derived from the Trustee and members of the Committee had to act in accordance with the Trustee’s legal duties; and

    b) power was given to the Trustee to amend the rules by resolution rather that the Committee (rule H1).

40. In terms of Scheme rule H6, the effect of the 30 May 2013 resolution was that power to make changes to the date on which members benefits were paid, passed from the Committee to the Trustee.

41. Whilst the Trustee had been considering the change of date, prior to the 30 May 2013 resolution, no steps were taken to implement the change until the resolution had been passed. The John Lewis Partnership Board consented to the change proposed by the Trustee and the change was made with effect from November 2013.

42. The Trustee clearly has the power under the Rules to make a change to the payment date and this power has been effectively and properly exercised by the Trustee in amending the payment date as a result of the RTI change.

Conclusions

<u>Decision to change the pension payment date and the choice of day on which it should fall</u>

43. The Trustee responded reasonably to a belief, based on advice, that the existing payment dates ran the risk of giving members 13 payments in a tax year and therefore making unauthorised payments. The choice of date was entirely in the discretion of the Trustee. That said the decision was entirely rational and considered the likely effects on members.

44. I do not consider that that Trustee provided members with misleading information about the proposed changes. There was a mistake in the initial member communication of March 2013, which was corrected by the 10 April letter. The Trustee’s final decision was then communicated clearly in June. Despite the change of payment date, it was true that pensioners would receive the same amount of pension in respect of a year and over a lifetime. The change took effect in terms of cash-flow. That inconvenience was mitigated by the offer of an interest free advance.

45. The Trustee came to a different solution to the problem than Mr Dennis would have done but that does not mean that the decision was wrong. When scrutinising decisions it is not my role to come to a decision of my own rather, my role is to look at the way in which the decision was made. The Edge case (Edge v Pensions Ombudsman [2000] Ch. 602) said that decision makers must:

    a) take into consideration all relevant matters and disregard any irrelevant ones;

    b) direct themselves correctly in law;

    c) ask the right questions; and

    d) not come to a perverse decision i.e. one which no reasonable decision maker would come to in the circumstances.

46. The minutes of the April and May 2013 Trustee meetings evidence extensive and explicit consideration of whether the change was required and why. Clearly the Trustee agreed the change of payment date. The Trustee took all relevant matters into consideration, for example, it listened to members and amended its decision as a result. It sought legal advice and considered HMRC guidance. It also asked itself pertinent questions such as, taking public holidays into consideration, what was the earliest day of the month the payment date could be moved to and, how could it minimise the effect of the change on members. The Trustee’s solution was not perverse; I consider that other decision makers may well have taken the same steps.

47. I am satisfied that the Trustee was thinking of the best financial interests of members by doing its utmost to avoid the situation of making 13 payments in a year. Further it offered a loan to those members who may be affected by the change of payment date. All of which leads me to conclude that the actions taken by the Trustee were reasonable.

Recovery of pension payment following the death of a member

48. The Trustee said that pension payments are recovered due to them being unauthorised for tax purposes and because of the need to ensure that members only receive the pension to which they are entitled, a point flagged up in a governance review. I draw no inference from the fact that the Trustee gave two reasons; the reasons are interrelated.

49. Previously pension payments were made in advance. The effect of payments now being made in arrears is that in most cases the value of overpaid pension will be smaller, so the impact of recovery on the deceased member's estate will be reduced.

50. The Finance Act 2004 imposed restrictions on the way certain payments could be made. Payments that fall outside of the legislation are deemed to be "unauthorised payments" and attract an excess tax charge. The relevant part of the Finance Act 2004 in this circumstance is section 165 pension rule 2, which deals with pension payments in the event of a member's death.

51. Mr Dennis contends that pension rule 2 was unambiguous. Conversely the Trustee considered that the wording of pension rule 2 was ambiguous because the first part said that pensions could be paid for ten years from commencement, irrespective if the member died, and the second part said that pensions could not be paid after a member's death. The wording has since changed. After taking legal advice the Trustee took a cautious approach to pension rule 2 and took steps to recover payments made in these circumstances. The Trustee's approach was reasonable. I do not agree with the contention that the rules should have been amended or that the decision was illegal. The Trustee was giving effect to the law and the rules already in place according to its considered interpretation of what they meant.

52. In respect of the contention set out at para 23, I have no evidence that those circumstances have in fact arisen and I cannot predetermine the view that HMRC would take of the matter if they did. Therefore I decline to draw the inference that unauthorised payments are being made.

Power to change the payment date under the Scheme rules

53. Until May 2013 rule H6(1) said that the payment of pensions and allowances should be determined by the Committee. The resolution of 30 May 2013 substituted the Trustee as decision maker in all rules previously citing the Committee. After 30 May 2013 the power in rule H6(1) was held solely by the Trustee.

54. The Trustee (rather than the Committee) were considering a date change much earlier than this and arrived at a decision about what it wanted to do in a meeting of 24 May 2013. Mr Dennis says this was inappropriate but I do not agree. Since the resolution of 24 July 2012, the Committee's status had been that of a delegated body of the Trustee. The resolution reads: "…and to the extent that the Rules provide for any role or responsibility to be undertaken by the Committee, or any power, duty or discretion to be exercised by the committee, the Committee undertakes such role/or action as a delegate of the Trustee". In effect, since 24 July 2012, the Committee had resolved to take direction on the exercise of its powers from the Trustee. In my view the Trustee formed a view about what it wanted to happen, then took the administrative steps necessary to acquire the power to implement its decision.

55. I am satisfied that the resolution of 30 May 2013 gave the Trustee sufficient power to amend the payment date and its decision took effect from that date.

56. In conclusion, I do not consider that the Trustee was wrong in law or that its conduct amounts to maladministration and for the reasons stated above I do not uphold the complaint.

Karen Johnston

Deputy Pensions Ombudsman
1 March 2016