

Ombudsman's Determination

Applicant	Mr Philip Greenhalgh
Scheme	Principal Civil Service Pension Scheme (the Scheme)
Respondents	(1) The Pension Schemes Executive (Cabinet Office) (the PSE) (2) My Civil Service Pension (MyCSP)

Complaint summary

Mr Greenhalgh has complained that the PSE and MyCSP (the latter being made a party in lieu of the former administrator/paying agent of the Scheme, Capita Hartshead (**Capita**), and HMRC Pension Services), should not require him to repay an overpayment of pension that Capita paid to him in error having incorrectly calculated his pension. Mr Greenhalgh was not aware that his partial retirement pension should be abated and he says that recovery of the overpayment should be waived on the basis that he has changed his position and also that he has a defence of estoppel (by representation).

Summary of the Ombudsman's determination and reasons

The complaint is not upheld against the respondents because, although I am satisfied that Mr Greenhalgh was not - or ought not reasonably to have been - aware that this pension should have been abated, he does not have a "change of position" defence, nor should the respondents be estopped from recovery. It follows that the respondents can pursue recovery of the overpayment. I have, however, found that Capita's maladministration has caused Mr Greenhalgh distress and, as such, MyCSP must compensate him for this.

Detailed Determination

Relevant Scheme rules and literature

1. Rule 3.26 of the rules of the Scheme says as follows:

“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 (including any increase under the Pensions (Increase) Act 1971 (as amended) will be reduced to the amount which his old salary exceeds his salary on his first day of re-employment...the pension in payment will not otherwise be adjusted unless a relevant event...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...”

2. The Civil Service Pensions Division (the predecessor to the Pension Schemes Executive) published a booklet called ‘Partial retirement - a guide for scheme members’, which is available to download on the Civil Service Pensions website. It includes a section headed ‘Things you need to think about’ which has an explanation of abatement. It says:

“Abatement is the reduction or suspension of your pension and it will apply if your pension plus your new salary is bigger than your “salary of reference”. Your “salary of reference” is normally your actual pensionable earnings in the 12 months before your partial retirement but, if your “best year” is not your final year, it might be based on a different period...For the abatement rules “pension” assumes that you take the standard lump sum in **classic** or the equivalent in **premium, classic plus** or **nuvos**. You can find out more by reading the leaflet “What is abatement?”...There is also a calculator on the website that will give you an indication of whether abatement would apply to your pension and how much it would be.”

3. The leaflet entitled ‘What is abatement?’ explains how abatement is calculated. It also says:

“What if I commuted some or all of my pension into a lump sum or lump sum into pension?”

If you were in **classic** we will apply abatement as if you had taken a standard lump sum.”

Material facts

4. On 29 September 2008, HMRC wrote to Mr Greenhalgh with an estimate for his partial retirement from the Scheme in December of that year. Based on pensionable earnings of £36,605.08 the estimate showed an annual pension of £16,704.18 and a net pension lump sum of £49,433.74. The estimate also told Mr Greenhalgh that he could opt to give up £3,317.54 of his annual pension for extra lump sum of £39,810.48.

5. On 5 October 2008, Mr Greenhalgh completed form CSP15 to apply for partial retirement. He opted to give up pension to receive the maximum lump sum. The form CSP15 was sent to HMRC.
6. On 11 November 2008, MyCSP wrote to Mr Greenhalgh with a benefit statement for his partial retirement. This showed his entitlement as a net annual pension after commutation of £13,510.73, a standard new lump sum of £49,891.97 and a commutation lump sum of £40,071.45.
7. On 9 December 2008, Capita wrote to Mr Greenhalgh setting out the payment arrangements for his pension benefits. They said they would pay him an annual pension of £13,386.64. In that letter Capita also said:

“As the reduction in your salary is less than the difference between your pension and your rate of earnings from the effective date of the phased retirement, your pension will not be affected.”
8. It appears that MyCSP subsequently revised Mr Greenhalgh's benefit entitlement to reflect a change in his pensionable earnings. On 27 November 2009, Capita wrote to Mr Greenhalgh with the payment arrangements for his revised benefits. They told Mr Greenhalgh his total lump sum had increased to £90,071.45 meaning he was due a balance of £827.23 and his pension was now £13,736.36.
9. On 12 April 2013, HMRC sent Capita a form CSP13 to inform them of a reduction in the amount of pensionable allowances included in Mr Greenhalgh's salary.
10. On 30 April 2013, Capita wrote to Mr Greenhalgh to tell him they had received the CSP13 and that:

“Upon receipt of this information it has emerged that your pension was not correctly assessed for abatement purposes at the commencement of your partial retirement on 12/12/2008, and when we received your revised awards.”
11. Capita explained in that letter that they had made a mistake when they assessed Mr Greenhalgh for abatement in not taking into account that he had commuted some of his pension for a larger lump sum (i.e. the maximum lump sum). Capita told Mr Greenhalgh that as a result of the error they had overpaid his pension by a net amount of £11,400.89 in the period 12 December 2008, (when it came into payment) to 31 March 2013. Capita apologised for the error but told Mr Greenhalgh they were obliged to recover the unpaid pension. They proposed to recover it by making deductions from Mr Greenhalgh's pension over the next 24 months (i.e. in 24 instalments).
12. On 4 May 2013, Mr Greenhalgh responded to Capita, saying he was in shock about the overpayments. He said he had received at least 8 letters from HMRC and Capita relating to his benefits on partial retirement and so far as he was aware he had done nothing that could cause them to make a miscalculation. He also said in that letter

that he was not in a position to repay the overpayment and, as he was not responsible for the error that caused it - it should be waived.

Summary of Mr Greenhalgh's position

13. He made his decision to take partial retirement entirely on the basis of the information he received from HMRC and Capita.
14. He did nothing to cause HMRC and/or Capita to make a miscalculation.
15. His decision to apply for partial retirement followed a lengthy period of detailed research and negotiation with his employer. Had he been aware of the correct calculations he could (and would) have reduced his hours to offset this (as evidenced by the letter from the Border Force to the Ombudsman dated 23 November 2014).
16. He has changed his position. He received the overpayment in good faith and has made a number of financial decisions that he would not have taken but for the incorrect information provided by Capita. Further, the injustice of requiring him to repay the overpayment is greater than the injustice to his employer of waiving recovery of the overpayment.
17. He also has the benefit of a defence of estoppel. Capita has made a representation of fact that has led him to believe that he was entitled to treat the overpaid money as his own. He has, in good faith and without notice of Capita's claim, changed his position to his detriment in reliance on the overpayment. Finally, the overpayment was not primarily his fault.
18. If the overpayment is recovered from him this will leave him having effectively worked hours which are unpaid; by receiving a salary his pension would have been reduced by an identical amount due to abatement rules.

Summary of the respondents' position

19. Mr Greenhalgh should have been aware that his pension needed to be abated. He had access to two booklets - 'Partial retirement - a guide for scheme members' and 'What is Abatement?' - as well as the online calculator. This guidance explains how abatement works and the effects of commutation. Had Mr Greenhalgh read the information in that guidance and inputted the correct figures into the online calculator he would have realised that Capita's assertion in their letter to him of 9 December 2008 - that his pension would not be affected by abatement - was incorrect.
20. The overpayments cannot be waived. As a statutory scheme neither HMRC or the PSE has the authority to disregard the requirements of rule 3.26 to allow Mr Greenhalgh to keep the pension payments Capita paid to him in error.

21. The PSE recognise that Mr Greenhalgh has suffered “an injustice” through Capita’s error “such that compensation is warranted”. The PSE have said that, in their view, Capita should pay Mr Greenhalgh £250 in recognition of the error (to be offset against the balance of the overpayment).

Conclusions

Introduction

22. As Mr Greenhalgh’s pension should have been abated but was not, the respondents are, at least in principle, entitled to seek recovery of the overpaid amount (in accordance with rule 3.26). There may be defences to recovery and these would only apply if Mr Greenhalgh received the overpayments in the reasonable belief they were his to spend. Mr Greenhalgh does not dispute that he has received an overpayment of pension. However, he challenges the respondents’ right of recovery.

Awareness of need for abatement

23. The respondents say that Mr Greenhalgh should have been aware that his pension needed to be abated in the period he was overpaid. They say that had he read the literature or inputted the correct information into the online partial retirement calculator he would have realised that Capita’s assertion in their letter to him of 9 December 2008 - where they said that his pension would not be affected by his receipt of pension and lump sum benefits on partial retirement - was false.
24. Turning first to the scheme literature, I do not see that having read it Mr Greenhalgh would have thought that Capita’s assertion in their letter of 9 December 2008, was incorrect. Indeed, I think it may have had the opposite effect. Both pieces of guidance explain that if a member elects to receive a maximum lump sum then the abatement calculations will still be made on the assumption that they elected to receive the “standard” lump sum. It follows that on reading these notes Mr Greenhalgh may reasonably have thought that his having elected to take the maximum lump sum would have made no difference with respect to the possibility that his pension might be abated.
25. However, if Mr Greenhalgh had inputted the correct data into the online partial retirement calculator - that is, if he would have inputted all the figures in the benefit statement he received on 11 November 2008, (i.e. which included the commutation lump sum) - it is clear that he would have realised that at his intended level of earnings going forward his pension would need to be abated. The online partial retirement calculator is, however, just a way for a member to work out when their pension might need to be abated. The results it produces are not definitive. Indeed, the first statement on the calculator warns the user that the projections it provides are “simplified” and that they “may not reflect your own personal circumstances”.

26. By contrast, the letter from Capita dated 9 December 2008, arrived with Mr Greenhalgh after he had been provided with previous statements in September and November, and since he had made his election to receive a pension and the maximum lump sum in October. Given the correspondence that had been sent to him previously, I do not think that, on receiving the statement on 11 November 2008, and the subsequent letter from Capita on 9 December 2008, Mr Greenhalgh ought reasonably to have queried why Capita thought that his pension did not need to be abated (and, thus, I do not think he ought reasonably to have had recourse to the online partial retirement calculator at that time). Although Mr Greenhalgh had clearly used the online partial retirement calculator before, there should be no expectation that he should do it again once he had received confirmation from Capita that his pension was unaffected. Capita were, after all, the paying agent for the Scheme at that time and so were providing information on which Mr Greenhalgh would have thought he could reasonably have relied.
27. It was therefore, reasonable for Mr Greenhalgh to have relied on Capita's statement in their letter of 9 December 2008, and, as such, I do not find that he was (or ought reasonably to have been) aware that his pension needed to be abated in the period of overpayment.

Change of position

28. However, my finding that it was reasonable for Mr Greenhalgh to have relied on the statement in Capita's letter does not mean that Mr Greenhalgh should not be required to repay the overpayment. As I have said previously, although Mr Greenhalgh received the overpayments in the reasonable belief they were his to spend, recovery of them will only be barred if Mr Greenhalgh has a defence to recovery.
29. Mr Greenhalgh says that he has changed his position. Broadly, to successfully argue change of position as a defence to recovery Mr Greenhalgh must have been unaware that the overpayment had been made (i.e. he must have received it in good faith), there must be a causal link between Mr Greenhalgh's change of position and the receipt of the overpayment and, further, all action taken by Mr Greenhalgh must be irreversible.
30. As set out previously, it is my view that Mr Greenhalgh was unaware that the overpayments had been made to him (and, thus, he received them in good faith).
31. There must also be a causal link between Mr Greenhalgh's change of position and his receipt of the overpayment. So, I must consider - but for the mistaken overpayments, would Mr Greenhalgh have acted as he did? Both Mr Greenhalgh and his union representative have provided details of how he spent his lump sum and about his "long term" finances. Details have been provided of an investment in property in Northern Cyprus and an overseas bond (also in Cyprus). His representative has also detailed some "long-term" arrangements. These include his mortgage payments on his UK home, the cost of supporting his wife's family in

Thailand (in respect of which Mr Greenhalgh has provided detailed information), the cost of an annual trip to Thailand (to visit his wife's family) and the cost of an annual trip to Cyprus ("to attend to business issues related to the property", as the title to the land is in dispute).

32. The information provided by Mr Greenhalgh does not demonstrate, on the balance of probabilities, that but for the mistaken overpayment of pension he would not have made the financial decisions that he made. Mr Greenhalgh had a distinct plan in place with respect to buying the property and the bond; the bond was supposed, on maturity, to cover the outstanding amount of the mortgage on his UK home and the property in Northern Cyprus appears to be an investment property (to achieve capital growth) from which equity could be released if he needed more funds to pay off his UK mortgage on maturity of the bond. There is no evidence to demonstrate that Mr Greenhalgh would not have purchased the property or the bond had he known that he was being overpaid pension in the period from 2008 to 2013, or had he known his pension should have been lower; the purchase of both was part of a wider investment strategy to clear the mortgage on his UK home at the end of its term (in 2014).
33. Further, I do not believe that the mistaken overpayment of pension would have made any difference on whether he continued with his "long term arrangements". Firstly, Mr Greenhalgh would have had to make his mortgage payments in any event. The same applies with respect to his visits to Cyprus to attend to the "business issues" relating to his property there. Further, the nature of his other commitments with respect to his wife and her family in Thailand suggest he would have adhered with them had he been aware of his correct level of pension at that time. Mr Greenhalgh has provided evidence to demonstrate that he sent £14,369.14 to his wife and her family in Thailand over a 32 month period between 2010 and 2013, and submits that he would not have been able to make these payments had he been aware of the true position in respect of his benefits and that, as the money has now been spent, the defence of change of position should apply in respect of those monies. Whilst the money sent is not insignificant in the context of Mr Greenhalgh's income in that period, the periodic nature of the payments and the (largely) consistent amounts sent are, in my view, suggestive of an agreed level of maintenance. Indeed, Mr Greenhalgh's union representative's comments (in his submissions under the IDR from November 2013) suggest that making such payments was not in any way discretionary, but "an expectation". It follows that it is my view that, on the balance of probabilities, Mr Greenhalgh would have made the payments to his wife and her family in Thailand anyway (so he did not make them in reliance of the incorrect information).
34. It follows that Mr Greenhalgh cannot rely on change of position as a defence to recovery of the overpaid pension.

Estoppel by representation

35. Mr Greenhalgh has also argued that the respondents' should be estopped from recovery of the overpaid pension.
36. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment. In other words, that it was reasonable for them to believe that they were entitled to the payments. These requirements were elaborated in the case of *Steria v Hutchison* [2006] 64 PBLR. In that case Lord Justice Neuberger said as follows:

"When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."

37. As considered previously, I am satisfied that it was reasonably foreseeable that Mr Greenhalgh would have relied on the incorrect information provided by Capita in respect of his pension (for example, the statement that it would not attract abatement). However, as considered previously in respect of the change of position defence, I do not consider that Mr Greenhalgh took any specific action in reliance of the incorrect information; it is my view that all of the financial undertakings he has evidenced he would have entered into anyway, so they were not entered into in reliance of the incorrect information.
38. It follows that I do not also find that the respondents should be estopped from recovering Mr Greenhalgh's overpaid pension.

Unpaid hours

39. Mr Greenhalgh has also argued that if the overpayment is recovered from him it will leave him having effectively worked hours which are unpaid; by receiving a salary his pension would have been reduced by an identical amount due to the abatement, so any hour he worked over and above the level that would lead to his pension being abated was, he argues, essentially unpaid.
40. Mr Greenhalgh has provided evidence, from his former line manager at the Border Force (dated 23 November 2014), which demonstrates that he could have changed his hours to avoid his pension being abated. So had he known of the correct position he would have been able to amend his working pattern to reduce his hours to avoid the need for abatement. It follows that, in being incorrectly told that his pension would

not attract abatement, he has worked hours for which he has not effectively received any pay.

41. Nevertheless, although I appreciate that this state of affairs must be of extreme annoyance to Mr Greenhalgh, it does not of itself relieve Mr Greenhalgh of the liability to repay the overpaid pension. He could only be relieved of the requirement to repay the overpayment if he has changed his position or if the respondents should be estopped from seeking repayment and, as I have already considered, I do not find this to be the case.

Distress and inconvenience

42. Mr Greenhalgh has said that he suffered distress upon receipt of the letter informing him of the overpayment. Given my finding that Mr Greenhalgh would not have (or ought not reasonably been expected to have) realised he was being overpaid, I can fully appreciate that Mr Greenhalgh must have experienced distress upon learning of the overpayment. The overpayment occurred as a consequence of Capita's maladministration and, as a consequence, MyCSP (in lieu of Capita) should be required to pay Mr Greenhalgh £250 to compensate him for the distress their maladministration has caused him. (This was the amount suggested by the PSE.)

Directions

43. Within 28 days of this Determination MyCSP must pay Mr Greenhalgh £250 by way of compensation for the distress that Capita's maladministration has caused him to suffer. The amount should be offset against the balance of the overpayment.

Anthony Arter

Pensions Ombudsman
21 July 2015