PO-7097

Ombudsman's Determination

Applicant	Ms Jane Lott
Scheme	Police Pension Scheme (**the Scheme**)
Respondent(s)	The Police and Crime Commissioner of South Wales **(the Commissioner**)

Complaint Summary

1. Ms Lott's complaint against the Commissioner and Capita relates to their failure to inform her of the tax penalties on her retirement benefits when taking subsequent re-employment.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against the Commissioner because it had a duty of care, as Ms Lott's employer, to have informed her of the tax implications of re - employment on her retirement benefits. Its failure to do so has led to Ms Lott incurring tax charges on her retirement benefits.

Detailed Determination

Material facts

3. Ms Lott was employed as a police officer with the Commissioner from 13 April 1981. She was entitled to retire with full pension benefits having attained 30 years service from 13 April 2011.

4. Ms Lott took her retirement benefits from 22 August 2010. She was re-employed by the Commissioner on 2 September 2010, within one month of receiving her benefits.

Relevant Documents

5. Home office Circular 007/2006, headed, "A-day and changes to Police Pensions Regulation 1987. It was published on 6 April 2006, and said,

> "The purpose of this circular is:
>
> a) To explain the changes which are being made to the Police Pensions Regulations 1987 and the Police Pensions (AVC) Regulations 1991…
> b) To instruct police pensions administrators on the action they need to take before 6 April ("A-day") to comply with the changes to tax legislation which came into force on the day.
>
> …General information about A-day
>
> 2.2 Annex D gives information about the new allowances & limits and related changes that will come in form A-day. This is based on information from HM Revenue and Customs (HMRC). The HMRC on line guide can be found at…www.hmrc.gov.uk/manuals/rpsmmanual/index.htm
>
> Technical pages Protecting Members Rights
>
> http;//www.hmrc.gov.uk/manuals/rpsmmanual/RPSM03100000.htm.
>
> ….Technical Pages: protecting pension rights from tax charge: taking benefits before normal minimum pension age:
>
> A break in employment of at least six months
>
> If the individual is not employed by any of the employers mentioned in …within the six months after becoming entitled to benefits the individual will not lose their protected pension age.
>
> A break in employment of at least one month and the employment is materially different
>
> An individual who after one month following becoming entitled to benefits, becomes employed by any of the employers mentioned …will not lose their protected pension age if the new employment is materially different. A simple

change in hours will not be a material different employment. To be a material different employment the duties and/or the level of responsibility in the new employment must be different from the old employment."

6. The Commissioner's legal representative wrote to this Service on 11 September 2015, in response to Ms Lott's complaint. The writer of the letter said,

"This issue was not limited to South Wales Police; in fact it was an issue for every force in England and Wales. A process is now in place to ensure that individuals are not re-employed until a period of at least a month has elapsed. This is a step a responsible employer, who has had the tax change brought to its attention, would inevitably take to assist its employees…

…the Director of Finance appointed tax consultants…to engage with the HMRC with a view to reducing or negating the additional tax liability …and through their negotiations we were able to exclude the pension commutation lump sum payments from any potential tax liability…

It is our position that neither the Police and Crime Commissioner for South Wales, nor the Chief Constable has any legal liability to advise individual officers and employees on their tax and pension liabilities. Quite clearly it is for individuals to take their own independent financial or legal advice on such matters …Nevertheless, South Wales Police has recognised that these individuals commenced their re-employment within one month of receiving their pensions, in order to accommodate the needs of the Force…we have agreed, in principle , a process whereby in consideration of the employees agreeing to forgo any future claims or legal action against South Wales Police, the Force will indemnify these former officers against tax liabilities arising from the legislative and regulatory changes to pension protection. This approach was approved and authorised by the former South Wales Police Authority…and its commitment will be honoured now by its successor, the Police and Crime Commissioner for South Wales.

The conclusion of this matter has unfortunately been delayed by the failure of HMRC to notify…Ms Lott …of the amount of tax they currently owe and will in future owe, until they reach the age of 55 when, in each of their cases, the additional tax liability will cease. We understand that HMRC were issuing self assessment demands to each affected individual and that following assessment we would be able to identify the liabilities arising from the issue.

The PCC stands by the commitment to ensure that the tax liabilities finally reported and agreed in relation to this issue will be fully indemnified."

7. In correspondence to this Service dated 7 October 2015, Ms Lott's legal representative says,

> "…we would of course be very content if it were possible to issue a determination that enshrines SWP's commitment to pay; or alternatively some other form of enforceable promise from them that they will fully indemnify my clients (which is all that they are looking for)…"

8. Following my preliminary decision the Commissioner has commented that it accepts the decision in principle. Whilst not accepting any legal liability, it has always been its position that it would meet the additional tax liability in question for Ms Lott.

9. The Commissioner says that the tax liability is that of Ms Lott and it cannot pay the amount due directly to HMRC. Any attempt by the Commissioner, directly to meet an individual's personal tax liability would be classed by HMRC as an 'employee benefit' and as such would be subject to further taxation liabilities.

10. The Commissioner submits that the Directions should be worded to state :

> Within 28 days of receiving written proof from Ms Lott of the amount of her tax liability, arising as a direct consequence of her loss of protected pension age, the Commissioner shall pay Ms Lott the amount due to HMRC in respect of this loss of protected pension age only. For the avoidance of doubt, any penalties and/or interest imposed by HMRC because of a failure by Ms Lott to comply with the self assessment process in a timely manner shall not be payable by the Commissioner.

11. The Commissioner contends that the above limitation is necessary because, in order to establish Ms Lott's additional tax liability, she will be required to undertake self assessment and this may result in additional individual tax liabilities unconnected to the loss of her protected pension age.

12. Following my preliminary decision Ms Lott's legal representative has said that the tax indemnity should put Ms Lott back in the financial position that she would have been in if there had been a sufficient break between her employment and re-employment. This is because HMRC have not issued the final tax demand but the tax bill is likely to be compounded by other charges too such as late payment charges, penalties, and interest. It is difficult to define them without knowing exactly what HMRC intend to do.

Conclusions

13. I note the Commissioner's comments that it was under no legal obligation to advise individual officers and employees on their tax and pension liabilities. I agree with this assertion, however, I do not consider that this was a matter of an employer giving advice. This was about the provision of relevant information to employees about the impact on his or her benefits following re-employment. I find that it was reasonable to expect the Commissioner to have provided the salient information to Ms Lott about the implications of re-employment as contained in the Home office Circular 007/2006.

14. As a responsible employer the Commissioner had a duty of care to inform Ms Lott of the tax implications of re-employment on her retirement benefits. I find that as a consequence of their failure to do so that they should reasonably meet the tax liabilities incurred by Ms Lott in this regard. So, I agree with the stance taken by the Commissioner that it proposes to pay the tax liability for Ms Lott in relation to this issue on confirmation of the amount from HMRC.

15. The Commissioner says that it agrees in principle to indemnify Ms Lott against the tax liabilities in question. However, I do not think that this offer goes far enough. It does not constitute a binding commitment to fully indemnify as it is only an agreement in principle and still leaves the possibility for the Commissioner to subsequently withdraw their offer.

16. I note the Commissioner's comments, that it cannot pay Ms Lott's tax liability directly to the HMRC, and the potential delays in the tax self-assessment process beyond its control. I consider that the Commissioner's concerns are reasonable and my directions, which are set out below, take account of this.

Directions

17. I direct that within 28 days of receiving written proof from Ms Lott of the amount of her tax liability, arising as a direct consequence of her loss of protected pension age, the Commissioner shall pay Ms Lott the amount due to HMRC in respect of the loss of protected pension age only.

18. Since the Commissioner will not be involved in the tax self-assessment process, as it is a matter between Ms Lott and HMRC, any penalties and interest imposed by HMRC for delays in the self-assessment process, not being a direct consequence of her loss of protected pension age will not be payable by the Commissioner.

Anthony Arter

Pensions Ombudsman
22 December 2015