

Ombudsman's Determination

Applicant	Mrs D
Scheme	Armed Forces Pension Scheme (AFPS 75)
Respondents	Veterans UK

Outcome

1. Mrs D's complaint against Veterans UK is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) Veterans UK should pay Mrs D an additional £250 for non-financial injustice.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs D's complaint concerns her pension credit pension paid by the AFPS as the result of a pension sharing order (**PSO**). She has been informed that the pension put into payment for her in 2010 was incorrectly calculated and must be reduced.
4. Mrs D says she was misled by the information provided by Veterans UK. She says she resigned from her teaching post, in August 2011, in the expectation that she would continue to receive an annual index-linked pension of £5,788.13 from the AFPS 75. Mrs D says Veterans UK requested sight of the draft PSO because a previous order had to be set aside by the court. She says the intention of the PSO was to provide her with 27% of her former spouse's pension from her 60th birthday.
5. Mrs D has calculated a loss of £14,000 over her remaining lifetime.

Background information, including submissions from the parties

6. Mrs D is a pension credit member of the AFPS 75. An annual pension of £5,788.13 was put into payment with effect from 2 July 2010; at which date, Mrs D was aged 59 and 8 months. Mrs D was advised of the amount of her pension in January 2011, following implementation of the PSO. Veterans UK sent her a 'Notification of Discharge of Liability' (the **Notification**). Amongst other things, the Notification said,

"You are to receive a pension credit which equates to 27% of the Cash Equivalent Value (CEV) of your former spouse's relevant benefits ... An in-

scheme pension entitlement has been created for you by internal transfer arrangements.”

7. The Notification went on to say the value of Mrs D’s pension credit had been assessed as a preserved pension of £5,788.13 per annum, which would increase in line with inflation as and when authorised by HM Treasury. The Notification stated,

“Claiming Your Benefits It is not possible to transfer your benefits. This is because the legislation does not permit unfunded public sector schemes like the AFPS to discharge liability by paying a transfer value to another scheme. They must instead provide an in-scheme credit. The preserved benefits, as shown ... are therefore due for payment to you when you attain the statutory minimum age of 55 ...”
8. The pension benefit age under the AFPS 75 rules is 65.
9. Mrs D’s PSO provided that she should receive 27% of the value of her former husband’s AFPS 75 benefits. Veterans UK calculated a CETV for those benefits amounting to £466,352.01. The CETV for Mrs D was calculated to be £125,915.04.
10. In March 2012, Veterans UK (then called the Service Personnel & Veterans Agency) wrote to Mrs D explaining that they had misinterpreted the legislation which applied to pension credit benefits. They said that, as a result, Mrs D had been overpaid pension. Veterans UK said they had understood that the legislation intended that pension credit members could receive unreduced benefits if they took them before the normal pension age. They said Mrs D should be receiving an annual pension of £4,032.24, instead of the £5,922.99 she was then receiving.
11. Veterans UK said they would normally be obliged to recover overpayments but would not do so in Mrs D’s case because of the nature of the error. They also said that the change to her pension would not be implemented until 1 June 2012.
12. Veterans UK subsequently informed Mrs D that her pension from 1 June 2012 would be £5,643.00. The difference resulted from a change in the actuarial factors used to reduce Mrs D’s pension. In their March 2012 letter, Veterans UK had used factors assuming payment from age 55; whereas the latter calculation used factors assuming payment from age 65. They had also applied pensions increases. Veterans UK apologised for the error in the initial payment of Mrs D’s pension and any subsequent confusion.
13. In response to Mrs D’s subsequent concern as to whether the latest figures she had been given were correct, the MoD said they might be able to meet the costs of having them checked by a professional.
14. Veterans UK subsequently agreed to pay Mrs D £250 for stress and inconvenience. They noted that an income and expenditure statement submitted by Mrs D showed that, with her revised pension, her income exceeded her monthly expenditure by £43.75.

15. Following further correspondence, Veterans UK wrote to Mrs D acknowledging that they had “negligently advised” her about her pension entitlement. However, they went on to say that any losses arising from her subsequent retirement from teaching were considered too remote for them to pay compensation. They said Mrs D was under a duty of care to reduce or avoid any losses; for example, by seeking alternative employment. Veterans UK said they might have considered compensation if Mrs D had been able to demonstrate that it was not possible for her to get another post. They said any compensation would only have covered the period to her 60th birthday, because this was her normal pension age. They noted that she had already reached normal pension age when she retired and said, therefore, they were not in a position to pay any compensation.
16. The payment of pension credit benefits under the AFPS 75 was subject to a previous application to the Pensions Ombudsman and a subsequent appeal to the High Court. The High Court set aside the Deputy Pensions Ombudsman’s decision. The key points in the Court’s decision are as follows:
 - The Welfare Reform and Pensions Act 1999 and the Pension Schemes Act 1993, require a benefit under a PSO to be equal in value to the value of the pension credit attributed to the individual.
 - The Pension Sharing (Pension Credit Benefits) Regulations 2000 (SI2000/1054) (the **2000 Regulations**), require the benefits which the individual receives should be at least equal to the credit value.
 - Theoretically, the legislation could mean that an individual could be paid an unreduced pension credit at an earlier date. However, the AFPS 75 rules (contained in the royal warrants) contain a requirement that, whenever an individual receives a credit, it must be equal to the pension debit.
 - Regulation 7(1) of the 2000 Regulations, provided that, on early retirement, a scheme could provide benefits which were different from those required in terms of amount, recipient and time at which payable. This regulation was unchanged after the April 2009 amendments.
 - After April 2009, regulation 7(2)(b)(ii) of the 2000 Regulations, provided that a benefit should not be payable before normal benefit age except where the individual had attained normal minimum pension age. Normal minimum pension age was defined as age 50 up to 5 April 2010, and age 55 thereafter.
 - Regulation 7(5) required the trustees or managers of a scheme to be reasonably satisfied that the total value of the benefits to be provided was at least equal to the value of the alternatives to the pension credit benefit.
17. The AFPS 75 rules require the benefit to be provided to be valued as equal to the pension credit. The key wording is “must be of such an amount that its value is equal

to the member's pension credit". There must be an actuarial valuation which remains constant; whilst the pension will alter to reflect the age at which it is taken.

18. Mrs D's representative (an actuary) made the following submission on her behalf:

- In July 2010, Mrs D's former spouse's pension in payment was £21,847 per annum, with a contingent spouse's pension of approximately £9,670 per annum.
- Standard assumptions, at the time, were that men would live to age 86 and women to age 89, and women were approximately three years younger than their husbands.
- Under the terms of the PSO, Mrs D's former spouse's pension was reduced by 27% (that is, by £5,898.69 per annum) and the contingent spouse's pension by approximately £2,610 per annum. Mrs D was awarded a pension of £5,788.13 per annum, with no contingent spouse's pension. This was brought into payment immediately and she had no choice in the matter.
- Mrs D and her former spouse were born in the same year and are, therefore, approximately the same age.
- In July 2010, it was expected that Mrs D's pension (£5,788.13) would be paid for 29 years. The reduction to her former husband's pension (£5,898.69) was expected to apply for 26 years, followed by the reduction in the contingent spouse's pension (£2,610) for 6 years.
- The cumulative reduction in Mrs D's former husband's pension amounts to approximately £169,025. The cumulative receipts by Mrs D amount to approximately £169,775. Thus, the 2010 award gave Mrs D an income of equal actuarial value as the deductions from her former husband.
- On the basis applied by Veterans UK in 2012, Mrs D will receive a cumulative income of around £153,775. This is £15,250 less than the amount by which her former spouse's pension has been reduced.
- The fault lies in the actuarial reduction factors applied. Since October 2011, the early retirement factors have been changed. The factors applied to Mrs D's pension were not actuarially neutral; the current factors are. If the current factors were applied in Mrs D's case, her pension from 2010 would be £5,705 per annum.
- He disagrees with the figures presented to the court in a related appeal case.
- In the appeal case, the judge referred to "the need for the amount of the credit to be equal in value to the credit [*sic*] at the time". On that basis, Mrs D's pension credit should be returned to the original amount or something very close to it. Using the Government Actuary's figures, £7,700 per annum for a 65

year old, £5,788 per annum for a 60 year old and £4,500 per annum for a 55 year are actuarially equivalent.

- He has referred to a previous Ombudsman decision (PO-1327) concerning the Firefighters' Pension Scheme and the Government Actuary's Department.

Adjudicator's Opinion

19. Mrs D's complaint was considered by one of our Adjudicators who concluded that Veterans UK should pay her an additional £250 for non-financial injustice. The Adjudicator's findings are summarised briefly below:

- The calculation of pension credit benefits under the AFPS 75 rules was the subject of a decision by the then Deputy Pensions Ombudsman in November 2014. This decision was successfully appealed in the High Court in April 2015. The Court's decision must, therefore, be applied in Mrs D's case.
- Strictly, Mrs D's entitlement under the AFPS 75 rules is to the reduced pension. The provision of incorrect information does not, in and of itself, establish an entitlement to the incorrect benefit.
- Mrs D had asserted that she took retirement from her teaching post in expectation that she would receive an annual index-linked pension of £5,788.13. The evidence suggested that Mrs D would have taken the same course of action even if she had been given the correct information about her AFPS 75 pension from the outset.
- There are circumstances where a member might be able to establish a right to a higher benefit or to compensation relating to the higher benefit. These would be if a contractual right had arisen or if Veterans UK were estopped from reducing Mrs D's pension. Neither of these arose in Mrs D's case.

20. Mrs D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs D's representative provided further comments many of which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the additional points made by Mrs D's representative for completeness.

Ombudsman's decision

21. Mrs D brought her complaint to me on the basis that Veterans UK should not reduce her AFPS 75 pension. At the time Mrs D applied to the Pensions Ombudsman Service (the **Service**), there was already another case concerning the calculation of pension credit pensions under the AFPS 75 in progress. As mentioned in the Adjudicator's Opinion, this case was determined and appealed. The High Court's decision must be applied in Mrs D's case, regardless of the fact that she had applied to the Service before the appeal case was heard.

22. As a result of the appeal, Mrs D's case has evolved over time. The focus has moved from an interpretation of the relevant AFPS rule (now decided by the High Court) to the consequences of Mrs D having been told she would receive a higher pension than provided for in the rules. This raised the contractual and estoppel questions dealt with in the Adjudicator's Opinion.
23. I note that Mrs D's complaint (as expressed by her representative) appears to be undergoing another mutation. Mrs D's representative disagrees with the actuarial factors used by Veterans UK to calculate the reduced pension. Whilst some evolution is inevitable as a case progresses, I consider the question of which actuarial factors should be used and whether they should have been reviewed to be a different complaint. It is not one which Veterans UK have been given the opportunity to respond to. I do not propose to deal with it under the umbrella of Mrs D's current complaint.
24. I uphold Mrs D's complaint to the extent that I find she has not been adequately compensated for the significant distress and inconvenience suffered as a result of the miscalculation of her pension.

Directions

25. Within 21 days of the date of this determination, Veterans UK will pay Mrs D £250 for the distress and inconvenience resulting from the miscalculation of her pension credit pension.

Anthony Arter

Pensions Ombudsman
4 July 2016