

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr William Cunningham
Scheme	Royal Mail Pension Plan (the Plan)
Respondents	Royal Mail Trustees Limited (the Trustee) Royal Mail Group (Royal Mail)

Subject

In 1996 Mr Cunningham began making additional contributions from his salary to purchase nine additional years in the Plan. In 2000 he transferred to another employer in the group without a break in pensionable service. However, when his payroll record was set up at his new employer they did not arrange for the deduction of the additional service contributions. In 2012, the Plan informed Mr Cunningham that he had not made any contributions towards his additional service for 12 years and that if he wished to retain the related benefits he would have to make up the shortfall of £17,474 in employee contributions. Mr Cunningham has complained that it is unfair to have to pay these arrears of contributions or suffer a reduction in the value of the pension he was expecting.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Royal Mail and the Trustee because they failed to set up the payroll records correctly in 2000, then failed to collect the additional contributions or advise Mr Cunningham of the non-payment of contributions when the mistake was discovered in 2003. He also received a series of benefit statements showing incorrect accrual on which he relied for his financial planning. By the time the errors were brought to his attention Mr Cunningham had changed his position irreversibly, had less than 10 years to his normal retirement age, and could no longer afford to fund future accrual as well as arrears. To the extent that he has lost his intended accrual he should be compensated.

DETAILED DETERMINATION

Rules Regarding Normal Retirement Age

1. The Normal Retirement Age (NRA) under the Royal Mail Pension Plan's rules for a Section C Member is 60 in respect of pensionable service accrued on or before 31 March 2010 and 65 in respect of service accrued after that date. If the employer consents, members may take early retirement on an unreduced basis from age 55.

Material Facts

2. Mr Cunningham has been a member of the Plan since 1986. In 1996 he began making additional contributions from his salary to the AddPlan section of the Plan in order to purchase nine additional years of pensionable service.
3. In 2000, Mr Cunningham transferred from the employment of Parcelforce to Royal Mail without any break in pensionable service. However, when his payroll details were set up by Royal Mail they did not arrange for the deduction of contributions in relation to the additional service. It is not clear whether this was as a result of Parcelforce failing to provide the correct details or an oversight by the Royal Mail payroll unit.
4. Throughout the period from 2000 to 2012 Mr Cunningham continued to receive annual benefit statements showing a full nine additional years' service.
5. On 20 January 2012, following a data reconciliation exercise, the Trustee wrote to Mr Cunningham, and informed him that no deductions of contributions for his additional service had been deducted from his pay since May 2000 and that there was a sum of £17,472 outstanding in respect of employee contributions. This letter offered Mr Cunningham, the options of cancelling the contract and receiving the additional service years based on the contribution up to May 2000, or bringing his contributions up to date by either paying a lump sum or paying in instalments from his pay over a period of time (not exceeding five years or up until his 60th birthday, whichever was the shorter period).
6. Mr Cunningham made a formal complaint under the Internal Dispute Resolution Procedure (**IDRP**) on 20 February 2012. The Trustee responded on 29 February 2012 to say that his complaint was not upheld on the basis that the original error had been made by the local pay unit in not setting up his payroll correctly when he moved to Royal Mail. They said that the Pension Service Centre (**PSC**) for the Plan had no

access to the payroll system and therefore had no way of knowing that the contributions for his additional service were not being deducted from his salary.

7. Mr Cunningham progressed the matter to Stage Two of the IDRPs on 9 May 2012. The Trustee responded on 19 September 2012. The Trustee explained that during the course of Royal Mail's investigation into the complaint they had also discovered that no employee contributions had been made in respect of Mr Cunningham's "BonusPlan" (a separate additional contribution facility of the Plan) since May 2000. The outstanding employee contributions in respect of the BonusPlan were £1,859.52 as at 31 August 2012.
8. It emerged that Mr Cunningham had made enquiries regarding Additional Voluntary Contributions (AVCs) payable to Equitable Life through the Plan in 2003. On 31 March 2003 the PSC informed Mr Cunningham that no contributions had been made to his BonusPlan since 2000. (Mr Cunningham did not take any action to resume his contributions to the BonusPlan.) However, Mr Cunningham's enquiry letter of 16 March 2003 was annotated by a member of PSC staff "No payments made to Bonusplan, AddPlan or (extra life cover) since April 2000 when he changed pay office". There is no record of any further action taken by PSC to inform Mr Cunningham of the lack of contributions to AddPlan or to investigate the cause of this position in 2003.
9. Because of this, the Trustee has accepted that the non-collection of contributions for both the AddPlan and the BonusPlan constituted maladministration and that the PSC's lack of action in 2003 once they knew of the situation had compounded the original error made by the employer.
10. The Trustee has however argued that notwithstanding these incidents of maladministration it is only able to pay benefits in accordance with the rules and "where a benefit has not been properly provided for through the payment of the necessary contributions that benefit cannot be paid."
11. The Trustee also countered Mr Cunningham's suggestion that this maladministration had cost him £17,500 or £2,000 a year in pension benefits by saying that he had benefitted from receiving higher levels of pay in the period from 2000. He also still had the option of paying the additional contributions over a period of ten years to replace the additional service [potentially] foregone as a result of the errors. The Trustee also agreed to pay Mr Cunningham the investment returns that would have

been earned had his BonusPlan contributions been paid correctly which amounted to £614.70 and offered Mr Cunningham £250 for distress and inconvenience.

12. Mr Cunningham complained to the Pensions Ombudsman on 24 October 2012, after which the Trustee and Royal Mail offered Mr Cunningham the following:
 - The opportunity to repay the outstanding employee contributions of £19,328.25 in relation to his BonusPlan and his AddPlan over a ten year period at around £40 per week to bring his AVCs up to date and to recommence future contributions to his AddPlan also at around £40 per week to buy his nine additional years service as originally planned.

Repayment of the investment returns totalling £614.70, he would have earned on his BonusPlan had the contributions been made correctly.
13. Mr Cunningham contacted the Plan in December 2012 to say that due to his current commitments he could only afford to pay a total of £40 per week. The Plan responded and asked Mr Cunningham to clarify whether he wanted to cease his AddPlan contract and for this £40 per week contribution to be used only to make up the arrears. Mr Cunningham confirmed that the £40 per week was to be used to make up the arrears. The Plan subsequently confirmed that if he were to cease his AddPlan contract from 4 March 2012 the arrears contributions would equate to around £35 per week payable over 10 years and would be used to restore his AVCs providing 7 years and 69 days of additional years' service to his pension.
14. After some discussion, Mr Cunningham agreed to cease his AddPlan from 4 March 2012 and to pay around £35 per week over 10 years to purchase 7 years and 69 days additional service. However he maintained his complaint and rejected an offer of £1,750 in compensation.
15. On 17th April 2012 as part of the IDR procedure, the Plan explained to Mr Cunningham 'if you retire within 10 years and before the arrears are fully paid up, you could continue to make payment via deduction from the pension you will start to receive, at the agreed rate, or if you prefer, all or part of the outstanding arrears at the date of your retirement could be deducted from the pension lump sum available to you on retirement'.
16. In January 2014, Mr Cunningham accepted a voluntary redundancy package which also allowed him to take early retirement. As the majority of Mr Cunningham's service was before 31 March 2010 this could be taken on an unreduced basis and included

the 7 years and 69 days of additional service. In the course of agreeing his redundancy he pointed out that his benefit statement was still showing incorrect accrual.

17. As a consequence of Mr Cunningham's intervention the severance package documentation was reissued to reflect the 7 years and 69 days rather than the full 9 years. He was also told by an email dated 11th October 2013:

“ if you do leave the business you can arrange to settle the arrears from any lump sum you receive if you wish. Alternatively we can continue deductions from any pension instalments you receive (or a combination of both).”

18. The original subject matter of Mr Cunningham's complaint to this service remains unresolved by the subsequent course of dealings between the parties.

Summary of Mr Cunningham's position

19. Mr Cunningham says that he did not notice that the weekly deductions from his pension were not being made to his AddPlan because his weekly pay was subject to fluctuations due to various allowances relating to night shifts and overtime, and that once he had joined Parcelforce his payslips were in a completely different format.
20. He argues that he is not a pension expert and it is not reasonable for the Plan to say that he should have noticed the reduced amount of contributions and therefore should have realised that the benefit statements were wrong. He relied upon the benefit statements which showed his added years.
21. He points out that the Royal Mail could have avoided the contributions accruing in 2003 if they had notified him and that the offer of £1,750 in compensation is not a significant contribution to the outstanding contributions they require from him.
22. He says he spent the additional earnings he had as a consequence of not paying the additional contributions on general household expenses over a period of approximately ten years. By the time he was notified of the missing contributions, he was 55 years old with dependent children and had taken on a new mortgage.

Summary of The Trustee's and Royal Mail's position

23. The respondents accept that there has been maladministration in this case because:
- they failed to process Mr Cunningham's payroll records correctly when he changed employer from Parcelforce to Royal Mail in 2000; and

- they failed to notify Mr Cunningham that no contributions were being deducted from his pay when PSC discovered the error in 2003.
24. They point out that the Trustee is only able to pay benefits in accordance with the Trust Deed and Rules. These rules state that Mr Cunningham must pay the additional contributions in order to receive the benefits associated with his additional years. Given that he has been given the opportunity to do so, he has no entitlement to receive the additional benefits in relation to the added years.
25. Mr Cunningham has not suffered any financial loss because he has acknowledged that he needs to make additional contributions; he has been offered the opportunity to pay the outstanding contributions over a 10 year period; he is not required to pay any interest on the outstanding contributions and he has been reimbursed for his investment returns in relation to the BonusPlan.
26. Mr Cunningham should have noticed that the contributions to both the AddPlan and the BonusPlan had ceased given that the contribution amounted to an additional 9% of his pay. The letter sent to him on 31 March 2003, had pointed out that the he was not making any contributions to his BonusPlan but he failed to take any action to rectify the matter.
27. The Trustee also says that on 15 February 2013 Mr Cunningham entered into a contractual settlement agreement (**the Agreement**) to repay the arrears of AddPlan contributions to 4 March 2012 and his missing BonusPlan contributions up to 27 January 2013. The Trustee does not believe that there is any legal basis by which the Agreement can be ignored.
28. Following the issue of a provisional decision, the Royal Mail has referred to the Terms of the Voluntary Redundancy package that Mr Cunningham agreed where he accepted that

“Payment of the relevant sums is in full and final settlement of all and any claims that you may have against Royal Mail Group Limited, any Group companies. The Royal Mail Pension Trustees Limited or any of its or their employees, officers or directors arising out of your employment or its termination.”

Royal Mail say they cannot see any reason why that settlement would not have the effect of preventing any further claim in respect of this matter.

29. Royal Mail and the Trustee have offered Mr Cunningham a generous compensation offer of £1,750 for the distress and inconvenience he has suffered.

Conclusions

30. My role in the first instance is to assess whether there has been financial injustice as a result of maladministration. In this case the Trustee and Royal Mail accept that there has been maladministration in that they failed to set up his payroll records to collect the additional contributions correctly when Mr Cunningham changed employer and they failed to notify Mr Cunningham when the error was discovered in 2003.
31. The respondents argue that Mr Cunningham should have noticed that his pension deductions were not being taken. However, I accept that Mr Cunningham did not notice that no additional contributions were being deducted because:
- his payslips were in a different format than he received from Parcelforce and, given that he never received a Royal Mail payslip showing the AddPlan contributions, he did not necessarily appreciate that deductions for his AddPlan were not included in the pension contributions shown.
 - he was paid on a weekly basis and received a number of allowances which caused his wage to fluctuate and was therefore not in receipt of a fixed sum which would have made any variance in deductions immediately recognisable
 - he was receiving benefit statements from the Plan which indicated that he was continuing to pay for his additional years.
32. Nobody is able to produce Mr Cunningham's payslips from 1996. The Plan points out that the deduction would have fluctuated between £14 and £21 per week rather than the £9 and £12 shown on his payslips from 1994 and 1995. The Plan has produced the payslips of some other members of the Plan from 2013, which show how clear the itemisation of the separate standard and AddPlan contributions was. I accept that the itemisation on these later statements is clear, but there is no suggestion that Mr Cunningham himself ever received a new format payslip showing the AddPlan item, and therefore no reason to conclude he should have known its absence meant the contributions were not being deducted. Due to the fluctuating nature of his earnings I accept that it would have been difficult for Mr Cunningham to notice that the additional contributions were not being deducted, based purely on the numbers. He had no way of knowing that the pensions administration system was blind to the payroll system, and his reliance on the continuing accrual shown on the benefit

- statement was in my view reasonable. The issue is therefore whether he should now be required to repay the missing contributions in order to obtain his additional years.
33. I accept that the usual principle is that the member cannot take a benefit which has not been paid for. However, in circumstances where a member has irrevocably changed their position in reliance on an unequivocal statement and it was reasonable for them to do so, the maker of the statement may be prevented from going back on it, if it would be inequitable to allow them to do so.
 34. I find that Mr Cunningham changed his position irrevocably in reliance on the benefit statements he received. He spent the additional earnings he had as a consequence of not paying the additional contributions on general household expenses over a period of approximately ten years. By the time he was notified of the missing contributions, he was 55 years old with a normal retirement age of 60, had dependent children and had moved to a new house with a mortgage. Even to fund a lower rate of accrual, entitling him to a lower pension than he had planned for, would require him to make contributions for many years after it came into payment.
 35. In my view it would be inequitable to allow the Scheme to go back on the representations made to Mr Cunningham that his benefits were accruing at the original contractual rate or to seek to recover the missing contributions past the point at which he retired. I conclude, therefore, that the Plan should only be entitled to recover from Mr Cunningham the contributions due since 20 January 2012 up to his last day of service at the original contractual rate. The Plan have said that in the normal course of events Mr Cunningham would have paid £26,234 .20 in additional contributions by 28 January 2014 and this would have been used to provide 7 years and 343 days of additional service credit.
 36. The Trustee has referred to the Agreement that Mr Cunningham made in February 2013 to repay the AddPlan and BonusPlan contributions and say that they do not believe there is any legal basis on which this can be ignored. But I find that at the time the Agreement was made Mr Cunningham had already lodged his complaint with this service. He explicitly asked for confirmation that agreeing to pay his arrears would not prevent his complaint from being investigated, from which it is clear that he did not intend to waive his right to pursue it. At no point during the course of the investigation did the Trustee assert that Mr Cunningham's agreement to pay arrears was a compromise of the complaint.

37. Mr Cunningham discussed the position regarding the repayment plan under the Agreement with the same individual who responded to enquiries from this service. There is no indication that the Trustee claimed to him that entering into the Agreement would compromise his ability to pursue his complaint. Furthermore the Trustee continued to correspond with this service over the complaint without asserting that a compromise had been reached. I therefore find that the Trustee accepted the complaint as ongoing and Mr Cunningham did not compromise his ability to pursue the complaint by entering into the Agreement.
38. A similar position arises in respect of the Voluntary Redundancy terms that Mr Cunningham later accepted. Royal Mail did not tell Mr Cunningham that the redundancy package was intended to compromise his complaint. This service asked Royal Mail in the course of the investigation whether they wished to rely on the terms of that agreement in the context of this complaint. They continued to respond to requests for information without reference to the terms of the redundancy, acknowledging the complaint as unsettled and ongoing.
39. If Royal Mail had intended the redundancy terms to compromise the complaint I would have expected this to be explained to Mr Cunningham and to this service around the time of the redundancy. Mr Cunningham alerted Royal Mail to the continuing errors in his benefit statement at the time of the redundancy negotiation which presented an obvious opportunity to compromise the complaint had that been the intention. This service also asked whether the redundancy terms were considered material, but Royal Mail simply did not refer to them until the issuance of the provisional determination. I conclude from this course of conduct that the redundancy terms were never intended to cover the subject matter of this complaint and therefore Mr Cunningham's acceptance of them did not compromise it.
40. I am also of the view that Mr Cunningham should be compensated for the distress and inconvenience he has experienced and I make the following directions.

Directions

41. To put matters right the Trustee should:
- (i) recalculate Mr Cunningham's pension so that his additional service credit is based on his original accrual rate up to the point of his redundancy i.e. 7 years 343 days and recalculate his pension accordingly.

- (ii) calculate the contributions due from Mr Cunningham at the original contractual rate between 20 January 2012 and his last day of service; any overpayment to be refunded within 28 days and any outstanding sums to be repaid at a rate to be agreed between the parties.
 - (iii) Calculate the amount of any shortfall due to the Plan in order to grant Mr Cunningham the additional service credit and reclaim this from Royal Mail.
42. Royal Mail are to pay the amount calculated in (iii) above.
43. In addition both the Trustee and Royal Mail should each pay Mr Cunningham £250 for the distress and inconvenience he has suffered.

Karen Johnston
Deputy Pensions Ombudsman

22 March 2016