

Ombudsman's Determination

Applicant	Mr H
Scheme	The Financial Assistance Scheme (FAS)
Respondents	The Board of the Pension Protection Fund (the Board)

Outcome

1. I do not uphold Mr H's appeal and no further action is required by the Board.
2. My reasons for reaching this decision are explained in more detail below.

Appeal summary

3. Mr S has appealed the Board's decision that he has been overpaid by £27,006.19 and that it should recover this sum by reducing future payments of his FAS assistance.

Background information

4. Mr H was a member of the WS Cowell Ltd Pension and Life Assurance Scheme (the WS Cowell Scheme). He became a deferred member of the WS Cowell Scheme in July 1991. Mr H retired in April 2004. Having taken financial advice, Mr H opted to take his deferred pension from the WS Cowell Scheme. At that time, Mr H's annual pension was £14,105.67.
5. The principal employer, Security & General Media plc, was placed into receivership on 30 September 1998 and was dissolved on 23 August 2005. It had ceased to pay contributions to the WS Cowell Scheme with effect from 31 December 1997.
6. The FAS was established by the Pensions Act 2004. The relevant regulations are the Financial Assistance Scheme Regulations 2005 (SI2005/1986) (the FAS Regulations). In order for a scheme to qualify for the FAS, it must have begun to wind-up between 1 January 1997 and 5 April 2005 (regulation 9).
7. In June 2012, Mr H began to receive FAS payments at 90% of his pension as at his date of retirement (£12,695.16 per year).

8. The WS Cowell Scheme was accepted into the FAS in April 2015. The Board wrote to Mr H informing him that there had been an overpayment amounting to £27,006.17. It also informed him that it proposed to recover the overpayment by reducing future payments of his FAS compensation to £8,567.17 per year.
9. Clause 18 of the trust deed in force as at 31 December 1997 provided for the principal employer to terminate its liability to contribute to the WS Cowell Scheme by notice in writing to the trustees. In a letter dated 12 November 1997, addressed to the trustees, Serif plc informed them it would terminate its liability to contribute to the WS Cowell Scheme on 31 December 1997. Clause 19(b) provided for the circumstances in which the scheme could be determined. The first of these was if the principal employer went into liquidation and there was no agreement in place, or likely to be put in place, for another company to perform its obligations. Clause 19 provided for the trustees to either wind-up the WS Cowell Scheme or enter into an arrangement/agreement to continue the scheme. Clause 20 provided for those events which would give rise to determination as follows,

“THE Plan shall be determined in accordance with Clause 21 upon the happening of any one of the following events:-

the Principal Employer terminating its liability ... to contribute to the Fund (unless the Trustees decide that the determination of the Plan shall be deferred); ...”
10. In 2011, the Board determined that the WS Cowell Scheme began winding-up on 31 December 1997.

Review decision

11. Mr H requested a review of the Board’s decision that he had been overpaid. The review decision, issued on 11 March 2016, is summarised below:-
 - The principal employer withdrew from the WS Cowell Scheme in 1997. At that point, the trustees chose to run the scheme as a closed scheme rather than commence the winding-up process immediately. By 2009, the scheme had become underfunded and it became apparent it would not have enough funds to meet its liabilities.
 - During the qualification process for the FAS, the WS Cowell Scheme’s documents were reviewed and it was decided that the scheme legally entered wind-up on 31 December 1997. This was the date on which the employer’s liability terminated and this triggered the start of the winding-up process, even though the trustees did not commence the process.
 - Once the WS Cowell Scheme entered the FAS, all payments dating back to the date the scheme started to wind-up are reviewed.

- Mr H's FAS payments are based on 90% of his expected pension at the date of winding-up. This meant that he was entitled to £10,582.48 at his retirement; not the £12,695.15 which had been paid from 2012. This is because the FAS uses a different method of revaluing pensions to that used by the WS Cowell Scheme.
- It was irrelevant that the WS Cowell Scheme had been overfunded for many years during the winding-up period. Ultimately, it could not afford to buy annuities for the members to cover their full entitlement. This meant that the scheme had been paying pensions to members which were higher than it could afford. This only became known when the scheme transferred to the FAS.
- As at June 2014, the date of the last actuarial valuation of the WS Cowell Scheme, the shortfall in assets amounted to £4 million.

Grounds for Appeal

12. Mr H's grounds for appeal are summarised below:-

- The Board's overpayment calculation is based on the assumption that the WS Cowell Scheme began winding-up in 1998. However, the trustees decided to defer winding-up and ran the WS Cowell Scheme as a closed scheme. They continued to pay benefits out of the assets of the WS Cowell Scheme.
- The trustees' decision is evidenced by annual reports published between 1998 and 2010. These contained the statements,

"The principal company was placed into receivership on 30 September 1998 and was dissolved on 23 August 2005. This does not affect the current position of the Fund and the Trustee continue to run the Fund as a closed fund. Benefits accrued before 31 December 1997 continue to be paid as and when they become due."

"At each meeting the Trustee reviews and currently continues to reconfirm their earlier decision to defer the eventual winding up of the scheme ..."

- The WS Cowell Scheme's actuary and administrator, Broadstone, has confirmed, in a letter dated 11 February 2016, that the trustees decided to operate the scheme on a closed fund basis.
- The WS Cowell Scheme continued to pay all benefits as they became due and also increased their value for several years after 1998. Thus, for many years there was no need to wind it up.
- The 90% reduction does not apply to pensions already in payment at the date a scheme begins winding-up and should not have been applied to his pension. The Board has only applied the 90% reduction because it has decided that the WS Cowell Scheme began winding-up in 1998.
- Broadstone has confirmed that his WS Cowell pension was calculated correctly.

Supplementary statement by Mr H

13. Having been provided with an opinion by one of our Adjudicators (see below), Mr H submitted further comments, which are summarised below:-

- The fact that the WS Cowell Scheme commenced winding up in 1998 was a factor of vital importance in 2004. It should have been included in the letter sent to him requiring his decision on the options available to him on retirement.
- One of the options available to him, in 2004, was to withdraw the whole of his “holding” in the WS Cowell Scheme and invest this with an alternative provider. Had he been made aware that the WS Cowell Scheme was in the process of being wound up, he would have withdrawn his funds and invested them elsewhere.
- At the time of his retirement, he was determined to avoid unexpected financial setbacks and engaged a respected financial consultancy to advise how he might achieve the best retirement income whilst avoiding unnecessary risk.
- It would have been obvious to the trustees and administrators of the WS Cowell Scheme that the fact that it was in the process of being wound up would influence the advice his financial advisers would give him. This vital information was withheld.
- If retrospective adjustment of the pension paid to him by the WS Cowell Scheme is justified and correct, the failure to provide essential information should be weighed against the decision to recover the overpayment. He would like the Ombudsman to recommend that the Board take into account the fact that this information was not made available to him and exercise its option to waive recovery.
- He asked for a review of the decision as to the amount of FAS assistance he would receive and also the decision to clawback the overpayment.

Adjudicator’s Opinion

14. Mr H’s appeal was considered by one of our Adjudicators who concluded that no further action was required by the Board. The Adjudicator’s findings are summarised briefly below:-

- The Ombudsman has been appointed, under regulation 3 of the Financial Assistance Scheme (Appeals) Regulations 2005 (SI2005/3273) (as amended) (the **Appeal Regulations**), to investigate and determine appeals against review decisions. A review decision is a decision issued by the Board under the Financial Assistance Scheme (Internal Review) Regulations 2005 (SI2005/1994) (as amended) (the **Internal Review Regulations**).

- Mr H asked for a review of the decision, dated 1 April 2015, that his annual FAS payment would be £8,567.17 per year. This is a “member assessment” decision under regulation 2(d) of the above Internal Review Regulations.
- The role of the Ombudsman is to consider whether the Board’s decision was reached correctly. If he determines there is action which the Board should take, he may remit the matter for the Board to take such action as he may direct.
- Mr H’s annual FAS payments must be calculated in accordance with the FAS Regulations. He is “a qualifying member of a qualifying pension scheme who was ... a deferred member of that scheme on the day before the day on which the qualifying pension scheme began to be wound up”. Mr H was of the opinion that the WS Cowell Scheme did not begin winding-up in 1998. He pointed to annual statements issued between 1998 and 2010 in which it was said that the trustees were running it as a closed scheme.
- In order to qualify for the FAS, the WS Cowell Scheme must have begun to wind-up between 1 January 1997 and 5 April 2005. If the WS Cowell Scheme did not begin winding-up until after 2010, it would not qualify for the FAS. The decision as to the date winding-up commenced, and therefore the scheme’s qualification for the FAS, was made by the Board in 2011. It is a “scheme eligibility” decision under regulation 2 of the Internal Review Regulations. Under regulation 5 of the Internal Review Regulations, an application for a review of a scheme eligibility decision must be made within two months of the date of the decision. The Board has confirmed that it has no record of there being any requests for the scheme eligibility decision to be reviewed within the statutory two months. The Ombudsman’s investigation of Mr H’s appeal must, therefore, proceed on the basis that the WS Cowell Scheme began winding-up in 1998. Mr H’s FAS entitlement must be assessed on that basis.
- Mr H is a qualifying member who was receiving a present payment from the WS Cowell Scheme under the scheme rules as at 1 April 2010¹. His FAS annual payments are calculated under schedules 2 and/or 4 to the FAS Regulations, as applicable. Mr H’s annual FAS payment is the sum of a “notional pension” plus the total amount of any annual increases calculated by the Board under regulation 27 of the FAS Regulations. This amount may be reduced by an amount determined by the Board having regard to: the amount of pension paid by the WS Cowell Scheme; the sum of the notional pension and any annual increases which the Board considers could have been paid; any FAS payments made before the Board issued a transfer notice in respect of the WS Cowell Scheme; and such other matters as the Board considers relevant.

¹ The date on which the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 (SI2010/1149) came into force.

- As indicated by the Board, in its correspondence with Mr H, the calculation of his FAS annual payments required an assessment of what had been paid by the WS Cowell Scheme in the period from Mr H's retirement to the date of transfer to the FAS. The Board must determine what increases should have been added to Mr H's pension since he left active membership of the WS Cowell Scheme. The way in which these increases are to be determined is provided for under the FAS Regulations and are not, necessarily, the same as those agreed by the WS Cowell Scheme. This is not to say that the increases which were applied to Mr H's pension were not in accordance with the WS Cowell Scheme rules. This has been confirmed by Broadstone. However, the Board are not bound to apply the same level of increases in its calculations. It is for this reason that an "overpayment" has arisen.
 - As a deferred member on the day before the day on which the WS Cowell Scheme began to be wound up, Mr H's FAS payment is 90% of his "expected pension" less any "actual pension", as defined in schedule 2.
 - Mr H's FAS annual payments have been calculated in accordance with the FAS Regulations and there is no action which the Board should be required to take.
 - This opinion would be extremely disappointing for Mr H and that it has not been possible to address all of his concerns under the confines of the Ombudsman's jurisdiction to hear appeals. Being informed of a totally unexpected overpayment of £27,006 must have come as a great shock to Mr H. Whilst his misgivings about making a hardship claim were understandable, he should consider doing so in order that the Board might consider if there is anything it can do to alleviate the situation. This is not, however, something which could be considered under the Ombudsman's jurisdiction.
15. Mr H did not accept the Adjudicator's Opinion and the appeal was passed to me to consider. Mr H provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr H for completeness.

Ombudsman's decision

16. It is important to be clear about what I can consider, in my role as the Pension Protection Fund Ombudsman, when I receive an appeal relating to a decision concerning FAS assistance. I appreciate that Mr H sees the failure to provide him with information relating to the winding up of the WS Cowell Scheme in 2004 as part of the circumstances which ultimately led to the reduction in his pension/FAS assistance. However, action or inaction on the part of the trustee and administrators of the WS Cowell Scheme does not come within my appeal jurisdiction. Nor can I consider any exercise of the Board's discretion to waive recovery of an overpayment.

It would not, therefore, be appropriate for me to make any recommendations as to what the Board should take into account in the way in which Mr H has requested.

17. Under the Appeal Regulations, I am required to determine whether the Board's decision in relation to Mr H's FAS assistance was reached correctly. Broadly, this requires me to consider whether the decision accords with the provisions of the FAS Regulations. I find that the calculation of Mr H's FAS assistance, including the reduction to account for the overpayment, is in line with the provisions of the FAS Regulations.
18. Therefore, I do not uphold Mr H's appeal.

Anthony Arter

Pension Protection Fund Ombudsman
30 June 2017