

**PENSIONS ACT 2004, PART 2 CHAPTER 6**  
**APPEAL TO DEPUTY PENSION PROTECTION FUND OMBUDSMAN**  
**DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND**  
**OMBUDSMAN**

**Appellant:** Mrs E R Cox  
**Scheme:** Fitzhardinge Retirement Scheme  
**Respondent:** Pension Protection Fund (**PPF**) as manager of the Financial Assistance Scheme (**FAS**)

The Deputy PPF Ombudsman has received an appeal from Mrs Cox, following the FAS review decision dated 25 November 2011. Mrs Cox's appeal concerns the amount of FAS assistance payable to her.

**Material Facts**

1. Mrs Cox's late husband, Mr A Cox, was the chairman of two companies, B T Batsford and a subsidiary company called B A Seaby. Both companies had defined benefit (**DB**) pension schemes. In the mid 1980's, when both schemes were in surplus, the B A Seaby scheme closed to future accrual, and its members were offered enhancements to transfer their preserved benefits to a defined contribution (**DC**) scheme, which was called the Cavendish Pension Scheme (**the Cavendish scheme**). Most of them did so. The BT Batsford scheme remained a DB scheme and was renamed the Fitzhardinge Retirement Scheme (**the Fitzhardinge scheme**).
2. Members of the Fitzhardinge scheme were subsequently offered transfers to the Cavendish scheme. The trustees of the Cavendish and Fitzhardinge schemes agreed that at retirement, members of the Cavendish scheme would be offered open market options, including the opportunity to transfer back to the Fitzhardinge scheme on a cost neutral basis. Mr Cox was a member of the Fitzhardinge scheme, and on 1 July 1987 he transferred his preserved benefits from the Fitzhardinge scheme to the Cavendish scheme. Mr Cox died on 17 September 1987.

3. The trustees of the Cavendish and Fitzhardinge schemes wrote to Mrs Cox on 24 September 1987. They said that Mrs Cox was entitled to a death in service benefit and a widow's pension. Pensions would also be payable to dependents. The trustees made an interim payment of £90,000 to Mrs Cox.
4. On 30 September 1987 one of the trustees' pensions advisers (**the adviser**) (who later became a trustee of the Fitzhardinge and Cavendish schemes) telephoned the actuary of both schemes. The actuary's note of the conversation says that the adviser requested calculations based on the spouse's pension being paid from the Fitzhardinge scheme. These were provided on 1 October 1987, and a revised costing was given on 2 February 1988.
5. On 15 February 1988 the adviser wrote to B T Batsford, saying:  
 "With the recent sale of Warburg assets in respect of Mr Cox's fund I believe that we are at last at the point of finalising the benefits. I have spoken to Mrs Cox to advise her of the benefits payable and to decide how she would like them to be set up. The results of these calculations and consultations are set out below.

#### **Benefits payable**

Lump sum	£188,000
Refund of contributions	£7,663
Refund of AVC's plus interest	£39,055
Total lump sum	£234,718
Widow's annual pension	£20,889
Child's annual pension (up to)	£10,445

#### **Funds available**

From insurance company (excluding overpayment of 1 x salary to be paid to X account)	£238,812
Cash fund at 31 December 1987	£162,042
Unit fund cashed	£162,088
AVC's	£39,055
Total funds available	£601,997

#### **Cost of benefit**

Cash sums	£234,718
Widow's pension	£345,800

(to purchase in Fitzhardinge scheme  
per actuary)

Total	£580,518
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Balance available for child's benefit	£21,479
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Total	£601,997
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I have discussed the provision of the widow's pension with Mrs Cox and obtained quotations to purchase it through an insurance company. Unfortunately we cannot obtain a quote for full RPI revaluation and Mrs Cox has therefore opted to have her pension paid through the Fitzhardinge Scheme. The actuary has calculated the cost, including full RPI, to be £345,800 and this amount should be paid over as soon as possible in order that the pension, including back payments, can commence. The pension should be paid monthly in advance with increases given at the same date as other existing pensioners to ease administration.

The balance of £21,479 is to be used to provide an income for the youngest child, who is still in full time education and will commence a four year degree course in September. We calculate that the surplus fund should provide an annual pension of £5,000 (non-increasing) for four and a half years. The balance of funds should be paid to the Fitzhardinge Scheme and the pension paid from the scheme, again monthly in advance.

Mrs Cox has received total cash payments of £230,000 and there is thus a small balance of £4,718 now due. This amount should be paid to Mrs Cox as soon as possible.

Finally there is an excess of £43,420 which was paid by National Mutual and this should be paid into the X account of the Cavendish Scheme."

6. The adviser says that the benefits provided by the Cavendish scheme were a death in service lump sum of four times annual salary, together with a fund made up of two times annual salary and Mr Cox's accrued DC "pot", to provide a pension for Mrs

Cox and any dependent children. (The death in service cover was insured for six times salary). The adviser says that the DC “pot” exceeded the Inland Revenue limits, as they then were, and it was not possible to purchase an annuity linked to the Retail Prices Index (**RPI**) on the open market. So after discussion with the Cavendish and Fitzhardinge schemes’ actuary and lawyer it was agreed that Mrs Cox would receive the maximum pension allowable from the Fitzhardinge scheme, increasing annually in line with the RPI. The residual fund was used to provide a child’s pension for Mr and Mrs Cox’s son.

7. The actuary’s notes show that his instructions were that Mrs Cox was to be paid the maximum spouse’s pension, (which at that time was 4/9ths of final salary irrespective of whether a pension scheme was DC or DB), and that the cost of providing this was £345,800, the remainder being used for Mrs Cox’s youngest son’s pension.
8. The adviser recalls that Mrs Cox was in a state of shock, and says that she did not personally discuss the arrangements with Mrs Cox in any detail; this was left to the trustees’ principal adviser and the trustees themselves. The adviser says that it is unclear how much Mrs Cox was told, and thinks it doubtful that she would have understood much of it anyway, given her fragile state.
9. The Cavendish scheme paid a transfer value of £326,824 to the Fitzhardinge scheme. The scheme’s actuary says that this was used to partly fund Mrs Cox’s pension, the liability for which was subsequently included with the other liabilities in the periodic valuations of the Fitzhardinge scheme.
10. Mrs Cox says that her husband had strong views about the profit made by insurance companies, and that is why he made arrangements for retiring members of the Cavendish scheme to be given the option of transferring back to the Fitzhardinge scheme, thus avoiding the purchase of an annuity on the open market.
11. B T Batsford ceased trading in 1999. On 14 May 2007 the trustees of the Fitzhardinge Scheme sought members’ views on buying out their benefits with an insurance company, at a reduced rate of 86% of the preserved benefits. A majority of members agreed with this proposal, including Mrs Cox. However, the trustees subsequently decided not to pursue this further, and the Fitzhardinge Scheme was wound up on 24 October 2008. Prior to the Fitzhardinge Scheme being transferred

to the FAS, the trustees sought advice from its solicitors about Mrs Cox's benefits. The solicitors concluded that they should be treated as DB benefits and therefore eligible to be included in the transfer to FAS, as in their opinion the transfer value had been used to purchase DB benefits for Mrs Cox in a DB scheme. On 23 June 2011 the PPF wrote to Mrs Cox, saying that her annual pension would reduce from £36,604 to £25,873.60. (The maximum annual amount that FAS could pay was £27,987, which had been reduced to £25,873.60 to recover an overpayment from the FAS entitlement date to the FAS payment date.) Mrs Cox sought a review decision from the PPF, saying that her widow's pension from the Fitzhardinge scheme was a DC benefit, and therefore not eligible to be transferred to the FAS. She also said that recovering the overpayment was causing her additional financial hardship.

12. The only scheme document available for the Cavendish and Fitzhardinge schemes is a Deed of Amendment dated 3 December 1987, relating to the Cavendish scheme. The PPF had a copy of the rules of the Fitzhardinge scheme when its review decision was made, but it was subsequently lost.
13. One of the trustees of the Fitzhardinge scheme (the former adviser) says that the FAS pressed the trustees to complete the transfer of the scheme. The trustee says that the trustees supported Mrs Cox's case, but the FAS said she could appeal after the transfer had been completed.

**PPF review decision (dated 25 November 2011)**

14. The PPF said that Mr Cox's fund in the Cavendish scheme was transferred to the Fitzhardinge scheme following his death, and the Fitzhardinge scheme provided predominantly DB benefits. Mrs Cox's widow's pension was administered in the same way as other DB pensions paid by the Fitzhardinge scheme. The PPF concluded that Mrs Cox's pension was a DB benefit and thus eligible for transfer to the FAS. The PPF said it would consider waiving the recovery of the overpayment, on receipt of a completed statement of income and expenditure from Mrs Cox. (Mrs Cox did not return the completed form).

### Summary of Mrs Cox's position

15. Mrs Cox says:

- The trustees of the Fitzhardinge scheme treated her pension as a DC benefit until they were pressured by the PPF into deciding that it was DB;
- She had to move from Canada to Mexico to cope with the reduction in her pension and is suffering financial hardship;
- She had no knowledge of the decisions that were made by the trustees of the schemes, and simply trusted them to do the best for her following her husband's sudden death;
- The trustees of the Fitzhardinge scheme should have purchased an annuity for her before the scheme was taken over by the FAS;
- Additional voluntary contributions (**AVCs**) in the Fitzhardinge scheme were used to accumulate DC "pots" that were annuitized in the scheme on retirement;
- The trustees of the Fitzhardinge scheme objected strongly to the PPF's decision regarding her benefits;
- An oral hearing might be helpful.

16. In addition to her appeal against the review decision, Mrs Cox made a number of complaints of maladministration by the PPF , including delays in answering letters and incorrect information being provided to her. My jurisdiction is limited to considering the PPF's review decision. Complaints of FAS maladministration should be made to the Parliamentary Ombudsman.

### Summary of FAS's position

17. The PPF says:

- The provision of benefits from the Fitzhardinge scheme was arranged with Mrs Cox's consent and she was fully involved with the process;
- On balance, Mrs Cox' s benefits were provided on a defined benefits basis;
- The Fitzhardinge scheme was a defined benefits scheme and there was no separate defined contributions "pot" for Mrs Cox;

- The trustees of the Fitzhardinge scheme must have had good reason to admit to membership someone who had never been an employee or former employee;
- Rules 6 and 8 of the Fitzhardinge Scheme permitted the provision of non-standard benefits to a non-standard member, such as Mrs Cox;
- Mrs Cox's pension was paid monthly in advance with RPI increases at the same date as other pensioners, which suggests a DB arrangement;
- Any link with a DC arrangement was broken when Mrs Cox's fund was transferred to a DB scheme, providing a fixed annual pension with annual increases;
- The available evidence suggests that the intention of the trustees at the time was to provide Mrs Cox with a DB pension;
- The Fitzhardinge scheme had never provided DC benefits and there is no evidence that the trustees promised Mrs Cox DC benefits;
- The trustees would have misdirected themselves if they had made special arrangements for Mrs Cox immediately prior to the transfer of the scheme to the FAS;
- The significant lack of contemporaneous documentation was an issue in making what was a difficult and carefully considered decision.

## **Conclusions**

18. Mrs Cox feels that an oral hearing might be helpful. She has not requested one and only asks that I consider whether one is necessary. I will usually only hold an oral hearing in the following circumstances:

- Where there are differing accounts of a particular material event and the credibility of the witnesses needs to be tested;
- Where the honesty or integrity of a party has been questioned and the party concerned has requested a hearing;
- Where there are disputed material and primary facts which cannot properly be determined from the papers alone.

None of these factors apply to Mrs Cox's appeal so I have decided that an oral hearing is unnecessary. I also note that Mrs Cox would have to bear the cost of travelling from Mexico to attend, and she has said she is in financial difficulty. .

19. Mrs Cox says that the trustees were supportive of her case and the PPF pressured them into changing their minds, and the trustees should have purchased an annuity for her before the Fitzhardinge scheme entered the FAS. One of the trustees confirmed that the FAS was keen to complete the transfer. These matters formed no part of the FAS review decision. However, I note in passing that the trustees sought professional advice from a firm of solicitors specialising in pensions, and acted in accordance with that advice, whatever their personal views may have been.
20. AVCs were usually arranged on a DC basis, and so they give no substantive indication of whether the main scheme benefits were DB or DC. Mr Cox's AVCs were refunded with interest.
21. The arrangements made for providing benefits for Mrs Cox and her son were unusual, including the payment of a transfer value after the member's death. In the absence of the Scheme Rules it is impossible for me to determine whether they were complied with, but in any event it would make no practical difference to the outcome of Mrs Cox's appeal. The PPF had to make a decision on the balance of probabilities, based on the available evidence of what happened at the time.
22. Whilst I accept that Mrs Cox did not have any particular pensions knowledge, and doubtless had much to contend with following her husband's death, the adviser's letter dated 15 February 1988 and recollection of events confirm that Mrs Cox was consulted about her pension arrangements, and wanted her pension paid from the Fitzhardinge scheme. It seems to me to be more likely than not that Mrs Cox did so because she was told that this was the most advantageous route for her, without understanding the details.
23. The transfer value funded most of the cost of Mrs Cox's pension, but the shortfall and her son's pension were funded from the Fitzhardinge scheme. There is no suggestion in any of the contemporaneous documents that the Fitzhardinge scheme had a separate DC section. The liability for the pensions was included with all the other liabilities of the Fitzhardinge scheme, and Mrs Cox's pension was paid on the same terms, including RPI increases, as the other Fitzhardinge pensioners.



24. I will usually only interfere with a decision if I consider it to be perverse, that is, a decision that no reasonable body, properly directing itself, could have arrived at. If I consider a decision to be perverse, my usual direction is that it is taken afresh. As the PPF acknowledged, its decision in Mrs Cox's appeal was a difficult one to take. I have concluded that the PPF's decision was not so beyond the bounds of reasonableness that I need to interfere with it, given that the funding and provision of Mrs Cox's benefits had sufficient DB features.
25. It follows that I do not uphold Mrs Cox's appeal.

**Jane Irvine**

Deputy Pension Protection Fund Ombudsman

10 December 2013