

Ombudsman's Determination

Applicant	Mr N
Scheme	The Weir Group Pension and Retirement Savings Scheme (the Scheme)
Respondents	The Weir Group Plc (the Company) The Weir Group Pension Trust Limited (the Trustee)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Company or the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N says he is entitled to a preserved pension, as he completed five years' continuous service in the Scheme between March 1975 and July 1980.

Background information, including submissions from the parties

4. The contracting-out provisions under the National Insurance Act 1959, permitted pension schemes to provide members with an Equivalent Pension Benefit (**EPB**), in lieu of their entitlement under the Graduated Pension Scheme. The Graduated Pension Scheme was abolished with effect from 6 April 1975.
5. Schedule 16 of the Social Security Act 1973 (the **SSA 1973**) states:

"Basic principle as to short service benefit

6.-(1) A scheme must provide so that where a member's service in relevant employment is terminated before normal pension age and -

(a) he has attained the age of 26; and

(b) he has at least 5 years' qualifying service,

he is entitled to benefit ...consisting of or comprising benefit of any description which would have been payable under the scheme as long service benefit...

...

(2) ...short service benefit must be made payable as from normal pension age or, if in the member's case that age is earlier than 60, then from the age of 60...

6. 'Qualifying service' is defined in SSA 1973 as five years' pensionable service, during which the member was at all times employed either in pensionable service or employment, or 'linked qualifying service' under a different scheme. A period of service previously terminated does not count towards the five years' qualifying service unless it counts towards qualification for 'long service benefit'.
7. Subject to provisions contained in the Social Security Pensions Act 1975 (**SSPA 1975**), an employed earner's employment could be contracted out of the State second pension by reference to that employment. It is a requirement under Section 34 (1) (2) of the SSPA 1975, (**Subsection 2**), that the scheme rules provide for an annual rate of pension of at least 1¼% of either the earner's average salary, over his/her period of contracted out employment, or of his/her final salary for broadly each year of such service.
8. Section 34 (3) of SSPA 1975 provides the following exception to the requirement under Subsection 2:

"(3) Where it is a condition of the scheme that the earner shall complete a specified minimum period of service before qualifying for requisite benefits in excess of guaranteed minimum pensions, the scheme's rules need not provide as in subsection (2) above for an earner whose service is terminated before completion of that minimum period."
9. On 24 March 1975, Mr N, aged 23, joined Catton and Company Limited (**Cattons**), then part of the Company. He left service at the age of 28 (his **First Service**).
10. At the time Mr N joined Cattons, it was possible for employers to make membership of a work place pension scheme compulsory. The Company has been unable to establish whether at that time it required new recruits to join the Scheme immediately on entering its service.
11. The Trust Deed and Rules of the Weir Group Works Pension and Life Assurance Scheme, effective from 7 March 1975, (the **1975 Rules**) were the Scheme provisions in force during Mr N's First Service. The subsequent Scheme provisions are dated 1988/89.
12. Schedule F: Alterations and Modifications, is missing from the copy of the 1975 Rules provided to this office. Neither the Trustee nor its current legal advisers have been able to locate a copy of the schedule, or the original copy of the 1975 Rules. It is possible that they have been mislaid, as the Trustee has changed lawyers over the years.

13. Schedule B of the 1975 Rules (**Schedule B**) says:

"Eligibility for Admission to Membership

An employee shall be eligible for admission to membership of the Scheme if in the opinion of the Trustees he fulfils the following qualifications namely: -

- (a) his name is entered in a Participating Employer's Register of whole-time permanent Works Employees
- (b) he has attained the age of 21 years
- (c) he has not attained the age of 65, if male, or 60 years, if female
- (d) he has completed one year's Service [**Clause D**]."

...

"...Benefits on leaving Service

- (a) On a Member leaving Service for any reason before the Normal Retiring Date without being entitled to any other [benefit] under the Rules he shall (subject as hereinafter provided) become entitled to a yearly pension payable from the Normal Retiring Date ..."

....

- (b) A Member to whom a yearly pension under (a) of this Sub-rule applies, not being a [Member whose Total Remuneration, broadly in any one year, has exceeded £5,000], and who has not [completed] five years' Pensionable Service, may on the date specified below elect to take in lieu thereof a return of Member's Contributions...and no further benefit shall be payable to or in respect of the Member under the Scheme..."

14. Under the 1975 Rules, member contributions were payable at a rate of 3% of weekly taxable earnings. Where a member has completed at least five years' service on leaving the Scheme, the amount of normal retirement pension payable is 1% of final pay for each year of pensionable service, or the value of any member contributions, if greater. A leaver who has completed less than five years' service, who does not elect to take a refund, is entitled to the value of their member contributions payable from 'normal retiring date' (**NRD**).
15. The 1975 Rules provides for the yearly deferred pension to be increased by 3% per annum from the date of leaving the Scheme to NRD.
16. On 13 June 1980, Mr N left Cattons, having paid total pension contributions of approximately £500 during the 1975/76 to 1978/79 tax years.
17. On 30 June 1980, the Company's pensions department completed a 'notice of termination of contracted-out employment contributions equivalent premium' (**CEP**)

form (the **CV45 Form**), which it then submitted to the Department of Health and Social Security. The pensions department stated on the form that Mr N had been in contracted-out employment between 6 April 1978 and 13 June 1980. It asked to be notified of the amount of CEP due, and indicated that payment would be made on request.

18. The administrators of the Scheme have no records indicating that Mr N's benefits were preserved on leaving the Scheme in June 1980. The Trustee has explained that, once the CEP payment had been made, the administrators would have closed then archived Mr N's member file.
19. Cattons was sold to the William Cook Group in the 1980's (the **Sale**). Personnel records covering Mr N's First Service, are no longer held by the Company. It is possible that those records were transferred as part of the Sale, or later destroyed.
20. Mr N re-joined the Company in October 1984 and left a year later (his **Second Service**). His letter of appointment (the **Letter of Appointment**) says:

“...The company operates the Weir Staff Pension Scheme and you will be expected to join the scheme.”
21. In late May 2016, Mr N obtained an estimate of his State pension from the Department of Work and Pensions (**DWP**). It indicated that he had a contracted-out pension equivalent (**COPE**) in respect of past contracted-out service in a work place pension or personal pension scheme(s). It stated that the actual amount would be paid via his private pension.
22. HMRC has since confirmed to Mr N that his COPE was not earned in the Scheme.
23. Several of Mr N's documents were unfortunately destroyed in a fire. However, he has managed to locate his 'certificate of pay and tax deducted' (**P60**) issued by Cattons for 1977/78 and 1978/79 tax years. The earlier P60 shows superannuation fund contributions of £151, pay of £4,640, and gross pay of £4,792 inclusive of superannuation fund contributions. The P60 for 1978/79 tax year indicates that Mr N was in contracted out employment under the Scheme. It shows superannuation fund contributions and gross pay of £173 and £4,641 respectively.
24. Mr N is adamant that he joined the Scheme around March 1975. When he was re-employed in 1984, he noted from his Letter of Appointment that Scheme membership was compulsory and realised that he had completed five years' membership during his First Service. However, at the time of leaving Cattons in June 1980, he had no interest in his pension and no understanding of the preservation requirements. On his re-appointment, he enquired about his benefits for his First Service. He says he was told that he could not have a refund because he had completed over five years' pensionable service. He was also told that his pension was worth £1,604.

25. Mr N has explained that, when he left the Company in 1985, he had a clear understanding that he had a deferred pension in the Scheme and that it would increase in line with inflation subject to a minimum annual increase of 5%. Based on the information he has since obtained from HMRC, he has calculated that his pension would have amounted to £1,622, within £18 of the pension value of £1,604 that the Company quoted to him in 1984.
26. Contrary to Schedule B, Mr N contends that the option to join the Scheme, immediately on attaining age 21, was in force when he first joined Cattons. Mr N says the ease of which he joined the Scheme in 1975, supports his view.
27. During the investigation, Mr N commissioned an Independent Forensic Document Examiner (the **Forensic Examiner**) to provide an expert view on Schedule B. In her report (the **Report**), she concluded that, while it appeared that the same old style typewriter was used to type the entire schedule, the lighter typescript and punctuation used in Clause D, when compared with that used in clauses (a) to (c), indicated that Clause D may have been added at a different time, possibly by a different person.
28. On 8 March 2018, Mr N managed to obtain proof of his employment history, covering the tax years 1975/76 to 1980/81, from HMRC. It states that he paid standard national insurance contributions during 1975/76 to 1977/78 tax year on a contracted in basis. It indicates that he was in contracted out employment in respect of 'Catton and Co Ltd' during 1978/79 to 1980/81 tax year.
29. The Company says it has no record of discussions Mr N claims he had with the Company about his pension at the time he re-joined in 1984.
30. The Company and the Trustee do not accept that the available information indicates that Mr N has an entitlement to an EPB under the Scheme. Nor do they consider it evidence that he completed 5 years' pensionable service during his First Service.
31. Mr N considers payment of the benefits he believes he is entitled to would be a reasonable resolution to his complaint.

Adjudicator's Opinion

32. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or the Company. The Adjudicator's findings are summarised briefly below:-
 - The Scheme provisions that would have applied to Mr N's First Service, indicates that it was open to him to join the Scheme, once the 'qualifications' conditions detailed in Schedule B had been met. There is no valid evidence to support Mr N's assertion that his membership of the Scheme was compulsory at any time.
 - The Report is not persuasive evidence that Clause D was added after the date Mr N would have been eligible to join the Scheme. In the absence of valid evidence to

the contrary, it is more reasonable to assume that it forms part of the Scheme's provisions that applies to Mr N.

- There is no independent evidence to confirm Mr N's account of his discussions with the Company concerning his benefits. Without such evidence, it is not possible to form a view on this aspect of his complaint.
- Where evidence is limited, a view must be reached based on the balance of probabilities. The available evidence only confirms that Mr N first contributed into the Scheme in 1977/78 tax year. The CV45 Form, completed by the Company's pensions department in late June 1980, indicates that a CEP payment was due. This suggests that it is more likely that Mr N completed less than the minimum five years' qualifying service required for a deferred pension, and that he elected for a refund of his net contributions.
- The fact that the DWP has not recorded a COPE in respect of Mr N's contracted-out employment with Cattons, indicates that he does not have any GMP benefits retained in the Scheme.

33. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N has provided his further comments and additional evidence.
34. On 25 June 2018 Mr N obtained a copy of his pay as you earn record cards in respect of his employment with Cattons from the state pension archive. They show that pension contributions of £67 and £123 were deducted from his pay during 1975/76 and 1976/77 tax years respectively . During both periods his PAYE records record him as contracted in to SERPs.
35. I have considered Mr N's representations and the further evidence, but these do not change the outcome. I agree with the Adjudicator's Opinion, except that I acknowledge that Mr N joined the Scheme at some point during 1975/76 tax year. I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

36. Mr N says he can prove that he contributed into the Scheme continuously over a five year period. As such, he is entitled to a preserved pension in the Scheme. The fact that no pension was recorded for him by the Scheme indicates that there may have been an error in the Scheme's records. I should say at the outset that the burden of proving there has been an error rests with Mr N and I have to decide whether that burden of proof has been discharged on the balance of probabilities.
37. Where an employee leaves contracted-out employment, having completed less than five years' pensionable service, Mr N has pointed out that it would have been a requirement to pay a CEP. However, the period shown on the CV45 Form, does not include the three years' pensionable service he completed in the Scheme between 1975 and 1978. I accept that, but it is equally clear from his recently produced

payslips and the table letter 'A' recorded under his national insurance contributions, that he was always contracted in 75/76 and 76/77, so there is nothing surprising about their omission from the CV45.

38. As he was not aware that he had a pension retained in the Scheme, Mr N says he was pleasantly surprised when he learnt it was worth £1,604. His joy was short-lived, because he was then told he did not have a pension, as he had completed less than five years' qualifying service in the Scheme. He accepts that he made a mistake by not getting proof of his entitlement at the time. Based on his average salary of £5,000 he has calculated that his pension would have been worth £416 [per annum] in 1980.
39. Mr N has highlighted that he has now reached age 66. He has spent the last two years, since receiving his State pension forecast, compiling information to support his case, with little support and despite the "incompetence" of HMRC's SARS team. Had the SARS team not initially suggested that he had received a refund on leaving the Scheme in 1980, it is likely that the whole issue would have been sorted out earlier.
40. In relation to Clause D, Mr N has pointed out that his Forensic Examiner testified that the clause was not part of the original typed deed. In his view, the absence of Schedule F means that there is no documentary evidence to confirm the validity of the clause. Furthermore, he joined Cattons some 17 calendar days after Clause D came into effect. Consequently, he considers it highly improbable any such provision was in place to prevent him from joining the Scheme on 6 April 1975.
41. Mr N says, based on his own experience, and qualification in reviewing documents, the problem he has identified with Clause D is to do with timing. Clause D is contrary to the spirit of the Company's policy at the time, which was to encourage, rather than compel, new employees to join the Scheme at the earliest opportunity. He would therefore have been encouraged to apply for the start of the 1975/76 tax year. In any case, aged 23, with potentially 40 years of contributory service ahead of him when he applied to join the Scheme in 1975, it would have been a "formality" for the Trustee to have waived the qualification in Schedule B.
42. Mr N says the fact that he was able to calculate a pension within £18 of the amount of £1,604 that was quoted to him in 1984 is astonishing, and further supports his assertion that his pension was retained in the Scheme. Also, the additional evidence he has since submitted, which confirm that he paid pension contributions during 1975/76 and 1976/77 tax year, calls into question why his pension has allegedly disappeared.
43. Firstly, I think it is worthwhile noting that HMRC confirmed that Mr N's COPE was not earned in the Scheme. It is also worthwhile noting that Mr N has not provided any evidence which supports that HMRC has changed its position on this.
44. Under the 1975 Rules, a member who has completed less than five years' service, on leaving the Scheme, is entitled to the value of his/her member contributions payable from NRD, unless he/she has elected to receive a refund.

45. To be entitled to a preserved pension under the Scheme in respect of his First Service, Mr N would have needed to have joined the Scheme on 14 June 1975 at the very latest. Had he done so, he would have completed exactly five years' pensionable service. Mr N considers that he would have joined the Scheme on 6 April 1975. He also says he was not paying attention to whether he had a scheme benefit when he left the scheme in 1980. Unfortunately, there is nothing to substantiate the date Mr N says he joined the Scheme and I would not expect him to remember the exact date he joined after such a lapse of time.
46. While I accept that Mr N first paid pension contributions sometime during the 1975/76 tax year, he has provided no valid proof that he started contributing on 6 April 1975, or even by 14 June 1975. I accept that he was a member in 1975 but it is not possible to ascertain his precise joining date from the contributions paid.
47. The fact that the Scheme no longer holds any records for Mr N, and that HMRC's records indicate that a CEP was paid by Cattons to reinstate him back into the State second pension indicate that the scheme considered he had no preserved benefit. They would have had their own records at the time they applied for the CEP. There is simply no contradictory evidence from which I can conclude that they were wrong.
48. In conclusion, Mr N's claim to a deferred pension under the Scheme is not supported by the available evidence. Based on that evidence, I conclude it is more likely than not that his contributions were refunded to him, under circumstances which he cannot now recall. And, that the payment extinguished any rights to benefits he would otherwise have retained in the Scheme.
49. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
26 September 2018