

Ombudsman's Determination

Applicant	Mr E
Scheme	Wildfowl & Wetlands Trust Pension Scheme (the Scheme)
Respondents	(1) Cartwright Benefit Consultants Ltd (the Administrator) (2) The Wildfowl & Wetlands Trust (the Trustees)

Outcome

1. Mr E's complaint is upheld and to put matters right, the Administrator, on behalf of the Trustees, should calculate the lump sum with interest that would have been payable to Mr E in December 2012. The Trustees should pay the difference between that amount, if any, and the actual amount he received. The Trustees are also liable for any related costs and charges, including (but not limited to) any unauthorised HM Revenue & Customs (**HMRC**) charges, scheme sanction charges and the cost of carrying out the calculation.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint is about the Trustees decision not to carry out a new calculation and is unhappy with its rationale on why it would not pay him a further Pension Commencement Lump Sum (**PCLS**).

Background information, including submissions from the parties

4. The Scheme was initially set up in 1967. From 31 October 2005, it was understood:
 - that the link between members' pensionable service and pensionable salary had been broken;
 - from 1 November 2005, no further benefits could be accrued in the Scheme;
 - the benefits accrued prior by the active members became deferred;
 - those members would receive a statutory revaluation in accordance with legislation and Scheme rules until such time when the member drew their benefits.
5. In May 2011, the Administrator took over the administration of the Scheme (and remains the administrator to date). It began a review of the Scheme's benefit basis

and discovered a number of issues which were considered by the Scheme's new legal advisers. The Trustees also sought Counsel's opinion for clarification.

6. In December 2012, while the review was ongoing, Mr E requested early retirement and was granted an actuarially reduced early retirement pension. Mr E had the following options:
 - Option 1 - a full pension of £6,713.76 per annum; or
 - Option 2 - a PCLS of £35,491.55 with a reduced pension of £5,323.68 per annum.
7. Mr E opted for the latter and his benefits were put into payment.
8. The review concluded in March 2014, when it transpired the amendment deed executed in 2005, had not frozen members' pensionable salaries as at 31 October 2005, when their benefits became deferred. As a result, the link to final pensionable salary had to be maintained until the members actually left service.
9. In a letter from the Administrator in May 2015, Mr E was told the benefits he had been quoted in December 2012 were understated. A breakdown of his revised benefits was provided, and he was informed that the increase to his pension would be made at the end of May 2015, and that he was due a back payment of £9,393.30 gross.
10. Mr E asked for details about what his entire pension benefits would have been had the calculation been done correctly in December 2012, in particular his PCLS.
11. The Administrator did not provide these details because of its understanding of HM Revenue & Customs (**HMRC**) guidelines relating to the payment of PCLS, and said:

“HMRC Pensions Tax legislation only allows for Pension Commencement Lump Sums to be paid within an 18 month period of your date of retirement starting 6 months before and ending 12 months after.

Unfortunately, the only option available to you under the Scheme is to continue to receive your monthly pension”.
12. In the combined first and second stage decisions under the internal dispute resolution procedure, the Administrator also highlighted that:

“...any variation to the Trustees' original decision to enable you to take a lump sum would result in the imposition of a tax charge on you equal to 40% of the lump sum, and also a tax charge on the Trustees. The calculation you have requested would incur a fee and, as a tax free cash sum cannot be paid, would not be appropriate”.
13. The Trustees recognised that Mr E would have suffered some inconvenience as a result of the error so they made a goodwill payment of £500 to him.

14. Because Mr E remained unhappy with their response, he referred the matter to our office.

Adjudicator's Opinion

15. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by the Administrator and the Trustees. The Adjudicator's findings are summarised briefly below:
- whilst the Administrator took steps to recalculate and pay a revised pension to Mr E, including all arrears since December 2012, there was no revision of the PCLS, the Administrator says an additional PCLS payment would be treated as an unauthorised payment, but that does not mean Mr E should be denied the opportunity to benefit from the correct PCLS he was entitled to, because of the Trustees' failure to correctly interpret the Scheme rules; and
 - the redress paid by the Trustees did not go far enough to put Mr E back into the correct position he should have been in had the mistake not occurred. It is not sufficient to cite factors of costs and tax charges as reasons for not paying the additional PCLS.
16. To put matters right, the Adjudicator recommended the following action:
- the Administrator, on behalf of the Trustees should calculate the additional PCLS due.
 - the cost of the re-calculation should be covered by the Trustees.
 - the Administrator should provide a copy of the calculation to Mr E setting out the correct position, confirming the additional PCLS due, and a further breakdown of any overpayments that may have occurred since May 2015. The Administrator should reach a suitable arrangement with Mr E to offset any pension overpayments against the PCLS.
 - all future tax charges applicable to Mr E personally and any Scheme charges should be paid by the Trustees.
17. The Trustees and the Administrator did not accept the Adjudicator's Opinion. In a joint submission, they summarised their disagreement:
- The Trustees disagree with the suggestion that it is their opinion that HMRC pension legislation precludes the payment of an additional lump sum 12 months after retirement. It is pension's legislation that actually states this, in particular Paragraphs 1 – 3 Schedule 29 of the Finance Act 2004.
 - The Finance Act 2002 says a lump sum must be paid 6 months before and ending 12 months after member becomes entitled to it. Mr E retired in 2012;

therefore any additional payment made now would be out of time and subject to additional tax charges.

- The Scheme rules in relation to unauthorised payments specifically state they do not confer a right to an unauthorised payment on any party.
 - The Trustees believe they have acted diligently in correcting Mr E's pension benefits. Instead of paying additional cash they have paid the equivalent as a pension.
 - In order to comply with Pensions legislation and the Scheme rules, the Trustees would not be prepared to make an unauthorised payment without the formal written permission of HMRC.
 - The Trustees are awaiting advice from HMRC in relation to this matter. Pending HMRC's response, the Trustees have requested the Administrator to carry out the calculation and write to Mr E and ask him to provide them with an indication of his intentions.
 - Neither the Trustees nor the Administrator agree that all future tax charges applicable to Mr E personally should be paid by the Trustees.
 - The Trustees have a duty to treat all scheme members fairly and equally. If the Trustees paid for one member's personal tax liability as suggested by the Adjudicator it would be inequitable and would have a detrimental effect on the benefits of other members. In doing so it would have an impact on the funding position of the Scheme which is currently in deficit.
 - The Trustees are of the opinion that written explanations at the time of the benefit recalculation could have been clearer. They do not expect Mr E to have understood the complexities of pensions. However, they do not consider that because of this he is entitled to benefits which fall outside standard pensions practice, pension's legislation and the Scheme rules or which would give him benefits greater than those provided to other members of the Scheme.
18. The Administrator wrote to Mr E with a recalculation of revised benefits. The Trustees also received a response from HMRC in relation to the query it raised. HMRC confirmed the Trustees understanding. The change in the interpretation of the Rules had given them the choice of treating the change as either a new entitlement or a continuation of an existing entitlement, but that if either payment was made after 12 months after the original pension entitlement that it would be treated as an unauthorised payment.
19. After careful consideration of the joint submissions made, I do not feel those comments change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Trustees and the Administrator for completeness.

Ombudsman's decision

20. In order to determine this complaint, I must consider whether the original mistake and subsequent decision made by the Trustees and the Administrator amount to maladministration. And, whether that maladministration has caused Mr E a financial or non-financial loss.
21. The review of the Scheme's benefit basis in 2011 reconsidered the interpretation on which member's benefits were being calculated after it had been thought the salary link between member's pensionable service and pensionable salary had been broken. The Trustees have confirmed they sought Counsel's legal opinion on clarifying a number of issues in respect of that understanding. At the end of that review in March 2014, it came to light that the salary link to a member's final pensionable salary had to be maintained until the member actually retired.
22. Mr E retired and took benefits from the Scheme in 2012. In my view, the calculation of his benefits at that time were incorrect and he was provided with lower benefits compared to those in which he was actually entitled to receive under the Trust Deed and Rules of the Scheme. That was an act of maladministration by the Trustees though I acknowledge because the review was only completed in 2014, it could not have been known sooner that Mr E had been paid understated benefits in 2012.
23. The lower benefits paid to Mr E means he has been financially disadvantaged as a result of the maladministration, although I do accept the Trustees recognised the mistake and tried to put matters right in May 2015. Therefore my decision will focus on what the Trustees need to now do to fully remedy the injustice suffered by Mr E in order that he can be put back into the correct position and make an informed decision.
24. The Trustees feel they have acted diligently and treated Mr E fairly by paying him the PCLS difference by way of an equivalent (higher) pension rather than paying an additional PCLS and reduced annual pension. But that is only a partial remedy in my opinion.
25. Mr E should be given the opportunity to fully reconsider his early retirement options as if they had been correctly calculated at the time of his retirement in December 2012. Because Mr E elected the PCLS with a reduced annual pension, it seems reasonable to conclude that if presented with the correct information, he would have elected option 2 or a higher PCLS than he did, had the benefits been calculated correctly in 2012.
26. I note the Trustees disagree they ought to pay for any personal tax liabilities applicable to Mr E as this would be inequitable to other scheme members and the ongoing funding position of the Scheme. However, in my opinion, the circumstances of this complaint have arisen from the fundamental misunderstanding of the salary link dating back to 2005, which ultimately impacted the benefits Mr E was awarded in 2012. It is, in my view, unreasonable of the Trustees to just say Mr E should pay a tax

liability when the mistake was directly caused by the Trustees misinterpretation of the Scheme rules in which they expect Mr E to abide by.

27. The Trustees are also of the view that the proposed remedy goes against pension's legislation, the Scheme Rules and general pensions practice if Mr E is paid a further PCLS outside of the recognised time limits. However, my decision is based on whether Mr E has been financially disadvantaged as a result of the Trustees or the Administrator's maladministration, which in this case I believe he has, and it is only correct that matters are put right and Mr E is given the opportunity to re-elect his retirement options.
28. I draw the Trustees attention to Section 241(2) of the Finance Act 2004, which states:
- “(2) An unauthorised payment is exempt from being scheme chargeable if -*
- (c) it is being made to comply with an order of a court or a person or body with power to order the making of the payment;”*

It is also likely that the following provision may apply:

“(d) it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so)”.

29. There is, as I understand it, actually no evidence HMRC will impose a penal tax charge on the Scheme or Mr E. If the circumstances are explained to HMRC, it is entirely possible HMRC will make a concession to allow for the fact a genuine mistake occurred in calculating the original PCLS in 2012 given the above provisions in the Finance Act 2004.
30. Therefore, I uphold Mr E's complaint.

Directions

31. Within 21 days of the date of the decision, the Administrator, on behalf of the Trustees should carry out a calculation of what additional PCLS and the accrued interest is due to Mr E. The cost of the re-calculation should be met by the Trustees.
32. The Administrator is to provide a copy of the calculation to Mr E setting out the true position and confirming any additional amounts due. If Mr E is happy to proceed on the basis set out in that re-calculation, then the payment relating to the additional PCLS should be arranged and paid to him within 14 days of receiving his written agreement, together with simple interest at the rate quoted by the reference banks on that sum from December 2012 to the date of payment, inclusive.
33. In the event that Mr E's revised final pension will need to be re-calculated, the Administrator should provide him with a further breakdown of any overpayments that have occurred since May 2015. Usually, overpayments can be paid back over the same period of time in which they occurred. Alternatively, any overpayment can be

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offset against any additional PCLS taken. The Administrator should reach a mutually agreeable arrangement with Mr E within 21 days of him learning of the revised pension.

34. If any future tax charges are applicable to Mr E personally, resulting from the maladministration I have identified above, those charges must be paid by the Trustees within 21 days of HMRC writing to Mr E, or the Administrators of the Scheme confirming that they are due.
35. Finally, I make no direction for any distress and inconvenience suffered by Mr E because the £500 awarded to Mr E was reasonable in my opinion.

Anthony Arter

Pensions Ombudsman
23 November 2016