

Ombudsman's Determination

Applicant	Mr S
Scheme	Invensys Pension Scheme (the Scheme)
Respondent	Invensys Pension Trustee Limited (the Trustee)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Trustee.

Complaint summary

2. Mr S' complaint concerns a request made by the Trustee that he repays part of the retirement benefits that were paid to him in error.

Background information, including submissions from the parties and timeline of events

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mr S has appointed Mr E as his representative.
5. From 1 November 1974 to 30 October 1981, Mr S was an active member of the APV Pension Scheme (**the APV Scheme**).
6. In 1993, Mr S' benefits in the APV Scheme were transferred to the Co-operative Insurance Society, which has since rebranded as Royal London. He was left with no benefits in the APV Scheme.
7. On 6 April 2000, the Scheme was created following the merger of the Siebe Pension Scheme, which included the former APV Scheme members, with the BTR Group Pension Scheme. The Scheme's administrators were referred to as IPS in correspondence. The information inherited from the previous administrators showed Mr S as having deferred benefits in the Siebe section of the Scheme.

8. On 12 July 2011, IPS tried to make contact with Mr S concerning the payment of his benefits from the Scheme. A subsequent attempt to contact him was made on 23 September 2011.
9. In October 2011, Mr S reached his normal retirement age under the Scheme of 65.
10. On 23 November 2011, IPS wrote to Mr S via the Department for Work and Pensions letter forwarding service to notify him that he may be due benefits from the Scheme. It asked him to complete and return a tear off slip to find out more information. He returned the slip on 26 January 2012.
11. In January 2012, Mr S says he queried his entitlement to these benefits during a telephone call with IPS. He says that this conversation convinced him that he was entitled to the benefits.
12. On 31 January 2012, IPS notified Mr S that he was entitled to payment of his benefits from the Scheme backdated to October 2011. It quoted an annual pension of £4,587.99 or an alternative option of a tax-free lump sum of £20,953 and an annual pension of £3,142.96. It asked him to complete and return an enclosed 'Pension Payment' form (**the Form**).
13. On 8 February 2012, Mr S claimed the benefits by completing and signing the Form.
14. On 20 February 2012, IPS acknowledged receipt of the Form. Mr S selected a tax-free lump sum of £20,953 and an annual pension of £3,142.96. These benefits were then put into payment.
15. On 16 February 2018, PSAL Pensions Administration (**PSAL**), the Scheme's administrators at the time, wrote to Mr S. It said:-
 - It had undertaken a project to reconcile the Scheme's guaranteed minimum pension (**GMP**) records with those of HM Revenue & Customs (**HMRC**).
 - Mr S was receiving a pension from the Scheme, including benefits from his contracted-out membership between 6 April 1978 and 30 October 1981.
 - HMRC's records indicated that this pension may have been transferred to the Co-operative Insurance Society. This may mean that the pension he was being paid from the Scheme was a duplicate pension.
 - It asked Mr S to sign an authority form so that it could approach Royal London to check this further.
16. On 14 March 2018, Royal London wrote to PSAL to confirm that Mr S held a pension with the APV Scheme which was transferred to the Co-operative Insurance Society on 16 December 1993. It confirmed that a GMP covering the period 1 November 1974 [sic] to 30 October 1981 was included in the transfer. It advised that it had been paying Mr S his pension since 4 October 2011.
17. On 2 May 2018, PSAL wrote to Mr S. It said:-

- It had received confirmation from Royal London that his benefits in the APV Scheme had been transferred out in 1993.
- He was not entitled to the pension he was receiving from the Scheme and the payments would stop after three months, the last payment would be on 1 August 2018.
- As at May 2018, he had been overpaid benefits amounting to £44,088.57 (gross).
- The Trustee had decided to only recover the overpayments made in the last six years which amounted to £21,045.30 (gross). This reduced the net overpayment to £16,838.50. It would need to review this figure to include the extra three months of pension payments that it would pay him.

18. On 8 May 2018, Mr S wrote to PSAL. He said:-

- He had taken his retirement benefits from the Scheme in good faith, in accordance with the figures provided to him at the time by IPS.
- When he was contacted by IPS in January 2012, with details of additional retirement benefits, he initially thought it was a scam. He was assured that this was not the case and he was given a list of companies and asked if he had ever worked for any of them. APV was on the list.
- He was told he was entitled to additional benefits from employer contributions that had been made to the APV Scheme, which had not been taken into account in earlier quotations.
- He asked for the information he had been provided with by IPS to be checked; it was checked at the time. He then accepted the benefits in good faith.
- He accepts no responsibility for the mistake that had been made. There was no possibility of him paying back the sum the Trustee had requested, as he and his wife had fully retired and were living on their State and workplace pensions.

19. On 22 May 2018, PSAL responded to Mr S and apologised for any distress its letter of 2 May 2018 may have caused him. It advised that the information it held in 2012 suggested he was due a pension. It now knew that this was not the case. It advised that it was responsible for recovering the monies owed and the Trustee was keen to discuss repayment options with him. However, it may have to consider further action, including the possibility of legal proceedings.

20. On 25 June 2018, Mr S acknowledged PSAL's letter of 22 May 2018 and a subsequent follow up letter it had sent requesting a response. He said he would not enter into any further correspondence concerning the matter.

21. On 30 July 2018, DWF Law (**DWF**), acting on behalf of the Trustee, wrote to Mr S concerning the overpayment. It asked for his response within 30 days.

22. On 1 August 2018, PSAL notified Mr S that the net overpayment had been recalculated and now amounted to £17,611.69. It said that this was due to him having received three further payments of pension. It confirmed that no further payments would be made. It advised that DWF would be contacting him.
23. On 16 August 2018, Mr S wrote to DWF setting out the facts of the case and enclosed its reply form, in which he indicated that he disputed the debt was recoverable. He maintained that any claim for repayment should be made against those at fault for the error.
24. On 18 September 2018, DWF wrote to Mr S. It said it was waiting on the Trustee's instructions as he had disputed the debt.
25. In October 2018, PSAL became Xafinity Punter Southall Administration (**XPS**).
26. On 2 October 2018, XPS responded to Mr S' letter of 16 August 2018:-
 - It enclosed documentation that he had requested and advised that it could not provide the information it had received from HMRC, as it also related to other Scheme members.
 - It advised that Mr S had the option of having his case reviewed by the Trustee via the Scheme's Internal Dispute Resolution Procedure (**IDRP**). If he did this, then his case could be considered under the second stage of the IDRP.
 - It also advised that Mr S could include details of his financial situation and the impact recovery of the overpayment would have on him.
27. On 12 October 2018, Mr S wrote to XPS. He said:-
 - He wanted to see all the correspondence relating to his case. He also wanted to know the names and positions of those involved and details of other overpayments the Trustee had made.
 - It was still not clear to him why he had been offered the additional benefits when he was not entitled to them.
 - He wanted a copy of the evidence HMRC had provided to the Trustee that confirmed that it was no longer responsible for paying his benefits.
 - He was concerned about the quality of the administration of the Scheme over the years. He was also concerned that the Trustee may have made mistakes in connection with the administration of the Scheme or acted in a negligent manner. He said that this made it impossible for him to use the Scheme's IDRP.
28. Between 24 October 2018 and 7 May 2019, there were further communications between Mr S and XPS. These are summarised in paragraphs 32 and 33 below.
29. On 10 May 2019, Mr S sent XPS a completed IDRP form with supporting documentation.

30. On 12 June 2019, the Scheme's Pensions Governance Committee (**the PGC**) provided its response to Mr S' complaint which it had considered under stage two of the IDR. The PGC did not uphold Mr S' complaint. In summary, it said:-
- No recording was available of the telephone call that Mr S maintained he made to IPS in 2012.
 - It apologised for the error and acknowledged the distress and inconvenience that had been caused to Mr S.
 - Royal London had confirmed that it was paying Mr S a pension in respect of his membership of the APV Scheme. Details of the transfer of Mr S' benefits in the APV Scheme had not been included in his file held by XPS. So, his records were incomplete when it was amalgamated into the Scheme in 2000.
 - It had to ensure that all benefits were paid in accordance with the rules that governed the Scheme (**the Rules**). It was obliged to take steps to seek recovery of any overpaid amounts and was seeking repayment of the overpayments made in the last six years.
 - It was willing to consider repayment by instalments over a six-year period. If that was not affordable, Mr S could make a reasonable proposal for the Trustee to consider. Alternatively, a charge could be placed on Mr S' property. This would mean that the sum it was seeking to recover would be repaid in the event of the sale of the property.
31. On 6 August 2019, Mr S brought his complaint to The Pensions Ombudsman (**TPO**) and on 21 November 2019, the Trustee provided TPO with its formal response to Mr S' complaint.
32. Mr S made the following additional submissions:-
- The question remained as to why the problem occurred. XPS' response, that the reason could not be determined due to the passage of time, was not acceptable. Furthermore, he had not been told who was responsible for the error and what action had been taken against them. Those responsible for the error should be held liable for the repayment that he was being asked to make. Alternatively, the debt should be written off as it was ultimately the result of the Trustee's error.
 - He would like details of other Scheme members who may have experienced the same issue.
 - It was inconceivable that, on receiving IPS' letters concerning his entitlement to benefits in the Scheme, he would not have telephoned it to check what he was being told was correct.
 - He did not provide evidence of the financial hardship the repayment would cause him as he did not consider that he was responsible for the overpayment.

- He considered the correspondence from DWF to have been threatening and unpleasant.
- He acknowledged that he had transferred his benefits to the Co-operative Insurance Society in accordance with guidance that he had received from his employer and union at the time.

33. The Trustee and XPS made the following additional submissions:-

- No individual was responsible for the error. XPS had acted on the information available to it and had provided Mr S with all the information it held on his case. It noted that he was not satisfied with XPS' explanation as to why the overpayment had occurred. However, it had confirmed to Mr S that it could provide no further explanation.
- The Trustee was required to act in accordance with the General Data Protection Regulations (**the GDPR**). It could not disclose any information to Mr S that would be in breach of the GDPR.
- The Trustee held no evidence to confirm that a telephone call took place between Mr S and IPS in 2012.

Adjudicator's Opinion

34. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee.

35. The Adjudicator's findings are summarised below:-

- The Trustee confirmed that retirement benefits were paid to Mr S that he was not entitled to, so there was no dispute that an error had occurred.
- Before the Adjudicator considered whether Mr S had any other legal defences available to the recovery of the overpaid benefits, he considered whether the Limitation Act 1980 (**the Act**) applied in this case. The Act can prevent the recovery of an overpayment made more than six years before the claimant, in this case the Trustee, took formal action to recover it. In the case of Mr S, the Trustee was only looking to reclaim overpayments made in the last six years. So, the Act did not provide Mr S with a defence to recovery.
- The most common defence against recovery of an overpayment is referred to as "change of position". That is, the recipient has changed their position such that it would be unjust to require them to repay the overpayment; either in whole or in part. Change of position is a defence to a claim in unjust enrichment. The recipient must be able to show on the balance of probabilities that:
 - their circumstances have changed detrimentally;
 - the change of circumstances was caused by receipt of the overpayment; and

- they are not disqualified from relying on the defence.

- The Adjudicator explained that a change of position defence is not available to an individual who did not act in good faith when changing their position.

36. The Adjudicator went on to consider the good faith test in the context of Mr S' case and made the following comments:-

- To meet the good faith test, Mr S must not have had actual knowledge of the overpayment. The good faith test would not be considered as having been met if the recipient of the overpaid benefits had doubts over their entitlement to those benefits. In other words, the recipient was aware that they might not be entitled to a pension, but then failed to make enquiries of the scheme before spending the money (the Adjudicator explained that this is often referred to as having "Nelsonian knowledge"). The Adjudicator also explained that this includes situations where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of an overpayment cannot turn a blind eye.
- IPS contacted Mr S in November 2011 and January 2012, concerning the benefits it believed he was entitled to from the Scheme. Mr S explained that he telephoned IPS to query his entitlement. He said that, during this telephone call, IPS convinced him that he was entitled to the benefits.
- Unfortunately, no record of this telephone conversation was held by the Trustee. So, the Adjudicator said he could not be sure exactly what was said by Mr S and also what responses were provided by IPS. The Adjudicator took the view that there was insufficient evidence to confirm that the telephone call took place and, if it did, whether the question of Mr S' entitlement to benefits from the Scheme was adequately addressed at the time.
- The Adjudicator noted Mr S acknowledged his benefits in the APV Scheme had been transferred to the Co-operative Insurance Society in 1993. Furthermore, Royal London confirmed that Mr S had been in receipt of a pension in respect of his transferred in benefits since 4 October 2011.
- The fact that Mr S maintained that he telephoned IPS at the time, confirmed that he had concerns that he may not be entitled to the benefits he was being offered. Consequently, he would not have been expecting to be told that he had benefits in the Scheme.
- Having considered the evidence, the Adjudicator's view was that Mr S' intentions, in claiming the benefits from the Scheme, were honest. However, in the Adjudicator's opinion, Mr S knew that he may not be entitled to those benefits. So, the good faith test was not satisfied and Mr S did not have a change of position defence to the recovery of any part of the overpayment.

37. The Adjudicator then considered other possible defences and any non-financial injustice that Mr S may have suffered:-

- The Adjudicator noted that there were three requirements that needed to be satisfied to establish estoppel by representation; namely:
 - a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act;
 - an act on the part of the claimant which was reasonably taken in reliance on the representation or promise; and
 - after the act has been taken, the claimant must be able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
- The Adjudicator did not consider that Mr S' acceptance of the benefits he was subsequently paid by the Scheme was reasonable in the circumstances. Mr S had the requisite information to know that he might not be entitled to these benefits. Similarly, because of the knowledge Mr S had at the time, it could not be argued that there was a common assumption between the parties that Mr S should receive the benefits he was receiving in error. The Adjudicator said that this was necessary to establish a defence of estoppel by convention. Consequently, the Adjudicator was not of the opinion that Mr S had a valid estoppel defence.
- The Adjudicator said he had not been able to identify the necessary elements for a contract to exist. In particular, he could not see that there was any intention on the part of the Trustee or XPS, to enter into a separate legal relationship with Mr S beyond any entitlement that they considered he may have had under the Rules.
- In the Adjudicator's view, Mr S did not have any defences available to the recovery of the overpayment of £17,611.69. The fact that IPS paid him benefits to which he was not entitled was nonetheless very unfortunate. The Trustee's request for the return of the overpayment would have caused Mr S distress and worry.
- However, the Adjudicator was of the view that Mr S had ample opportunity to make the necessary enquiries to ascertain for certain whether he had an entitlement in the Scheme. In the Adjudicator's opinion, Mr S did not adequately address this at the time. For this reason, the Adjudicator did not consider it appropriate to recommend that the Trustee make a payment for any distress and inconvenience he had suffered.

38. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E provided Mr S' further comments in response to the Opinion. In summary, he said:-

- The Opinion had been written with the benefit of hindsight which was not available to Mr S, or the other parties involved in the events that took place at the time.

- The blame was being apportioned to Mr S for not sufficiently checking that he was entitled to the benefits he was being offered. However, he had checked this during a telephone conversation with IPS and had been advised that he was entitled to the benefits. The fact that no record of this telephone call exists was not surprising given the administrative failings that had taken place. It was inconceivable that he would not have made the telephone call.
- Mr S asked the Trustee for confirmation of how many other members had received benefits in error. He also asked for confirmation of the total amount of benefits paid in error but had not received a response. He said that, if the figures were as high as he believed, this would demonstrate who was responsible for the situation he now found himself in.
- The overpayment has arisen because the administrators of the APV Scheme failed to correctly record the completion of the transfer. Instead of going back to the source of the problem, Mr S was being blamed for the overpayment. The Trustee should have investigated thoroughly how the problem occurred and who was responsible. The overpaid funds should then have been recovered from that party's indemnity insurance. It was unacceptable to say that the reason for the error could not be determined due to the passage of time.
- Mr S questions why it took more than six years for the Trustee to identify that a problem had occurred. He also questions why the Trustee's internal controls and audits failed to pick up the problem earlier.
- Mr S believes he has a defence against the recovery of the overpayment. The Trustee has been negligent in this case. It failed to exercise its duty of care because it did not take remedial action when the mistake was first discovered. The extent of the negligence would be further demonstrated by the many other overpayments the Trustee has made in similar circumstances.
- Mr S noted that no reference had been made in the Opinion to the support he had been given by a former Pensions Minister. He said that she was aware of retired workers who were facing cuts to their pensions after administration records had been compared with those of HMRC.

39. I have considered the additional points raised by Mr E on behalf of Mr S. However, they do not change the outcome; I agree with the Adjudicator's Opinion.

Ombudsman's decision

40. Mr S' complaint concerns an overpayment of pension benefits that the Trustee is seeking to recover.
41. After IPS contacted Mr S in November 2011, concerning his possible entitlement to benefits in the Scheme, Mr S said that he telephoned IPS in January 2012 and queried the position. He maintains that it was inconceivable that he would not have

made this telephone call given that it was not clear to him at the time that he was entitled to the benefits he was being offered. During the telephone call, Mr S says he was reassured that he was entitled to the benefits.

42. I note that the Trustee has no evidence of the telephone conversation Mr S says he had with IPS. This is not surprising given the passage of time. However, I agree with the Adjudicator that there is insufficient evidence to confirm that the telephone call took place and what was actually discussed at the time.
43. I note that Mr S had concerns about his eligibility for benefits in the Scheme but there is no evidence that he made reasonable enquiries before claiming those benefits except the telephone call he insists that he made. Given that he had already begun to draw down the pension from Royal London which commenced on 4 October 2011, it should have been very clear to Mr S that something was wrong and that he could not be entitled to this pension. The good faith test has not been met because Mr S had, at the very minimum, "Nelsonian knowledge" that he may not be entitled to those benefits. I find that Mr S does not have a change of position defence against the recovery of the overpayment. Similarly, the other defences against the recovery of the overpayment do not apply in this case for the reasons explained by the Adjudicator.
44. I note that Mr S has asked for details of the number of pension scheme members who have been impacted by a similar issue.
45. The scope of TPO's investigation is restricted to the facts of Mr S' complaint and whether he has a legal defence to the recovery of the overpayment. I do not have jurisdiction to extend the investigation to other instances where benefits may have been overpaid. Furthermore, I do not agree that obtaining this information would affect the outcome of Mr S' case. The Trustee has already acknowledged that an error occurred when Mr S was offered benefits to which he was not entitled, so there is no doubt in this respect.
46. Mr S has suggested that TPO's investigation should have identified the circumstances that led to the transfer of his benefits not being recorded on the administration records, and who was responsible for this error.
47. Even if it was still possible to obtain this information, I do not agree that it would have an impact on the outcome of Mr S' complaint. Mr S has been paid benefits to which he is not entitled. So, he will be required to repay the overpayment because he has not established a legal defence against recovery.
48. Mr S considers that the Trustee has been negligent in this case. I find that the error made in not correctly recording the transfer of Mr S' benefits to the Co-operative Insurance Society amounts to maladministration.
49. Mr S has questioned why the problem was not picked up earlier and was only identified when a GMP reconciliation exercise was undertaken by the Trustee. I acknowledge that the time taken to identify the error has contributed to the magnitude of the overpayment.

50. While I sympathise with Mr S' position, I do not agree that the Trustee can be held responsible for any distress and inconvenience he has suffered in connection with this matter. Mr S completed the Form to claim benefits from the Scheme without making reasonable enquiries to establish that he was entitled to those benefits. In my view even if he had queried the pension in a telephone call, it should have been obvious that he was not entitled to a second pension from the one he was already receiving.
51. Mr S should now contact the Trustee to discuss a repayment plan in respect of the amount of £17,611.69 that is due to the Scheme.
52. I note that the Trustee is willing to consider repayment by instalments over a six-year period. That is, over the same period over which the part of the overpayment that it is looking to reclaim accrued. The Trustee has advised that, if the recovery period it has proposed is not affordable, Mr S could make a reasonable proposal for the Trustee to consider. It has also advised that a charge could be placed against Mr S' property. This means that the sum it is seeking to recover would be repaid in the event of the sale of the property.
53. It would be reasonable in the circumstances for the Trustee to request further evidence in relation to Mr S' financial position if it considers that it requires this information.
54. I do not uphold Mr S' complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman
2 March 2023