

Ombudsman's Determination

Applicant	Mr Michael Williams
Plan	Hornbuckle Mitchell SIPP (the Plan)
Respondent	Hornbuckle Mitchell Group Ltd (Hornbuckle Mitchell)

Complaint summary

Mr Williams has complained that Hornbuckle Mitchell (the Plan's Administrator) made a number of errors with the administration of his pension which has resulted in unauthorised payments totalling £537,357.08 and a potential additional tax liability for him.

Summary of the Ombudsman's decision and reasons

The complaint should be upheld because Hornbuckle Mitchell did not:

- inform Mr Williams' financial advisor that the second payment made within the same pension year would amount to an unauthorised payment;
- seek clarification before making the second payment;
- carry out reviews for two of Mr Williams' income drawdown arrangements; and
- discover the overpayment earlier.

DETAILED DETERMINATION

Material Facts

1. Mr Williams had three flexible income drawdown arrangements in the Plan which was established by a Trust Deed and is governed by the Rules. The Plan is administered and operated by Hornbuckle Mitchell in accordance with the Terms and Conditions which imposes conditions and restrictions on them.
2. Rule 19 of the Plan Rules deals with income withdrawal from an Income Withdrawal Fund. It states that Hornbuckle Mitchell “shall pay out...to the [member] such amounts and at such times as the [member] may specify”. However, no income payment “shall be made if it would not qualify as income withdrawal” and payments may be subject to “such restrictions as to timing and minimum and maximum amounts...as may be reasonably consider[ed] appropriate”.
3. Section 7 of the Plan’s terms and conditions deals with communications and instructions between Hornbuckle Mitchell and the member. Section 7.1 states that all their “formal communications” will be in writing and that “oral statements...cannot be relied upon unless confirmed by [them] in writing”. Section 7.2 requires instructions about the Plan (from the member or authorised financial advisor) to be in writing and states that the instructions authorise Hornbuckle Mitchell “to rely on, and treat as fully authorised and binding on [the member], any decision or instruction which purports to have been given by [the member] without any further enquiry from [them]...”.
4. Mr Williams’ first arrangement commenced on 24 September 2008, the second and third on 20 July 2009:

Arrangement No.	Pension year start date	Level of income advised at outset	Recalculated income
Arrangement 1	24/09/2008	£537,835.08	£540,156.27
Arrangement 2	20/07/2009	£19,217.29	£19,009.21
Arrangement 3	20/07/2009	£414.23	£414.23

5. Hornbuckle Mitchell have not been able to provide copies of any documents issued at the start of the arrangements which told Mr Williams (or his financial advisor) the date when the pension years started.

6. On 10 February 2009, Hornbuckle Mitchell informed Mr Williams' financial advisor (**the IFA**) that the maximum yearly pension available to Mr Williams was £537,835.08.
7. On 02 March 2009, the IFA emailed Hornbuckle Mitchell:

“Can you pay this income as soon as possible as we need to ensure that it is paid in this tax year. We would also like to take an income payment as early into the next tax year as possible ie early in April for the 2009/2010 tax year. Thank you.”
8. Hornbuckle Mitchell paid Mr Williams £537,835.08 on 10 March 2009 and again on 28 April 2009.
9. On 05 May 2009, Hornbuckle Mitchell emailed the IFA:

“I can confirm that this year[’s] pension was paid on 28/04/09, the amount was £537,835.08.”
10. As both payments occurred within the same pension year (24/08 – 23/09) and together exceeded the recalculated income for that year (£540,156.27), this resulted in an overpayment of £535,513.89. Nothing more happened at that point.
11. Mr Williams received his annual income from Arrangements 2 and 3 together and the sum of £19,631.52 was paid annually from 2009 to 2013.
12. In 2013, when Hornbuckle Mitchell conducted a review of the drawdown payments made to Mr Williams the initial overpayment from Arrangement 1 was identified. In addition, it was identified that the 5 payments from Arrangement 2 and 3 had resulted in a further overpayment of £1,040.04 and also that there had been a Pension Commencement Lump Sum overpayment of £802.77.
13. Hornbuckle Mitchell wrote to the IFA on 8 October 2013 and informed him that an overpayment of £535,978.88 in 2009 had been discovered – in relation to Arrangement 1 only. (This amount was based on an incorrect recalculated maximum income of £539,691.18.) The letter stated that Hornbuckle Mitchell had acted on the instructions of the IFA in his email of 02 March 2009.
14. Hornbuckle Mitchell requested that the full amount be repaid with immediate effect or the overpayment would be treated as an unauthorised payment which would have tax liabilities and result in scheme sanctions.

15. The IFA wrote to Hornbuckle Mitchell on 6 November 2013, stating that he had received verbal confirmation from Hornbuckle Mitchell that it was possible for Mr Williams to take his income payment for the next pension year at the beginning of tax year 2009/10. The IFA said he had relied on Hornbuckle Mitchell to calculate and confirm the level of income Mr Williams could take and when.
16. Hornbuckle Mitchell disputed this maintaining that they had followed the IFA's March 2009 instructions. A different amount was also given for the total overpayment (£536,106.76).
17. In an email to Hornbuckle Mitchell on 21 January 2014, the IFA asked if it was "possible to get HMRC to offset the tax payable against that already paid". He also suggested that it may be possible to have the scheme sanction charge waived "under certain circumstances". He asked for details of the tax office that deals with the Plan and said he would contact them to "ask hypothetical questions to try and get a solution" to the overpayment. It is not clear whether Hornbuckle Mitchell responded.
18. The IFA then wrote to Hornbuckle Mitchell on 14 February 2014. He stated that they had made an unauthorised payment which was not an income payment and that they had not carried out their fiduciary duty to ensure that the payment was being made correctly. The IFA indicated that Mr Williams was willing to reach an agreement to repay the overpayment. He further stated that Mr Williams would however be disadvantaged as he would be paying tax at a rate of 45% when the original amount was taxed at 40%.
19. Hornbuckle Mitchell sent their final response to the IFA on 18 March 2014. They stated that incorrect income levels were provided at the outset and that the overpayments and missed reviews were identified following their business decision to review all drawdown payment transactions in 2013. Hornbuckle Mitchell apologised for this but maintained that they were not wholly responsible for the overpayment and that Mr Williams should not be compensated.
20. Mr Williams contacted HM Revenue & Customs (**HMRC**) following the notification of the overpayment. He has re-opened his self-assessment tax returns for the tax year 2009/10 and is awaiting HMRC's notification of his final tax liability.

21. To date he has repaid £331,000 of the overpaid amount and he is in the process of repaying the balance (£206,357.08) to Hornbuckle Mitchell.

Summary of Mr Williams' position as presented by him, his representative, Mr Woodford and his IFA

22. Mr Williams asserts that Hornbuckle Mitchell made a number of errors with the administration of his pension:

- he requested an 'income' payment in March 2009 and asked whether it would be possible to receive the next 'income' payment in April 2009, Hornbuckle Mitchell however made an unauthorised payment;
- they did not check that the April 2009 payment was being made correctly;
- it then took Hornbuckle Mitchell five years to discover their error;
- the effect of their actions has resulted in an additional tax charge (which is not yet known) and associated professional costs for re-opening his tax returns for the five year period and dealing with this matter, as set out below:
 - tax consultancy fees (January 2014 to 10 January 2015) of £10,434 (including VAT);
 - financial advisor fees (January 2014 to 9 January 2015) of £12,375 (including VAT);
 - compliance accountancy fees: £257.11 (including VAT);

23. Mr Woodford says:

- Hornbuckle Mitchell have been aggressive in their attempts to recover the overpayment;
- they did not act swiftly to resolve the matter and initially denied that they were at fault;
- further costs have been incurred since January 2015 because HMRC have been seemingly unresponsive in Mr Williams' case and it is still outstanding;
- Mr Williams should be reimbursed for the professional costs incurred to date and the future costs that will be incurred until this matter is brought to a conclusion;

- Mr Williams should be substantially compensated for his time and effort and for Hornbuckle Mitchell to be liable for the additional tax he will have to pay;
- Hornbuckle Mitchell's current position is a complete turnaround and the solution they are now suggesting was proposed by the IFA at the outset, but at the time they denied it was allowable in Mr Williams' case;
- Mr Williams' professional advisors have carried out a lot of work in trying to resolve this matter so it is unacceptable that Hornbuckle Mitchell are now deeming the payment to be authorised as all that work is now a waste of time.

24. The IFA says his fees were not ordinarily incurred in the annual dealings with Mr Williams' pension.

Summary of Hornbuckle Mitchell's position

25. Hornbuckle Mitchell maintain that they followed the IFA's March 2009 instruction to make a further payment as soon as possible after the tax year end.
26. Although a review of Mr Williams' file in 2013 identified overpayments and missed reviews, the IFA was made aware in 2010 that the reviews were due in 2013. He should have therefore been aware that reviews were due.
27. Hornbuckle Mitchell have apologised for the overpayment and the fact that it was not identified sooner but assert that they are not wholly responsible. They do not agree that Mr Williams should be compensated for the error as "it is reasonable to expect Mr Williams to have received the benefit and/or enjoyment from the extra £537,835.08 over a prolonged period of time".
28. More recently, Hornbuckle Mitchell have said that after talking legal advice they are of the opinion that the Registered Pension Scheme (Authorised Payments) Regulations 2009 (**the 2009 Regulations**), are applicable to this situation. They consider that the combined effect of Regulations 4 and 13 make the accidental April 2009 overpayment of pension income an "authorised" payment for the tax year 2009/10 because at the time of making the payment they believed that Mr Williams was entitled to it.

29. Further, Hornbuckle Mitchell have said that “there is nothing to be gained from recovering the overpayment” as Mr Williams is the sole beneficiary of the Plan. They have suggested that given the 2009 Regulations, Mr Williams could, therefore, retain the balance of £206,257.08 rather than repay it. This amount would therefore continue to be subject to the tax applicable in 2009/10 which he has already paid. Hornbuckle Mitchell considers that this course of action should result in there being no additional tax liability for which they could be liable.
30. If Mr Williams decides to withdraw the £331,000 he has previously repaid and pays tax at a rate of 45%, they will agree to pay the difference between the tax he would have paid in 2009/10 and what he will pay for the current tax year, 2015/16, to a maximum of 5% on the repaid amount.
31. After being informed of the overpayment, Mr Williams’ IFA did not inform them that the overpayment could be treated as an authorised payment under the 2009 Regulations.

Conclusions

32. All pension arrangements utilising drawdown must monitor the income taken out over the ‘pension year’ to ensure that the maximum withdrawal limits in the relevant twelve-month period are not exceeded. Indeed, the Plan Rules specifically allow Hornbuckle Mitchell to impose restrictions on the timing of payments and the maximum amount allowed.
33. After being informed of the maximum income that could be taken in the pension year commencing 24 September 2008, the IFA’s email of 2 March 2009, instructed Hornbuckle Mitchell to make a payment in March 2009 from Arrangement 1. This email then said that Mr Williams would like to take an income payment as early into the next tax year as possible. Hornbuckle Mitchell have said that this amounted to a further instruction. In accordance with section 7.2 of the Terms and conditions above, it would appear that they did not need to clarify the position with the IFA. However, given the close proximity between the maximum being set in February 2009, the first amount being paid in March 2009 closely followed by a second payment which also equalled the maximum in April 2009, Hornbuckle Mitchell ought properly to have informed the IFA that to make a further payment in April 2009 before the next pension year commenced would have penal tax implications.

34. Hornbuckle Mitchell maintain that they simply followed the IFA's March 2009 instruction. Despite the provision of section 7.2 of the terms and conditions, I do not think that confirming the position in this respect placed a further obligation on Hornbuckle Mitchell than that which would have been reasonably expected under Rule 19. Therefore, Hornbuckle Mitchell's failure before making the April 2009 payment to inform the IFA that the maximum income allowable for that year had already been met amounts to maladministration. Although the IFA's email could have been viewed as an instruction to make the April 2009 payment, given the circumstances, Hornbuckle Mitchell should have sought clarification before making the payment to ensure that Mr Williams understood the consequences of such action.
35. The overpayments from Arrangements 1 and 2 should have been identified sooner. Hornbuckle Mitchell concede that they missed reviews for both Arrangements. Again this amounts to maladministration. Had the overpayments been identified shortly after they occurred, in particular the April 2009 payment from Arrangement 1, it is highly likely that the matter could have been resolved without the possibility of a future tax charge for Mr Williams.
36. In consequence I find that Hornbuckle Mitchell are liable to cover any additional tax liability actually incurred by Mr Williams as a result of the overpayments.
37. Hornbuckle Mitchell have suggested that the April 2009 payment can now be classed as an authorised payment in light of their recent interpretation of the 2009 Regulations. I make no finding in relation to whether the 2009 Regulations are applicable to this situation. This is a matter for HMRC to determine.
38. Mr Williams has necessarily employed the services of specialists since being notified of the overpayments. He has incurred professional costs that he would not otherwise have incurred but for Hornbuckle Mitchell's maladministration. It is reasonable for Mr Williams to be reimbursed these costs. In view of the fact that this matter is ongoing, the appropriate direction is made below.
39. Mr Williams' Plan is self-invested and he was using the services of the IFA to assist him in the general running of the Plan. However, I find the IFA's costs in this matter were for services beyond that and incurred in his attempt to resolve the matter for Mr Williams.

40. It is likely that the professional costs would not have reached the current levels had Hornbuckle Mitchell been more agreeable to resolve the issue with Mr Williams' IFA at the outset. I find that reasonable costs incurred by Mr Williams for the services of the IFA are also recoverable.
41. Mr Williams has incurred fees with Hornbuckle Mitchell for services which have been woefully inadequate. A number of errors occurred with their administration of his Plan and were not discovered in a reasonable time. Mr Williams however continued to pay their fees during this period. I therefore find that there should be some recompense in respect of those fees and I consider £1,000 to be suitable in the circumstances.
42. Inevitably this whole matter has caused Mr Williams distress and inconvenience. Although Mr Williams believes that he should receive a substantial amount for this, my awards are not designed to be punitive. In recognition of the distress and inconvenience caused, I consider £300 is a suitable amount for Hornbuckle Mitchell to pay. This payment is separate and distinct from the paragraph above (which relates to a specific financial injustice). It is an award recognising the non-financial injustice Mr Williams has suffered as a direct result of Hornbuckle Mitchell's maladministration.

Directions

43. Within 21 days of the date of this Determination, Hornbuckle Mitchell are to pay Mr Williams £300 for distress and inconvenience caused.
44. Within 21 days of being provided with evidence of the amount, Hornbuckle Mitchell are to pay Mr Williams' tax consultancy fees, the fees of Parkland Financial Advisors, and compliance accountancy fees, reasonably incurred in relation to this matter (from January 2014 to the date of conclusion) . In the event of an unavoidable dispute concerning the fee amount, this should be enforced through the County Court as this matter cannot be referred back to me.
45. Within 21 days of the date of this Determination, Hornbuckle Mitchell are to credit Mr Williams' fund account with £1,000 in respect of his fees.

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46. Once notified and provided with evidence of the amount, Hornbuckle Mitchell are to pay Mr Williams' additional tax liability (if any) to HMRC within the timeframe prescribed by HMRC.

Anthony Arter
Pensions Ombudsman

22 July 2015