PO-6585

Ombudsman's Determination

Applicant	Mr R
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondents	Wetton Cleaning Services Limited (**Wetton**), Capita Employee Benefits Limited (**Capita**)

Complaint Summary

1. Mr R has complained that the overtime pay he received from Wetton should have been included in his pensionable pay for the purpose of calculating his retirement benefits under the Scheme, and that Wetton and Capita caused delays in providing relevant information.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be partly upheld against Wetton because:

   - Mr R's overtime work was not pensionable, but Wetton deducted Mr R's pension contributions from his pay incorrectly, calculating them by reference to his gross pay; and
   - Wetton unreasonably delayed the provision of information that Capita needed in order to issue Mr R's benefit statements .

3. The complaint against Capita should not be upheld because Capita had to rely on Wetton to provide it with accurate information about Mr R's pensionable pay.

Detailed Determination

Material facts

4. Mr R originally worked for the London Borough of Brent (**Brent**) as a driver and cleaner, responsible for the collection and disposal of bulk refuse from several sites in that borough, including a housing estate. Section 8 of Brent's statement of written particulars issued in 2000 was headed "Hours of work" and stated:

> "Your normal hours of work are Monday to Thursday 8 a.m. to 4.30 p.m. Friday 8 a.m. to 4 p.m. or as determined by your supervisor in order to meet the local customers' requirements. Where you are requested to work additional hours but your total hours worked in any week do not exceed 37 hours, you will receive the same hourly rate of pay for additional hours as set out in sect[ion] 6 above. Where you work more than 37 hours in any week the hourly rate for the hours in excess of 37 will be enhanced in accordance with the NJC condition. If you are required to work on any Bank holiday you will receive flat overtime pay for the time worked plus time off in lieu on another day, depending on whether you work for more or less than 4 hours. Lieu days earned between April and the following March should be taken within that year or they will be forfeited."

5. As a member of the Scheme, Mr R was required to pay contributions of 5% based on his pensionable pay. His retirement benefits were also based on his pensionable pay. Brent's local conditions of service stated that pensionable pay meant:

> "normal pay, plus shift allowances, bonuses, regular contractual overtime, statutory sick pay and statutory maternity pay".

6. Brent issued an employees' guide to the Scheme. This said that non-contractual overtime was not included in pensionable pay. The guide also explained that the member's retirement pension would be calculated as 1/80 of his final year's pensionable pay for each year of pensionable service.

7. Mr R's employment was transferred from Brent to Wetton in April 2003, in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 1981 (**TUPE**), when Brent took the decision to outsource the bulk refuse work. This meant that Mr R's conditions of service remained unchanged. Following the transfer of his employment, Mr R remained an active member of the Scheme. Wetton entered into the necessary agreement with Brent to join the Scheme as a participating employer.

8. Mr R later received several estimates of his prospective retirement benefits. An estimate as at 1 January 2010 referred to an annual pension of £5,885, based on final pay of £18,763. In February 2011 Mr R was told that his pension would be based on pensionable pay of £17,039. Another estimate as at 1 September 2011 referred to an annual pension of £6,966, based on final pay of £19,516.

9. Capita was appointed as administrator of the Scheme in October 2011. On 21 March 2012 Mr R asked Capita for an annual benefit statement as he was thinking of retiring. Capita asked Wetton to provide details of Mr R's full-time equivalent pay and the weeks and hours he worked. On 30 July 2012 Capita sent Mr R a "provisional estimate" which referred to an annual pension of £8,152, based on current pensionable pay of £21,266.

10. Mr R told Wetton on 6 August 2012 that he would be retiring on 5 October 2012 (at age 66). Capita said it could not put his retirement benefits into payment until it had received the correct membership data in order to calculate his benefits.

11. Also in 2012, Brent told Wetton that in light of budgetary pressures it was reducing the service levels it required. There was a corresponding reduction in overtime and weekend working available to Wetton's employees. This provoked claims from some of Wetton's employees that Wetton was required to provide overtime to them. Wetton said it recruited a new human resources manager in 2012 who recommended that the company should introduce a form to ensure a fair system for selecting volunteers for overtime. Mr R retired before these arrangements were put in place.

12. In October 2012 Wetton sent Capita the membership data which Capita had requested. Capita sent Mr R another "provisional estimate" of retirement benefits on 7 November 2012. This referred to an annual pension of £6,637, based on final pensionable pay of £17,023.

13. Mr R's financial adviser queried the figures. On 28 January 2013 Mr R complained to Capita that his final pensionable pay should have been about £20,088, because Wetton had deducted contributions from his pay of about £83.70 each month and the Scheme contribution rate was 5%. Mr R enclosed copies of his pay slips to support his case.

14. Mr R received a letter from Capita dated 4 April 2013 which apologised for not responding sooner. Capita said that his retirement benefits had been correctly calculated, based on the information that Capita held: the pensionable pay figure which they had used was that provided to Capita by Wetton.

15. Mr R was not satisfied with the explanation he received and the delays that he considered Wetton and Capita had caused, and sought help from his trade union and The Pensions Advisory Service (**TPAS**). In particular, Mr R said that he had received overtime pay regularly for weekend and Bank holiday working, and this should have been treated as pensionable because that work was contractual, and the statutory regulations governing the Scheme only excluded non-contractual pay from the calculation of pensionable pay. Wetton disagreed, saying that Mr R's overtime working at weekends/Bank holidays was voluntary, not contractual, and therefore was not pensionable.

16. When Mr R pointed out that his contributions to the Scheme had been calculated by reference to his gross pay (including weekend/Bank holiday overtime), Wetton said

that was an error, caused because its payroll system could not differentiate between basic pay and other pay: it was not an admission that Mr R's overtime was pensionable. Wetton offered to repay the excess contributions to Mr R.

17. After further correspondence, TPAS told Mr R in January 2014 that whether overtime working was contractual or not was essentially an employment law issue, and in the absence of any "contractual evidence" to support Mr R's case they could not assist further, so he should contact this office.

18. Because of the dispute about Mr R's final pensionable pay his benefits under the Scheme were not put into payment until 2015, on the basis of the adjusted final pensionable pay figures provided by Wetton, with arrears and interest being added from his leaving date in 2012.

19. In later correspondence, both Mr R and Wetton produced several witness statements. A trade union official stated that he had represented two colleagues of Mr R who had been disciplined by Wetton for not doing their weekend/Bank holiday duties. However, a Wetton manager stated that overtime was always voluntary for "Operators" including Mr R.

20. We issued a first preliminary decision on 7 June 2017. Mr R and Wetton then made further representations. Wetton also disclosed a large volume of documentary evidence recording the terms of the consultation exercise which took place around the time of the TUPE transfer, which included discussion about treatment of overtime, contemporaneous Wetton internal email correspondence relating to the same subject, contemporaneous email correspondence recording the technical discussions which took place when Wetton set up payroll, and contemporaneous minutes of the staff disciplinary proceedings referred to by the trade union official.

21. On 17 April 2018 we issued a second preliminary decision which superseded the first preliminary decision. Mr R and Wetton again made further representations. I refer to these later.

Regulations

22. Under Regulation 4(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the Regulations**):

> "an employee's pensionable pay does not include (a) payments for non-contractual overtime...".

Summary of Mr R's position

23. His overtime working at weekends and on Bank holidays was a contractual requirement, which Wetton inherited from Brent. After the TUPE transfer he carried on working on the same basis as before.

24. For health and safety reasons and fire prevention purposes he was required every weekend and Bank holiday to collect rubbish from the sites for which Wetton was responsible. His line managers did not ask him if he wanted to be selected for overtime working. He was aware of employees who had been disciplined for not performing their weekend/Bank holiday duties.

25. Therefore, the overtime pay that he received from Wetton was contractual and should have been pensionable; his retirement benefits should be recalculated because they did not take account of his overtime pay.

26. He never received or signed Brent's statement of written particulars in 2000.

27. The agreements that he had signed in 1999 and 2003 to opt out of a maximum 48 hour working week implied that his overtime working was contractual.

28. Wetton's pay slips showed that it had deducted pension scheme contributions from his overtime pay as well as his basic pay, and this implied that Wetton considered his overtime pay to be pensionable like his basic pay.

29. Wetton and Capita had caused delays in determining his pensionable pay and pensionable service, had been slow to disclose relevant documents, and failed to explain why each of his estimates of benefits contained different pensionable pay figures. This had caused him significant distress and inconvenience, for which he should be compensated.

30. Mr R has directed me particularly to certain passages within the documentary evidence produced by Wetton between pages 320 and 334 of the bundle. He has asked to be directed to documents containing evidence to support the preliminary finding that Wetton had no contractual obligation to provide overtime and that Wetton had a two-tier workforce.

Summary of Wetton's position

31. Although Wetton had a number of employees who were contractually obliged to perform weekend overtime, that obligation did not apply to its ex-Brent transferees. Mr R's overtime working was voluntary, not contractual, and therefore his overtime pay was not pensionable.

32. Mr R had expressly or impliedly agreed to Brent's statement of written particulars in 2000.

33. The conditions of service that Wetton inherited from Brent did not stipulate that overtime working was compulsory; ex-Brent employees such as Mr R were asked verbally – but not in writing - whether they would like to work weekend overtime, and could accept or decline any such request, and therefore there was no contractual obligation to work overtime.

34. Notwithstanding the expression “If you are required” in section 8 of the statement of written particulars, Mr R could accept or decline requests for Bank holiday working.

35. Because Mr R’s overtime working was not contractual, his retirement benefits under the Scheme had been calculated properly.

36. The opt-out agreements that Mr R signed were to the effect that the 48 hour average weekly limit on working hours under the Working Time Regulations 1998 should not apply to his employment. They signified that Mr R was willing to work more hours. That did not necessarily mean that his weekend and Bank holiday overtime was a contractual requirement.

37. In calculating and deducting Mr R’s contributions to the Scheme by reference to his gross pay, including overtime pay, Wetton had acted incorrectly. This was an unfortunate administrative or procedural error, caused because Wetton’s payroll computer system at the relevant time could not differentiate automatically between compulsory/pensionable overtime and voluntary/non-pensionable overtime. It required a manual input for Mr R’s overtime pay which had been done wrongly because the payroll software treated the overtime pay in a different manner to that advised by Wetton’s software provider. Therefore the wrong deductions were calculated. New software was introduced after Mr R retired which could distinguish between the different pay types. The “excess” contributions paid by Mr R should not have been paid by him and therefore should be refunded to him.

38. Wetton was unable to disclose relevant information sooner, because following an office move the old documents were contained in an off-site storage facility which was difficult to access.

Summary of Capita’s position

39. As the Scheme administrator from 2011, Capita relied on Wetton’s payroll department to provide it with accurate information about Mr R’s pay and pensionable pay. Capita did not have direct access to Wetton’s payroll system. When Mr R retired, Capita calculated his final pensionable pay using the figures provided to it by Wetton.

40. Therefore Capita was not responsible for any errors that had occurred, and there were no unreasonable delays on its part.

Conclusions

41. This case turns on whether Wetton declared the correct or incorrect pensionable pay to Capita at the point of Mr R’s retirement, which depends in turn on whether Mr R’s overtime working at weekends and on Bank holidays was contractual or non-contractual. Under Regulation 4(2) of the Regulations, payments for non-contractual overtime are not pensionable, payments for contractual overtime are pensionable.

42. In The London Borough of Newham v Skingle (2003) the Court of Appeal ruled that if an employee is, in effect, obliged to work overtime then, for the purposes of the

Regulations, the overtime is classed as contractual and therefore pensionable. I have considered whether there is evidence that Mr R was, in effect, obliged to work overtime. I find that he regularly worked overtime which was made available to him, but on balance, for the reasons set out below, I am not satisfied that Mr R can demonstrate, on the balance of probabilities, that he was contractually obliged to work the additional hours. I consider that the evidence taken as a whole tends to support Wetton's submission that overtime was voluntary.

43. My starting point has been to examine the contractual documentation which is available. Under the TUPE transfer of Mr R's employment in 2003, Wetton was required to honour the employment terms and conditions in force immediately before that transfer, and could not worsen them without Mr R's prior agreement. Mr R said that he never received Brent's statement of written particulars in January 2000 and did not sign them, despite the fact that his name appears on them. I accept that he did not sign them. However, Mr R and Wetton have been unable to unearth any other statements of written particulars issued to Mr R before the TUPE transfer, so the 2000 terms are the best contemporaneous evidence of what Brent's standard contractual terms were before the TUPE transfer to Wetton.

44. Section 8 of those terms and conditions did not refer specifically to weekend and Bank holiday work. Rather, it provides discretion for the employer to set usual hours outside the run of weekday hours documented "as determined" by a supervisor. It then makes provision for remuneration of any overtime which is in fact worked. The words "where you are requested to work" could be taken to imply that Mr R had a choice in the matter so far as weekend overtime is concerned, but the subsequent words "If you are required to work" could be read as recognising that Bank holiday working, which falls within the Monday to Friday run of "usual hours", is compulsory.

45. In practice and in argument the parties have drawn no distinction between Mr R's weekend and Bank holiday working; both sets of hours and elements of pay have always been treated in the same way. Wetton argues that both elements are non-contractual and Mr R argues that both elements were contractual. I have not therefore attempted to draw a distinction on the basis of the requested/required wording used in the contract, but looked at the treatment of overtime in the round.

46. I have considered Mr R's argument that his overtime was so regular as to raise an inference that it must have been contractual. Mr R's payslips for the three years before he retired (and earlier) show that he usually worked at weekends and on Bank holidays. The income from this supplemented his basic pay. For example, in May 2012 his basic pay was £1,132 and he received weekend pay of £197 and Bank holiday pay of £28. I am satisfied that the overtime was regular.

47. However, analysis of Mr R's weekend and Bank holiday working shows that he did not work every weekend and Bank holiday. This leads me to conclude that in practice there must have been some negotiation and communication with his employer about which weekends and Bank holidays he would work. I note Mr R's submission that

there were few months when he did no overtime at all, and these were accounted for by sickness absence or his taking leave, but I cannot see any predetermined pattern from which I can infer that the working must have been contractual.

48. Similarly, Mr R's signing the 48 hour opt out agreement takes the matter no further in my view. Whether Mr R's overtime was contractual or non-contractual did not turn on how often that overtime was worked or how much of it there was, but on whether Mr R, as an employee of Wetton, was under an obligation to Wetton to do that work if requested to do so by a supervisor.

49. Wetton made the point that it was under no contractual obligation to provide overtime, and produced email evidence which demonstrates its historic understanding that this was always the case, which I accept. However, that is a different question in my view, and not one which it is necessary or appropriate for me to try to make a finding about. I limit my findings to the question of whether Mr R was, in effect, obliged to work overtime.

50. I have had regard to all of the evidence provided by both parties but draw attention below to passages of documentary evidence from which I have derived particular assistance in ascertaining what the parties understood the contractual position to be at the point when Wetton became Mr R's employer.

51. I have seen a contemporaneous, signed and agreed minute of the 2003 staff consultation between Wetton and TUPE'd staff, which took place in the presence of GMB representatives and was signed by Russell Rhodes on behalf of the GMB. This minute records that Wetton's Managing Director told staff "the Council had asked Wettons to operate a 7 days week. Overtime would be on a voluntary basis as it is now and there would be no compulsory and no contractual overtime." (page 146 of the bundle).

52. This position is restated in an internal Wetton email between Jeff Rodrigues, Wetton Regional Manager and Nicola [Holmes] dated 24 April 2003 (page 161 of the bundle): "when we spoke with the TUPE staff they raised concerns about taking away the weekend work and giving to Wettons Staff. Brent confirmed it was voluntary but we will have big issues with the union if we do not continue to offer it to them each month. We have asked each of them and on the list highlighted are those staff willing to work weekends over the next couple of months. [Mr R] stated in the one to one meeting he could not work the April weekends but he now has. I have the Westminster staff who can also work Weekends when these guys cannot. They are at the bottom of the list and will be used until such time as we can recruit more staff". Appended is a list of 'Brent' staff (including Mr R) and 'Wetton' staff and a contract for one of the 'Wetton' staff showing the terms on which they worked, which includes an obligation to work at weekends.

53. This evidence demonstrates that at the time of taking over the contract Wetton did not consider it could compel TUPE'd staff to work weekends and did not consider it a

contractual obligation, nor did it tell the ex-Brent staff that they could be compelled to work weekends. There is no record of this position ever having been challenged by the trade union until the point when Mr R retired and threw the spotlight on Wetton's pension contribution deduction process.

54. I have also seen evidence (between pages 320 and 334 of the bundle) which demonstrates that controversy over withdrawal of the availability of voluntary weekend working broke out in 2013 as a result of Wetton's reduced need for weekend staff, but the documentation from that period is consistent with that from 2003, e.g. at page 334 there is a record of staff being notified about the withdrawal which states 'with regards to the non-contractual overtime working pattern at the weekends… you will no longer be required to work overtime at the weekends'.

55. Mr R has asked me to draw an inference from the use of the word 'required' in the correspondence from this period. In the context of the records and the dispute that preceded this notice it is plain that staff were arguing that they should be allowed to continue to work at weekends in circumstances where Wettons insisted it was not obliged to provide them with weekend working. Given that context, I am satisfied that the use of the word 'required' was intended to be understood as needed by Wetton.

56. The evidence cited above also persuades me to accept Wetton's submission that there was (whether or not Mr R and other employees knew it) a distinction between ex-Brent employees and those employees engaged on Wetton's own terms and conditions. I can find no necessary linkage between Wetton's obligation to provide out of hours service and Mr R's contracted hours. I accept that overtime was worked by some staff to assist Wetton to fulfil its contractual obligations, but I cannot infer from this that Mr R must have been contractually required to work overtime in order for Wetton to achieve performance of its contract.

57. Mr R and Wetton have also provided a number of witness statements dealing with the issue of whether or not ex-Brent employees were required or asked if they wished to work overtime and I have had regard to these but found them of less help in determining the central issue. They are of recent origin, they postdate the history of dispute about what has happened in Mr R's case, and contain conflicting views which I find difficult to reconcile.

58. The account which the witness statements present is also significantly incomplete in the sense that there is no statement from one of the longer standing middle managers directly involved in Mr R's work pattern, a witness claimed at different times to support both sides of this dispute, but who has provided a statement to neither. I have considered carefully whether additional witness evidence, or the further testing of the available witness evidence would assist to resolve the contractual issue which is at the heart of this dispute, but given the content of the available documentary evidence, have concluded that it is unlikely to do so. While I have considered the witness evidence I give greater weight to the contemporary documentary evidence.

59. I have also considered the evidence of disciplinary proceedings taken against members of staff for failure to undertake tasks assigned to them during the hours they were in fact rostered on. I accept that disciplinary proceedings sometimes occurred in these circumstances because staff were allegedly not working during the hours they were supposed to be working, but I find none of this evidence persuasive either way on the central question of why they were working those hours in the first place i.e. whether they had volunteered to work at weekends for extra pay and had then failed to do what was required or whether they had always been required to do it.

60. I have also considered in detail why Mr R's contributions to the Scheme while he was employed by Wetton were always calculated by reference to his gross pay, i.e. including his overtime working. Initially I considered the most likely explanation of that practice to be a contemporaneous understanding that the overtime pay was in fact pensionable. However, Wetton has since produced detailed documentary evidence in support of its assertion that the payroll system was deducting contributions in the way that it was because of an error in the way that the system was initially set up. Although the system was in principle capable of distinguishing between pensionable and non-pensionable pay, it relied on human inputs to achieve that outcome. Emails from around the time of the system set up demonstrate that Wetton intended to input the overtime payments as non-pensionable items, but did not achieve it because of a technical misunderstanding. I am therefore satisfied that the historic practice was the result of administrative error, rather than the reflection of an underlying contractual entitlement.

61. I consider that this error amounts to maladministration, which has caused Mr R direct financial loss (because contributions were wrongly deducted from his pay for many years), for which Wetton should compensate Mr R, so that he is put into the financial position that he would have been in had the deductions never been made. However, the fact that in practice Mr R's contributions were calculated by reference to his gross pay does not mean that he is entitled to receive pension benefits from the Scheme calculated by reference to his gross pay. He is only entitled to pension at the rate permitted by the scheme rules, i.e. calculated by reference to his actual pensionable pay.

62. I have considered whether, on the balance of probabilities, Mr R can demonstrate reasonable reliance upon the misstatements made to him prior to his benefits being put into payment, but I am not satisfied that he can because there is no evidence that he made particular decisions based upon the incorrect statements made to him. Turning to Mr R's contention that had he known the true position he would have worked on until he could afford to retire, the burden of proof on this point rests with Mr R, and I have to consider what he would likely have done without benefit of hindsight. I can see no evidence that the level of pension he would receive was affecting his decision at the time which he tendered his resignation. The instruction which was sent to his financial adviser at the time asked only for advice about the tax implications of taking the larger or smaller lump sum

63. I am satisfied that Mr R should also be compensated for the serious distress and inconvenience that this matter has caused him over a long period. While there is no evidence that he would have made different pension provision had he known the correct position it is nevertheless the case that he was deprived of the opportunity to plan his retirement properly, the correct position being revealed only after he had retired.

64. Wetton deducted too much money from Mr R's pay, failed to check and correct its payroll system, failed to provide the correct pensionable pay information to the scheme up to and past the point of Mr R's retirement, and gave answers lacking transparency to Mr R when he challenged the information provided, all of which gave him serious cause to doubt whether he was being awarded the right pension and caused him very considerable distress and inconvenience. This justifies me making a larger award for distress and inconvenience than would normally be the case where a scheme or employer simply provides an incorrect benefit statement.

65. Apart from the over-calculation of Mr R's contributions to the Scheme, it is clear that there were also several unnecessary delays in explaining the correct position. Although Mr R told Capita in March 2012 that he would like to see a benefit statement, it was not until the end of July 2012 that Capita was able to send him the relevant information, once Wetton had supplied the necessary financial data. In August 2012 Mr R gave notice to Wetton that he would be retiring two months later, but Capita did not receive full data from Wetton until October 2012, so it could not issue a final estimate of his retirement benefits before then. Our investigation of Mr R's complaint started in September 2015, but Wetton was unable to produce employment documentation until February 2016. It would have been helpful if that information had been made available sooner.

66. In its role as Scheme administrator, Capita had to rely on Wetton, as the employer, to provide the correct information about Mr R's pensionable pay and length of service. It was therefore primarily due to Wetton, not Capita, that the calculation and payment of Mr R's benefits was delayed. For that reason I consider that Wetton, rather than Capita, should compensate Mr R for the distress and inconvenience that the delays caused.

67. Therefore, I partly uphold the complaint against Wetton.

68. The correspondence disclosed shows that there were some instances where Capita could have chased Wetton more promptly for information. For example, it took Capita more than two months to answer Mr R's query of January 2013 about his final pensionable pay. However, as Capita had to rely on Wetton to provide it with relevant information, I do not consider that any delays on the part of Capita are so serious as to constitute maladministration for which Capita should be required to pay compensation to Mr R. Therefore, I do not uphold the complaint against Capita.

69. I note that Wetton has recently tendered a cheque which Mr R has refused to accept. I make the Direction below on the understanding that any money accepted by Mr R may be offset against the amounts directed to be paid.

Directions

70. To put matters right:

- within 28 working days after the date of this determination, Wetton shall refund to Mr R the excess contributions that it deducted from his pay, with interest calculated from the dates of deduction to the date of repayment at the same rates as applied under the Scheme in cases of late payments by employers; and

- within 28 working days after the date of this determination, Wetton shall pay Mr R £2,000 for the serious distress and inconvenience that he has been caused.

Karen Johnston

Deputy Pensions Ombudsman
19 July 2018