

Ombudsman's Determination

Applicant	Mr E
Scheme	Firefighters' Pension Scheme (FPS)
Respondents	Bedfordshire Fire and Rescue Service (BFRS)

Outcome

1. Mr E's complaint against BFRS is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) BFRS should recalculate the overpayment from 25 November 2010 and inform Mr E of the revised amount.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint is that his pension has been overpaid through no fault of his own and the resultant overpayment should be written off. Mr E asserts that he made financial and lifestyle choices based on the pension he received and the pensions increase due on his 55th birthday. Although he has not suffered an actual loss, he asserts that the repayment plan suggested by BFRS would be extremely difficult for him to meet.

Background information, including submissions from the parties

4. Mr E retired in November 2009, at age 50.
5. BFRS transferred the administration of the FPS to a new administrator in 2014. When the new administrator took over, it carried out an audit of the pension files.
6. Mr E had been expecting a pensions increase payment on or around his 55th birthday on 3 November 2014. When he did not receive it, he contacted BFRS and queried the payment. Mr E says he was informed that there was a possibility his pension had been overpaid. The pension increase was not paid and the matter was investigated.

7. BFRS wrote to Mr E on 10 April 2015 and informed him that his pension had been recalculated and his pension had been overpaid from his retirement in 2009. The overpayment occurred because a pensions increase due at age 55, had been incorrectly applied to the 'best of the last 3 years' calculation. Therefore, he received them too early, before he had attained the age of 55. In addition, he also received a pensions increase on his commuted lump sum but as he had now turned 55 and didn't receive a further payment, no action was due in this respect. A further incorrect pensions increase was applied to Mr E's monthly pension in April 2011 so this increased the overpayment amount.
8. Mr E was informed that as at 30 June 2015, the overpayment amounted to £5,437.68 (gross). As the overpayment occurred over a five year period, BFRS proposed a repayment plan of £90.62 a month for five years.
9. Further, it confirmed that his new monthly pension would be £1,488.99 (before the deduction of the monthly overpayment).
10. Mr E attended a meeting with BFRS on 29 April 2015. He informed them that he could not afford to repay anything as he was working reduced hours, and had purchased a holiday and a new kitchen based on his expected rise in November 2014. He asked for the overpayment to be written off. Mr E was provided with details of the internal dispute resolution procedure (**IDRP**) and he completed a stage one application on 16 May 2015. Mr E's complaint was not upheld on the basis that he had received money in excess of his entitlement from the FPS and had not provided sufficient evidence to establish a change of position. He was however offered compensation of £250.
11. Mr E appealed for a stage two decision out of time so his complaint was not reconsidered. Consequently, he brought his complaint to this organisation on the basis that he should not have to repay the overpayment.
12. Mr E provided a breakdown of his monthly income and expenditure to demonstrate his inability to make the monthly repayments of £90.62. His total household income amounts to £4,068.73, and his total monthly expenditure amounts to £3,891.41. The full itemised list is in the Appendix to this Opinion.
13. BFRS provided its formal response to The Pensions Ombudsman (**TPO**) on 25 November 2016, with regard to Mr E's complaint. It accepts that an error was made in calculating Mr E's pension. Although the overpayment did not occur as a result of Mr E's actions, it is obliged to seek repayment of the overpayment. BFRS noted that the breakdown provided by Mr E did not make it clear which expenditure occurred within the timescales of 2009 and 2014.
14. Further, BFRS said as a result of a change to the FPS rules, Mr E will be entitled to an unexpected amount of approximately £2,745 (the amount can only be confirmed when the Government Actuary's Department have reviewed the costings). This is due to a contributions holiday refund which is due to be paid in February/March 2017. In view

of this, it is BFRS' intention to off-set the contributions holiday refund due to Mr E, from the overpayment amount. This would reduce the monthly repayment amount so that financial hardship does not occur.

Adjudicator's Opinion

15. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by BFRS. The Adjudicator's findings are summarised briefly below.

- BFRS agreed that an error occurred in the calculation of Mr E's pension which led to an overpayment.
- The established legal principle in cases such as this is that benefits can only be paid in accordance with the rules of the particular scheme and that the member cannot benefit from a mistake. As Mr E received more than he was entitled to as a result of a mistake, BFRS is legally entitled to seek recovery of the overpayment and pay Mr E the correct rate in accordance with the rules.
- Mr E accepts his pension should be paid at the correct rate but says that recovery should not be sought from him as he was not responsible for the mistake. The Adjudicator considered whether Mr E had any defence to recovery.
- The Adjudicator concluded that Mr E did have a partial defence to recovery under the Limitation Act 1980 (the **Limitation Act**), meaning that BFRS is unable to recover part of the overpayment.
- The Adjudicator reached this view broadly on the following basis.

The mistake that led to the overpayment occurred due to the incorrect application of the rules governing the FPS, not because BFRS was unaware of any information that would affect the level of benefits due to Mr E (that is his age at retirement).

Following the reasoning of Mr Justice Nugee in *Webber v Department for Education* [2014] EWHC 4240 (Ch) (an overpayment case involving the Teachers' Pensions Scheme), it is clear that BFRS had all the information it required in order for it to be apparent, that Mr E was not being paid the correct level of benefits in 2009 and that BFRS would inevitably be making an overpayment. BFRS could have immediately discovered the mistaken overpayment with reasonable diligence. It was the Adjudicator's opinion that for the purposes of the Limitation Act, time started running from the date that the overpayment first occurred in 2009, and subsequently when further errors occurred in 2011. The effect being that Mr E has a limitation defence for the recovery of any overpayments made more than six years before the relevant date when the limitation period is to be regarded as having stopped (the cut-off date).

The Adjudicator referred to the recent case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), where the High Court held that the applicable cut-off date for Limitation Act purposes was the date when Teachers Pensions brought its claim during the course of TPO's complaints procedure. That date was identified as being the receipt by TPO, of Teachers' Pensions response to Mr Webber's complaint.

The Adjudicator said that in order for BFRS to be able to recover the whole overpayment from November 2009 onwards, its claim would have had to have been made by November 2015 in fact, it was not made until 25 November 2016 – at which time TPO received BFRS' response to Mr E's complaint (that date having been identified above as the cut-off date for the purposes of the limitation period). Concluding that Mr E has a limitation defence in respect of the period from November 2009 to November 2010, so BFRS is unable to recover the overpayment amount that occurred during this period (because it occurred more than six years before the relevant cut-off date). However, the overpayment from 25 November 2010 is recoverable because BFRS made its claim within the required limitation period.

- The Adjudicator then went on to consider whether there were any further defences available to Mr E in respect of the remainder of the overpayment. Explaining that generally, for a defence to succeed, the recipient must not have been aware of the error, must have received the overpayment in good faith and must have spent the money on irreversible expenditure. The defence is unlikely to succeed if these requirements are not met.
- The Adjudicator considered that from the facts of this case, Mr E was not aware that he was being overpaid and had received the money in good faith. As to irreversible expenditure, Mr E asserted that his financial position has changed through the reduction of his hours, the purchase of a new kitchen, cars and a motorcycle. The exact date that these financial decisions were made was not supplied. However, the Adjudicator came to the view that it was evident some of the items were not purchased outright but have been leased instead or have payments being spread over a period of time. The Adjudicator concluded that given the nature of the expenses, and the lack of information about the outstanding terms of lease/payment agreements, there was insufficient evidence to conclude that Mr E had made irreversible decisions based on the overpayment he received. As a result, the Adjudicator considered that the overpayment from November 2010 is recoverable by BFRS.
- As to Mr E's main contention that the repayments will be difficult for him to make, the Adjudicator concluded that adding a further £90.62 to his expenses will not take him into deficit, even though it may leave him with very little afterwards. It is incumbent upon Mr E to seek to mitigate his losses where possible, whilst making the repayment. BFRS's proposed five year repayment term accords with the general rule which is that the repayment term must be at least as long as the

period over which the overpayment took place, and should not cause undue financial hardship.

- The Adjudicator considered the recent comments of BFRS in relation to the contributions holiday refund, and concluded that its suggestion of off-setting the amount due to Mr E, is not an unreasonable one. As BFRS are able to do so in accordance with the rules of the FPS, such action would reduce the amount of the overpayment, and as a result, reduce the monthly repayment amount due from Mr E, provided that the repayment term remained the same.
 - As the exact amount of the contributions holiday refund is not yet known, the Adjudicator recommended that BFRS should not commence any recovery until it is known and a new calculation has been carried out of the revised overpayment amount, with deduction of the overpaid amount accrued from November 2009 to November 2010. The Adjudicator also suggested that BFRS provide Mr E with the breakdown of its calculation of the revised overpayment amount; deductions to be applied; and the new overpayment amount prior to repayment.
 - Finally, the Adjudicator recommended that BFRS' offer to Mr E of £250 compensation should be increased to a total of £500 in recognition of the fact that its actions caused Mr E significant distress and inconvenience.
16. Both Mr E and BFRS did not fully accept the Adjudicator's Opinion and the complaint was passed to me to consider. The additional comments provided by Mr E and BFRS do not materially change the outcome of Mr E's complaint and on the whole. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr E and BFRS for completeness.
17. Mr E does not consider £500 compensation as suggested by the Adjudicator to be sufficient. He asserts that given the timescale of this complaint, it equates to just over £19 a month (on the basis that his first knowledge of the error was in November 2014).
18. As to the availability of a possible defence to recovery, Mr E provided the following information about his irreversible expenditure:
- July 2013 – he leased a car on hire-purchase, with a repayment term of five years;
 - July 2014 – he leased a motorcycle on hire-purchase, with a repayment term of four and a half years; and
 - November 2014 – he purchased a kitchen, with a repayment term of four years.
19. In relation to the contributions holiday refund, Mr E asserts that this future payment is not an unexpected one as he has been aware for a number of years that he would be due around £2,500 to £3,500, by his own calculations. Mr E believes off-setting the refund from the overpayment will effectively penalise him twice.

PO-13320

20. Mr E's final point was that he omitted to include £60 of monthly bank charges from the expenditure list he had previously provided. This takes his total monthly expenditure to £3,951.41.
21. BFRS's disagreement with the Opinion is in relation to the applicability of the Limitation Act and the Webber High Court decisions. BFRS have made various arguments as to why the cut-off date should not be the 25 November 2016.

Ombudsman's decision

22. Although, I have noted BFRS' comments in relation to the applicable cut-off date, in light of the most recent Webber decision, I am not going to explore these further because the issues have been decided. I am satisfied that the Adjudicator correctly applied the reasoning adopted in the two Webber High Court decisions, as well as relevant sections of the Limitation Act (being section 5 and section 32 respectively).
23. Consequently, for the purposes of Mr E's complaint, he has a Limitation Act defence which means that BFRS cannot recover the overpayment which occurred prior to 25 November 2010.
24. I will now address the additional points raised by Mr E.
25. It is helpful that Mr E has provided information in relation to the duration of his hire purchase agreements. My first observation is that he is at least halfway through the payments on two of the agreements, regarding the car and the kitchen installation.
26. Credit hire agreements can be terminated at any time, giving the required notice set out in the agreement, but there may be associated costs with this. However, in most cases, if at least half of the total price of the goods have been paid, there will usually be no further costs to pay. Consequently, I do not agree with Mr E's assertion that the agreements for the car and motorcycle are irreversible, and that he has a defence to recovery. In any event, if Mr E chooses not to return the car and/or the motorcycle now, as their terms are less than the current proposed repayment plan of the overpayment, his liability will come to an end once the terms end, thereby reducing his monthly expenditure as a result.
27. There is no expectation on Mr E to have the kitchen uninstalled. However, its installation is not considered a 'loss'. Although Mr E will have to pay the full amount of the kitchen, since it was installed, he would have enjoyed the benefit of a new kitchen, which should have added value to his property.
28. I do not dispute that Mr E has known about, and been expecting the contributions holiday refund. However, I do not find that BFRS are unable to use the amount to offset the overpayment. Doing this would substantially mitigate against any potential hardship that Mr E would suffer.
29. In view of the additional £60 that Mr E has added to his monthly expenditure, when the total of £3,951.41 is deducted from his monthly income of £4,068.43, the balance

PO-13320

is £117.02. This is still sufficient to cover the current proposed monthly repayment amount of £90.62, which should reduce once the contributions holiday refund is taken into account.

30. Therefore, I uphold Mr E's complaint to the extent that BFRS are unable to recover the overpayment which occurred prior to 25 November 2010, owing to the Limitation Act defence which has been identified and which acts as a bar to recovery before this date.
31. On the question of compensation for distress and inconvenience, Mr E has said that the amount suggested by the Adjudicator of £500 is not sufficient because this equates to £19 per month for the period over which he was overpaid his pension. BFRS have made no further comments in this respect.
32. The Limitation Act does not apply to claims of maladministration. But a complaint about an overpayment at its heart is a claim for restitution and so the Limitation Act does apply. Although BFRS are not able to recover the full sum sought from Mr E, Mr E's complaint does not succeed in substance; rather BFRS's claim fails on a procedural technicality. This is because, it is a well-established principle of law that the Limitation Act bars the remedy BFRS are seeking, but does not extinguish BFRS's right. I have made no findings of any maladministration. It is therefore my view that as a matter of public policy, it would be quite wrong to award Mr E compensation for distress and inconvenience.
33. Therefore I do not agree that the Adjudicator's recommendation of £500 is reasonable in the circumstances, and make no award for distress and inconvenience. I do however note that BFRS made an offer to Mr E of £250, so Mr E may wish to accept the offer should it still remain open to him, which I hope for his sake it is.

Directions

34. To put matters right (for the part that is upheld) BFRS should recalculate the overpayment from 25 November 2010 and inform Mr E of the revised amount within 28 days of this Determination. Once the exact amount of the contributions holiday refund is known, it should deduct the refund due to Mr E from the overpayment amount.
35. It is my expectation that BFRS and Mr E will now enter into sensible discussions about how the remaining overpayment will be repaid.

Anthony Arter
Pensions Ombudsman

20 March 2017

Appendix

Information provided by Mr E in respect of his monthly income and expenditure.

Income:

Fire Service Pension	£1,323.43
RAC salary	£1,345
Mrs E's salary	£1,400
Total income	£4,068.43

Expenditure:

Water	£38
Barclay card	£211.92
Kitchen	£114.14
Council Tax	£170
Car & m/cycle insurance	£85.57
BT	£100
MasterCard	£85
New Furniture	£101.80
DVLA	£25.01
Gas / Elec	£115
Loans	£682.14
Car Loans	£376.11
Mortgage	£361.08
TV License	£12.18
Unison	£11.50
BPHA rent	£300
Vodafone	£110.69
Motorcycle	£159.03
Income insurance	£26.03
Union	£4.33
Sons Support	£264.69
Groceries	£320
Fuel	£200
Contents' insurance	£17.19
Total expenditure	£3891.41