

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant : Mr J B Harper
Scheme : The Firemen's Pension Scheme
Employer : Royal Berkshire Fire Authority (**RBFA**)
Administrator : Liberata (formerly CSL Group Limited) (**CSL**)

MATTERS FOR DETERMINATION

1. Mr Harper has complained that he was given incorrect information concerning his pension scheme benefits in 1998/1999. He says that, as a consequence, his divorce settlement was incorrectly calculated.
2. Some of the issues before me might be seen as complaints of maladministration while others can be seen as disputes of fact or law and indeed, some may be both. I have jurisdiction over either type of issue and it is not usually necessary to distinguish between them. This determination should therefore be taken to be the resolution of any disputes of facts or law and/or (where appropriate) a finding as to whether there had been maladministration and if so whether injustice has been caused.

JURISDICTION

3. RBFA submit that I do not have jurisdiction to consider the terms of a Court Order made on 20 August 1999. They suggest that Mr Harper should seek leave to appeal against the original order. Mr Harper is of the opinion that he is prevented from doing so by clause 6 of the order, which states,

“Upon compliance with paragraphs (3) and (4) of this order, the petitioners and respondents claims and deemed claims for periodical payments, secured periodical payments, lump sum and property adjustment orders shall stand dismissed and neither party shall be entitled to make any further application in relation to their marriage ...”

4. RBFA say that, notwithstanding clause 6, where it can be shown that new evidence has emerged since an order was made, which would materially affect the terms of the order, a person may ask the Court to reconsider the terms of the order.
5. I take the view that Mr Harper has asserted that maladministration on the part of RBFA and CSL has resulted in his suffering injustice. The fact that the mechanism by which the injustice may have been effected is a court order does not alter the fact that his complaint is one of maladministration resulting in injustice. As such, Mr Harper's application falls within my jurisdiction.

MATERIAL FACTS

Background

6. Mr Harper was divorced in 1996. The decree absolute was dated 9 December 1996. Subsequently, in connection with their financial settlement, Mr and Mrs Harper attended court on 19 November 1998, 1 February 1999 and again on 20 August 1999, when Mrs Harper appealed against the order given on 1 February 1999. The terms of the consent order issued on 20 August 1999 were; for Mr Harper to pay Mrs Harper £15,000 on or before 20 November 1999, for Mrs Harper, upon payment of this sum, to transfer her interest in a property to Mr Harper, and, upon Mr Harper retiring and drawing his pension and lump sum, for Mr Harper to pay Mrs Harper a further £6,750. Mr Harper was also to pay Mrs Harper £43 as a contribution to the costs of her surveyor attending on 19 November 1998.
7. Mr Harper's solicitors, Colemans, in a letter to CSL dated 22 January 2002, said,

“The sum of £6,750 was reached after negotiations took place between Mr Harper's and his ex-wife's Barrister. Accordingly there are no calculations available. The agreement was reached taking into account the evidence available to include valuations of all available assets and pensions. Originally there had been a proposal that [Mrs Harper] receive a larger lump sum now to off-set against our client's pension but after further negotiations it was agreed that [Mrs Harper] would receive a lump sum straight away and await a share of Mr Harper's pension when he retired. The figure of £6,750 was arrived at after, the writer recalls, the difference between two figures being put forward by the two Barristers was split.”

8. In connection with the financial settlement, Mr Harper had been required to complete a 'Form E' financial statement. On the copy of Form E which was provided to me by Mr Harper, an estimated pension of £12,847.80 p.a., an estimated maximum lump sum on retirement of £63,039, a lump sum payable on death before retirement of 80,800 and a 'Bid or transfer value' of £186,000 have been entered. CSL have said that they believe a member of their staff, who no longer works for them, completed the form in late 1997 or early 1998 (there is no date on the form). They have confirmed that they do not have a copy of the calculations to which the figures refer or any request from Mr Harper to complete the form which might help to date it. Mr Harper has suggested that it was this transfer figure to which the judge referred at the August 1999 court hearing.

Quotations provided by CSL prior to Court Hearings

9. *20 May 1998, addressed to Mr Harper,*

Pensionable service: 25 years and 229 days (including 2 years and 235 ICI service)

Average pensionable pay: £28,419.00

Preserved annual pension: £16,213.35

Transfer value: £164,087.77

10. *4 November 1998, addressed to Colemans,*

“If Mr Harper were to leave on 31 October 1998 a pension would be payable amounting to £12387.45 per annum (spouses £6193.73pa). A lump sum is payable only by commuting some of the pension.

I have also recalculated the transfer value which now stands at £136869.12.

Please be advised these figures are based on current salary of £21234 and the figures of the pension if Mr Harper were to leave at this date would increase every 6 April by RPI.”

11. *19 November 1998, fax sent to District Judge Fortgan,*

In a letter to Mr Harper's solicitors dated 26 February 2002, the RBFA stated that a transfer value of £136,869 had been quoted in the fax. They said the correct figure should have been £121,620. CSL have confirmed this and state that they were telephoned by Mr Harper on 19 November 1998 requesting an urgent transfer value quote. CSL state that initially they declined to provide figures in the time given, which they say was approximately ten minutes, but later agreed to do so.

12. *8 January 1999, addressed to Mr Harper although as a result of a request from Mrs Harper's solicitors,*

Retirement on 30 November 1998, pension at age 60: £14,852.40 p.a.

Ill health retirement on 31 May 1999: £16,593.38 p.a.

Retirement at age 50 (10 October 1999): £11,546.69 p.a.

Retirement at age 55: £13,914.89 p.a.

Pensionable salary: £28,419

Lump sum commutation up to 25% of the pension

Spouse's pension one-half of the annual pension.

13. *18 January 1999, sent to Mr Harper,*

Retirement on 30 November 1998, pension at age 60: £11,494.03 p.a.

Ill health retirement on 31 May 1999: pension £11,369.06 p.a.

maximum lump sum £42,633.98

residual pension £8,526.79 p.a.

Retirement at age 50 (10 October 1999):

pension £9,303.33 p.a.

maximum lump sum £34,887.45

residual pension £6,977.50 p.a.

Retirement at age 55: pension £11,135.08 p.a.

maximum lump sum £40,364.67

residual pension £8,351.31 p.a.

Pensionable salary: £21,993

14. A letter from RBFA to Mr Harper dated 22 January 1999 stated,

“I write to confirm that the pensions calculations provided in a letter dated 8 January 1999 by the CSL Group Ltd were incorrect as they were based on a salary of £28,419.

I can also confirm that the salary figure they should have used is £21,993 per annum plus £405 per annum outer fringe London weighting.”

15. CSL have explained that Mr Harper joined the Scheme on 24 March 1975 but had a break in service in 1977 before re-commencing on 16 January 1978. The first part of his service amounts to 2 years and 235 days. CSL say that this service was also recorded on their database as a period of transferred in service, which they later mistakenly assumed had been transferred in from Mr Harper’s former employer. This resulted in them counting the first part of Mr Harper’s service twice in the May and November 1998 quotations and in subsequent quotations provided in January 1999.

Later quotations provided by CSL

16. On 2 May 2001, in a letter addressed to RBFA, CSL provided quotations for retirement on 30 June 2001 and 3 January 2002.

30 June 2001

Pensionable service: 26 years and 36 days

Pensionable salary: £23,297.50

Ill health pension: £15,219.97 p.a.

3 January 2002

Pensionable service: 26 years and 223 days

Pensionable salary: £23,678.01

Ill health pension: £15,785.34 p.a.

17. CSL wrote to Mr Harper on 6 June 2001 informing him that his service in the Scheme to 30 June 2001 amounted to 26 years and 36 days. They said that the service they should have used to calculate his benefits as at 31 October 1998 was 23 years and 159 days instead of 26 years and 92 days. CSL apologised for the error and asked Mr Harper if he required any further information to be forwarded to his solicitors. Mr Harper retired on 3 January 2002. CSL notified him that his annual pension would be £11,839.01 p.a. after he had commuted pension for a lump sum of £58,800.32.

Potential Financial Loss

18. In response to a query from the Pensions Advisory Service dated 24 January 2003, Colemans said,

“Any financial settlement in relation to Ancillary Relief Proceedings relies on there being full and accurate financial disclosure by both parties. When making their decision about financial settlement, the Court have to consider a number of factors including the income, earning capacity, property and other financial resources of each party, the financial needs, obligations and responsibilities of each party, the standard of living before the breakdown of the marriage, the age of each party and the duration of the marriage, any physical or mental disabilities of either of the parties, the contributions which each party has or is likely to make, the conduct of each of the parties (if appropriate) and any benefit (for example a pension) which, by reason of the dissolution of the marriage, one party or another may lose.

As a result, hopefully you will see that it is not simply a mathematical task in assessing how incorrect information provided to the Courts will have affected the Court’s decision and/or the advice given to both Mr and Mrs Harper by Barristers at the hearing and the subsequent appeal hearing.”

19. According to Mr Harper, the first court hearing relating to his financial settlement was adjourned and he was ordered to obtain clear and detailed information from CSL for the second hearing. He states that, at the second hearing, his ex-wife was awarded approximately £19,000 and appealed against this on the advice of her solicitor. Mr Harper states that, at the appeal hearing, costs amounting to approximately £4,000 were awarded against him.

RBFA's Position

20. RBFA acknowledge that Mr Harper was given inaccurate information by CSL in 1998/1999. They do not accept that this amounts to maladministration on the part of the Fire Authority or that it caused Mr Harper's divorce settlement to be incorrectly calculated. RBFA say that, although a mistake was made, there is no evidence that this affected or in any way influenced the outcome of the divorce settlement. RBFA suggest that, if Mr Harper did suffer a loss as a result of the error, such loss amounts to no more than £669. They point out that an offer of £500 was made in February 2002, which Mr Harper rejected.
21. On the matter of the court hearings, RBFA say that there are normally at least three pre-scheduled hearings in Ancillary Relief matters required under the Court Procedure Rules. They suggest that the starting point for the division of matrimonial assets is a 50:50 split and that the relevant date for valuation is usually the date the parties formally separated. RBFA say that pensions are not considered the equivalent of a liquid asset and therefore the Court would not be interested in the transfer value of a pension, but in the overall benefits a party could expect to receive at retirement. In Mr Harper's case, they suggest that the Court will have been mindful of the fact that he stood to receive a significant lump sum and that his pension would increase with his annual salary before retirement.
22. RBFA say Mr Harper received a higher pension and lump sum on his actual retirement than had been quoted to him previously. They quote a pension of £15,219.97 p.a. and a lump sum of £58,800. (The pension is the pre-commutation figure.) RBFA suggest that, if the matter were remitted to the Court, there is a strong

possibility that the Court would increase the sum awarded to Mrs Harper. They point to the fact that the sum of £6,750 was not index linked in any way and say that, if Mrs Harper had to wait until Mr Harper's 65th birthday to receive it, it would have become almost worthless.

23. RBFA have suggested that one possible way of assessing the effect of the error in calculating the transfer value is to take the proportion of the transfer value represented by the award. Thus £6,750 is approximately 5% of the transfer value and so 5% of the correct transfer value would have been £6,081. The difference between the two amounts is £669, which RBFA suggest is the maximum loss to Mr Harper.
24. RBFA submit that the effect of the mistake was negligible. They suggest that the main matrimonial asset was a property. RBFA say that it can be deduced from references in the consent order of 20 August 1999 that the property was jointly owned by Mr and Mrs Harper there was a mortgage on the property. The consent order refers to Mr Harper using his best endeavours to procure Mrs Harper's release from her obligations under a mortgage with UCB secured upon this property. RBFA suggest that the fact that Mrs Harper was eligible for Legal Aid indicates that her main asset was a share in this property. They point out that the consent order specifically did not give Mrs Harper a share in Mr Harper's pension. RBFA suggest that the sum of £6,750 represented the balance of Mrs Harper's share in the property, which Mr Harper had not been able to meet at the time. They suggest that there had been some disagreement over the value of the property, evidenced by the attendance of a surveyor at an earlier hearing.

Mr Harper's Costs

25. Mr Harper has submitted that his legal fees for the three court hearings amounted to £13,000. He submits that he incurred three lots of court fees, whereas, if he had been provided with the correct information by CSL, there should only have been one. He also states that, having later been made aware of the error in calculating his benefits, he sought advice from his solicitors, Colemans, and a barrister, the cost of which amounted to £3,270.15. Mr Harper submitted receipts from Colemans dating between 17 December 2001 and 2 May 2002 amounting to £1,904.78.

26. Having been asked to provide more detailed information concerning his costs, Mr Harper provided a letter from the Legal Services Commission, Debt Recovery Unit, which confirmed that he had cleared his indebtedness to the Public Fund by payment of £18,876.32 and they were arranging a refund of £74.00. In addition, Mr Harper provided a number of invoices from Colemans dating between 31 December 2001 and 30 September 2002. Mr Harper has acknowledged that the invoices cover work done by Colemans on both his pension dispute and in relation to a matter involving the Child Support Agency. Those invoices which specifically identify work done in relation to Mr Harper's pension dispute are;

31 December 2001

All work undertaken between 23 November and 20 December 2001.

Amending a draft letter £13.50, 3 letters written £40.50, 1 letter received £13.50 and telephone calls £27.00.

The documentation indicates that Colemans wrote to CSL on 6 December 2001. This represents £13.50 (£15.86 incl. VAT) of the amount invoiced.

27 February 2002

Work undertaken in respect of Mr Harper's 'matrimonial and financial affairs' from 21 December 2001 to 18 February 2002

Reviewing file (12 minutes) regarding query from CSL - £27.00 (£31.72 incl. VAT)

The invoice refers to 10 letters written, 6 letters received and 6 telephone calls but there is no indication that these relate to Mr Harper's pension dispute. For the period in question, I have been supplied with copies of correspondence between Colemans and either CSL or RBFA amounting to one letter received from CSL (15 January 2002) and one letter written to CSL (22 January 2002). This represents £27.00 of the £216 invoiced (£31.72 incl. VAT).

30 April 2002

Work undertaken in progressing pension case and Child Support Agency matter from 26 March to 26 April 2002.

8 letters written, 3 letters received and 10 telephone calls amounting to £364.84.

None of the correspondence relating to Mr Harper's pension dispute that has been supplied to me relates to this period.

29 May 2002

Work undertaken in respect of 'matrimonial matters' from 27 April to 24 May 2002.

Mr Harper was invoiced for 7 letters written at £94.50, 3 letters received at £54.00 and 7 telephone calls at £108.00.

Perusing advice from Counsel regarding pension issue.

This forms part of 2 hours 36 minutes charged to Mr Harper, which includes work on his CSA case (preparing brief for Counsel, collating enclosures to go with brief and perusing CSA papers), amounting to £351.00 (£412.42 incl. VAT).

The invoice also includes £293.75 Counsel's fees for advice on the pension dispute.

None of the correspondence relating to Mr Harper's pension dispute that has been supplied to me relates to this period.

31 July 2002

Work undertaken in respect of 'matrimonial matters' from 28 May to 26 July 2002.

4 letters written and 1 telephone call at the rate of £135.00 per hour and 5 letters written and 1 letter received at the rate of £145 per hour.

The copy correspondence I have been provided with includes 2 letters written by Colemans (1 at £135.00 per hour) and 1 written by RBFA to Colemans in this period. The resulting cost of that correspondence was £42.50 (£49.93 incl. VAT).

30 September 2002

Work undertaken in respect of Mr Harper's pension dispute from 27 July to 27 September 2002 amounting to £1,787.75 (incl. VAT). This includes taking advice from Counsel and Counsel's fees amounting to £500 (£587.50 incl. VAT).

27. On 18 October 2002 Colemans informed RBFA that Mr Harper had sought advice from the Pensions Advisory Service and thereafter correspondence from RBFA and CSL was with the Pensions Advisory Service.

CONCLUSIONS

28. It was unquestionably maladministration for CSL to provide incorrect information about Mr Harper's pension. However, the extent to which Mr Harper has suffered any injustice as a consequence is less clear. Mr Harper has asserted that the error by CSL resulted in his incurring additional legal fees because he was required to attend court on more than one occasion. The evidence does not support this assertion. The error came to light in 2001 when CSL realised that they had incorrectly counted Mr Harper's earlier service in the Scheme twice. By this time Mr Harper's divorce settlement had been agreed. There is nothing to suggest that the information, incorrect though it may have been, provided by CSL at the time caused any extension to the ancillary relief process.
29. Mr Harper has asserted that the amount payable by him to his former wife was inflated because of the over-statement of his prospective transfer value. However, although Colemans have suggested that the sum of £6,750 represented a share of Mr Harper's pension there is no evidence as to how the figure had been calculated. The RBFA have put forward a very plausible argument suggesting that it related to the balance of Mrs Harper's share in the property, which Mr Harper had been unable to pay at the time. All that can be said with any confidence is that the sum does not appear to relate in any obvious way either to the transfer value quoted at the time of £136,869 or the £186,000 quoted earlier. In the absence of any persuasive evidence to the contrary, I find that Mr Harper has not established that his divorce settlement

would have been materially different had the correct transfer value been quoted at the time.

30. Mr Harper has asked me to consider the costs he has incurred in bringing his complaint. Insofar as these costs have been identified and substantiated by invoice, they amount to some £2,313.84 (including £103.11 being 25% of the costs identified in the 29 May 2002 invoice). I do accept that it may sometimes be reasonable for an Applicant to incur reasonable professional fees in pursuing a claim that injustice has been caused by maladministration. Such fees are a foreseeable consequence of an act of maladministration.
31. I have very real doubts, however, whether the fees incurred by Mr Harper were reasonably incurred. He (or his solicitors) seems to have failed, at the outset, to assess reasonably what possible difference to the overall settlement could be said to have arisen as a result of the maladministration. As I have set out above, my own assessment is that no such connection can be shown. That should have been apparent to Mr Harper and certainly should have been apparent to his solicitors. Despite this he has incurred very considerable costs amounting to a significant proportion of the amount which the solicitors have suggested might be in issue. I have not sought to establish what advice the solicitors offered or what instructions they received before Mr Harper chose to incur such costs. He may have some recourse elsewhere if that advice was not well founded or if the costs were excessive. But, so far as I am concerned, his actions in incurring such costs were not reasonable and I am making no direction for their reimbursement.

DAVID LAVERICK
Pensions Ombudsman

8 August 2005