PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Ian George Mayes-Wright
Scheme	Principal Civil Service Pension Scheme (**the Scheme**)
Respondent	Scheme Management Executive (**SME**) of the Cabinet Office

Subject

Mr Mayes-Wright complains that Capita, the paying authority for the Scheme, have allowed an overpayment of his pension to accrue due to no fault of his own. He would like the overpayment to be reduced by significantly more than the existing offer of £500.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the SME, managers of the Scheme, as they are responsible for the maladministration by the Foreign and Commonwealth Office (**FCO**), Mr Mays-Wright's employer, and Capita. FCO failed to identify and inform Capita until August 2005 that Mr Mayes-Wright had exceeded his annual earnings limit from 2000. Once informed by FCO that Mr Mayes-Wright had exceeded the annual earnings limit in 2005, Capita failed to take steps to inform Mr Mayes-Wright of the overpayment, prevent further accrual of the overpayment, and arrange recovery of it, until 2010.

DETAILED DETERMINATION

Material Facts

1. Mr Mayes-Wright retired from FCO on 14 September 2000 aged 60. On 8 March 1999, before his retirement, FCO sent him details about the retirement process in the Scheme booklet "Your Pension Scheme Benefits Explained". Among other things, the booklet explained re-employment after retirement and abatement. The booklet explained that his pension would be completely suspended if he was re-employed at the same or higher salary. If he was re-employed at a lower salary, his pension would be reduced so that his total earnings of salary and pension will not be more than his salary when he retired. This is known as abatement.

2. FCO wrote to Mr Mayes-Wright on 25 July 2000 to confirm his appointment as an Entry Clearance Officer from 15 September to 30 November 2000 on a fee-paid contract. They subsequently wrote to him on 23 August with details of his benefit award. The letter said "if you are re-employed in the Civil Service payment of the whole or part of your pension may be suspended during your re-employment depending on your new rate of pay…".

3. Mr Mayes-Wright has secured new FCO contracts (on a fee paid basis) periodically from 2000.

4. FCO wrote to Paymaster (the previous administrator of the Scheme before Capita) on 23 February 2001, with details of Mr Mayes-Wright's re-employment. Paymaster replied on 14 March informing FCO that his annual earnings limit before abatement was £12,248.30. They asked to be told if Mr Mayes-Wright earned more than the limit.

5. On March 28 March 2001, FCO wrote to Mr Mayes-Wright about a revised benefit award and repeated the warning about abatement. FCO also informed Paymaster on 30 March 2001, on form CSP13 about Mr Mayes-Wright's periods of re-employment.

6. Capita became the Paying Authority for the Scheme from 1 October 2002.

7. On 11 August 2005, FCO wrote to Capita informing them that Mr Mayes-Wright had reached his earnings margin of £12,248.30. Capita asked for details on 19 August and FCO replied on 16 September. The reply showed that Mr Mayes-Wright had exceeded his earnings margin from September 2000 to September 2005. Capita informed FCO on 15 December 2005 that Mr Mayes-Wright had been overpaid

pension benefits of £23,491.66 and asked “advise how you would wish us to proceed with recovery of the overpayment”.

8. On 10 January 2006, FCO asked Capita for a breakdown of the overpayment, which Capita provided. There was no progress on the matter until 21 September 2006 when FCO wrote to Capita informing them of Mr Mayes-Wright’s earnings of £19,475 from September 2005 to August 2006.

9. FCO wrote again to Capita on 14 May 2008 referring to their earlier letter of 15 December 2005. FCO said that the overpayment matter may still be outstanding and Mr Mayes-Wright had continued to exceed his earnings margin. They enclosed details of Mr Mayes-Wright’s earnings from September 2000 to April 2008. FCO wrote again to Capita on 29 January 2010, enclosing an update of Mr Mayes-Wright’s earnings and asking for an up to date earnings margin for him.

10. On 16 March 2010, Capita wrote to Mr Mayes-Wright informing him of the overpayment of his pension amounting to £31,124.05 for the period September 2000 to October 2007. They suggested recovering £6,743.04 from his pension annually for 4 years with the balance being recovered in the fifth year. They also wrote to FCO on 17 March 2010 with a copy of their letter to Mr Mayes-Wright and informing them that Mr Mayes-Wright’s earnings margin was £16,087.07.

11. Mr Mayes-Wright’s accountant, Whiting and Partners, represented him in his correspondence with FCO and Capita. He asked for and received a breakdown of the overpayment. In November 2012, Mr Mayes-Wright asked Capita to consider his complaint under the Internal Dispute Resolution Procedure (**IDRP**). The IDRP Stage One decision was issued on 7 December 2012. Capita said they had explained how the overpayment arose and they were obliged to seek recovery of the overpayment regardless of how it had occurred. Mr Mayes-Wright appealed and the IDRP Stage Two decision was issued by the SME on 25 July 2013. They said the overpayment arose because Capita did not abate Mr Mayes-Wright’s pension when his pay exceeded his earnings margin. The SME said that FCO did not inform Capita that Mr Mayes-Wright had exceeded his earnings margin until August 2005, by which time he had already been overpaid by £23,491.44. Notwithstanding, the SME said that Mr Mayes-Wright should have known that his pension was subject to abatement when he was re-employed by FCO. The SME said that neither Capita nor FCO took any action to deal with the overpayment and the overpayment grew between 2005 and 2007 to £31,125.05. The SME accepted that the overpayment arose “largely through

a breakdown in communication between Capita and FCO" but it remained recoverable. They directed Capita to reduce the overpayment by £500 (to be shared between Capita and FCO) in recognition of the injustice suffered by Mr Mayes-Wright. They also said that Capita must offer him the opportunity to repay the balance of the overpayment in instalments over the same period in which it accrued.

12. Mr Mayes-Wright brought his complaint to this service. He is currently repaying the overpayment at £364.58 per month for 83 months, with a final payment of £363.91. He has submitted copies of his bank statements in support of his contention that he would suffer hardship in the event of full repayment. The SME referred the matter of hardship to the Finance Estate Management (**FEM**) team. When we contacted the FEM team some weeks later, they told us that they were issuing a demand to Mr Mayes-Wright for the outstanding amount. They agreed to withhold the request while we concluded our investigation and said they would instead request details of Mr Mayes-Wright's income and outgoings. This would enable them consider the repayment level.

Summary of Mr Mayes-Wright's position

13. Mr Mayes-Wright says that he was not aware of the overpayment and he thought his pension was being abated. He was working abroad for most of the time the overpayment accrued and so he was unable to keep track of his income. He trusted FCO to make the correct payments and deductions.

14. His salary was used up in day-to-day spending and the education of his children who were preparing for university. His father-in-law was also living with them at the time. He says that he has a mortgage of about £180,000 and a home improvement loan of £15,000 from 2013 for replacement windows. He does not have any savings and cannot say what he would have done differently. He may eventually have to sell his home to repay the amount outstanding.

15. He has been repaying the overpayment since September 2013 but he was not consulted regarding whether the amount of the monthly repayment was sustainable. He is continuing to work to offset the repayment. He only went back to work after retirement as it was clear to him that his income as a pensioner would need to be supplemented.

16. His current FCO contract ended in September 2014 and he is hoping to commence another in April 2015. His only current incomes are his occupational and state pensions.

Summary of the SME's position

17. The SME say that Mr Mayes-Wright should have known that his pension was subject to abatement. They have seen no evidence that he took action to query or check his position with either Capita or FCO.

18. They admit that the overpayment has arisen largely through a breakdown in communication between Capita and FCO. However, they cannot disregard the abatement rule. They are bound by the principles of Managing Public Money (**MPM**) which sets out guidance on the recovery of overpayments. In accordance with the guidance, the overpayment to Mr Mayes-Wright is legally recoverable.

Conclusions

19. The general position is that money paid in error is recoverable. An error such as this does not automatically lead to Mr Mayes-Wright being entitled to retirement benefits in excess of what the Scheme rules allow. For Mr Mayes-Wright to have any defence to repayment he must not have been aware, or reasonably capable of being aware, of the error in the first place.

20. The SME believe that Mr Mayes-Wright should have known that his pension was subject to abatement. FCO wrote to Mr Mayes-Wright on 23 August 2000 and 28 March 2001 warning him of this. The Scheme booklet also included information about abatement so it is reasonable to say that Mr Mayes-Wright should have known that his pension could be affected by his re-employment. However, I do not consider that Mr Mayes-Wright was aware that his pension was subject to abatement from 2000 to 2007 and that it was not being abated.

21. The SME is unable to provide any evidence that Mr Mayes-Wright was informed of his actual annual earnings limit. The annual earnings limit is how FCO identify whether abatement is due. If Mr Mayes-Wright's income exceeds the annual earnings limit, then his pension will be abated. As Mr Mayes-Wright was unaware of his earnings limit, he could not have known if and when any abatement was due. This meant that he would not have known if his pension was being overpaid. Mr Mayes-Wright says that he relied on FCO/Capita to pay the correct pension and that is not an unreasonable expectation.

22. Mr Mayes-Wright was frequently working abroad on a fee paid basis and his salary was paid into his UK bank account. So, even if he had been aware of his annual earnings limit, he may not have been in a position to accurately determine whether he had reached or exceeded it. Working on a fee paid basis means that his income fluctuates and it can be difficult to keep track, more so in Mr Mayes-Wright's circumstances.

23. It is my view that Mr Mayes-Wright acted in good faith when receiving his unabated pension as he could not have known that he was being overpaid. In anycase, it was not a matter for him to decide; it was the responsibility of FCO. It was for them to monitor his salary against the earnings limit and inform Capita if and when it is reached. Mr Mayes-Wright exceeded this limit from 2000 but FCO did not inform Capita until 2005. By this time, the overpayment was £23,491.66. I understand that the calculation for Mr Mayes-Wright should have been done yearly in arrears as it is uncertain how much his salary would be in any year. Nonetheless, it is maladministration that FCO failed to monitor Mr Mayes-Wright's income and did not inform Capita of the accruing overpayment until 2005.

24. For their part, it is the responsibility of Capita, as the paying authority, (once informed that the earnings limit has been exceeded) to apply the abatement and seek recovery of any overpayment. However, Capita did not do this in 2005 when FCO first informed them that Mr Mayes-Wright had exceeded the limit. Instead, Capita appeared unsure of their responsibility and requested directions from FCO regarding what should be done. Furthermore, Capita did not take any recovery action in 2008 when FCO reminded them about the outstanding overpayment. In fact, Capita did not take any steps to recover the overpayment until 2010. Unfortunately, the overpayment had further increased by £7,632.39 between 2005 and 2010. Capita eventually informed Mr Mayes-Wright of the overpayment in 2010 and commenced plans to reclaim the overpayment. This is what they should have done in 2005 and their error also amounts to maladministration.

25. Having settled the question of whether Mr Mayes-Wright should reasonably have been aware of the mistake, I need to consider whether he changed his position in reliance on the amount of pension he was receiving, such that it would be inequitable for the SME to pursue recovery.

26. Mr Mayes-Wright says that it is unfair to expect him to repay £31,124.05 at his age (he is 74 years old) and when he is ending his employment with FCO soon. He argues that the overpayment has been subsumed into his normal spending running his home in the UK and providing for his children through 6th form and university. He says that he has no savings as all his income is spent. He has a significant mortgage to repay and he has carried on working to supplement his pension. Mr Mayes-Wright says that he has changed his position and I am inclined to agree with him. In reaching this decision, I have not taken account of the home improvement loan as that commenced after he was aware of the overpayment.

27. Mr Mayes-Wright's income is fully used up in day-to-day spending and he appears to have adjusted his lifestyle to match his income. I find that his position has changed because he relied on the pension he was receiving and lived according to his means. The overpayment of his pension would have allowed him to live an improved lifestyle and provide more for his family than he ordinarily would have. This cannot be undone. Mr Mayes-Wright has not accumulated any savings and spent his pension believing that it was his to do as he wanted.

28. In correspondence with us, the SME said that Mr Mayes-Wright's case had not been considered for any hardship that may be caused to him by recovery of the overpayment. The case was therefore referred to the FEM team. However, the FEM team have now said that they were unaware that they were supposed to consider hardship under the MPM guidelines. It was only due to our intervention that a demand letter was not sent to Mr Mayes-Wright. The FEM team (and the SME by extension) appear intent on seeking repayment of the overpayment despite not fully considering Mr Mayes-Wright's defence against recovery. This is not in the spirit of MPM and I am concerned about the manner Mr Mayes-Wright's case has been handled. The SME should have considered Mr Mayes-Wright's claim of hardship during the IDRP Stage Two decision and/or referred the case automatically to the FEM team. They did neither and this is similar to the failure of both FCO and Capita to take responsibility for the overpayment in 2005 and 2008.

29. It would be unequitable for Mr Mayes-Wright, at this time of his life, to be encumbered with a significant debt that he was not aware of until it was too late. In any event, I do not think that it is right that Mr Mayes-Wright should have to repay the amount which accrued after 2005 when the overpayment was initially discovered. Therefore, the balance of the overpayment should not be recovered.

30. My directions are set out below.

Directions

31. SME are not to attempt to collect any further overpayment from Mr Mayes-Wright. If SME require an equivalent payment to the Scheme, then they are to seek that from Capita and FCO by whatever means and share as they decide.

32. Within 28 days of the date of this determination the amount already repaid by Mr Mayes-Wright as part of the repayment schedule should be returned to him with interest. Interest shall be paid at the base rate for the time being quoted by the reference banks, calculated from the dates Mr Mayes-Wright made the payment up to the date SME refund the payment to him.

Anthony Arter
Pensions Ombudsman

2 June 2015