

Final Determination Mrs D v Public Sector Pensions Authority – Deputy Pensions Ombudsman Isle of Man – 10 December 2018

Applicant = Mrs D (**Mrs D**)

Pension Scheme – Isle of Man Government Unified Scheme (the **Scheme**)

Respondent - Public Sector Pensions Authority (**PSPA**)

Final Determination - Mrs D v PSPA

1. Complaint Summary

1.1 Mrs D has complained that, as a result of an inaccurate retirement quote given by the PSPA in 2014, she accepted a payment (the "**MARS Payment**") under the Mutually Agreed Resignation Scheme (**MARS**) offered by the Civil Service Commission. In particular:

- 1.1.1 there was maladministration resulting in her suffering distress and inconvenience as a result of a substantial disruption to her early retirement plans; and
- 1.1.2 she has suffered loss as a result of relying on the inaccurate retirement quote as she would not have accepted the MARS Payment and, on the balance of probabilities would have continued working if the inaccurate quote had not been given.

1.2 For the reasons set out below. I uphold Mrs D's complaint.

2. Background

2.1 Mrs D's complaint is made against the PSPA in its capacity as manager and administrator of the Scheme.

2.2 The complaint relates to an inaccurate early retirement quote given to Mrs D in December 2015 when Mrs D was considering taking early retirement under MARS operated by her then employer the Civil Service Commission. The quote related to the pension and lump sum payable to Mrs D under the Scheme. Under MARS Mrs D was also offered a payment of around £45000).

2.3 The error was not discovered until 6 May 2016 after Mrs D had agreed to resign under the MARS Scheme at the point when Mrs D sought to draw her pension and discovered that the figures provided were incorrect. Mrs D was incorrectly quoted figures of:

2.3.1 a lump sum of £142,685 (assuming maximum commutation of the pension); and

2.3.2 a residual pension of £16,646

2.4 The correct figures as communicated to Mrs D on 5 May 2016 were (I understand):

2.4.1 A lump sum of £130,070.06; and

2.4.2 A residual pension (assuming maximum commutation of the pension) of £15,174.84.

- 2.5 There is a difference of about £12,000 in the amount of the lump sum and a difference of about £1,472 pa in the level of pension before any future increases in the level of pension.
- 2.6 Mrs D alleges that, if she had been made aware of the correct figures at the time she made a decision to accept the MARS Payment, she would not have resigned under the MARS. Mrs D alleges she was relying on the MARS Payment and the projected level of lump sum and pension and rental income from her house in the IoM (which I understand she had not planned to sell as part of her retirement plans) to provide sufficient income in her retirement for her needs. As a consequence of the inaccurately quoted pension and lump sum being less than she had been expecting, she alleges that she has had to alter her retirement plans; borrow money from another family member to pay off the mortgage, sell the house she had been relying on to provide the rental income (and buy another smaller one) and seek work to ensure that she had enough money to fund her retirement.
- 2.7 Mrs D has advised that, following the discovery of the inaccurate early retirement quote, she sought to establish whether she could be offered her old job back by contacting the Manx Industrial Relations Service (**MIRS**) through which the MARS Payment had been negotiated. Mrs D has told by MIRS that having her old job back was not an option as her post had already been filled by her former employer. I accept that Mrs D did approach MIRS and that it was correct that by the time Mrs D did find out about the inaccuracy in the early retirement quote her old job had been filled.
- 2.8 Mrs D is effectively alleging that if she had been given the correct information she would not have taken the MARS Payment but would have remained employed by the Civil Service Commission (now the Public Services Commission). Or in other words, in legal terms, that Mrs D relied to her detriment on the inaccurate early retirement quote and suffered both:
- 2.8.1 distress and inconvenience as a result of the disruption to her retirement planning; and
 - 2.8.2 financial loss by relying on the inaccurate quote to her financial detriment.

3 Independent Disputes Resolution Second Stage = Determination on 30 September 2016

- 3.3 The complaint has already been considered under the two stage Internal Disputes Resolution Procedure operated by the PSPA. The Independent Disputes Resolution Procedure Second Stage Determination of the PSPA acknowledges that an error has been made, an apology has been issued and an offer of £500 made by way of settlement of the matter for distress and inconvenience suffered as a result of the inaccurate quote. In other words the PSPA has conceded that there was maladministration resulting in distress and inconvenience to Mrs D. The PSPA, however, has not conceded that Mrs D has suffered any legal loss for which she is entitled to be compensated.
- 3.4 In relation to the proposed payment for distress and inconvenience the PSPA noted in its Second Stage IDRP determination that the payment of £500 takes into account the level of compensation the Pensions Ombudsman will typically award in cases like this. I will comment further on the appropriateness of the level of compensation offered for distress and inconvenience below.

3.5 The Second Stage IDRPs Determination also notes that the Scheme is a statutory scheme, approved by Tynwald, and the PSPA is unable to pay benefits other than in accordance with the provisions of the Scheme. The PSPA also considers that Mrs D has suffered no financial loss for which she is entitled to be compensated for as she would have accepted the MIRS payment in any event even if the correct figures had been given. It is correct as a matter of law that:

3.5.1 the PSPA can only pay benefits in accordance with the provisions of the Scheme; and

3.5.2 if no legal loss flows from reliance on any inaccurate statement of Mrs D's early retirement benefits the PSPA is not liable to or able to pay any financial compensation over and above any payment for distress and inconvenience (see below).

3.6 I would also note, however, that there is an augmentation power under the Scheme (clause 30) which would enable Mrs D's pension to be augmented if this was requested by Mrs D's former employing authority which would for this purpose be the Public Services Commission subject to the payment of additional contributions (if any) advised by the actuary.

4 Ombudsman's ability to award compensation in respect of maladministration and negligent misstatement

4.3 The Isle of Man Pensions Ombudsman has jurisdiction, among other things, to consider:

4.3.1 complaints of maladministration made by a beneficiary of a pension scheme against a manager or administrator of a pension scheme who alleges (s)he has suffered injustice in consequence of maladministration in connection with any action or omission of a person responsible for the management of the scheme;

4.3.2 a dispute of fact or law in relation to a pension scheme between a person responsible for the management of the scheme and an actual or potential beneficiary of the scheme.

4.4 In the current case the complaint can be analysed both in terms of alleged maladministration (which has been admitted in the IDRPs procedure by the PSPA) as a result of the provision of the inaccurate quote and also as an alleged breach of law on the basis that the quote negligently misstates Mrs D's benefit entitlement.

4.5 There is no direct authority in the Isle of Man yet on the size of the awards the Isle of Man Pensions Ombudsman can make for maladministration. However, the UK courts have confirmed in relation to the UK Ombudsman's jurisdiction (which is virtually identical to that in the Isle of Man) that the UK Ombudsman can award reasonable awards for distress and inconvenience. The UK courts originally held that an award of up to £1000 could be paid other than in exceptional cases. Recent cases have however confirmed that higher awards may now be appropriate. The UK Ombudsman has also generally increased the level of awards paid for distress and inconvenience not causing financial loss in recent years and has recently issued revised guidance so awards are typically now (if any award is appropriate) £500 or £1,000 or £1,500 or £2,000 (other than in exceptional cases where the awards can be higher still) depending on the seriousness of the case. I am not bound by the UK Pensions Ombudsman's guidance but it does indicate

that in the analogous UK jurisdiction the typical level of awards is now higher than in previous years. My approach in determining the appropriate level of award is to focus on the level of distress and inconvenience suffered as a result of any maladministration.

- 4.6 On the evidence submitted about the disruption caused to Mrs D by the misstatement of her benefit entitlement, I consider that Mrs D has suffered significant distress and inconvenience here and an award of £1000 is appropriate. I accept that on the evidence (see below) there has been major disruption to Mrs D's retirements plans, resulting on her having to borrow money from her family to meet the shortfall in the lump sum payment she expected, may have impacted on her plan to sell her IoM house when she had not originally planned to and that she had to take on work earlier than she had planned to make up the shortfall in her income and has generally caused her considerable worry and distress. This in my view amounts to significant distress and inconvenience for which an award of £500 is not sufficient.

5 Has Mrs D suffered financial loss as a result of any reliance on the inaccurate early retirement statement?

- 5.3 For Mrs D to be entitled to any financial compensation in relation to the negligent misstatement of her benefits it will be necessary to demonstrate:
- 5.3.1 a negligent misstatement of her benefits (which has been admitted by the PSPA in the IDR process);
 - 5.3.2 reliance on the misstatement (this is disputed by the PSPA) ; and
 - 5.3.3 loss has flowed from such reliance (this is disputed by the PSPA). To the extent that there has been a negligent quotation of benefits that has been relied on Mrs D should also take all reasonable steps to mitigate her loss. If she fails to do so this will reduce the amount of compensation payable.
- 5.4 Mrs D maintains that she would not have taken early retirement and accepted the MARS Payment if she had been given the correct early retirement figures. Mrs D alleges that if the correct early retirement figure had been given she would have remained employed in her existing job. Mrs D indicates that the difference of circa £1,500 per annum for her pension and the difference of £12,000 or so for the lump sum was sufficiently material for her to have refused the offer. In this connection I would observe that for someone of Mrs D's age the capital value of providing an extra £1 of pension for the remainder of her life is very significant and could easily be 30/40 times the value of the pension. Mrs K would of course not have received the MARS Payment but would have been able to continue to earn a much higher salary than she has been able to earn since and build up further replacement pension.
- 5.5 Mrs D also has advised that:
- 5.5.1 after receiving details of the inaccurate early retirement quote she approached the MIRS service to ask if she could be reinstated to her old job but was told that this was not possible as the post no longer existed;
 - 5.5.2 the previous year she had been offered early retirement and a MARS payment and she had turned it down as it would not provide sufficient income in her retirement; and

- 5.5.3 the difference between the inaccurate and correct projection of her pension benefits was critical to her retirement plans. The difference was sufficiently significant to result in her having to by selling her Isle of Man property (which she had planned to rent out) and to buy a smaller one and also to take up part time employment. Mrs D also has advised that she had to borrow from a family member to pay off the mortgage as the lump sum available was no longer sufficient to do this.
- 5.6 The PSPA argues that a difference of £1,500 or so per annum of pension and the difference in lump sum would have had made no difference to her decision to take early retirement and accept the MARS Payment. In other words Mrs D would have still accepted the early retirement pension if she had been given the correct figures so no loss flowed from the inaccurate quotation.
- 5.7 The PSPA also alleges that:
- 5.7.1 Mrs D had been commuting from the UK to the IoM throughout her employment. The PSPA understands that the long commute was challenging and her line manager had sought a review of her flexible working arrangements which she asserted had been agreed at the time of her interview to reflect her long commute. The PSPA consider that this was a relevant factor in her decision to accept the MARS Payment;
- 5.7.2 around the time of departure her work place was undergoing significant changes to allow a more flexible and efficient structure to be implemented and these changes were not generally welcomed in the workplace. This was again a factor in her decision to accept the MARS payment;
- 5.7.3 Mrs D knew, or should have known, that MIRS were not the correct entity to approach about re-employment. Mrs D should have approached her former employer directly to discuss re-employment. The PSPA believes that her preference to seek reemployment in the UK is indicative of her desire to address her circumstances regarding her long commute and altered work practices;
- 5.7.4 Given Mrs D's relatively young age it was not surprising that she took on part-time work in any event. In other words she would have taken on part-time work even on the higher retirement quote.
- 5.8 Mrs D disputes the above. In particular:
- 5.8.1 Mrs D states that she had made her flexible working arrangements operate effectively for many years throughout her previous employment. Occasionally there were problems due to inclement weather but the travel was no more challenging than a 2 hour commute on the mainland. Mrs D states that flexible working was not a factor which would have persuaded her to accept MARS on the lower figures;
- 5.8.2 while the proposed changes to the employment arrangements were not welcomed by Mrs D and another colleague there was nothing new in the situation in December 2014 when she previously had been invited along with a number of colleagues for expression of interest in MARS (which she had refused). Changes had been effected already in her workplace and Mrs D had adapted to them. Again this issue would not have persuaded Mrs D to have accepted the lower early retirement figures;

- 5.8.3 Mrs D disputes that she should have known that MIRS was not the correct entity to approach to make enquiries if the MARS agreement could be set aside and that effectively it was reasonable to assume that they had ostensible authority to make the statement. Mrs D is also at a loss to understand why the MIRS officer she spoke to did not refer her back to her employer instead of telling her that her position had been filled, had this been an obvious and realistic course of action. There was no longer a vacancy as it had been filled;
- 5.8.4 Mrs D accepts that she did retire relatively young and it was always her intention to seek part time position in due course but did not anticipate that her need for employment would be as urgent as it proved to be. It was certainly not her intention to seek the post she was forced to accept because of its stressful nature but she had to do so to mitigate her position and make up some of the shortfall in income. In this connection, I would note that the salary in her previous IoM position was significantly greater than the full time equivalent salary in the part time jobs she was able to obtain and Mrs D has struggled since to obtain work in her area of professional expertise since. There are, I understand, limited opportunities in this area of expertise on the mainland;
- 5.8.5 Mrs D has also provided details of her income and savings and outgoings in relation to her house on the IoM. Mrs D has advised that she was relying on the lump sum to pay off her mortgage and as a result of the inaccurate figure the lump sum did not cover the mortgage. Also as a consequence of the lower projected income Mrs D ended up having to sell her house on the Isle of Man and buy a cheaper house in the UK when she had not planned to do so under her original retirement plans. Mrs D has advised that £7,000 was a significant sum to her as was the difference of pension of £1,472 pa. Having regard to the information provided I accept that, the difference was material to her overall finances. Also generally I find Mrs D's evidence credible.
- 5.9 Mrs D has also provided details of the earlier early retirement quotation and MARS payment of circa £38,000 which Mrs D had turned down previously. The quote provided previously (which was also inaccurate again for slightly different reasons) and was not accepted was, depending on the projected date of retirement, either for:
- 5.9.1 a lump sum of £117,130 and a lump sum of £13,665 (assuming maximum commutation of the pension; or
- 5.9.2 a lump sum of £117,530 and a lump sum of £13,711 (assuming maximum commutation).
- 5.10I would note that the MARS payment figure was also slightly lower (£37,000 instead of circa £45,000) and the pension and lump sum on offer (even if incorrect again) were lower than the revised inaccurate quote and also the correct quote given in 2015 of a lump sum of £130,070.06 and a pension of £15,174.84 (assuming maximum commutation) and significantly lower than the incorrect 2015 quotation of a lump sum of £142,685 and a pension of £16,646 (after maximum commutation). However, although the 2014 quotation was lower than the correct 2015 quotation the fact that Mrs D had turned down a MARS payment previously does illustrate that the decision to retire and accept the MARS payment the

second time was finely balanced. Mrs D was offered extra lump sum and an extra pension pa of almost £4,000 more in 2015 than the inaccurate 2014 quote she turned down in 2014. I am not convinced that an extra £1,600 or so of pension (i.e. the difference between the 2014 quote and an accurate quote in 2015) would have been sufficient for Mrs D to have resulted in her accepting the MARS Payment in 2015. I can, however, see why an extra £3,000 pa of pension quoted inaccurately in 2015 (compared with the 2014 figure) would have been enough to make a difference given Mrs D's overall financial situation as disclosed to me.

5.11 Having regard to all the above information, in particular the evidence that Mrs D did approach MIRS to see if she could have her old job back, and the credibility of Mrs D's other evidence, I consider that, on the balance of probabilities, Mrs D did rely on the early retirement quotation and would have not accepted the 2015 early retirement quote and MARS Payment if she had been given the correct early retirement information in 2015.

6 What loss has flowed from Mrs D's reliance on the inaccurate early retirement quote?

6.3 Once materially detrimental reliance has been established it is then necessary to calculate the loss which flows from such reliance. The approach which would be taken in the UK in this situation (my understanding is that the Isle of Man courts would take a similar approach) is set out in *Banque Bruxelles v Eagle Star* [1996] 3 WLR 87. In this case which related to an inaccurate valuation Lord Hoffman confirmed a principle that the UK Pensions Ombudsman has applied in determining the level of loss caused by the provision of incorrect information:

"In the case of a breach of duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what elements of his loss is attributable to the inaccuracy of the information."

6.4 The issue of the correct measure of loss for detrimental reliance on inaccurate information was also considered by Walker J in *Westminster v Haywood* [1996] 2 All ER 467. In this case, Walker J held at paragraph 64 of the judgment:

"Compensation for negligent misrepresentation (to which the Pensions Ombudsman equated to maladministration) should put the plaintiff in the same position as if the informant had performed his duty and provided correct information – not put himself in the position he would have been in if the incorrect information had been correct"

6.5 Under general legal principles relating to negligent misstatement the member should also take reasonable steps to mitigate her loss e.g. to seek to apply for her job back (which she did via MIRS) and also seek work in an alternative job to make up the lost income. On the evidence I have seen Mrs D has taken such steps although she might possibly have been able to increase her earnings since.

6.6 Generally any financial compensation should not put a member in a better position than they would have been in if the information had proved correct. For example in a UK Pensions Ombudsman decision (E00493 - 6 November 1996) the complainant argued that he would not have taken early retirement a year earlier

than he would have done if it were not for an incorrect quotation. The then UK Ombudsman concluded that the complainant would have worked for a further year to bring his benefits up to the level originally quoted. The Ombudsman noted that the law did not require a precise calculation of the loss since it appeared higher than the difference in the value of the misquoted pension rights and what he actually received. Where inaccurate information is provided, damages should not put the victim in a better position than he would have been in had the information been correct and reference was made to *Banque Bruxelles v Eagle Star* [1996] 3 WLR 87.

- 6.7 Mrs D has alleged that if she had not been given an inaccurate early quote she would not have accepted the MARS Payment and would have continued to work and earn a salary of circa £80,000 and build up further pension until she was satisfied that she had sufficient pension and other income from letting her property to retire. I have no evidence that Mrs D would have been made compulsorily redundant and would not have been able to continue to work for her employer if she had not accepted the MARS Payment.
- 6.8 It is unclear to me how long Mrs D would have continued to work but the evidence she has provided is that she had always hoped to be in a sufficiently strong financial position to retire at age 58 i.e. if she had not taken the MARS Payment she would have retired in two years' time.
- 6.9 If I had needed to calculate a compensation payment I would have taken the following approach:
 - 6.9.1 If Mrs D had retired in 2-4 years' time, she would have received a salary of circa between £160,000 to £320,000 (before tax) during this period;
 - 6.9.2 Mrs D would have benefitted from any increase in the capital value of her pension which would have been significant during the period she continued to work compared with what it would have been if the inaccurate quotation had not been provided;
 - 6.9.3 The MARS Payment of circa £45,000 would need to be deducted; and
 - 6.9.4 The amount she actually earned or could reasonably have earned during this period should be deducted (Mrs D seems to have earned about £26,000 a year since she took the MARS payment and on the evidence I have it does appear would have struggled to find a full time job due to lack of work opportunities in her professional area. It may be reasonable to assume that she may have been able to earn a bit more if she undertook other work outside her area of professional expertise);
 - 6.9.5 Any employee contributions to the Scheme would need to be deducted.
- 6.10 In order to calculate damages on the above basis, I would need to direct the PSPA to carry out detailed calculations of the value of the pension accrual and work out a discounted figure for the loss. It would appear however that the calculation is likely to be in excess of the difference in the value of her pension and lump sum between the amount quoted and the amount of pension and lump sum received. Mrs D should not be put in a better position than she would have been in if the inaccurate quotation had not been given.
- 6.11 I cannot direct the PSPA to do anything it does not have power to do under the Scheme provisions. However, as noted above there is, *inter alia*, a power to

augment Mrs D's benefits with the consent of the Public Service Commission. I understand that the PSPA would be willing to use its available powers to augment Mrs D's benefits to comply with a direction to put her in the position she would have been in if the inaccurate quotation had not been given. This will have the effect of compensating her for the loss suffered.

6.12I have considered whether I should make any further award for costs incurred selling her house. I have concluded that this is not appropriate as the loss is too remote and it is unclear to me whether it flowed from the inaccurate quotation. It is possible that at some point in the future she may have needed to have incurred these costs in any event.

7 Findings of fact and law

7.3 I make the following findings of fact and law:

7.3.1 the inaccurate early quotation issued to Mrs D by PSPA amounts to maladministration for which Mrs D is entitled to a payment for distress and inconvenience;

7.3.2 Mrs D relied on the inaccurate quotation to her detriment and has suffered loss as a result.

7.4 I direct that the PSPA should:

7.4.1 pay Mrs D the sum of £1,000 for the distress and inconvenience suffered;

7.4.2 retrospectively augment Mrs D's pension and lump sum benefits and pay her arrears of the augmented pension and lump sum to put her in the position she would have been in if the retirement quotation given in December 2015 had been accurate; and

7.4.3 pay interest on the arrears of pension and lump sum at the rate prescribed for the purposes of section 151A of the Pension Schemes Act 1993 (as applied to the Isle of Man) and regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996.

7.5 In respect of 7.4, the PSPA has set out the basis for the payments owed under the Appendix to this Determination. A further interest payment will be necessary to the extent that payment of the arrears of pension and lump sum occurs after 1 December 2018.

Ian Greenstreet

Deputy Pensions Ombudsman

10 December 2018

Appendix

PSPA Response to the [Provisional] Determination Mrs D v Public Sector Pensions Authority
– Deputy Pensions Ombudsman Isle of Man

Applicant = Mrs D (Mrs D)

Pension Scheme – Isle of Man Government Unified Scheme (the Scheme)

Respondent = Public Sector Pensions Authority (PSPA)

The PSPA have been directed to

- 7.4.1 pay Mrs D the sum of £1000 for the distress and inconvenience suffered;
- 7.4.2 retrospectively augment Mrs D's pension and lump sum benefits and pay her arrears of the augmented pension and lump sum to put her in the position she would have been in if the retirement quotation given in December 2015 had been accurate; and
- 7.4.3 pay Mrs D reasonable interest in respect of the arrears of pension and lump sum.

Retrospectively Augmented Pension and Lump Sum

Had the retirement quotation been correct, based on Mrs D's final pensionable service and pay as at 24 May 2016, Mrs D would have been awarded a Maximum Lump Sum of £148,951.22 and a Residual Pension of £17,377.64 per annum and a Dependent Survivor's Pension of £11,290.80 per annum.

The respective values as at 1 December 2018 are a Maximum Lump Sum of £167,832.38 and a Residual Pension of £18,077.96 per annum.

The amounts due for payment to Mrs D (assuming a payment date of 1 December 2018) are as follows:

- One off payment of arrears of Lump Sum: £18,881.16;
- Augment Mrs D's Residual Pension in payment to equal £18,077.96 per annum from 1 December 2018; and
- One off payment of arrears of Residual Pension, including the annual pension increases applied in April 2017 of 1% and the annual pension increase in April 2018 of 3%, to equal a total of £5,629.83.

Interest

The PSPA propose to calculate interest on the backdated Pension instalments and additional Maximum Lump Sum using the Bank of England Base Rates for the period from 25 May 2016 to 30 November 2018.

The interest on the Arrears of Lump Sum amount to £195.60

Interest on the arrears of Residual Pension amount to £34.97

Refunded Contributions

The arrears and interest of the residual pension owed and the additional Maximum Lump Sum amount to £24,741.56.

From this the PSPA will deduct the contributions that were initially deducted from Mrs D and later refunded to her when the error was identified.

The amount of contributions refunded amounted to £6,137.86. These being:

- £545.80 refunded in April 2012, representing over payment of employee contribution for the period from November 2011 to March 2012; and
- £5,592.06 for the period from April 2012 to 8 July 2016.

Total to be paid in settlement of the Determination by the PSPA to Mrs D

The PSPA will deduct the refunded contributions of £6,173.86 from the total arrears of £24,741.56 and will arrange for payment of the balance of £18,603.70 from 1 December 2018. The PSPA will also pay £1000 for distress and inconvenience.

The PSPA will contact Mrs D directly to arrange payments.

The PSPA will augment the residual pension in payment to equal £18,077.96 per annum from 1 December 2018.

PSPA 27 November 2018