DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I dismiss the appeals. Mr D, the claimant, is appealing with my permission. His appeals are against the decisions of the Portsmouth appeal tribunal on 30 03 2005 under reference U 03 210 2003 00334. For the reasons below, the decisions of the tribunal were not wrong in law. This decision applies formally to the separate appeals heard by the tribunal against the decisions of the Secretary of State for Work and Pensions and (now) the Commissioners for Her Majesty's Revenue and Customs. However, I follow the tribunal in dealing with the matters together.

Mr D's appeals

2 Mr D was 65 on 23 May 2002. After many years working as a civil servant, he was forced to take medical early retirement due to his ill health in January 1992. He was awarded a medical retirement pension from his employer's pension scheme, the Principal Civil Service Pension Scheme ("the PCSPS"). He was told in the letter awarding the pension that he "will be eligible for the issue of a full pension on the date of your retirement". His PCSPS medical retirement pension was paid as awarded.

3 When Mr D claimed his state retirement pension in 2002, he was told that it was to be reduced by a contracted out deduction. He was informed that his weekly entitlement from 27.05.2002 (at the rates payable that year) was:

Basic pension	£75.50
Additional pension	£68.13
Graduated pension	£ 4.70.

But he was also told that his actual entitlement to additional pension was to be reduced by £65.71 a week because of a contracted out deduction.

4 Mr D objected to this deduction. In his appeal form he also asked that "the high SERPS element" in his incapacity benefit entitlement also be taken into account. And he later also objected to the fact that his PCSPS pension was reduced when he became 65 because of his state pension.

5 The tribunal at its final and full hearing rejected Mr D's objections, and he appealed to the Commissioner. In his grounds of appeal here, Mr D also raised other issues about the way the tribunal hearing was conducted.

6 By the time of the appeal here, Mr D had sought guidance from his trade union, an advice agency whose representative turned up to a tribunal hearing only to tell it that the agency did not have the expertise to handle the appeal, his local Member of Parliament and, more recently, a firm of solicitors. His preparations also appear to have involved letters to the heads of two government departments and the Paymaster General. That might have been understandable if Mr D's case was unduly

complex or involved unusual facts. It does not. I therefore thought it right to hear the appeal so that I could examine the decisions taken thoroughly.

Mr D's pension entitlements

7 Since he reached 65, Mr D's weekly pension income consists of two pensions:

- his state retirement pension, and
- his PCSPS retirement pension

To complicate matters, Mr D's state retirement pension consists of two elements:

- a basic pension payable at a weekly flat rate, and
- an additional pension payable by reference to contributions paid.

To complicate matters further, Mr D is also entitled to a graduated retirement benefit paid by the state. This is technically not part of his state pension, but is in practice treated as if it is part of it (see Social Security Contributions and Benefits Act 1992 sections 44 and 62). To complicate matters still further:

- Mr D's weekly PCSPS pension was reduced by reference to his state pension, and
- Mr D's weekly state pension was reduced by reference to his PCSPS pension.

He asked why this was so.

8 Put as a series of questions, Mr D's challenges to his position may be summarised as follows:

(a) Was Mr D contracted into or out of the state scheme while at work?
(b) If he was contracted out, was the contracted out deduction correct?
(c) Was Mr D treated as receiving the correct level of NI contributions and credits?
(d) Was Mr D correctly subject to a reduction in his PCSPS pension from retirement age?

I have only a limited jurisdiction to deal with these matters sitting as a social security commissioner. Unusually, I also sit as a special commissioner of income tax. While I have no actual jurisdiction to hear this case in that capacity, I could have heard parts of this appeal in that other capacity, so I take the liberty of indicating the broad position as I see it of that aspect of this appeal. I have no authority in any capacity to deal with the PCSPS pension, but I think the position on that issue is so plain that I can comment on it.

9 Perhaps that should have been a straightforward series of questions to which there should be straightforward answers. In practice, there is not. The decisions involved in answering Mr D's questions involve three separate bodies. Responsibility for the various decisions involved in this appeal were shared at the relevant time between the National Insurance Contributions Office ("NICO") of the

Inland Revenue (now Her Majesty's Revenue and Customs) and either the local social security office of the then Benefits Agency or the Pensions and Overseas Benefits Directorate of the Department for Work and Pensions ("DWP") (now the Pensions Service but technically, for legal purposes, "the Secretary of State") about the appeal.

10 Appeal tribunals and social security commissioners have jurisdiction over most of those decisions. But some - in particular appeals relating to the amount of contributions paid - have to go to the tax appeal tribunals if challenged. Mr D's occupational pension is a PCSPS pension. Any decision about that pension is for the Trustees of the PCSPS and their staff, or for the government department where he worked (the Ministry of Defence), or the Paymaster General who pays it, or the appeal procedures laid down in that scheme. Appeal tribunals and social security commissioners have no jurisdiction over any of those bodies, or over any occupational pension scheme.

11 Unfortunately, this division of labours tends to lead to untidy and incomplete decision making, as it did in this case. That would perhaps be understandable if Mr D's case was an unusual one. But it was not. On the contrary. His pension position is far from unusual. The majority of individuals receiving a state retirement pension that includes an additional pension have been contracted out of the full state pension schemes for all or part of their working lives. Many also rely on NI contribution credits as part of their contribution records. So the series of questions asked to establish Mr D's pension must, in practice, be repeated many times. It is to be hoped that they are now decided more efficiently that was the case for Mr D.

12 Mr D first took the matter up with his local social security office. The local office sent the file to NICO. NICO wrote to Mr D in September 2002 and then sent the file to the DWP Pensions Directorate. The Pensions Directorate sent the file back to the local office and told the local office to send it back to NICO. The local office then sent the file back to NICO with a request to be informed about what was happening. After three months, there had been no reply from NICO to the local office. So the local office sent its papers to the appeals tribunal. The matter did not go straight to a tribunal because of Mr D's ill health. Eight months later, in October 2003, NICO notified Mr D in an undated letter of the position with regard to his contracted out deduction (though it was not called that in the letter). Eight months later still the matter came before a tribunal for the first time. This occurred only after an appeals tribunal clerk refused to adjourn the appeal so bringing it to the attention of a tribunal chairman. The tribunal chairman ruled that the appeal involved an appeal against the belated decision by NICO, and directed the Inland Revenue to make a full submission. Only then did the Inland Revenue produce a full explanation of its decision.

13 While the law is complex, I see no reason for these delays. Were it not for the seriousness of the matter, I would have been amused to see that the local office send NICO a copy of my decision R(P) 1/04 (the reported version of CP 4479 2000, decided in February 2003) with advice to them, if I may paraphrase somewhat, to read it and follow it. That sets out a clear series of steps. The Revenue should have issued a decision in September 2002 when the matter was first referred. When the decision was issued over a year later an appeal was invited, so as to comply with the requirements of the Social Security and Child Support (Decisions and Appeals)

Regulations 1999. Perhaps not surprisingly, Mr D thought he had already appealed. Eventually the tribunal chairman put matters right.

Who should represent at the tribunal?

14 Mr D objected that an officer of the DWP attended the tribunal to represent both the Secretary of State and the Inland Revenue, and that the Inland Revenue sent no separate representative. The chairman did not accept that objection. I agree with the chairman's action, provided that the chairman was satisfied that there was no relevant clash of interests between the two departments and that the officer was properly instructed by both. I have no reason to believe that she was not so instructed. Nor can I see how Mr D's own position would be affected by that in such a way that he would be entitled to have this much delayed case adjourned again because of this. I see no unfairness in the decision taken by the tribunal chairman in this case.

Was Mr D in contracted-out employment?

15 Mr D appears totally to have misunderstood his own position, and the law, on this point. He said that he was under the impression that he was, or had chosen to be, contracted-in to the state earnings-related pension scheme. And he asked for time to get documents to prove this. He has not produced any. I am not surprised. But the lengthy documents eventually sent to him by both government departments do not actually deal directly with this query. They simply assume it. It is therefore appropriate to summarise the legal position between 1975 and 2002 to clarify Mr D's position. I stop at that date because that was when the State Second Pension was introduced to replace the SERPS pension entitlements described below. But that did not change the previous law, and does not affect Mr D.

16 State pension entitlement was reformed radically in 1975. After that, everyone paying National Insurance ("NI") contributions potentially gained contributors entitlement to two pensions: the basic pension and the additional pension. The basic pension is the flat-rate weekly pension in payment to retired contributors since before 1948. The additional pension was from 1975 earnings-related, and was therefore also called SERPS, or the state earning-related pension scheme. Most employees who were earning enough to pay the NI contributions were also in occupational schemes linked to their employments. The scheme introduced in 1975 took this into account. An employer providing an occupational pension could contract out its occupational pension scheme from SERPS. Where there was a contracted out scheme, both the employer and the employee paid lower NI contributions. This also meant that the employee did not receive a full additional pension or SERPS on retirement.

17 One condition of a contracted out pension scheme is that it must provide each employee with a guaranteed minimum pension ("GMP"). The rules for calculating the GMP are in the Pension Schemes Act 1993. The value to the pensioner of his or her occupational pension should not be less than his or her GMP. Parliament also laid down that a contracted-out pensioner should receive the additional pension (or SERPS) less the GMP (called for this purpose the contracted out deduction). That is laid down in the Pension Schemes Act 1993, section 46.

18 The law about contracting out is also in the Pension Schemes Act 1993. Section 7 provides that a scheme was contracted out if a contracting out certificate was issued by the government department (latterly the Inland Revenue). This was issued to an employer in respect of all, or defined groups of, employee. The employees did not have to make - or join in - the application, or indeed normally have any choice about it. Either an employment was contracted in or it was contracted out. Like most civil servants, Mr D would not have been given any option about this. He would at some stage have been told the position. He was certainly informed in 1991. Since 1975, as a result of these laws, every employee with sufficient earnings paid either the contracted in (higher) or contracted out (lower) rate of NI contributions. As a result, every pay slip contained a reminder (although perhaps hidden to the non-expert in most cases) of the pension status of the employee.

19 There is no doubt in my mind from the records of contributions paid that Mr D paid contracted out contributions from 1975 to 1991. Further, he was told by his employer that his employment was contracted out employment in 1991, if not before. He is therefore only entitled to receive an additional pension after the GMP or contracted out deduction has been deducted from it. That is precisely what happened in this case, and the tribunal took the only decision open to it on all the evidence in front of it in confirming that that deduction should be made. However, like the tribunal chairman, I can only make that decision on the evidence before me. If Mr D is formally challenging whether he was properly treated as contracted out, or he is challenging the accuracy of his contribution record, then the appeal tribunal and a social security commissioner cannot formally decide the matter. Thos issues have to be appealed to a tax appeal tribunal. However, drawing on my own expertise in that area, I have to say that I can see no grounds whatsoever in law or fact for such an appeal in this case. I do not therefore take that aspect of the appeal any further.

Mr D's contribution credits

20 Mr D also raised the issue of whether he had received full credits for his period of incapacity between his early retirement and reaching pension age. Again, despite the length of the explanations offered to Mr D, this point has not been dealt with clearly. The records produced by NICO, on the form RD 18, show that Mr D was credited with the proper credits from the week that he took early retirement until he reached retirement age. He was credited with the maximum amount of creditable contributions. Judging by his grounds of appeal, he may have misunderstood how these credits work. The relevant law is in the Social Security Contributions and Benefits Act 1992 and the Social Security (Credits) Regulations 1975, regulation 8B. The form RD18 sets out Mr D's contribution record. It could have been made clearer, perhaps by an attached note to the form RD 18 to explain all the abbreviations in it. But it shows clearly that Mr D was awarded 13 credits in 1991-92 and full credits in each following year until he was 65.

21 This is another matter that the appeal tribunal and the social security commissioner cannot decide formally if they are disputed. The position with regard to Mr D's contribution credits was that entitlement to the credit depended on decisions both of the Secretary of State for Work and Pensions (usually through the local social security office) and the then Inland Revenue through NICO. Any appeal would go in part (as to underlying entitlement) to the appeal tribunals and in part (as

to the actual award of the credits) to the tax appeal tribunals. But the records show without doubt that Mr D received the maximum credits to which he could be entitled on any reading of the law or facts. It may be that Mr D misunderstood the nature of these credits. Contrary to his assertion in his grounds of appeal, they cannot affect his SERPS or additional pension, or his occupational pension or GMP, in any way. They count only towards his basic retirement pension. He could gain nothing more through a formal decision or appeal. I therefore take that issue no further.

22 The law behind these contribution and pension questions is most complex. I have tried to summarise it without too much reference to the extremely opaque and convoluted terminology of the statutory provisions. I recommend anyone wishing to explore the issues further to consult *Wikeley, Ogus and Barendt's The Law on Social Security, 5th edn, Butterworths, 2002,* Chapters 4 and 17.

The offsets between the state pension and the PCSPS pension

23 I have no jurisdiction over a dispute about the amount of occupational (or PCSPS) pension that Mr D receives. Nor has an appeal tribunal. (Nor would I have as a special commissioner of income tax.) The decision to make a deduction from Mr D's PCSPS pension when he received his state pension is not something over which I or the tribunal have any power of decision. But it seems to me that Mr D's position is entirely clear. I asked the Secretary of State to produce a copy of the full rules of the PCSPS and they are now in the papers. Mr D will see at rules 3.19 to 3.23b the rules of the PCSPS that deal with the offset between NI benefits (including the state pension) and the PCSPS pension. Rule 3.19 states that subject to those other rules:

> "a pension ... will be reduced in respect of flat-rate national insurance pensions or basic social security pension. The reduction will apply from pensionable age..."

The rules then set out the amount of the deduction. Mr D was clearly warned of this in the letter sent to him in 1991 awarding him his medical retirement pension. The figures show the amount of the reduction to be made when he became 65. Note 1 to his pension estimate explains that this "NI modification", as it is called is made to his PCSPS pension from retirement because of the basis state pension. I have no reason to believe that the deduction made is not fully in line with those rules and the deduction of which Mr D was warned in 1991.

24 Is this a double deduction? Is Mr D right to say that his PCSPS pension has been reduced by his state pension, and also that his state pension has been reduced by his PCSPS pension? The answer, so far as I am competent to give it, is yes, but no. The deductions are not a "double deduction" or double counting, though it may look like it. Mr D's *additional* pension was reduced by reference to his PCSPS pension, but only to the extent that the law required the deduction of the GMP based on the PCSPS pension. Mr D therefore receives a reduced additional pension. The papers clearly state that his PCSPS pension was to be reduced when he reached state pensionable age by reference to his state *basic* pension, which he received in full. The PCSPS is clearly designed to take account of the basic retirement pension to be received by an employee on retirement. It takes no account of the additional pension entitlement of the pensioner. That is a policy decision clearly laid out in the PCSPS

rules, and of which Mr D was warned. There is no double offsetting in these deductions.

Conclusion

25 The legislation that applies to determine Mr D's state pension entitlement is, by any standards, extremely complex. I have sought in this decision to set out a basic outline of the rules. In doing so I am conscious that I have gone beyond not only my jurisdiction as a social security commissioner, but also the jurisdiction I would have had the matter been referred to me as a special commissioner of income tax. I do so with only a little hesitation because Mr D found such difficulty in getting expert advice about his problems. But, as far as I am competent to comment, I am satisfied that the two government departments eventually took the correct decisions in his case. And the tribunal took the only decisions it could properly take by, first, ensuring that it looked at all decisions within its jurisdiction, and then in confirming those decisions.

David Williams
Commissioner

01 February 2006

[Signed on the original on the date shown]