

## Ombudsman's Determination

Applicant	Mr R
Scheme	Aviva Staff Pension Scheme ( <b>the Scheme</b> )
Respondents	Aviva Staff Pension Trustee Limited ( <b>the Trustee</b> ) XPS Administration ( <b>XPS</b> )

## Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Trustee or XPS.

## Complaint summary

2. Mr R has complained that the Trustee led him to believe that his Guaranteed Minimum Pension (**GMP**) would be payable in June 2021 at age 60. He was expecting an estimated annual pension of £4,049 from the Scheme at age 60. However, he was later advised that he would receive an estimated annual pension of £1,858 at age 60 as a mistake had been made and the GMP was not payable until age 65.
3. Mr R says that he relied on this information in his financial decision making in 2016 and it directly influenced his decision to use his savings of £25,000 to supplement a pension from Aon until age 60 when he understood his GMP would be payable.
4. Mr R has also complained that in 2019 XPS told him that the Trustee would make good its written pledge to pay the GMP at age 60. As well as incorrectly informing him that he could receive tax-free cash (**TFC**) of around £30,000 from the Scheme at age 60 with a reduced pension.

## Background information, including submissions from the parties

5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. On 6 March 1979, Mr R joined Aviva and the Scheme. The Scheme had a Normal Retirement Date (**NRD**) at age 60 which Mr R reached in June 2021.

7. On 12 July 1985, Mr R left Aviva with a final pensionable salary of £5,893.
8. On 31 January 2012, following a request from Mr R, the Trustee sent him a Deferred Benefits Certificate, which stated the following:

“The benefits payable from Normal Retirement Date (NRD), calculated at the date of leaving Pensionable Service, are as follows.

1. A pension of £623.00 p.a. which will be revalued on 1st July each year until retirement at a rate decided annually by the Trustee.
2. The pension above includes a Guaranteed Minimum Pension (GMP) of £154.96 p.a. The GMP will be revalued to age 65 at the fixed revaluation rate of 8.50%.

The pension payable will not be less than the minimum required by legislation.

The pension will be reduced at State Pension Date by £62.30 p.a., revalued as above. This is the Basic State Pension Deduction.

At retirement you may have the option to surrender part of your pension for a cash sum. You will be provided with details of this option when you retire.”

9. On 22 February 2016, following a request from Mr R, the Trustee wrote to him and stated that it was not possible for him to retire on 30 June 2016 at age 55. The Trustee also incorrectly stated that the Scheme was required to provide him with a GMP when he reached age 60. It calculated that his early retirement pension at age 55, which was estimated to be £1,317, would not be sufficient to cover his GMP entitlement at age 60, which was £4,049,76 (**the Estimate**).
10. On 24 February 2016, Mr R requested details of the transfer value of his preserved pension benefits within the Scheme.
11. On 27 February 2016, the Trustee wrote to Mr R and stated that the estimated value of his pension as at 1 July 2015 was £1,664.26 per annum and the current transfer value available in lieu of these benefits was £69,526.95 (**the Quotation**) .
12. Mr R says that, in June 2016, in the expectation of the GMP being payable from the scheme at age 60, he decided to use a sum of £25,000 he had in the bank to supplement a modest pension he was receiving from Aon.
13. In 2018, the Trustee board appointed XPS to take on the administration of the Scheme.
14. On 4 July 2019, Mr R telephoned XPS as he was considering transferring his pension under the Scheme to another provider.
15. On 8 July 2019, Mr R telephoned XPS again and at this point it became apparent that the Trustee had provided incorrect information in the Estimate regarding when his GMP would become payable.

16. On 9 July 2019, XPS wrote to Mr R and enclosed a Statement of Entitlement. This document stated that the total transfer value was £80,463.46 and a total pension of £1,858.86 per annum was payable as at 1 July 2019.
17. On 10 July 2019, XPS wrote to Mr R and confirmed that in line with legislation, the GMP for a male is payable at age 65 and statutory increases are not applied to the GMP until then. Due to the level of Mr R's GMP, he was unable to take his pension before his NRD. Prior to reaching age 65, Mr R's pension benefit would be his accrued pension within the Scheme, which currently stood at £1,858.82. XPS also estimated that Mr R's pension at 65 would be no less than £5,446.86 per annum based on no further revaluation on his deferred pension and no increases in payment between age 60 and 65. However, XPS did request details of Mr R's retirement planning so it could establish the impact the mistake may have had on him, in particular, any actual financial loss incurred as a result.
18. On 17 July 2019, Mr R telephoned XPS (**the call**) and says he was advised that the Trustee would make good its written pledge to pay the GMP at age 60. He also says that he was incorrectly informed that the fund would be worth around £120,000 and he could take a tax-free lump sum (**TFC**) of around £30,000 at age 60 if he sacrificed around £1,000 per annum from his pension. In addition, Mr R says that he was informed that the GMP plus his deferred benefits payable from the scheme would produce an annual pension of around £5,700 as at June 2021 or he could sacrifice £1,000 per annum if he opted to take the TFC.
19. By July 2019, Mr R says he had used about two thirds of the £25,000 he had decided to use to supplement his pension from Aon. Mr R maintains he took this decision on the strength of the financial reassurances made by the Trustee.
20. On 5 August 2019, Mr R emailed XPS and requested that the Trustees pay the GMP at age 60 as he had acted upon figures in the Estimate and incurred financial losses that flowed directly from it. Mr R also advised that he was sending extracts from a financial report prepared by his IFA, Robert Sacre and Associates (**RSA**), for its consideration. This report stated that he should use funds from other sources to supplement a pension he took at age 55 until the Scheme pension became payable at age 60.
21. On 5 August 2019, XPS advised Mr R that the figures provided during the call were inaccurate and that a further explanation would be provided in due course.
22. On 9 August 2019, XPS emailed Mr R and provided him with the following options:
  - “Opt to transfer to another pension provider, the current transfer value is £80,463.46 guaranteed until 9 October 2019;
  - Receive an estimated pension of £1,858.82 at age 60, there will be no option of tax free cash at this time;

Defer payment of your pension until age 65 with an estimated pension of £5,446.86. You would also have the option to commute part of this pension for a tax-free cash sum.”

23. On 12 August 2019, Mr R emailed XPS and suggested that it should have sought the input of the Trustee before replying further.
24. On 13 August 2019, XPS responded and said that in 2018, the Trustee board appointed it to take on the administration of the scheme. In its capacity as scheme administrator, it must pay benefits in accordance with the Scheme's Trust Deed and Rules and overarching legislation. However, it had made the Trustee Executive Services (**TES**) aware of his case and the written clarity of the options available to him at ages 60 and 65 were being reviewed.
25. On 14 August 2019, XPS emailed Mr R and restated the options given to him on 9 August 2019, for retiring at ages 60 and 65.
26. On 26 August 2019, Mr R emailed XPS seeking formal confirmation of the options he says were given in the call as this differed from the options given on 9 August and 14 August 2019.
27. On 28 August 2019, XPS emailed Mr R and explained that in the call, its representative incorrectly created an expectation of benefits that were not payable under the Rules of the Scheme.
28. Later on 28 August 2019, Mr R emailed XPS and explained that its representative was supposed to confirm the content of the discussions in the call, in writing, but failed to do so. Mr R stated that he was entitled to rely on the comments made in the call and requested that his concerns be forwarded to the Trustee. This was forwarded to the Trustee as a complaint on 3 September 2019.
29. On 25 October 2019, XPS issued the Trustee's response to Mr R's complaint which is summarised as follows:-
  - It only pays benefits in line with the Scheme Rules, but where a member has relied upon information provided and made irrevocable decisions that cannot be mitigated against, then it will look at the wider issue of the materiality of the error when considering compensation.
  - A transfer value and benefit statement were provided in the Quotation, which quoted the correct benefits.
  - Mr R had sufficient information at that time to receive guidance from his IFA on his pension arrangements and it was unable to establish a financial loss as a result of the error in the Estimate.
  - Although the complaint was not upheld, the Trustee was disappointed to note that Mr R had been provided with incorrect information in 2016 and again in 2019. To

compensate him for this maladministration, a cheque for £1,000 from the Trustee was enclosed.

30. On 25 October 2019, Mr R had a telephone discussion with XPS in which he agreed to outline his current level of expenditure. This was in order to demonstrate his reliance upon the incorrect sums provided in the Estimate and how he had structured his retirement planning to date based upon this. Mr R emailed this information to XPS on 8 December 2019.
31. On 13 January 2020, Mr R again requested his options at ages 60 and 65.
32. On 17 January 2020, XPS advised Mr R that his estimated pension at age 60 would be £1,664 per annum with no TFC available and at age 65 would be at least £5,299.88 with the TFC option available.
33. On 14 January 2021, XPS advised Mr R that his estimated pension at age 60 would be £1,890 per annum.
34. On 8 June 2021, XPS wrote to Mr R confirming that, in accordance with the options he had chosen, a pension of £1,994 per annum would be paid to him from his selected retirement age of 60 on 16 June 2021. This was the date Mr R had originally selected to retire in the expectation of the GMP becoming payable. XPS also confirmed that his estimated GMP from age 65 would be £4,049.76 per annum.
35. During the course of The Pensions Ombudsman's (**TPO**) investigation Mr R provided bank statements covering the period January 2017 to September 2019. Although these were heavily redacted Mr R also listed items with a total expenditure value of £19,084.97 which he claimed was spent as a direct consequence of the misinformation provided by the Trustee. These included, among other things, parts for the refurbishment of two classic motorcycles, costs for dining out, purchases of gifts and flowers and the purchase of a new car. Mr R also confirmed that he had held £28,067.64 in the bank in January 2017, which had now dwindled to £2,250 due to the expenditure outlined. As such, Mr R held the Trustee responsible for his reduced financial situation, which he said caused an affordability issue for him going forward.
36. TPO asked Mr R to provide bank statements for the period July 2019 to the present date to establish his expenditure after the error became known in July 2019. Mr R has declined to provide these.

### **Mr R's position**

37. His level of expenditure for the five years prior to June 2021 was based upon the Estimate, which led him to believe that at age 60 he would receive a pension of at least £4,049 per annum.
38. He is unable to accept the Trustee's view that he suffered no loss as he had greatly diminished his reserves of over £25,000 over five years at a rate of approximately £5,000 per annum. Had he received the correct information in 2016, he may well have structured his finances for the years 2016 to 2021 differently.

39. He has been unable to work due to illness since 2009 and is reliant on pension income. It was therefore entirely reasonable for him to rely on the content of the Estimate.
40. He pays more than £700 a month in outgoings including subsistence, insurance, TV licence, vehicle costs, property costs and holidays. If he does not receive the £4,049 per annum he expected from age 60, he would suffer genuine financial hardship.
41. The attachments to the Quotation stated that his NRD was at age 60. It also stated that the GMP would be revalued to age 65 at the fixed revaluation rate of 8.5%. Nowhere did this document state that the revalued GMP was payable from age 65 or that the GMP is withheld until age 65 so it does not rectify the error made in the Estimate.
42. On 17 July 2019, it was confirmed to him that a cash option of £30,000 would be available in exchange for a reduction in annual pension payments at age 60. It was further explained to him that such a figure would be considered as the 25% tax free lump sum available within the rules of a typical occupational pension scheme. Some weeks later, XPS confirmed that this offer was withdrawn but its reasons were undisclosed other than it had made a further error.
43. Despite the Trustee's comments that it repeatedly requested evidence of his financial loss, he received no request for this information. The Trustee asked him to provide a synopsis of his monthly outgoings, and this was supplied in 2019. At no time had he been requested to supply bank statements or similar financial data.
44. He did not relay any specific details of the Scheme to RSA. He consulted with RSA for investment advice and provided the briefest details of the Scheme but only payment dates and estimated amounts. As a layman, he was not aware of the term GMP nor its ramifications. He saw no reason to discuss this with RSA or indeed query it with XPS, as it appeared without ambiguity. RSA was never privy to the fact that his benefits included a GMP.
45. He has acted reasonably at all times with regard to mitigation of losses.
46. He held cash at the bank of £28,067.64 as at January 2017 and £19,084.97 as at August 2019, which equated to an average spend of £615 per month during this period. He held cash at the bank of £8,983 as at September 2019 and £2,272 as at January 2023, which equated to an average spend of £163 per month during this period. This showed that his average monthly spend had reduced to £163 per month from £615 per month once he was notified of the error.
47. He has supplied adequate documentation for his case to be successful. He considers that he is the victim, and his account should be accepted at face value.

### **The Trustee's position**

48. It is only able to pay benefits in accordance with the Scheme Rules and legislation. It was not able to put Mr R's pension into payment at age 55 as his benefits would not have been sufficient to cover his GMP when it came into payment.
49. It was able to put a reduced pension into payment for Mr R from age 60. This pension would have stepped up when Mr R reached age 65 and his GMP was payable. However, it was not able to pay TFC at age 60 as this would have meant that his benefits were not sufficient to cover his GMP at age 65.
50. It accepts that the Estimate provided incorrect information that Mr R's GMP was payable at age 60 (not age 65). However, this error should have been clear to Mr R's financial advisers.
51. The Quotation recorded that the GMP was payable from age 65 and Mr R and his advisers did not query this difference.
52. It accepts that Mr R was incorrectly told in the call that he could take TFC from the Scheme at age 60 but it corrected the position the following month. Mr R has not expressly stated that he relied on the incorrect information provided in the call regarding TFC, or that he suffered any actual financial loss as a result. This position was corrected within one month so any such claim would in any case be limited.
53. It does not believe Mr R has met the standard required to evidence financial loss and if he had been told the correct amounts in 2016, he would still have needed to support himself for the period until his benefits came into payment. It has repeatedly requested evidence in this respect, but Mr R has not provided any evidence of actual loss resulting from his alleged reliance on any incorrect information.
54. Mr R has said that he "may well have" structured his finances from 2016 to 2021 very differently had the Estimate been correct. Mr R has not demonstrated any specific expenditure which he would not otherwise have incurred had the Estimate been correct, or any details of how he would have structured his finances differently, had he known his GMP was payable from age 65. Mr R has also not provided any bank statements or actual documentary evidence to support his case.
55. It has checked its files to determine whether it has any further documents which were issued to Mr R, setting out when his GMP was payable, but has not been able to locate any further information.

### **XPS' position**

56. It accepts the error in the Estimate advising Mr R that the GMP was payable from age 60. However, its letter of 10 July 2019 explained it would be necessary to see evidence of actual financial loss before the Trustee could consider whether any compensation should be paid. The Trustee did not believe Mr R had met the standard required to evidence financial loss but it did make a payment of £1,000 for the distress and inconvenience caused.

57. Mr R misunderstood the information supplied to him in the call, which it considers was correct and clearly explained. Based on the complaint received, Mr R appears to have only understood some of the information supplied in the call and in any event, the correct information was made clear within one month of the call.
58. As its calls are not recorded, it is unable to provide a recording of the call.
59. It considers that it acted appropriately and accurately in all of its dealings with Mr R and does not support his complaint with regard to matters that took place in 2019. The complaint about events prior to it being appointed as administrator are not matters for it to comment on.

## **Adjudicator's Opinion**

60. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or XPS. The Adjudicator's findings are summarised below.
61. The Trustee accepts that in 2016, Mr R was given incorrect information in the Estimate that his GMP was payable at age 60. However, it believes that this error should have been clear to RSA and also from the Quotation which recorded that the GMP was payable from age 65. It also believes that Mr R has not met the standard required to evidence financial loss and has said that its offer of £1,000 is adequate compensation to reflect the distress and inconvenience caused.
62. XPS considers that the information supplied to Mr R in the call was correct and clearly explained to him, but that he misunderstood what was said.
63. The starting point for the Ombudsman's approach for cases involving a misstatement, and provision of incorrect information, is that the member is only entitled to receive the benefits provided under the Scheme rules. For Mr R to have a claim for financial loss as a result of a misstatement, there needs to be evidence that there was direct reliance on the misstatement. Also, that it was reasonable for him to do so and that it resulted in an irreversible loss.
64. It was clear that Mr R was disappointed when he discovered in July 2019 that the Estimate was incorrect, and he was not in fact entitled to the GMP until age 65. However, the Adjudicator considered whether it was reasonable for Mr R to have relied on the GMP becoming payable at age 60, as stated in the Estimate.
65. There appeared to be no evidence to confirm that RSA was aware of the error in the Estimate or that Mr R had led RSA to believe he would be entitled to the GMP at age 60. The Adjudicator was therefore unable to conclude that RSA should have realised the error in the Estimate and advised Mr R that the GMP was not payable until age 65.



66. The Adjudicator considered that Mr R was entitled to rely on the information provided in the Estimate. It was stated clearly and unambiguously in that letter that his GMP entitlement was payable at age 60.
67. The Adjudicator was unable to conclude that the Quotation was clear and unambiguous in respect of the GMP age. As stated by Mr R, the attachments to this document stated that the GMP would be revalued to age 65 at the fixed revaluation rate of 8.5%. However, it did not clearly state that the revalued GMP was payable from age 65 or that the GMP was withheld until age 65.
68. The Trustee had also confirmed that it had no further documents that were issued to Mr R to demonstrate that he would have been made aware that the GMP age was 65, under HMRC rules.
69. The Adjudicator considered that the incorrect information stated in the Estimate amounted to maladministration by the Trustee, and in his opinion, it was reasonable for Mr R to have relied on the Estimate which led him to believe he was entitled to receive the GMP at age 60.
70. As maladministration had occurred, and the Adjudicator considered it was reasonable for Mr R to have relied on the information in the Estimate, in order for Mr R's complaint to succeed he would need to have suffered financial detriment as a direct result of the misinformation.
71. Mr R contends that the Trustee's refusal to honour the GMP being payable at age 60, as stated in the Estimate, had caused him an irreversible financial loss. Specifically, in relation to the funds he held in the bank.
72. The Adjudicator considered that as Mr R was not in receipt of the pension he expected, it was harder to evidence that money was spent in the expectation of receiving something in the future and in direct reliance on the wrong information. This was a loss of expectation unless an actual financial loss could be proved, that is Mr R would need to demonstrate that he relied upon the negligent misstatement to his detriment. Moreover, a person who has suffered a loss is under an ongoing duty to mitigate it as much as possible, so evidence of income and expenditure before and after becoming aware of the error (and therefore the loss) was essential in considering Mr R's claim.
73. Mr R may have incurred expenditure he might otherwise not have made if the Estimate was correct, but it did not necessarily follow that Mr R suffered an actual financial loss. The expenditure must be irreversible.
74. Mr R had provided bank statements covering the period January 2017 to September 2019. The Adjudicator noted that these statements had a significant number of redactions to the payment description sections and a majority of the payment amounts going in and out of the accounts had been redacted. Mr R had also listed items with a total expenditure value of £19,084.97 that he said were spent as a direct consequence of the misinformation provided by the Trustee.

75. The Adjudicator's view was that the bank statements had been redacted to the point that it could not be concluded that expenditure was in direct reliance on the incorrect information, rather than to a general way of living or money received from other sources.
76. Further evidence Mr R had provided did not show conclusively that his expenditure over this period had resulted in a financial loss, was in direct reliance on the incorrect information given, nor that it was irreversible. For example, he had purchased a number of parts to restore two classic motorcycles. While he had claimed that he would not have started the restorations had he not been provided with incorrect information, it was likely that this restoration would have increased the value of the motorcycles and therefore there was no evidence that these purchases had resulted in a financial loss.
77. Similarly, Mr R had purchased a car. He had said that he did not require a new car at the time but had bought a higher end vehicle as he thought funds allowed. This was not necessarily irreversible expenditure, or a financial loss, as the car could be sold.
78. While the Adjudicator accepted that Mr R may not have made some or all of the financial commitments highlighted between 2017 and 2019 had the error in the Estimate not been made, he believed Mr R would have seen a lasting benefit from much of the additional expenditure incurred. So, the reduction in funds held at the bank would not necessarily constitute a financial loss.
79. From the point Mr R became aware that an error had been made, on 8 July 2019, it was reasonable to expect him to have mitigated his position by curtailing his expenditure. This was on the basis of his awareness from that point that he would receive an estimated annual pension of £1,858 at age 60, as opposed to an annual pension of £4,049, as incorrectly stated in the Estimate.
80. In order to evidence that Mr R had curtailed his expenditure after July 2019, TPO had requested unredacted copies of the bank statements Mr R had previously supplied and additional unredacted bank statements from July 2019 to January 2023. However, Mr R considered that he had already supplied adequate documentation in support of his case.
81. The Adjudicator concluded that the evidence Mr R had provided to support an argument that he had reduced his average outgoings between September 2019 and January 2023, that is a comparison between the cash he had available in September 2019 and that available at January 2023, with the difference averaged monthly over the intervening period, was not sufficient. His view was that Mr R could have received monies from other sources between these dates which would account for the apparent reduction in spending. Or there could have been a number of other reasons that resulted in lower monthly expenditure not related to the incorrect information. Without Mr R providing the unredacted bank statements requested, the Adjudicator took the view that he could not make a conclusive finding in this regard.

82. So, given the evidence presented, it was the Adjudicator's opinion that Mr R had not adequately demonstrated that there was a financial loss to him caused by the maladministration identified.
83. With regard to the taking of TFC, the Adjudicator concluded that the evidence supported Mr R's assertion that he was told by XPS in the call that he could take TFC from the Scheme at age 60.
84. The Trustee had accepted that Mr R was incorrectly advised at this time and XPS had been unable to provide a recording of the call. However, the Adjudicator noted that XPS had corrected the position within a month of the incorrect information being provided, so he was unable to conclude that Mr R had suffered any financial loss in this regard.
85. In the Adjudicator's opinion, receiving incorrect information in the Estimate and in the call would have caused Mr R serious distress and inconvenience. He concluded that a payment of £1,000 was in keeping with the Ombudsman's guidance for non-financial injustice of this type. So, his view was that the offer of £1,000 to Mr R was sufficient recognition of the distress and inconvenience caused to him.
86. The Trustee and XPS accepted the Adjudicator's Opinion but Mr R did not and the complaint was passed to me to consider. Mr R provided his further comments which do not change the outcome. I note the additional points raised by Mr R but I agree with the Adjudicator's Opinion.

*Mr R's comments*

87. There is no reference in the Opinion to the fact mitigation is subject to the test of reasonableness. The tone and narrative used by the Adjudicator suggests that his case is being assessed as one of a criminal nature rather than a civil matter. It does not make reference in any way to what would have been considered reasonable action for him to have taken.
88. That the expenditure must be irreversible is an erroneous and draconian interpretation of mitigation. He is under a duty to act reasonably and must seek not to increase costs upon the Trustee and XPS, which he has done. He does not believe that he has a duty to dispose of assets so as to minimise the Trustee's and XPS' potential outlay. The Trustee has made a misstatement and his funds are suitably diminished as a result; the Thai Airlines case supports his position.<sup>1</sup> Having considered the correct interpretation of mitigation, it is clear that he is not under the level of duty that the Adjudicator implies.
89. He agreed with the Adjudicator that his expenditure would be evidenced in the form of redacted bank statements. He was originally requested to provide invoices but these were not available, other than the car purchase in 2018. Clearly when purchasing other items he could not be expected to be aware that a situation might arise in the

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<sup>1</sup> Thai Airways International Public Company Ltd v KI Holdings Co Ltd [2015] EWHC 1250

future where he would need to provide evidence of purchase. It now appears that having supplied these redacted statements it has "opened a can of worms" and is now being used to avoid the provision of indemnity to him.

90. He does not accept that the expenditure is reversible. Purchases were made sometime prior to the misstatement being identified. He believes the term reversible refers to a situation where an individual was in a situation to avoid certain expenditure when a final decision or payment is yet to be made.
91. With reference to the motorcycle restorations; these machines were bequeathed to him by his father, they remain a collection of parts, some new and others original. The projects are awaiting funds to enable completion of the restorations. He doubts the value of these machines has increased greatly. They would have to be disposed of as projects or work in progress. The "higher end car" he purchased was 10 years old at the time of purchase and had covered circa 100,000 miles. Its purchase price was £7,600 which he considers is hardly extravagant.
92. Monies spent were as a direct result of the Trustee's misstatement. The Trustee had led him to believe that his GMP of £4,049 would commence in June 2021 and he had a pot of money to use up until this date. The action he took was entirely logical and reasonable.
93. It appears that his claim for damages has failed upon two key issues. Firstly, he has not been able to demonstrate that his financial losses flowed directly from the misstatement. He trusts that the above comments will now rectify that view and suggests that the legal maxim of "Res Ipsa Loquitur"<sup>2</sup> would prevail.
94. Furthermore, he understands that TPO considers that he has failed to mitigate his losses. He would refer to the following well established and accepted legal text.

"The rule of mitigation requires a claimant to take steps to mitigate its losses and avoid taking unreasonable steps that increase its losses. An injured party cannot recover its damages from any loss (wherever caused by breach of contract or breach of duty) which could have been avoided by taking reasonable steps. The claimant is said to have a duty to mitigate, however this is a duty not enforceable by any one, rather it is a recognition that if the claimant fails to do so its damages recovery will be affected by this failure"
95. He maintains that mitigation is not a legal principle and believes that legal opinion appears to support his view. He acknowledges that case law reflects or mentions it but does not enshrine it as a legal principle.
96. Bearing in mind that his claim for damages ceased very soon after he first became aware of the misstatement he is not sure how he might have mitigated his losses any

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<sup>2</sup> Literally 'the thing speaks for itself' a doctrine or rule of evidence in tort law that permits an inference or presumption that a defendant was negligent in an accident injuring the plaintiff on the basis of circumstantial evidence if the accident was of a kind that does not ordinarily occur in the absence of negligence.

further. He is happy to have any items of damages claimed for after first notification of the misstatement removed from the schedule of quantum.

97. He is of the view that this matter should have been more appropriately dealt with as a loss of expectation. This is the usual measure of damages for a breach of contract. It refers to the innocent party's loss of a bargain, such as the profits that they would have expected to receive had the contract been performed in the stated manner. The aim of these damages is to place the innocent party in the same position as if the contract had been performed.

### **Ombudsman's decision**

98. While I agree with the Adjudicator that there has been maladministration on the part of the Trustee and XPS, and that the starting point in misinformation cases is that a member is only entitled to the benefits provided by the rules of their pension scheme. However, it might be the case that an applicant can show that the misinformation amounts in law to what is known as a negligent misstatement. In negligent misstatement cases, parties in a close relationship in which one party (perhaps with special skill and knowledge) assumes responsibility towards the other party, may find that the law will impose a duty on the first party to ensure that information it gives to the other party is accurate and reliable. Where the information is inaccurate or unreliable in some material respect, the party assuming a responsibility towards the other party will be in breach of that duty. If the breach causes financial loss to the party who has reasonably relied on the information to their detriment, and that loss is reasonably foreseeable as a consequence of the breach, then the loss is recoverable in damages.
99. In this case, it appears that the Trustee and XPS assumed responsibility to provide Mr R with accurate information about his pension entitlements but failed, in different ways, to do so. In my view, it is likely that the Trustee and XPS would know that providing incorrect information to Mr R may cause him loss. It also appears that Mr R reasonably relied upon the information provided by the Trustee and XPS in arranging his affairs and that the role of RSA in challenging any of that information was limited. In these circumstances, Mr R may be entitled to damages from either or both parties for any loss he suffered.
100. These damages would be assessed on what the law describes as a tortious basis. This means that the damages would seek to put Mr R in the position in which he would have been had the incorrect information not be given to him; the damages are not calculated so as to put Mr R in the position in which he would have been had the misinformation been correct. This is an important distinction. Much of Mr R's complaint focuses on his loss of expectation of the earlier payment of some of his Scheme benefits, but this will not inform the assessment of financial compensation to which Mr R may be entitled as a result of a negligent misstatement. Rather, the question is would Mr R have made different decisions in the absence of the

misinformation? Would he, for instance, have made different financial arrangements than those he actually made?

101. The burden of proving that Mr R would have made different decisions in the absence of the misinformation (and that these decisions show that a financial loss has been caused by the misinformation) is placed upon Mr R. The standard of proof is on the balance of probabilities. This means that Mr R must prove that it was more likely than not that the misinformation has caused him a financial loss.
102. In this case, I do not consider that Mr R has supplied sufficient proof that the misinformation provided to him by either the Trustee or XPS has caused him a financial loss. Mr R's heavily redacted bank statements, and supporting information, show ordinary living expenses which were likely to be incurred even if the misinformation had not been provided to him. To the extent that Mr R acquired capital assets through the spending of his savings, there is no clear evidence from which I could conclude that these acquisitions would not have been made but for the misinformation, nor that the assets acquired lack value such that, taken in the round, Mr R's net worth has actually decreased.

### *Mitigation*

103. Turning to the question of mitigation, there is no doubt that mitigation of loss is a legal principle. It is a principle of long-standing, clearly set out in case-law. It applies to damages claims based in the law of contract and law of tort. The basis for its application in this case is tort, of which negligent misstatement is a type. There is no doubt that it applies in the circumstances of a negligent misstatement claim such as this.
104. While it is sometimes said that an applicant is under a duty to mitigate his or her loss, I acknowledge that is not strictly true. The applicant is not under any duty. Rather, the effect of the applicant's failure to limit their loss, when becoming aware that they have a legal claim to recover that loss, is to reduce their damages by the amount of loss which they could have reasonably avoided.<sup>3</sup>
105. The applicant only has to take reasonable steps to limit their loss. Therefore, an applicant does not need to identify and take every step possible to limit their losses. Indeed, in certain circumstances, provided an applicant's actions in mitigation are taken in good faith, their actions can actually increase their losses, and the increased amount will nonetheless be recoverable in a successful claim against a respondent.<sup>4</sup>
106. Mr R cites *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWHC 1250, in support of his claim that he took steps to mitigate his loss. This case dealt with a claim of losses resulting from breach of contract and with the mitigation of those losses. In this case, the court held that benefits obtained by the

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<sup>3</sup> *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd* [1912] AC 673.

<sup>4</sup> *Banco de Portugal v. Waterlow & Sons Ltd.* [1932] AC 452.

claimant during mitigation of losses should be taken into account and any loss should be reduced by the amount of the benefit. Given my conclusions about the financial loss which Mr R claims to have suffered, I do not consider this case to be of any relevance to Mr R's complaint.

107. However, had I been persuaded that financial loss was present in Mr R case, I accept that Thai Airways would potentially support Mr R's argument that his action in acquiring capital assets in the form of a motor vehicle and parts for the refurbishment of motorcycles was capable of amounting to mitigation. In such circumstances, if Mr R had derived a clear financial benefit from these assets, that benefit could be taken into account and used to reduce the amount of financial loss which was recoverable from the respondents.

### *Conclusions*

108. The Trustee has not disputed that Mr R did reasonably rely on the incorrect information it provided to him. On that basis, Mr R has argued that he has suffered a financial loss as a result. However, while I sympathise with Mr R and acknowledge that his financial planning will have been impacted by the provision of misleading and incorrect information, I find that, despite being invited to do so, he has provided insufficient evidence that he has been made worse off as a result of receiving this incorrect information. Therefore the question of mitigation does not arise.

### *Non-financial injustice*

109. I agree with the Adjudicator that receiving incorrect information in the Estimate and in the Call would have caused Mr R serious distress and inconvenience. When deciding whether to direct an award for distress and inconvenience, I assess each case on its facts and merits. My awards for non-financial injustice are modest and not intended to punish a respondent.

110. In this case I note that the Trustee has previously offered Mr R £1,000 and I find that this is sufficient recognition of the distress and inconvenience caused to him. Mr R should now contact the Trustee if he wishes to accept the £1,000 award, assuming this has not already been cashed.

111. I do not uphold Mr R's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman  
10 April 2024