CAS-68540-P1H1

Ombudsman's Determination

Applicant	Mr I
Scheme	Aviva Workplace Pension[1] (**the Scheme**)
Respondent	Infosys Limited (**Infosys**)

Outcome

1. I do not uphold Mr I's complaint and no further action is required by Infosys.

Complaint summary

2. Mr I has complained that his former employer, Infosys, did not:

   - provide him with a workplace pension from November 2005; and
   - comply with its statutory requirement to automatically enrol him into a qualifying pension scheme under the Pensions Act 2008 from its staging date of 1 July 2013.[2]

3. To put matters right, Mr I is seeking from Infosys payment of an amount equivalent to the pension rights he would have accrued within a workplace pension while on secondment in the United Kingdom (**UK**) between November 2005 and December 2020.

Background information, including submissions from the parties

4. Infosys is a company registered in India with multiple branches across the globe.

5. Mr I commenced employment with Infosys in India on 2 May 2005. The terms and conditions of his employment were set out in a letter dated 8 April 2005. These provided for a "company's contribution" from Infosys to the Employees' Provident Fund, a retirement saving scheme for employees in India, at 12% of his Basic Salary and Dearness Allowance.

[1] This is a stakeholder pension plan administered by Aviva.

[2] Infosys had a staging date of 1 April 2013 and applied the three-month postponement period to defer automatic enrolment to 1 July 2013.

6. Infosys operates a secondment process known as “deputation” involving employees from India being temporarily assigned to one of Infosys’ offices in another country, whilst remaining employed in India.

7. Mr I was seconded to Infosys’ UK office in order to work on an assignment with BT in London from 27 November 2005.

8. The terms of Mr I’s secondment were set out in a letter of deputation dated 25 November 2005 (**the 2005 Letter**). The 2005 Letter showed that his secondment was initially for “about 24 months” but the exact duration would “depend on the specific need of the project”.

9. Mr I’s secondment was extended several times, each time for a fixed term period.

10. The letter of deputation did not stipulate that Mr I would be provided with a UK pension in any form on secondment to the UK. However, it confirmed that Mr I would continue to receive several components of the salary which he was receiving in India (**Indian Salary**) including the company’s contribution to the Employees’ Provident Fund.

11. Under clause 6 of the 2005 Letter, headed “Process of Deputation”, it said:

> “*You are to return to India immediately after your deputation in UK on intimation of the date of termination of your deputation.*”

12. By signing the letter of deputation, Mr I declared to Infosys that he had read, accepted and agreed to the terms and conditions in the 2005 Letter.

13. Infosys did not provide Mr I with a new contract of employment governed by the law of England and Wales.

14. Mr I became a British Citizen in 2012, and it was at that time he started to enquire about the process to become a UK based employee. He states that he was informed that “*deputies were not paid a workplace pension*”.

15. Mr I says it was not until 18 August 2020, after Infosys had stopped paying his salary and told him to return to India that he discovered: (a) it had not provided him with a workplace pension; and (b) its position that he was ineligible to join such a scheme was incorrect.

16. On 31 August 2020, Mr I contacted Infosys’ UK pension department to ask for details of his pension and the staging date for UK automatic enrolment. Initially, Infosys said that:

> *“The UK Group Pension Plan is applicable only for UK base hires and deputees will not be covered under this scheme. This is irrespective of how long you had been deputed here. You can refer this under the policy below […]”*

17. Mr I contested this and asked for confirmation of the law on this point.

18. On 16 November 2020, Infosys confirmed it did not accept that a deputee would ordinarily be entitled to be enrolled into a workplace pension in the UK. However, as a gesture of goodwill, it offered Mr I an ex-gratia lump sum payment representing his missing "standard"[3] matching employer and employee contributions for the period July 2013 "to date" into the Scheme. It offered a further payment should there be a discrepancy between what the pension fund would have been if the standard contributions had been made from July 2013, and the lump sum payment.

19. Mr I declined the goodwill offer and requested that Infosys speak to his solicitor.

20. Mr I resigned from Infosys in December 2020, having remained an India based employee for the duration of his service. He did not return to India after his deputation was ended. He says that this was not possible in any event at the time because of the COVID-19 pandemic.

21. Mr I made some enquiries about automatic enrolment with The Pensions Regulator (**TPR)** who directed him to The Pensions Ombudsman (**TPO**). Mr I made an application to TPO in March 2021.

22. Following the complaint being referred to TPO, Infosys and Mr I made further submissions that have been summarised in paragraphs 23 to 45 below.

Infosys' position

Eligibility for Auto-Enrolment

23. Infosys submits that, as a seconded deputy, it was under no obligation to offer Mr I access to a stakeholder scheme, and he was not eligible to join a pension scheme before its automatic enrolment staging date on 1 July 2013. As a seconded deputy he is not eligible to be auto enrolled into the Scheme between 1 July 2013 and November 2020.

Contribution Rates

24. With effect from 1 July 2013, eligible employees were automatically enrolled into the Scheme using a contribution structure that had a standard matching employer contribution rate of 2% of Qualifying Earnings[4]. This rate subsequently increased to 3% from 1 October 2017, and to 4.5% from 1 October 2018.

25. There is also an "enhanced" matching rate contribution rate of 6% available to members of the Scheme who wish to pay 6%[5] of Qualifying Earnings.

[3] Details of the standard matching employee and employer contribution rate may be found in paragraph 24.

[4] Defined in section 13(1) Pensions Act 2008, as amended from time to time.

[5] This is the maximum employer contribution rate payable to the Scheme by Infosys on behalf of an employee.

26. The Scheme has a Default Investment Option (**DIO**). During the growth phase for the DIO, contributions paid into the Scheme are invested entirely in the 'Blackrock 50:50 Global Equity Index Tracker S6 Fund'.

27. Members can select their own investment funds. However, in October 2020, only 8.9% of members chose how and where to invest their contributions to the Scheme.

Ex-Gratia Offer

28. Although Infosys considers that Mr I was ineligible for automatic enrolment while he was seconded to the UK, it recognises that automatic enrolment is complicated and fact specific. So, as a gesture of goodwill to Mr I, it originally offered to pay pension contributions reflecting both the backdated standard employer and employee contributions that would have been paid had he been entitled to automatic enrolment from July 2013 to August 2020 to the Scheme.

29. It also offered to pay an additional sum to allow for any investment loss based on the return of the DIO for the Scheme.

30. During the Adjudicator's investigation of Mr I's complaint, it proposed a new goodwill offer (**the Updated Offer**) without any admission of liability, as follows: -

- It would meet the 'standard' matching employer pension contributions due to Mr I for the period July 2013 to August 2020 on the basis that he paid the arrears of his employee contributions[6].

- It would make good any lost investment return on his pension contributions "up to the current date" assuming they had been invested in the DIO for the Scheme. In its view, this would be the fairest approach for assessing the loss.

31. Aviva has said that it is unable "*to enrol [Mr I] into the default fund*" because he is no longer an employee. So, Infosys will be prepared to arrange for an appropriate sum to be paid into "*an alternative pension scheme identified by [Mr I]".*

32. In order to be entitled to the proposed payment, Mr I will need to provide evidence of "*payment being made into a pension scheme*". Mr I will also need to consider any tax implications.

33. Its revised goodwill offer is fair, especially when it is not requiring any offset of its pension contributions to the Employees' Provident Fund for Mr I against the payment.

34. Regarding the calculation of the goodwill offer, the onus is on Mr I to demonstrate that he would have paid employee contributions into the Scheme at a rate higher than the standard rate, and he has not provided sufficient supporting evidence.

[6] This can be done either by way of a lump sum or through a payment plan over a reasonable period before Mr I reaches his Normal Pension Age (**NPA**) in the Scheme.

35. Mr I has not provided any compelling evidence to substantiate his assertion that he would not have chosen the DIO for his pension contributions and followed his own investment strategy instead.

36. It would be inappropriate to calculate the goodwill offer by reference to Mr I's submission as to where he would have self-invested his pension contributions with the benefit of hindsight.

Mr I's position

37. He rejected the Updated Offer on the basis that he would have matched Infosys' maximum employer contributions to the Scheme for him, that is, 6% of Qualifying Earnings. Given the opportunity, he would have paid even more. The pension fund would be his "future nest egg" providing a vital source of income in retirement. It could also be passed onto his beneficiaries on his death.

38. He can prove that financial literacy is valued and important in his household. His wife and his son have university degrees in "Economics" and "Behavioural Finance and Investments" respectively. Furthermore, most of his family members have their own "Stocks and Shares ISA" and investment portfolios that are readjusted every six months at the start of each new financial year. To have this level of exposure to finance in his household, it is implausible that he would have settled for the DIO in the Scheme.

39. He says that:

> "*Theoretically, if I was to have a look at the different funds available in Aviva and I perfectly timed buying at the lowest points of a fund and selling the peak of the same fund and compounded that consistently…there is still no way that Infosys can prove that I couldn't have done that. However, I can say with 100% certainty that I was systemically blocked by the company from even having that facility available to me. They state that I have the benefit of hindsight now, but simply put, they can't have their cake and eat it too. You can't block access to the pensions tools…then when you get an official complaint…make assumptions on what I would or wouldn't have done, and still choose the option that favours yourself heavily while stating that I now somehow have an advantage*."

40. He would not have invested in the DIO because of its higher weighting in UK and European stocks. He would have followed his own research as he does now with his personal investment account.

41. The annual management charge of the DIO of 1%, is "ludicrously high when all it does is track an index". Index funds typically only charge between 0.2% to 0.4% per annum.

42. He has submitted as evidence to TPO images of "a rough portfolio construction rationale" and "metadata" for it showing: (a) the location of his home; and (b) a date of 24 March 2020, along with other details.

43. The breakdown of investments shown for this portfolio was: (a) 40% American equities; (b) 25% Emerging Markets/Japanese equities; (c) 5% UK equities; (d) 15% European equities; and (e)15% property. He also provided details on how these proportions should be "split up" further.

44. In order to resolve his complaint, Infosys should:

- pay backdated employee contributions at 15% of his Qualifying Earnings and employer contributions at the maximum rate of 6% into the Scheme for him;
- provide pertinent data on all of Aviva's investment funds for the Scheme available from July 2013, so that he can decide how his pension contributions should have been invested and also when "buys/sells" occurred;
- cover the lost investment growth on his pension contributions to the Scheme;
- pay the loss in both basic and higher tax relief that would have been available from HMRC on his pension contributions to the Scheme; and
- award him compensation for the distress and inconvenience that he has experienced dealing with this matter.

45. It is unfair that for its revised goodwill offer, Infosys require him to pay the arrears of employee contributions.

Adjudicator's Opinion

46. Mr I's complaint was considered by one of our Adjudicators who concluded that no further action was required by Infosys. The Adjudicator's findings are set out in paragraphs 47 to 68 below.

Infosys' failure to provide Mr I with a workplace pension from November 2005 to June 2013

47. Regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (**the Regulations**) states:

> "*5-Time limit for making complaints and referring disputes*
>
> *(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.*

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable."

Regulation 5(1)

48. The event which Mr I had complained about occurred in November 2005. It was on 27 November 2005 when Mr I's secondment to Infosys' UK office began and that was when he had said it failed to provide him with a workplace pension. So, this "act or omission" occurred some 15 years before Mr I made his formal complaint to TPO in March 2021 and therefore fell outside of Regulation 5(1) of the Regulations.

Regulation 5(2)

49. The Adjudicator considered when Mr I became aware of the act or omission complained of, or when he ought reasonably to have been aware of it.

50. TPO received a copy of Mr I's payslip for November 2007 as evidence. This showed that a deduction had been made for pension contributions into the Employees' Provident Fund but no employer or employee contributions were being paid into a UK workplace pension for him.

51. In the Adjudicator's view, from the omission on Mr I's payslips he ought reasonably to have been aware in November 2007 at the latest that Infosys had not enrolled him in a UK workplace pension. As Mr I only raised this part of his complaint with TPO in March 2021, it was brought outside of the three-year period from when Mr I ought, reasonably, to have been aware of his complaint under Regulation 5(2) of the Regulations. It followed that the complaint was not within TPO's jurisdiction.

Regulation 5(3)

52. For completeness, the Adjudicator considered whether TPO could exercise its discretion in accordance with Regulation 5(3) of the Regulations. In order to exercise this discretion, the following two stage test needed to be satisfied: -

- It was reasonable for the complaint to not have been brought within the three-year period following when the complainant became aware of the act or omission complained about; and

- It was brought within a further reasonable period.

53. The Adjudicator did not consider that it was reasonable for Mr I to have delayed bringing his complaint until 2021, some 14 years after he was reasonably aware that his complaint had arisen. In the absence of anything else that would explain why Mr I's complaint could not have been brought to us within three years of November 2007, under the first limb of the test the Adjudicator found that it was not reasonable for the complaint not to have been brought within three years of November 2007. It followed that Mr I's complaint was not within jurisdiction under Regulation 5(3).

54. The Adjudicator had not decided whether this part of Mr I's complaint should be upheld, only whether, under Regulation 5 above, it fell within the Pensions Ombudsman's jurisdiction. For the reasons given, the Adjudicator decided that it did not, and TPO was therefore unable to investigate this part of Mr I's complaint.

Infosys' failure to comply with its statutory requirement to automatically enrol Mr I into a qualifying pension scheme under the Pensions Act 2008 from its staging date of 1 July 2013

55. Regarding an employer's alleged failure to comply with their automatic enrolment obligations, section 34 of the Pensions Act 2008 (**2008 Act**) stipulates that:

> "*34 Effect of failure to comply*
>
> *Contravention of any of the employer duty provisions does not give rise to a right of action for breach of statutory duty……."*

56. Section 35(1) of the 2008 Act provides that: *"The Regulator may issue a compliance notice to a person if the Regulator is of the opinion that the person has contravened one or more of the employer duty provisions*."

57. TPO was therefore unable to investigate or make a finding of fact as to whether an employer had breached its automatic enrolment obligations, for example, an alleged failure to correctly categorise an employee as an eligible jobholder or to enrol an eligible jobholder in a pension scheme. Power to enforce compliance with an employer's duties under the 2008 Act is reserved to TPR.

Remaining points

58. Notwithstanding the issues above, there were two discrete outstanding disputes of fact between the parties, separable from section 34 of the 2008 Act, which were within TPO's jurisdiction. These were:

- the level of contributions Mr I and Infosys would have paid to the Scheme if he had been automatically enrolled in July 2013; and

- how Mr I would have invested those contributions in the Aviva funds.

Level of Contributions

59. The Scheme rules set out the standard and enhanced matching contribution rates due from Infosys' staging date and beyond. These either exceeded or were equal to the statutory minimum.

60. Mr I said that he would have paid employee contributions of 15% to the Sceme and received higher matched employer contributions of 6%. The burden of proof, however, was on Mr I to show that, on the balance of probabilities, he would have paid higher contributions by providing clear contemporaneous evidence, that is, evidence from the time he would have made that decision.

61. Mr I had submitted bank statements for the periods "August 2015 to February 2016", "May 2018 to November 2018" and "December 2018 to June 2019" showing his regular savings to demonstrate his "pension-to-income" ratio in 2018. Whilst the bank statements demonstrated that he put between 8.5% and 12.1% of his gross earnings in a savings account, due to the fact that the bank statements were heavily redacted, none of the Applicant's outgoings were visible. It was therefore not possible to ascertain the total net savings the Applicant made after expenditure. In any event, the evidence presented was not contemporaneous and merely establishes that at certain points in time, Mr I placed funds from his income into a savings account. It did not demonstrate a contemporaneous intention or ability to invest these funds in a pension scheme.

62. It was therefore the Adjudicator's opinion that there was insufficient evidence to support Mr I's assertion that he would have elected to pay employee contributions at 15% of his qualifying earnings during the period from July 2013 to August 2020, if Infosys had automatically enrolled him into the Scheme back in July 2013. The Adjudicator considered that it was more likely than not that Mr I would have elected to make employee pension contributions at the 'standard' rate set out in the Scheme rules (summarised by the Respondent in its formal response[7] to TPO) at the staging date and subsequently.

Choice of Fund

63. For the reasons set out above, Mr I said that he would not have invested his Scheme funds in the DIO and would have followed his own active investment strategy instead. He had requested that Infosys provide him with relevant information on all of Aviva's investment funds for the Scheme from July 2013 so that he could decide how he would have invested his contributions and also when he would have switched investment funds.

64. He had provided as evidence images of "a rough portfolio construction rationale" and "metadata" for it showing: (a) the location of his home; and (b) a date of 24 March 2020 in support of his position. This portfolio showed a breakdown of investments as

[7] Formal Response of the Respondent dated 17 November 2022

follows: (a) 40% American equities; (b) 25% Emerging Markets/Japanese equities; (c) 5% UK equities; (d) 15% European equities; and (e)15% property.

65. The evidence which Mr I provided, in the Adjudicator's view, however, fell far short of demonstrating that, on the balance of probabilities, he would not have chosen the DIO for his pension contributions in 2013 and subsequently, and would have followed his own investment strategy. On his own case, the evidence was dated in 2020, so had no evidential value for establishing how he would have invested in 2013 and subsequently. Whilst this portfolio might well have outperformed the DIO over that time span, it was clearly applied with the benefit of hindsight.

66. To the extent that the portfolio model could demonstrate how he might have invested as at March 2020 and after, it was unclear for what purpose the model was created. The Adjudicator had seen no clear evidential link between this model and how Mr I said he would have invested his pension contributions in the Scheme.

67. The Adjudicator had seen insufficient contemporaneous evidence to establish that Mr I would have invested his contributions in the manner he said. The Adjudicator considered that it was more likely than not that his Scheme funds would have remained in the DIO.

68. If Mr I decided to accept the Updated Offer, he should contact Infosys directly.

69. Mr I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr I provided his further comments which do not change the outcome.

Mr I's further comments

70. TPR advised him in 2020 that TPO was the appropriate body to deal with his complaint, which has created a situation where he has no "avenue for redress".

71. He disagreed that his complaint fell outside of TPO's jurisdiction under regulations 5(2) and 5(3) of the Regulations because:-

- During his employment Infosys consistently said that "*deputees were not paid a workplace pension*". This was presented as company policy, so he had no reason to doubt this statement.

- Furthermore, his situation was complex involving employment and pension law in both UK and India.

- The pension contributions shown on his payslips to the Employees' Provident Fund could "*reasonably be interpreted as Infosys fulfilling obligations through the Indian system*".

- He had no reason to believe until August 2020 that: (a) he should have been eligible for a UK pension; and (b) his pension contributions to the Employees' Provident Fund had been significantly underpaid.

72. Mr I disagreed that TPO is unable to consider his complaint about Infosys' failure to auto enrol him on its staging date. Section 34 of the 2008 Act only bars civil court claims for breach of statutory duty. It does not prohibit TPO from undertaking investigations into maladministration or ordering "remedies" for automatic enrolment failures.

73. The "evidentiary standard" is skewed. He has had to practically provide all the evidence for his complaint. Infosys has merely relied on statements of company policy and unsubstantiated assertions. It has also not rebutted any of his claims with counter-evidence or answered the questions that he asked during TPO's investigation.

74. He has sufficiently demonstrated that he would have paid employee contributions into the Scheme higher than the standard rate through both his "historical savings rates" and his "current 35% pension contributions".

75. He cannot provide exact contemporaneous evidence of his pension contribution decisions because Infosys had wrongly denied him access to the Scheme. To use this evidentiary gap created by Infosys' breach against him is wholly unjust.

76. Given his documented financial methodology, he would have been a part of the "8.9% of members" who chose how and where to invest their contributions to the Scheme.

77. He has provided TPO with "everything financially possible to paint a full picture of my intent and capability to contribute my own money into my pension."

78. He has clearly demonstrated that Infosys violated the pension law of UK and India. The Adjudicator's opinion "completely absconds Infosys of illegal practice" in both countries. This is neither fair nor reasonable.

79. The failure to auto-enrol him into the Scheme was Infosys' breach. Requiring him now to pay backdated employee contributions to the Scheme was effectively asking him to fund Infosys' non-compliance.

80. I note the additional points raised by Mr I but agree with the Adjudicator's Opinion not to uphold the complaint.

Ombudsman's decision

81. Mr I has raised several points relating to his Indian pension. To the extent that he intends to bring a complaint against Infosys regarding his Indian pension, I have not accepted this complaint for investigation because it relates to an overseas pension scheme, and any decision would be unenforceable.

82. In addition, Mr I has raised several questions concerning employment issues. These issues are matters of pure employment law and are not in my jurisdiction to investigate.

Infosys' failure to provide Mr I with a workplace pension from November 2005 to June 2013

83. Mr I considers this part of his complaint did not fall outside of TPO's jurisdiction under Regulation 5 of the Regulations.

84. For the purposes of Regulation 5(1) of the Regulations, the "act or omission" occurred in November 2005, some 15 years before Mr I made his formal complaint to TPO in March 2021. Even if I considered that this was a continuing act between 2005 and 2013, Mr I would have needed to bring his complaint to TPO in 2016 at the latest. I find that this is outside the time period set out in Regulation 5(1) of the Regulations.

85. I must therefore consider when Mr I became aware, or ought reasonably to have become aware, of his complaint under Regulation 5(2) of the Regulations, and whether it would be reasonable for me to exercise discretion to continue investigating this part of his complaint under Regulation 5(3) of the Regulations.

86. I concur with the Adjudicator that Mr I ought reasonably to have been aware in November 2007 at the latest that Infosys had not enrolled him in a UK workplace pension.

87. This means that the latest date on which Mr I could have made an application to TPO fell in November 2010 if he disagreed with Infosys' policy. Consequently, the complaint was brought to TPO outside the time period set out in Regulation 5(2) of the Regulations.

88. In order to exercise discretion under Regulation 5(3), the following two stage test needs to be satisfied-:

- It was reasonable for the complaint to not have been brought within the three-year period following when the complainant became aware of the act or omission complained about; and
- It was brought within a further reasonable period.

89. I note Mr I says that while he was employed by Infosys, it told him on several occasions that, in accordance with company policy, "deputees were not paid a workplace pension". However, as explained above, the relevant act or omission complained about is the alleged failure to enrol him in a workplace pension scheme, not whether Infosys gave him incorrect information about his entitlement to join such a scheme. As it is not in dispute that Mr I was aware from November 2007 onwards that he had not been enrolled in a workplace pension scheme, I conclude that it was not reasonable for him not to have brought his complaint within three years of the act complained about.

90. For completeness, I have seen no evidence why Mr I was prevented from bringing his complaint before 2021 and I conclude that it was not brought within a further reasonable period.

91. It follows that this element of the complaint has been brought out of time under the Regulations and I cannot determine it.

Infosys' failure to comply with its statutory requirement to automatically enrol Mr I into a qualifying pension scheme under the Pensions Act 2008 from its staging date of 1 July 2013

92. Infosys has maintained that Mr I, as a secondee, was ineligible to be automatically enrolled into a workplace pension. Mr I, however, disagrees with Infosys' stance and considers that it had failed to comply with its statutory duty to automatically enrol him into a qualifying pension scheme from 1 July 2013.

93. In respect to an employer's failure to comply with their automatic enrolment obligations, section 34 of the 2008 Act stipulates that:

> *"34 Effect of failure to comply*
>
> *Contravention of any of the employer duty provisions does not give rise to a right of action for breach of statutory duty…"*

94. This means that I cannot make a finding that an employer has breached its statutory automatic enrolment obligations, for example, a failure to correctly categorise an employee as an eligible jobholder or to enrol an eligible jobholder in a pension scheme. I must determine disputes in accordance with established legal principles. Here, Mr I's complaint is one alleging a breach of Infosys' statutory obligations, and under section 34 he would not have a right of action to bring that alleged breach to court. I can also consider complaints of maladministration which do not concern the breach of a legal right, which a court could not. However, in this case I consider Mr I is alleging that his legal rights were infringed and claims financial loss on that basis. Accordingly, I consider that I am prevented from determining the issue and I decline jurisdiction to investigate and determine this element of Mr I's complaint.

95. I acknowledge Mr I's submissions that this effectively leaves him with no avenue to seek redress. However, the wording of the legislation is unambiguous and reserves enforcement powers regarding alleged breaches of an employer's auto enrolment obligations to TPR.

Remaining points

96. Given the Updated Offer that has been made by Infosys, there are two discrete disputes of fact between the parties based on how the Updated Offer should be calculated, which are within my jurisdiction to determine. These are:

- the level of contributions Mr I and Infosys would have paid to the Scheme if he had been automatically enrolled from July 2013; and
- how Mr I would have invested those contributions in the Aviva funds.

97. With each of these, Infosys has provided details of the standard contribution rate to which all eligible employees contributed to the Scheme and details of the DIO into which all eligible members' funds were invested in the absence of different instructions. The dispute proceeds on the hypothesis that Mr I had been auto enrolled; it is also not in dispute that there was a standard rate of employee and employer contributions, and that unless members elected an alternative, the contributions would have been invested in the DIO.

98. Mr I submits that he would have acted differently and would have departed from the standard rate of contributions and the DIO. In order for me to make a finding of fact that that would have been the case, I consider that Mr I must establish that he would have acted differently on the balance of probabilities. I acknowledge Mr I's submissions that he considers it is unfair that the burden of proof falls to him. However, it is a well established principle of law that it is for the party who asserts they would have acted in a certain way to provide sufficient evidence to meet the required standard of proof.

99. I consider that the evidence Mr I submitted regarding his excess savings rate in certain years does not meet this threshold. Whilst some of the statements date to a period in which he would have been making employee contributions, the evidence simply establishes that, at certain points in time, he transferred funds into a savings account. Whilst that does demonstrate that Mr I was able to transfer money at specific points in time to a savings account, it does not demonstrate a contemporaneous intention or ability to make employee contributions of 15% into a pension scheme, and indeed as a matter of fact he did not transfer these savings to an alternative pension arrangement, but into a cash savings account. I find that Mr I would have made employee contributions at the standard rate each year.

100. I also consider that Mr I has not successfully discharged the burden of proof regarding fund selection. I acknowledge that Mr I and his family have a level of financial education and knowledge, but this lacks any specificity in relation to the question of fact before me. His hypothetical portfolio construction significantly post-dates the period in question and so inevitably applies hindsight to the selection. I note that only 8.9% of Scheme members elect not to invest in the DIO. Whilst this is not determinative, it does suggest that it is inherently likely that Mr I would have invested contributions in the DIO, and I would need to see cogent contemporaneous evidence that this would not have been the case. To the extent that Mr I's 'rough portfolio model' could demonstrate how he might have invested as at March 2020 and after, it is unclear for what purpose this model was created, and there is no clear evidential link between this model and how Mr I states he would have invested his pension contributions in the Scheme from 2013 onwards. I find that it is more likely than not that Mr I would have invested his and Infosys' contributions in the DIO.

101. Therefore, I do not uphold Mr I's complaint.

Camilla Barry

Deputy Pensions Ombudsman
13 January 2026