

## Ombudsman's Determination

Applicant	Dr S
Scheme	British Cement Association Pension Scheme ( <b>the Scheme</b> )
Respondents	JLT Benefit Solutions Limited ( <b>JLT</b> ) Trustees of the British Cement Association Pension Scheme ( <b>the Trustees</b> )

## Outcome

1. Dr S complaint against the Trustee is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) the Trustee should increase the maladministration compensation to £500 for the distress and inconvenience caused.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Dr S was quoted a pension of £4,758.24 per annum payable at age 65 from the Scheme when he left employment with the British Cement Association, on 30 April 1984. On his retirement at age 65 the pension he actually received was £3,334.80 per annum as it was realised that the previous figure was overstated. Dr S would like JLT to honour the quoted pension of £4,758.24 per annum and pay the arrears due to him.

## Background information, including submissions from the parties

4. On 30 April 1984, Dr S left employment with the British Cement Association (**the Company**), and on 31 July 1984 Dr S was provided with the following 3 options in relation to his pension from the Scheme;

“1. A deferred pension payable at age 65 of £4,758.24 per annum, plus an attaching Widows pension of £2,379.12 per annum.

2. A transfer value of £3,252.52 to your new employers scheme, or if you wish, to buy an annuity with an Assurance Company.

3. A refund of your contributions amounting to £1,447.11 less 10% tax. Your total contribution amount to £2,298.32 from which £851.21 would be deducted

and paid to DHDD along with £1,556.00 which is the Association's contribution. The payment of £2,407.21 to the DHSS will buy you back the additional component of the State Pension Scheme.

I am sorry for the delay in giving these details but our Scheme rules have now been changed which allows you to 'buy out' your benefit with an insurance company.

If you would kindly let me know which option you wish, I will expedite this for you."

5. On 17 June 1985, Dr S choose option 1, the deferred pension within the Scheme of £4,758.24 per annum payable at age 65. This was also confirmed on 4 November 1996, by the administrators of the Scheme at the time.
6. On 3 March, 2014, JLT provided Dr S with a retirement quotation at age 65 of £3,334.80 per annum.
7. On 5 March 2014, Dr S queried the drop in value. His email included the documentation he was given on 31 July 1984, his letter dated 17 June 1985 accepting option 1 and the letter of 1996 confirming the amount of the pension payable at age 65.
8. On 17 July 2014, JLT informed Dr S that there had been an error in the calculation of his benefits in 1984, and that the correct figure is the lower amount. JLT explained that the difference is due to franking legislation that allows the increases in Guaranteed Minimum Pension (**GMP**) to be offset against the pension, which can result in a GMP only pension.
9. Dr S's position is as follows.
  - Dr S has disputed the Trustees decision and requested that the higher amount is paid as he views the documentation he received to constitute a contract.
  - Dr S references the rule change, which is explained in the letter dated 31 July 1984, that allowed members to purchase an annuity instead of receiving a pension directly from the Scheme. He believes that this constitutes an acknowledgement that although this rule was effective after his date of leaving it was still offered to him. He argues that the anti-franking legislation could have been used in the same manor, in that the decision to not frank his excess pension was made by the administrators in 1984 due to the announcement of the anti-franking legislation which was effective from 1 January 1985.
10. The Scheme's position is as follows.
  - The figures provided to Dr S in 1984 and 1996 were incorrect. JLT have not been able to reconcile the calculations done in 1984 and do not hold a copy, however, the figures have been recalculated using the rules in force at the time Dr S left employment and the Trustees have determined that the lower figure is payable.

- The Scheme has requested evidence that Dr S made plans or commitments based on the incorrect higher figure. Dr S has not provided any such evidence to support a change of position.
- JLT have provided confirmation from HMRC on how much GMP Dr S is due.
- The Trustees offered Dr S £200 compensation in recognition of the maladministration in 1984 and 1996, when the overstated figure of an annual pension payable at 65 of £4,758.24 were provided. Dr S has notified JLT and the Trustees that he does not accept the compensation.
- Franking of excess over GMP was allowable under legislation at the time that Dr S left the Scheme. The Trustees and JLT have confirmed that there was no amendment to the rules that required the anti-franking legislation to be followed where a member left prior to 1 January 1985, either at the time Mr S left or in subsequent years.

### **Adjudicator's Opinion**

11. Dr S' complaint was considered by one of our Adjudicators who concluded that further action was required by JLT. The Adjudicator's findings are summarised briefly below.
- The letter dated 31 July 1984, and Dr S's response dated 27 June 1985, do not hold the four key elements in order to constitute a contract: offer, acceptance, consideration and intent to create legal relations. The Scheme did not intend to create legal relations when providing Dr S with his options upon leaving the Scheme in 1984.
  - The anti-franking legislation did not come in to force until 1 January 1985, after Dr S had left membership of the Scheme. This legislation was effective for people leaving on or after this date and did not affect members who left prior to it.
  - The rules specifically mention that the pension payable will not be lower than GMP, this suggests that franking will be used.
  - As the new rules allowing for members to purchase an annuity or "buy out" their benefits (which was not previously allowed) was highlighted within the letter dated 31 July 1984, had the anti-franking approach been used but not yet been written into the rules, it would have also been highlighted in the letter.
  - JLT have confirmed that the GMP put into payment at age 65 of £3,334.80, has been confirmed by HMRC.
  - The Trustees admitted maladministration where overstated figures were provided in 1984 and 1996. In recognition of the significant distress and inconvenience Dr S has suffered the Trustees should pay compensation of £500 to bring the compensation in line with the Ombudsman's current guidelines.

12. Dr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Dr S for completeness.
13. Dr S disagreement is:

"I contend that the current Trustees have not demonstrated that there was a mistake in the original calculation, because they are unable to exclude the possibility that the Company/Trustees may have used the flexibility given to them under Rule 21, to augment benefits, by e.g. back-dating imminent changes in the rules/legislation. Taking into account that the uncertainty has arisen because of the Trustees' failing in their duty under the Trust Deed, to "keep or cause to be kept a complete record of all matters essential for the working of the Scheme", I believe that the original offer should stand."
14. Dr S says that he accepts when he left employment he was not entitled to a pension in excess of GMP under the Rules. However, he believes that the calculation of benefits in 1984 could have been a deliberate act where the Trustees were using Rule 21 (see Appendix below) to augment his benefits. He says that "having already augmented my pension by back-dating one imminent rule change, they could well have also decided not to apply a process (franking), which was about to become illegal and would therefore have been considered not to be 'best practice'."
15. Dr S also says that the pension fund was financially healthy, the Company was directly administering it and the company was being forced to reduce employee numbers, therefore he views the higher pension quoted in 1984 as a conscious act of anti-franking.
16. JLT and the Trustees accepted the Opinion.

### **Ombudsman's decision**

17. I do not agree that in offering Dr S the option of "buy out" the Trustees were augmenting his benefits. An augmentation is generally an increase applied to benefits at the discretion of the trustees or the employer. The option to buy out the benefit with an insurance company is not an increase to benefits. While this rule was made after Dr S left the Scheme, the fact that the Trustees chose to make it applicable to members who left before its existence does not constitute an augmentation. Some Rule changes will be effective for all members irrespective of the date they left the Scheme, such as the buy-out Rule, and some Rule changes will only be effective from point of creation and will not affect members who are already deferred. Unless protected by legislation this is decided at the trustees' and or the employer's discretion depending on the power provided under the rules.
18. Rule 21 clearly states that an augmentation would be made at the discretion of the Trustee, on request from the Company. There is no evidence to suggest that the

Company requested Dr S' benefits to be augmented. Due to the nature of augmentations, I would expect the leaving statement to clearly show that an augmentation had been granted. An augmentation is not the type of benefit that would be silently awarded, members who receive augmentations are typically aware of them and documentation issued upon leaving would clearly show the additional benefit. While Dr S states that the Scheme was in a good financial position at the time of his leaving, this would not be enough, to assume that an augmentation was awarded.

19. While I agree with Dr S that it would have been helpful if the Trustees, or the Scheme, had held complete records of Dr S' benefits, including the original calculation and copies of documentation issued, I do not agree that the Trustees are failing in their duty under the Trust Deed as Dr S has said. The extract of the Rules that Dr S quotes: "to keep or cause to be kept a complete record of all matters essential for the working of the Scheme", does not necessarily mean every piece of correspondence issued and calculation performed. It simply means the information required to run the Scheme. This could consist of a record of members' entitlement and the relevant Trust Deed and Rules.
20. I agree with my Adjudicator's view that Dr S should receive compensation of £500 for the significant distress and inconvenience caused by the incorrect quotation in 1984 and 1996.
21. Therefore, I partially uphold Dr S' complaint.

## **Directions**

22. Within 21 days of this Determination, the Trustee will pay Dr S £500 in compensation for the significant distress and inconvenience he has suffered.

**Anthony Arter**  
Pensions Ombudsman

5 January 2017

## **Appendix**

Extract of the British Cement Association Pension Scheme Rules

**“21. Augmentation of Normal Benefits**

The Trustee shall have the power, in respect of any Member, on request from the Company, to add to or augment the normal benefits described in the Rules. The augmentation may be for any amount or amounts and in any form provided only that any such augmentation shall not cause the approval given to the Scheme under Chapter II of Part II of the Finance Act 1970 to be prejudiced.”