

Ombudsman's Determination

Applicant	Mr E
Scheme	Cobham Pension Plan (the Scheme)
Respondents	Trustees of the Cobham Pension Plan (the Trustees) Cobham Plc (the Employer)

Outcome

1. I do not uphold Mr E's complaint and no further action is required by Trustees or the Employer.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint is that the Trustees and the Employer failed to provide all the necessary documentary evidence relating to the calculation of his benefits under the Scheme; they classified him incorrectly; and they calculated his benefits incorrectly.

Background information, including submissions from the parties

4. In 1975, Mr E joined a pension scheme with Royal Ordnance.
5. In 2003, that pension scheme merged with the Scheme.
6. From 2003 to 2007, Mr E had several periods of sickness absence. In November 2007, Mr E went on long-term sick leave. In March 2008, his entitlement to company sick pay ended. His contributions to the Scheme also ended at that time.
7. In 2008, Mr E says the Trustees offered him an Incapacity Pension (**IP**). I understand this offer was agreed by the Employer and reiterated in January 2009. However, Mr E rejected it in August 2009, so no benefits were paid.
8. In July 2010, the Employer informed the Trustees that Mr E had been on long-term sick leave since November 2007, and his salary around that time was £37,815.

9. In August 2011, Mr E complained to this Office that the Employer had not accepted his application for Full Medical Retirement (**FMR**). The Ombudsman partly upheld the complaint, directing the Employer to reconsider Mr E's application and pay him £500 for distress and inconvenience.

10. In November 2011, the Trustees wrote to Mr E. They stated: -

"The Trustees have considered your position with regard to the Incapacity and Full Ill Health Medical Retirement, based on the medical information provided, and have concluded that you do not meet the Incapacity or Full Ill Health Medical Retirement definitions.

The reasons for this decision, in the Trustees opinion, is that the medical information covering 2005 to 2008, from the doctors [sic] reports does not give a clear consensus on your condition. Some of the doctors have indicated that with appropriate medication, you will be able to perform your duties.

The Trustees recognise that they originally offered you an actuarially reduced Incapacity pension under Rule 15.3 in 2008, which you rejected in August 2009. This pension was offered by the Trustees on their understanding that Rule 15.3 and the definition of Incapacity allowed such a benefit to be offered when there was a prospect of the member's recovery.

Following the comments in the Ombudsman's Determination relating to the "permanence" requirements of both the Full Medical Retirement and Incapacity definitions, and after receiving legal advice, the Trustees have concluded that their original application of the "permanence" aspect of the test for Incapacity was incorrect.

The Trustees appreciate that their original interpretation of the Scheme Rules may have caused you inconvenience and therefore are offering you a compensatory payment of £500. To enable the Trustees to arrange payment please return a signed copy of this letter in acceptance. On receipt of the acceptance, a cheque will be issued to you.

For completeness you remain entitled to receive an actuarially reduced early retirement pension from the Scheme if you wish to exercise this option. Please let the Trustees know if this is the case."

11. The Trustees state that Mr E requested no benefits at that time, so none were paid.
12. In 2011, the Employer informed the Trustees that Mr E should continue to be treated as a Life Assurance only member.
13. In May 2013, the Employer informed the Trustees that Mr E should be treated as a Deferred Member, following his redundancy in March 2013.

14. In April 2014, Mr E and a representative of his union (**the representative**) informed the Trustees that Mr E's benefits under the Scheme had been calculated incorrectly. This was because, after Mr E stopped making contributions to the Scheme in 2008, there was no possibility of his returning to work, so he should have been treated as a Deferred Member. But from May 2008 onwards, the Trustees and the Employer had treated him as an Active Member, so his benefits were not subject to revaluation.
15. In August 2014, Mr E and the representative said, because Mr E's status changed in 2008, the Employer had a responsibility to inform him, and make him a Deferred Member of the Scheme. But the Employer stated, although Mr E's contributions to the Scheme ended in 2008, he correctly remained an Active Member for Life Assurance purposes until 2013. Also, as Mr E's 'Pensionable Service' ended in 2008, it used his salary at that time to calculate his Scheme benefits, which the rules permitted.
16. In February 2015, Mr E wrote to the Trustees explaining why he thought they had calculated his Scheme benefits incorrectly. The key points were: -
 - At the date of leaving Pensionable Service, Mr E's preserved pension should have been calculated in line with definitions in the relevant Appendix based on Final Pensionable Salary at the date of leaving Final Pensionable Service, that is, based on three years until March 2008 (not March 2013). The Trustees had conceded that March 2008 was his date of leaving Pensionable Service.
 - The Trustees' application of Rule 3.3 (i) and (ii), cited without the source, was incorrect as he was no longer a Scheme member after March 2008, since his Pensionable Service ended at that time.
17. In June 2015, the Trustees responded. The key points were: -
 - Mr E was treated as being 'temporarily absent' from March 2008 onwards, so he came under Rule 6.1. That meant, there was an expectation that he would return to work and, as long as the Trustees and the Employer agreed, he could continue to be treated as an Active Member, thus benefitting from life cover.
 - He only ceased being an Active Member of the Scheme in 2013 when he was made redundant. Rule 6.5 provided that the Employer should inform the Trustees of the member's salary, so the Trustees could determine his benefits.
 - They treated Mr E as an active member from March 2008 to March 2013, as their administrative records indicated that was how he should be treated.
 - They were not informed that Mr E should be treated otherwise until May 2013, when the Employer informed them he should be treated as a leaving member. There was no additional information in their records regarding his membership.
18. Dissatisfied with the Trustees' and the Employer's responses, Mr E referred his complaint to this Office.

Adjudicator's Opinion

19. Mr E's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees or the Employer. The Adjudicator's findings are summarised briefly below: -

- The Trustees and Employer had made reasonable efforts to supply the relevant information in relation to the calculation of Mr E's benefits.
- The Trustees had to meet three conditions, under Section 6 of the Scheme Rules, to classify Mr E as an Active Member after 2008: (1) there must be a definite expectation or intention the member would return to work; (2) the Employer must request the member remain an Active Member; (3) the Trustees must agree.
- The Trustees argued that their classification of Mr E as an Active Member of the Scheme after 2008/09 was correct, as that is how the Employer's "administrative records" indicated that he should be classified. There was no further evidence to support this. However, that was insufficient for a finding of maladministration against the Trustees or the Employer.
- Whilst there was insufficient evidence that the Employer informed the Trustees that Mr E should be classified as an Active Member after 2008/09, there was also insufficient evidence that he should not have been. The Trustees explained, in November 2011, that the original offer to pay an IP was incorrect. Their misunderstanding of "permanence" under the Scheme rules meant Mr E should not have been offered an IP. They apologised for any inconvenience this caused Mr E and offered him £500. However, Mr E remained classified as an Active Member.
- Mr E's case was that, as the Trustees had offered him an IP in 2008/09, they could not have believed there was a definite expectation that he would return to work. However, as the IP was offered in error, the Trustees' belief that Mr E could return to work was reasonable. After that, Mr E remained classified as an Active Member, as there was no further evidence to indicate that was incorrect. This position only changed in 2013, when the Employer informed the Trustees that Mr E should be classified as a Deferred Member, following his redundancy.
- In 2008/09, the Trustees believed Mr E's condition met the requirements for an IP, but that belief was misguided. In 2011, there was no medical consensus about his condition, with some doctors indicating that with treatment he would be able to carry out his duties. Therefore, the Trustees and the Employer had followed the correct process when classifying Mr E as an Active Member, albeit there was insufficient evidence to support this stance.
- The Trustees reasonably believed Mr E would be able to return to work. Therefore, Rules 6.3 and 6.5 were applicable. It was appropriate for them to classify Mr E as being on temporary leave, rather than permanently incapable of returning to work, until he finally retired in 2013.

- The Employer was entitled under the Rules to decide what salary should be used to calculate Mr E's benefits, so it had not acted in maladministration in this regard.
- As Rules 6.3 and 6.5 applied, the three conditions had to be met. Though there was a lack of evidence, it was more likely than not that the conditions were met. If the Trustees had not mis-understood the "permanence" test, then they would not have offered Mr E an IP, and they would have had no reason to doubt he could return to work. Where there was no reason to doubt that, there was also no reason that the Employer and the Trustee would have objected to Mr E's remaining an Active Member. Therefore, the complaint could not be upheld.

20. The Trustees and the Employer agreed with the Adjudicator's Opinion. However, Mr E's representative disagreed. He provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by the representative for completeness.

Ombudsman's decision

21. To re-iterate Rule 6, "Temporary Absence", this states as follows: -

"Subject to the provisions of this Rule if a Member which includes a Life Assurance Only member if provided for in the Rules is absent from active employment (whether or not his contract of employment remains in force):

(A) if the period of absence is due to illness or incapacity for any period; or

(B) if the period of absence is due to employment abroad for a period not exceeding 26 consecutive months; or

(C) if the period of absence is due to any other reason and

(i) he remains a resident in the United Kingdom; and

(ii) he does not become a member of any other Registered Pension Scheme for a period of 36 months or less

"then provided there is a definite expectation or intention of his returning to active employment and subject to Rule 6.3 such a Member may be permitted at the request of the Employer and with the agreement of the Trustees[,] remain an Active Member for so long as the Trustees may determine and on such terms as the Trustees shall decide."

22. Mr E's representative argues that Rule 6 is properly construed as providing that, if a member is absent from active employment, he may no longer be an Active Member of the Scheme, unless there is a "definite intention" or "definite expectation" that he will return to work, the Employer has requested that the Employee remain an Active Member, and the Trustees agree.

23. However, I do not agree. I consider the correct interpretation is: Mr E was correctly classified as an Active Member, as he had always been so classified; and, as there was insufficient evidence that he should not be classified as an Active Member, the Trustees and Employer acted correctly leaving him classified as an Active Member.
24. The Trustees have provided a document, a Life Assurance submission form from 2011, showing Mr E was included in a list of Life Assurance only members. This is evidence of the Employer informing the Trustees that Mr E should remain a Life Assurance only member. The fact the Trustees did not challenge this indicates they agreed with it at the time; moreover, it indicates that they had agreed with it, back in 2008/09. The representative has seen a copy of this document, but in his view it supports his own position that no request was made by the Employer to the Trustees that Mr E remain an Active Member, so the Trustees did not consider the question how long Mr E should remain an Active Member and if so on what terms. However, I do not agree. While there is insufficient evidence of a “definite intention” or “definite expectation” that Mr E would return to work, I consider that the Trustees and the Employer had such an expectation. This is because, it is unlikely they would have agreed to continue to provide him with a valuable benefit, namely Life Assurance, in circumstances where there was no expectation that he would return to work.
25. Therefore, I find that there is insufficient evidence of maladministration on the part of the Employer or the Trustees. The classification of Mr E as an Active Member being correct to begin with, it remained correct, in the absence of evidence to the contrary, albeit there is not necessarily sufficient evidence that the process described in Rule 6 was correctly followed.
26. The representative also states: “As the default position is that the complainant should not be classified as an active member (absent a request and approval and agreement), the decision should be that the member cannot for this period be treated as an active member... It is inappropriate to shift the burden to the complainant to demonstrate that there was no request by the employer or no approval given by the trustees as required.”
27. I appreciate the representative feels the burden of proof is being unfairly shifted to Mr E. However, I do not agree. I consider that I must make a decision, on the balance of probabilities, about whether there was an agreement between the Trustees and the Employer. I find it is more likely than not that they did agree to Mr E’s remaining classified as an Active Member, as explained above.
28. I consider that the intention of Rule 6 is essentially to provide a way for members to remain classified as Active Members, where they are absent from active employment, provided the Trustees and the Employer agree. In this case, their position is that they did agree. Therefore, whilst they would ideally be able to demonstrate this, it would be unreasonable to uphold the complaint on the basis that they are unable to do so. If Mr E’s case were that he was incorrectly classified as a Deferred Member, the onus would be on the Trustees and Employer to show that they discussed whether or not he should remain classified as an Active Member, and why it was not agreed.

29. In its letter dated 26 March 2012, the Employer referenced various correspondences to Mr E from 2010 to 2012. This correspondence demonstrates, in its view, that Mr E was being treated as an employee and that, therefore, it would have been reasonable for him to understand that he was still an Active Member of the Scheme. I agree.
30. In summary, I find that Rule 6 should not be interpreted in the way the representative has argued. It essentially provides a way for members to continue being classified as Active Members, in circumstances where that would not normally be permitted. I find that, because the Trustee and Employer left Mr E classified as an Active Member for Life Assurance purposes; they were not informed that he would be unable to return to work; and there was no attempt to make him a Deferred Member, they have not acted in maladministration in this case.
31. Therefore, I do not uphold Mr E's complaint.

Anthony Arter

Pensions Ombudsman
26 July 2017