

Ombudsman's Determination

Applicant	Mrs B
Scheme	Bank of America Pension Scheme
Respondents	Bank of America Merrill Lynch (the Bank)

Outcome

1. I do not uphold Mrs B's complaint and no further action is required by the Bank.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs B claims that she has an entitlement to a pension from one of the Bank's UK pension schemes based on a letter she received dated 7 August 1981. Mrs B is also complaining about the failure of the Bank to respond to correspondence during the complaint process.

Background information, including submissions from the parties

4. Mrs B worked for the Bank between 1975 and 1981. When she left, she received the letter dated 7 August 1981 (the **1981 letter**), which says:

"Thank you for your letter dated 5 August 1981 advising that you do not intend to return to work; you realize, of course, that as your pensionable service with Merrill Lynch exceeded five years, you have a vested pension benefit and that you will not receive a refund of contributions..."

5. On 25 September 2013, Mrs B contacted the Bank asking for details of her accrued pension benefits. The Bank replied on 25 October 2013, saying that it was unable to trace any record of pension benefits payable to her and asked Mrs B for further information.

6. Following correspondence between Mrs B, the Bank and Capita (the Bank's former pension scheme administrators), the Bank responded in full on 11 June 2015:

"... Although I have been able to verify your dates of employment, I have not yet been able to trace benefits for you for this period. As you can probably appreciate,

the records for the period in question are all paper-based and it has taken some time to investigate, recall archive files, analyse their contents, etc. Also, given the time that has passed we cannot ignore the possibility that relevant paperwork has been lost.

I note in your letter of 16 March 2014 to the Plan administrators that you have no documentary evidence of Plan Membership, and have relied on ... letter dated 7 August 1981 as your evidence. However, we are not in a position to use this letter as evidence as it does not inform us of which plan you were in, or the level of the benefits that you might be entitled to. Indeed, the process that is followed when a member leaves a pension plan involved sending a leaving service statement that sets out exactly what benefits have vested, and the age at which those benefits become payable. As it is possible for members to transfer benefits away from a plan between leaving and retirement, a letter stating that there is benefit in 1981, without any further details, cannot be used as enough evidence to put a benefit into payment...”

7. In this response, the Bank also detailed what investigations it had carried out which included their UK pension plan and two overseas pension arrangements. In relation to the UK scheme, they noted:

“Despite the below, the fact that you were hired in the UK at a time that you had UK-citizenship (albeit dual citizenship) indicate that any membership would likely be in a UK Plan.

I spoke to ... and discussed with her the potential areas of investigation. Unfortunately, she does not recall the circumstances of your specific employment.

As you know from your correspondence with the UK administrators, they are unable to find a record of you being in any of the plans.

They have also checked with the Contracted out employments group of HMRC, who have confirmed that you have never been contracted out of the State’s secondary pension scheme (which would have been a necessity of membership in the UK plans at this time).

This suggests that you were not in a UK plan, or that you later transferred the benefits elsewhere.”

8. In relation to Mrs B’s complaint regarding the failure to respond to her correspondence, the Bank acknowledged this in their response to this Service dated 6 July 2016. The Bank recognised they could have communicated better with Mrs B, and that they ought to have been better at acknowledging her letters and investigating her complaint.

Adjudicator's Opinion

9. Mrs B's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Bank. The Adjudicator's findings are summarised briefly below:
- My remit is limited to considering complaints brought by members (or potential members) of pension schemes administered in the UK and therefore the investigation only considered Mrs B's claim to membership of one of the Bank's UK pension schemes.
 - The 1981 letter is important, not because of what it says about Mrs B's entitlement, but what it omits. It does not say: what pension scheme holds her pension benefits; when she is eligible for the payment of her pension; or what her entitlement under such a scheme would be.
 - The Bank was correct to ask HMRC about Mrs B's national insurance records. The fact that these records show that she was not contracted out of the state second pension shows that she was not a member of one of the Bank's UK pension schemes.
 - I am unable to direct the Bank to make a pension payment purely on proof of employment and there needs to be evidence that Mrs B was a member of a particular, UK based, pension scheme. As Mrs B has no other evidence to support her claim to a pension from one of the Bank's UK based pension schemes, it is reasonable for the Bank, and I, to rely on the information provided by HMRC.
 - In relation to the complaint regarding a failure to reply to correspondence, the Adjudicator's opinion was that it was reasonable the Bank took time to investigate Mrs B's complaint and agreed that it could have done more to keep her informed. However, there is no loss as a result of this action and therefore this part of the complaint was also not upheld.
10. Mrs B did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs B has provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and therefore, I will only respond to the key points made by Mrs B for completeness.

Ombudsman's decision

11. Mrs B has argued that because the pension was earned in the UK, and the 1981 letter was issued by a UK based company, then Mrs B must be a member of a UK scheme within UK jurisdiction. Any complaint about a UK pension scheme is within my jurisdiction. It is merely that, on the basis of the information available, Mrs B is not entitled to a benefit from any of the Bank's UK based pension schemes.

12. In relation to the possibility that Mrs B is entitled to a benefit from one of the Bank's overseas schemes, The Pension Schemes Act 1993, relates to my jurisdiction with regard to the types of schemes that I can investigate. That includes complaints about the management and administration of occupational (work based) and personal pension schemes. Part of the definition of an occupational pension scheme is one that is wholly administered in the UK, or outside of the European Economic Area. While technically it would be possible to investigate a complaint about a US based scheme, there is a requirement for in depth knowledge and expertise of foreign pension law to allow this Service to fully investigate such a complaint. Naturally our expertise focuses on those areas in which we are able to make decisions which are enforceable. I explore this further below.
13. At the conclusion of an investigation I can issue a final and legally binding decision (a Determination). This means that by law all parties to the complaint must comply with the Determination, including any directions I may give to the parties at fault to put things right. In Mrs B's case, there is also the issue that any Determination I make is only legally binding in the UK, meaning that any directions can only be enforced by the County Courts of England, Scotland, Wales and Northern Ireland - as these countries fall under the scope of my powers. It follows that any Determination I issue relating to Mrs B's US based pension scheme would have very limited value because, even if I made a Determination in favour of Mrs B, there would be no way for her to enforce it.
14. Section 146 of the Act gives me discretion not to investigate a complaint and, in this instance, that discretion is being applied. For the reasons listed above, I agree with the Adjudicator's decision to limit the investigation to Mrs B's disputed claim for pension benefits within a UK based pension scheme. It follows that I have not looked at Mrs B's complaint relating to the US based pension scheme.
15. The role of the Service is to adjudicate on complaints of maladministration causing an injustice. While, in the early stages of the complaint process we try to mediate between the parties, this is usually only when it can be seen that there is some middle ground that can be reached. There is little point in mediating between Mrs B and the Bank about access to a benefit to which Mrs B cannot prove entitlement on a balance of probability. The Bank (their UK branch) has confirmed that they do not know what steps Mrs B can take next in respect to any claim for a US occupational pension. I can only suggest that Mrs B contact the Bank in the US with regard to pursuing a claim in respect of possible membership of their US staff pension arrangements.
16. I do not agree with Mrs B's assertion that this Service "...washes its hands of the matter because records may have been lost or pension contributions have been misapplied." The Adjudicator made no comment with regard to either lost paperwork or the accusation that contributions had been misapplied. The investigation merely looked at the evidence that is available and whether, in all likelihood, Mrs B is a member of a UK pension scheme. While I agree that the Bank has been unable to

find anything other than confirmation of Mrs B's employment history, Mrs B has only been able to put forward the 1981 letter as evidence that she is entitled to pension benefits from one of the Bank's pension schemes. This does not provide undoubtable proof that she is a member of a UK pension scheme.

17. I also cannot ignore that the Bank, after searching their archives, took the next step and contacted HMRC to see whether they had any records which would support Mrs B's claim. As the Adjudicator stated, the information from HMRC is important and shows that, if Mrs B was never contracted out of the second state pension, then it is not possible for her to be a member of one of the Bank's UK pension schemes which were all contracted out of the second state pension. Therefore, the argument over lost documents is irrelevant – the information that has been put forward is good evidence to show that Mrs B is not entitled to a benefit from the Bank's UK schemes.
18. Finally, in relation to Mrs B's complaint concerning the Bank's failure to reply to her correspondence, I cannot find that there is a link between this and any possible loss of documents from 35 years ago. The Bank has acknowledged that they could have approached the matter differently, but Mrs B has not suffered a loss as a result. 35 years is a long time and it is hardly surprising that the Bank now has only limited information concerning Mrs B's employment with them..
19. Therefore, I do not uphold Mrs B's complaint.

Anthony Arter

Pensions Ombudsman
18 August 2016