

Ombudsman's Determination

Applicant	Mr H
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent	Our Place Schools Ltd (the School)

Complaint Summary

1. Mr H has complained that the School, which is an independent school, promised to maintain his membership of the Scheme at the time of his appointment in September 2011, but failed to do so even though it deducted employee contributions from his pay.
2. Mr H says that the offer of Scheme membership was central to his decision to accept the post and formed part of his contract of employment.
3. Mr H says he agreed to alternative, inferior, pension arrangements following misrepresentations made to him under duress, and wants his benefits in the Scheme reinstated, either by enrolment into the Scheme, or by provision of equivalent benefits.
4. He complains that the School continues to retain the deducted employee contributions.

Summary of the Ombudsman's Determination and reasons

5. The complaint should be partly upheld and, to put matters right, the School should pay the cost of making good the financial loss Mr H has suffered in relation to contributions deducted and retained by the School, and outstanding employer contributions.

Detailed Determination

Material facts

6. Mr H's offer of appointment letter of August 2011, formally signed by Mr H and Ms T, a then Director of the School, stated that the School could operate the Scheme should Mr H wish to join it, and that the letter and staff handbook formed his contract of employment and may be revised from time to time.
7. Under the relevant regulations governing the Scheme, certain independent schools may apply to participate in the Scheme, but if they do so, they may be required to provide a guarantee.
8. At the time Mr H was offered membership of the Scheme, the School had not applied for entry into the Scheme and it has not subsequently gained admittance.
9. The School says it was not in a position to obtain a guarantor at that time. It says its business was in special measures at the bank and had severe revenue/costs and cash flow issues.
10. Ms T has confirmed that the mistake resulted from her misunderstanding of what was required to enter Mr H into the Scheme. Ms T says she did not realise, until some 14 months later, that, although the payroll provider was deducting Mr H's contributions (with national insurance (**NI**) being deducted at the lower contracted-out rate), they were not being paid to the Scheme and that it was the School's responsibility to apply for entry and pay contributions to the Scheme.
11. In June 2013 the School made enquiries to Teachers' Pensions about how to rectify the situation and, in September 2013, asked to register with the Scheme. Teachers' Pensions informed the School that it would need to provide a guarantee from the bank to cover three months' contributions, for all members (**the Three Months' Guarantee**), in order to enter Mr H into the Scheme. No evidence has been provided showing that at the time the School asked the bank to provide a guarantee.
12. In November 2013, the School notified Mr H that there was no prospect of finding a willing guarantor. The letter also stated that the School would make good the promises made by Ms T, including making contributions of 14% into his pension fund, and that Mr H and the School would need to find a scheme with 'similar' benefits (**the Offer**). Mr H was asked to seek professional advice and to confirm that he was happy to proceed on that basis. In the period that followed, the School met with financial advisers and discussed pension provision for Mr H; it also wrote to Mr H about the issue, asking him to confirm his instructions.
13. In May 2014, Mr H met with an adviser (the **IFA**). The IFA says Mr H engaged him to act on his behalf and his role was to put a personal pension plan in place to receive contributions agreed between Mr H and the School. The IFA says he was not involved in any negotiations regarding contributions, nor was he asked to be.

14. Mr H says the School's Director tried to encourage him to seek advice from an adviser known to the Director, but he refused and chose his own adviser. Mr H has confirmed that the IFA provided recommendations on a pension scheme but did not take part in any pension negotiation.
15. Mr H says he was first diagnosed with cancer in November 2014. In December 2014, the School wrote to Mr H, recording the outcome of a meeting which had taken place on 17 December 2014. There are no contemporaneous notes of that meeting. The letter confirmed an agreement between Mr H and the School that it would pay a minimum amount each month to reduce outstanding contributions of £15,176.59 to his pension fund. The letter did not state whether the amount covered any employee contributions deducted but not paid to a pension arrangement. It made no mention of contingent benefits.
16. In April 2016, the School notified Mr H that the final agreed payment had been made and this payment brought to an end the arrangement under which the School had agreed to accept the commitment made by Ms T. It also stated that the School would continue to pay normal monthly contributions in line with the agreement reached with Mr H and his IFA. The same month, Mr H formally complained to the School that he had been misled about the pension arrangements.
17. Mr H subsequently brought his complaint to the Ombudsman and, in the course of investigation, the School reopened its archives and checked the basis of the payments it had made up to April 2016. It has confirmed that both the employer and all deducted employee contributions were included in the original calculations, but a recalculation based on a review of its pay and deduction records, shows that the total amount of contributions outstanding was £16,799.35 as at April 2014, i.e. there remains a shortfall of £1,622.76.
18. The first regular contribution of £385 was paid to Standard Life on 12 August 2014. Based on the amount paid from August 2014, there appeared to be additional employer contributions of £1,155 due in respect of the period May 2014 to August 2014. The School accepted that contributions should also have been paid in respect of May 2014 to 31 July 2014 and that Mr H is entitled to lost investment return on the additional amount due. The total contribution still due and outstanding to Mr H's scheme amounts to £2,777.76.

Mr H's position

19. Mr H says he agreed to accept payments into a personal pension plan which provides inferior benefits when compared to those that would have been provided under the Scheme, because he believed the School had exhausted every avenue to find a guarantor; the School's Director consistently painted a picture of the financial vulnerability of the School to staff. Mr H says the reason he did not complain to the Pensions Ombudsman when he first became aware that he was not enrolled in the

Scheme was partly because he was told that the only alternative open was to arrange a private pension for him.

20. Mr H denies that he failed to engage with the School and asserts that he was hindered by lack of opportunity to discuss the matter with the School's director who was not often available.
21. Mr H says the process and discussions with the School's Director were misleading. Mr H says he would not have accepted an alternative had he known the only barrier to enrolment in the Scheme was provision of the guarantee. Mr H says, at the time, he was the only teacher at the School that met the requirements to join the Scheme. He asserts that the School was (and is) able to obtain a guarantor for the Three Months' Guarantee as it still only employs a few qualified teachers.
22. He says he was told that any replacement scheme would fully compensate him for the losses and terms of the Scheme. Mr H says he verbally accepted this in good faith. Mr H says the School's Director's verbal agreement to fully compensate him, particularly to provide similar life assurance and ill-health benefits, appears to have been ignored.
23. Initially Mr H said that before and during the time pension provision was being discussed, he was unwell but his condition had not been diagnosed. When the School maintained it had been unaware of his illness at the relevant time, he said he told the School about his illness when it was first diagnosed in November 2014. He says he feels the School took advantage of his health and pressured him into accepting the Offer. He believes he is entitled to be reinstated into the Scheme (or a scheme that provides equivalent benefits); to a refund of any outstanding contributions, and to have any incorrect NI records corrected.

The School's position

24. The School says it made attempts to reach a resolution but Mr H did not fully engage with the School and did not provide input regarding the Offer.
25. The School says at no time did it advise that Mr H use any particular adviser. The School says it suggested that Mr H meet with a pension adviser, who had been retained by another employee, to encourage him to make a decision about his pension and had to continually prompt him to take action.
26. The School denies that the School's Director made misleading statements to Mr H about the terms of its pension promises. It says the School's Director made it clear to Mr H that, whilst the School's investors were prepared to support compensating him, this related exclusively to the money due to him and not the availability of any particular benefits.
27. The School says if Mr H regarded it as a priority to maintain his membership of the Scheme, he had the option of resigning and seeking employment elsewhere, but on

no occasion did he mention this. The School says in view of Mr H's lack of urgency, it considered that he was happy with the process that had been explained to him.

28. The School says that Mr H's current state of health was not disclosed to the School until late 2015. While it recognises that this has given him cause to reflect on decisions he made prior to his ill health, the School, under its new management, has acted in good faith to resolve the issue and has complied with its responsibilities and has kept to the terms of the agreement.
29. The School accepts that it is liable to make good any continuing contribution shortfall.

Other evidence

30. When asked what his instructions were, Mr H's IFA said he was given a copy of the Offer letter. The Suitability report records no discussion of 'similar' benefits. It says 'your main objective is to commence a pension plan to accept your employer's contributions in a portfolio that suits your attitude to risk and can be rebalanced each year.' Under risk it says 'Your employer has agreed to contribute to your pension arrangement and asked you to set up an appropriate plan. This was part of your employment contract. They have agreed to pay our fees for advising you on this matter. Your employer has agreed to make up the contributions that should have been paid, this figure has to be agreed between you and your employer. They have not asked you to contribute and they are currently late in starting contributions. This is a long term arrangement.' Mr Smith also completed a death benefits nomination form under the personal pension plan which described the extent of benefits available from the personal scheme.
31. In the course of investigations, Teachers' Pensions explained that if the School had been accepted into the Scheme when Mr H first entered employment, his membership would have been linked with previous service and treated as continuous from 1 November 2005. It says there is nothing to prevent the School from applying to join the Scheme again and, provided all other requirements are met, the Three Months' Guarantee should be sufficient. However, all teachers employed by the School would immediately become members of the Scheme and admission to the Scheme cannot be created with retrospective effect.
32. Standard Life has confirmed that it is willing and able to calculate lost investment returns as if any outstanding additional contributions due had been applied on 12 August 2014, the date the first contribution was applied, and invested in line with the investment instruction in force at that time, allowing for any charges that apply to the policy.

Conclusions

33. When Mr H started work with the School, it promised that it could operate the Scheme if Mr H wanted to continue his membership, and it proceeded to deduct contributions as if Mr H was a member. Mr H believed he had been re-admitted into

the Scheme. In fact he had not. Moreover the School was not even an admission body. On the evidence of a former Director, which has not been disputed, this situation arose because the School did not understand the steps which it needed to take in order to gain admission and enrol Mr H.

34. Mr H would like the benefits of the Scheme by virtue of membership of the Scheme or via his personal pension plan. As explained above, the School has not been admitted to the Scheme, and there is no dispute between the parties that, by the parties' mutual conduct, Mr H instead became a member of the personal pension plan. I consider that Mr H's agreement to use a personal pension scheme is incompatible with a request now to be enrolled into the Scheme because the parties have proceeded by agreement on quite a different footing.
35. It is therefore the personal pension plan and the terms applicable to it that I will consider. The contention before me is what those terms should be. More specifically, it is loss of access to the contingent benefits which has driven Mr H to pursue his complaint. Mr H has argued that the terms of the personal pension plan should cover the broader benefit structure afforded by the Scheme. For its part the School contends that it agreed contributions only and so honoured lesser terms.
36. For the reasons set out below, I have concluded that I can give no remedy for that part of the complaint relating to contingent benefits. I consider that Mr H's actions in relation to this matter are such that he agreed to the provisions of the personal pension plan without reference to whether it would pay benefits comparable to those payable by the Scheme.
37. But first I will deal with the missing contributions issue. The School has accepted that it undercalculated the payments due and agrees that it is liable to make good the shortfall. Mr H is in my view entitled to full restitution for his financial loss and I can see no reason why he should have had to pursue a complaint to achieve that. I accept that there was an initial lack of engagement by Mr H. That said, once the alternative scheme was put in place, there was unreasonable delay in ascertaining and disclosing how much employee contributions were owed to him, and the amount of employer contributions due. It has now been ascertained that £2,777.76, remains outstanding. To that extent, I uphold the complaint and make the direction below to remedy this injustice.
38. That leaves the more difficult question of whether Mr H should be entitled to compensation because he has no access to contingent benefits.
39. I am conscious that the terms of the Offer were never formally accepted in writing, and no independent legal advice was taken by Mr H. Neither party has ever contended that they turned their minds to the structure of the contingent benefits available under the Scheme when coming to their agreement.

40. Mr H says he considered it was the job of the IFA to make sure that the School's Director honoured his promise to provide equivalent benefits. However, the Suitability report contains no reference to equivalence of benefit structure.
41. Neither the School nor Mr H has said they turned their minds to contingent benefits until after Mr H became ill. I find this of considerable importance. In the period leading up to the Offer letter in November 2013, when the terms of the alternative pension plan were being considered, neither party knew the severity of his ill-health. The benefits in dispute are contingent benefits and would not have been first and foremost in contemplation of the parties. I cannot conclude from the words 'similar benefits' contained in the Offer letter that the parties intended to include contingent benefits, when there is no evidence that either of them was actually thinking at the time about the circumstances in which such benefits would be useful.
42. In April 2016, when the School announced that it had fulfilled its side of the agreement, Mr H countered with a question about provision for contingent benefits – but by then Mr H was seriously unwell.
43. The Death Benefits Guide which applies to Mr H's plan is very descriptive about the types of benefits payable on death. I conclude that if Mr H did not know, then he ought reasonably to have known, by virtue of the information provided to him about the personal pension scheme, that the death and ill-health benefits provided by the Scheme were simply not features of the personal pension arrangement.
44. The evidence is clear that the only benefits actually being funded by the School were those covered by contributions to Mr H's personal pension. I conclude that what was in contemplation was that the equivalent contributions would be made good by the School. There is no indication that the parties intended to mirror the Scheme in terms of funding and benefits. I bear in mind that the only contributions which were going into the personal plan long term were from the School. To replicate the provisions of the Scheme, including the contingent benefits, would have required Mr H to make ongoing contributions in addition. There was no agreement to that effect.
45. When Mr H was diagnosed as seriously ill, the significance of the contingent benefit structure of the Scheme would have become apparent. However, I do not accept that availability of such benefits was ever in contemplation of the parties when they reached their agreement about the terms of the pension provision which was put in place. Had such benefits been in contemplation, Mr H could have sought cover and there would have been discussions around that, including who would meet the cost.
46. Mr H has argued that he only chose the personal pension plan because the School told him it was in such financial difficulties that it could not obtain the guarantee necessary to participate in the Scheme. I have no reason to doubt that the School had financial difficulties. That practicality probably did lead to the easier option of both parties agreeing to the arrangement of the personal pension scheme, but I can see no evidence that the School induced Mr H to agree less benefits.

47. Mr H also considers that the School took advantage of his illness. The School denies it knew of his illness at the relevant time. Certainly, at the time it made the Offer, the School could not have known the extent of Mr H's ill health because his condition had not yet been diagnosed. By the time the alternative scheme was put in place, Mr H says the School was aware of his diagnosis. Even if I accept that the School was told as soon as the diagnosis was made, I am unable to conclude from this evidence that the School placed Mr H under duress or undue influence. The School, by its own admission says it put some pressure on Mr T to address the issue of his pension. But the School also advised Mr H to obtain financial advice, and he did so. The School did not prevent him from bringing a complaint to this office, or influence the choice of the alternative scheme which Mr H put in place. Mr H says that the School did try to introduce him to an adviser but he refused the suggestion and found his own. He also says that he told the IFA that 'the School's Director had agreed that the package offered would be fully in line with the one offered by the [Scheme]'. Mr H says the IFA's job was 'to ensure that the School's Director would make good to his word [sic]'. While I understand that Mr H may consider this was the IFA's role, there is no evidence of a connection between the School and the IFA. The parties agree that the only instruction to the IFA came from Mr H. In those circumstances, I cannot impute any responsibility for the choice of an alternative scheme to the School.
48. Therefore I uphold that part of the the complaint relating to unpaid contributions and make a direction aimed at remedying the injustice.

Directions

Within 14 days of the date of this Determination, the School shall pay:

1. Contributions of £2,777.76, along with lost investment returns, to Mr H's Standard Life pension policy. Investment returns to be calculated by Standard Life, taking into account investment returns to the date of the Determination, as though the additional sum had been invested on 12 August 2014;
2. £500 to Mr H for the distress and inconvenience of having to pursue the missing contributions.

Karen Johnston

Deputy Pensions Ombudsman
15 March 2017