

## Ombudsman's Determination

Applicant	Mr N
Scheme	J Whitaker & Sons Final Salary Plan ( <b>the Scheme</b> )
Respondents	Trustees of J Whitaker & Sons Limited Final Salary Plan ( <b>the Trustees</b> ) First Actuarial LLP ( <b>the Administrator</b> )

## Outcome

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

## Complaint summary

3. Mr N's complaint centres on his late wife's entitlement from the Scheme and the level of benefits that are now due to him as the surviving spouse. His four main areas of concern are:
  - the information issued to Mrs N about the spouse's pension entitlement was unclear;
  - the Administrator failed to provide information on more suitable options upon knowledge of Mrs N's serious ill health;
  - there was sufficient time to activate an early retirement option; and
  - the unclear information and failure to act quickly has resulted in a very significant difference in his pension entitlement.

## Background information, including submissions from the parties

4. Mrs N was a member of the Scheme from April 1981 and became a deferred member in August 2004. The Scheme's Normal Retirement Date (**NRD**) is age 60 and for Mrs N, this would have been 30 July 2016. Mrs N also had Additional Voluntary Contributions (**AVC**) with Scottish Widows.
5. Mrs N was diagnosed with breast cancer in April 2014 and sadly died on 4 August 2015.

6. The background chronology of the key events and correspondence that occurred shortly prior to Mrs N's death is contained in the Appendix to this Determination.
7. Following her death, the Administrator informed Mr N, in a letter dated 11 September 2015, of the benefits he was entitled to. Namely, a refund of Mrs N's contributions to the Scheme (£6,982.21), the current value of Mrs N's AVC fund with Scottish Widows (£93,091.07) and a spouse's pension (£3,361.08).
8. Mr N disputed the spouse's pension on the basis that he had expected to receive two-thirds of the pension stated in the Administrator's letter of 12 November 2014 to Mrs N, namely a spouse's pension of approximately £11,800. The Administrator informed Mr N that his entitlement under the Scheme rules was half of Mrs N's Guaranteed Minimum Pension plus two-thirds of the pension she earned after 5 April 1997. It clarified that the letter of 12 November 2014 was an estimate of the benefits payable at Mrs N's NRD, rather than in the event of her death before then.
9. Mr N complained under the Scheme's internal dispute resolution procedure (**IDRP**). He said the letter of 12 November 2014 was misleading and formed the basis of Mrs N's decision making when she was already seriously ill. It did not point out the significant difference in the spouse's benefit if she died before her NRD. Mr N said Mrs N did not receive a response to her email of 3 July 2015, and was not provided with the options available to her. He said it was unfair that the Scheme would gain significantly from Mrs N's death, less than 12 months before her NRD when she could have chosen early retirement.
10. In their stage one IDRP decision of 26 January 2016, among other things, the Trustees said the Administrator had outlined various options "including the possibility of early retirement and retirement on the grounds of ill-health", during the telephone call of 27 July 2015 with Mr N. The Trustees said it was for the Scheme Member to consider which option to take and that they (and the Administrator) could not provide financial advice, only factual information about the Scheme. The Trustees confirmed that the benefits outlined in the Administrator's letter of 11 September 2015, were those payable to Mr N from the Scheme.
11. Mr N invoked IDRP stage two. He said he was unhappy with the way the matter had been managed and the information provided to Mrs N.
12. The Trustees issued their stage two decision on 26 February 2016. They said:
  - Mrs N's query had not been mismanaged and sufficient information had been provided in respect of her request.
  - There was no indication in any of Mrs N's queries that she wished to take early retirement (on grounds of ill-health or otherwise) and the letter issued on 12 November 2014 had stated that the options provided were on the assumption that she wished to retire at her NRD.
  - They were first aware that Mrs N was seriously ill on 27 July 2015.

- It would have been too late to put an early retirement pension in payment before her death one week later. The process for putting a pension into payment would have included the following steps:
    - A clear instruction from Mrs N (or a duly appointed attorney) that she wished to take early retirement, and ideally her confirmation from when. A telephone instruction from Mr N would not have been sufficient as the pension belonged to Mrs N.
    - Trustees' formal consent to the early retirement request (usually 1 to 2 days).
    - Issuance of an early retirement quotation setting out the different options available (usually completed within 10 working days). The quotation would have needed to include details of Mrs N's AVC benefits with Scottish Widows (which Scottish Widows would have been requested to provide).
    - Mrs N's completion and return of forms confirming her chosen retirement options, with supporting documents (including her original birth and marriage certificates).
  - They had received confirmation from the Administrator that certain elements of the administrative process could be expedited in urgent cases such as this. However, as it was necessary to look into Mr N's query of 27 July 2015, it would not have been possible to complete all of the necessary steps, and for Mrs N to confirm her choices in a timeframe shorter than two to four weeks. Consequently, the Trustees did not uphold Mr N's complaint.
13. Mr N asserts that the Trustees should have been aware of his wife's ill health when she called the Administrator on 28 October 2014. Whilst he does not have a record of that call, he says Mrs N's letter of 10 November 2014 clearly indicated that she was "concerned about her life expectancy". He maintains that the Administrator did not remind Mrs N at that time of what the pension provision would be if she died before her NRD. He says her employer was aware of Mrs N's history of cancer and assumes that this information would have been passed to the Administrator at the time (in 2000). He says the Administrator was wrong to provide an illustration based on the assumption that Mrs N wanted to retire at her NRD. He says he had incorrectly assumed that the spouse's pension would be two-thirds of Mrs N's pension, even if she died before her NRD. He says the Administrator failed to clarify this during his call on 27 July 2015 and he was not informed it would be more beneficial for Mrs N to take early retirement. He says had he been correctly informed, Mrs N would have requested early retirement.
14. The Trustees' position in relation to Mr N's complaint is summarised as follows:
- Mrs N did not mention her ill-health during the call of 28 October 2014, and it was not incumbent on the Administrator to ask her why she "had been in hospital".

- Mrs N's letter of 10 November 2014, did not mention her ill health and the Administrator's response (the November 2014 illustration) was reasonable in light of the requests Mrs N had made. Had she said she was in ill-health, her request would have been clarified.
- Mrs N did not mention in her email of 3 July 2015, or letter of 9 July 2015, that she was in ill-health and she did not request early retirement. No immediate action was required as Mrs N had referred to choosing Option 3 from the retirement illustration. This option was receiving a lump sum and reduced pension using her AVC fund as part of the lump sum. However, attempts were made to contact Mrs N to discuss her correspondence.
- During Mr N's call to the Administrator on 27 July 2015, various options were discussed about how Mrs N could take her benefits. But Mr N did not give a clear instruction or pass on a clear instruction from Mrs N as to what she wished to do. The option of Mrs N possibly taking early retirement, but deferring her AVC fund, was a technical question which the Administrator raised promptly with its technical team and legal advisers.
- Mr N did not inform the Administrator that he had Power of Attorney (or provide the Administrator with a copy) prior to Mrs N's death.
- Mr N's complaint contains conjecture that does not accord with the Administrator's records and, therefore, seems largely based on how he wished events had happened rather than how they actually transpired.

## **Adjudicator's Opinion**

15. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees or the Administrator. The Adjudicator's findings are summarised briefly below:
  - From the Administrator's record of Mrs N's call of 28 October 2014, and her letter of 10 November 2014, that the illustration (based on Mrs N's NRD) was a reasonable response to her requests. Mrs N did not expressly ask for any other type of quotation and while she expressed concern about her husband surviving her, she did not say anything which would have indicated that she was currently in ill-health.
  - The illustration was not incorrect in only quoting what the spouse's pension would have been in the event of Mrs N's death on or after her NRD. The Administrator should not have highlighted the significant difference in the spouse's pension if Mrs N died before her NRD. There is no requirement for this additional or comparative information to be provided as a matter of course.

- Mrs N's contact with the Administrator on 3 and 9 July 2015, did not reveal her serious ill-health and there was no way the Administrator could have been aware that she was seriously ill at that time.
  - From the available evidence, the Administrator first became aware of Mrs N's serious ill-health on the afternoon of Monday 27 July 2015. The Administrator's contemporaneous note of the telephone conversation says that there was a discussion about Mrs N's condition.
  - Mrs N's requests of 3 and 9 July 2015, indicated that she wanted her pension put into payment. However, she chose "Option 3", on an illustration based on retiring at NRD. The telephone note of 27 July 2015 says it is unclear whether Mrs N wanted early or late retirement. Given this uncertainty, when knowledge of Mrs N's condition and life expectancy were then known, the Administrator should have made it clear to Mr N that the November 2014 illustration did not cover early retirement.
  - Taking into account the short time between the date of notification and the date Mrs N died, it is highly unlikely that all the administrative steps (required to process an application for early retirement) would have been completed in that period. Mrs N would have needed to instruct the Administrator of her wishes to retire early and she would have then had to provide medical evidence that would be satisfactory to the Trustees. Whilst this initial step could have been expedited, it is not possible to say with certainty that the relevant doctor or consultant would have been available immediately to provide the evidence. There are other factors which would also have been outside the control of the Administrator. These include obtaining the necessary information from Scottish Widows about Mrs N's AVC and awaiting the return of the completed claim forms with the retirement date. Consequently, the six working days that were available would not have been sufficient.
  - In the circumstances, the Administrator has paid Mr N his correct entitlement in accordance with the rules governing the Scheme. There is no discretion that could vary his entitlement on account of what happened or the closeness of Mrs N's death to her NRD.
16. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N 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 Mr N for completeness.

## Ombudsman's decision

17. Mr N rejected the findings in the Opinion for the following reasons.
- On 27 July 2015, the Administrator did not discuss the possibility of early retirement on ill-health grounds with him as it claimed. Had this been discussed, Mrs N would certainly have taken the option.
  - The heart of the issue is that the Administrator failed to provide the full information requested in Mrs N's letter of 10 November 2014. From her hospital bed, she had asked what her husband's entitlement would have been if she were to die before him.
  - Following receipt of this request from Mrs N, the Administrator made a "sweeping assumption" that Mrs N would die after her NRD and it failed to remind her of the significant difference in provision if she was to die before this date. As the difference was over £300,000, Mr N questions the Administrator's motives for failing to provide this information.
  - Irrespective of the Administrator's motives, Mr N says he has received legal advice which said the Administrator should have been forthcoming to remind Mrs N of the provision of spouse's benefit on death, both before and after her NRD. Further, upon knowledge of Mrs N's serious ill-health in July 2015, the legal advice was that there was still time to at least implement or start the early retirement option. As he had Power of Attorney, the process could have been concluded.
18. Mrs N's request to the Administrator in November 2014, was for a quotation of what her benefits would "look like on retirement". Although she did not expressly say she wanted the quote to be based on her NRD, she also did not specifically ask to be given figures based on her retiring early. I do not find that the Administrator was wrong to issue a quotation to Mrs N that was based on her NRD. The basis on which the quote was issued was also clear. The Administrator's letter of 12 November 2014 to Mrs N said "Normal retirement illustration" as a sub-heading and the first sentence said: "I set out below an illustration of the options available to you assuming you were to retire...on your normal retirement date of 30 July 2016". In view of this, it would not have been reasonable to have expected the information that followed to cover any other situation other than retiring at NRD. This includes the additional information in relation to the spouse's pension.
19. Mrs N did not query the basis of this illustration at the time and she did not ask for another one which specifically covered early retirement or death before NRD. As at that time, there was no apparent reason for the Administrator to have provided information that covered early retirement or the spouse's pension payable on death before NRD. I do not find that there were any ulterior or financially based reasons for this information not being provided. It was an appropriate response to the request that was made at that time.

20. Unfortunately, it is now evident that Mr and Mrs N accepted the information in the November 2014 illustration as being applicable on death before NRD. The Administrator can only act in accordance with the rules that govern the Scheme. The rules allow for the payment of a spouse's pension of two-thirds of the member's pension, in the event of death on NRD, and also following early retirement. The lower pension is only paid in the event of death before retirement. In contrast to the findings of the Adjudicator on this point, I do not find that the Administrator should have corrected any assumptions that Mr N had during the telephone call of 27 July 2015. This is because it may not have been apparent to the Administrator that Mrs N would die before her retirement, whether early or normal.
21. Mr N has said that he had Power of Attorney. I have not seen any evidence that the Administrator or the Trustees were aware of this at the time of his call. In spite of this fact, I do not find that six working days were sufficient to have implemented an application for early retirement. Mr N had raised a technical query on 27 July 2015 which had to be answered. It is likely that the answer to this query would have then informed Mr and Mrs N's choices. Therefore, I cannot conclude that Mrs N had been ready to apply for early retirement on that date.
22. Even if the application process had begun, given the uncertainty involved with the required steps, on balance, it is highly unlikely that the signed paperwork (and other supporting documents) would have been returned to the Administrator within that short timeframe. Had the Administrator been aware of Mr N's Power of Attorney, whilst he may have been able to give instructions in relation to the application, his authority for that purpose would have ended on Mrs N death.
23. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**

Pensions Ombudsman  
23 November 2016

## Appendix 1 – Background chronology

Below is a summary of key events and correspondence that occurred shortly prior to Mrs N's death.

- 28 October 2014 – Mrs N called the Administrator and said she had missed the deadline to return her data verification form because she had been in hospital. The file record of the telephone call also says Mrs N asked for an illustration of her normal retirement benefits.
- 10 November 2014 – the Administrator received a letter from Mrs N. She enclosed the corrected form and asked that her record be updated. In addition, she asked the following:

“I would also be grateful if you could, as you suggested on the phone, send me a complete up to date picture of what my full pension might look like on retirement. I have definitely got confused about the two separate aspects of the pension, and would really appreciate help in understanding the full picture. Could you also remind me of how things would work out if I should pre-decease [Mr N]?”

- 12 November 2014 – The Administrator wrote to Mrs N and provided an illustration of the three options available to her, on the assumption that she would retire on 30 July 2016, her NRD. One of the options used her AVC fund as part of her possible lump sum. It included the following information:

“If you are married at the time of your death your spouse will be entitled to 2/3rds of your own pension or, if you elected to exchange part of your pension for a tax-free lump sum, 2/3rds of the pension you would have received had you not done so. This pension will increase on the same basis as your own pension.”

The Administrator informed Mrs N that a full retirement pack would be issued closer to her retirement date.

- 3 and 9 July 2015 – Mrs N emailed the administrator and sent a letter, both of which said:

“Many thanks for your letter dated 12 November outlining the options for my pension. On reviewing the options with my husband [Mr N], and our current circumstances, we would like to follow option 3. Please can you advise what steps we need to follow with regards to this option.”

- July 2015 – the Administrator says it attempted to contact Mrs N on a number of occasions to clarify her intentions and that no response was received. Mr N does not have a record of any calls being received.



- 27 July 2015 – Mr N called the Administrator. The file record of this call says Mr N “explained that his wife was very ill” and that he “talked in terms of [Mrs N] not surviving very long beyond this point”. The call record noted that Mrs N had not called the Administrator back and that Mr N did not seem to be aware that a message had been left for her. It was recorded that contact had been made “as it was not clear whether they wanted early or late retirement” and that “early retirement could be taken now but an [early retirement factor] would be applied...”. The Administrator confirmed Mr N’s query that on death, the AVC would be paid as a death benefit. Further confirmation was provided about the spouse’s pension payable after NRD and the call record says the following:

“[Mr N] made the following deducements (sic): there is not as an immediate need to release money from the pension scheme as they thought as the [AVC] fund is released on death. If they do not take the [AVC] fund and leave it where it is, [Mrs N] could potentially take retirement and tax-free cash from the Plan and then on death another lump sum would be payable to the next of kin. As the spouse’s pension is not affected by taking cash this may be the scenario which realises the best monetary outcome”.

- 30 July 2015 – the Administrator sought legal advice from the Scheme’s legal adviser in relation to the query raised by Mr N about possibly leaving the AVC fund. The request included the following:

“A query has been raised by one of the Whitaker deferred members. The member in question is in ill-health, such that she may not survive too long into the future. I am not sure whether this is a serious ill-health situation, as it was not mentioned to me that the member has less than 12 months to live...The member has realised that, if they were to die before retirement, the [AVC] fund becomes payable as a death lump sum. They therefore hypothesised a scenario where they take their final salary benefits at early retirement, but defer doing anything with their [AVC] fund. This would preserve the [AVC] fund so that it would still be payable on death.”

- 5 August 2015 – the Administrator received a response from its legal adviser, one day after Mrs N passed away.