

Ombudsman's Determination

Applicant	Mr D and Mr L (the Applicants)
Scheme	Fortum O&M UK Limited Targeted Group Personal Pension Plan (the Scheme)
Respondent	Fortum O&M (UK) Limited (Fortum)

Outcome

1. The Applicants' complaints are upheld and to put matters right Fortum will re-perform the targeting exercises on the Applicants' pension benefits, using alternate assumptions. Fortum will also pay £500 to each of the Applicants to recognise the distress and inconvenience Fortum's actions have caused them.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The Applicants have complained that Fortum has not honoured its agreement to match the retirement benefits from their former employer.

Background information, including submissions from the parties

4. The Applicants were formerly employed by BP. Their employment terms were changed under a TUPE transfer to Fortum in August 2005.
5. In a document entitled 'Amendments to Contracts of Employment' dated 9 August 2005, under the heading, 'Pension Scheme' it said:

"Additional salary £1056 gross, per person pa to provide employee contribution.

This £1056 will increase on an individual basis to ensure that each member of staff will receive the higher of £1056 or 4% of their basic salary.

The targeting of pensions will be undertaken initially by Alexander Forbes Financial Services Limited. This will be based upon an annual review of the pension funds and projection based upon the entitlement of staff under their old BP benefits. Targeting of pensions during Your [sic] employment with

Fortum is regarded as a Term and Condition of employment. We understand that BP staff were entitled to 1/60th of basic pay and shift allowance (if appropriate) which will be followed by Alexander Forbes.”

6. In December 2005, a representative for the employees affected by the TUPE transfer wrote to Alexander Forbes with several questions. One of these was about the targeting exercise. The comments from Alexander Forbes were:

“Our actuarial department will undertake a review annually to ensure that the contribution levels are adequate to match the BP scheme benefits. I anticipate [sic] that any changes will be made to regular contributions.”

7. In a pension review document for Mr D in 2007 it said:

“Fortum’s intention is for the individual contribution rates to be reviewed annually to ensure that your funds are on target to match the benefits you would have received if you had remained in the British Petroleum benefits scheme until retirement.”

8. In 2010, it was discovered that the pension for a separate member, on the same employment terms as the Applicants, was significantly underfunded, compared to what he would have received from the BP scheme. Fortum agreed to ‘top up’ the pension for this individual, and for all employees ‘retiring in service in the future’.

9. The Applicants have since left employment with Fortum, and so Fortum took the decision not to make up the shortfall in their pensions.

10. Mr D has said:

- Fortum replaced Alexander Forbes with another administrator, Generation Financial Services (**GFS**) following the discovery of the pension shortfalls.
- GFS investigated in 2011 and found that Alexander Forbes had not reviewed the actuarial assumptions used in performing the targeting exercises, therefore the contributions made were not correct.
- It was not until 2013 that Fortum entered into conversation with the employees about the underfunding.
- Mr D notified Fortum in July 2013 of his intention to leave employment in October 2013.
- Discussions were held with Fortum and a union representative on 13 September 2013 on outstanding issues about the shortfalls.
- Fortum used the annual assumptions set out by the Financial Ombudsman Service (**FOS**) to calculate what adjustments were required to make up the shortfall for employees still in service.

Adjudicator's Opinion

11. The complaint was considered by one of our Adjudicators who concluded that further action was required by Fortum. The Adjudicator's findings are summarised briefly below: -
- Fortum argued that it made no commitment to match benefits, however the former administrator had stated it would 'ensure that the contribution levels are adequate to match the BP scheme benefits'.
 - Fortum has acknowledged that the assumptions it used did not accurately track the progression of pension against the BP benefits.
 - Fortum has made up the difference in the acknowledged shortfall in the pensions of remaining employees.
 - By refusing to do the same for the Applicants, it is treating them in an unreasonable manner. Had the Applicants remained employed by Fortum, their shortfalls would have been corrected.
 - Fortum should redress the Applicants respective pensions, using the same method and assumptions as those used for remaining employees.
 - Fortum should pay £500 to each of the Applicants to recognise the significant distress and inconvenience caused by the unreasonable treatment.
12. Fortum did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Fortum provided its 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 Fortum for completeness.

Summary of Fortum's further comments

13. A requirement to carry out a targeting exercise is different to a requirement to top up the pension if a shortfall is discovered.
14. The Adjudicator's Opinion refers to documents that show the aim of adjusting contributions so that members' pensions would have equivalence to the benefits that would have been payable from the BP scheme, which is a targeting exercise.
15. The Adjudicator did not reference question 12, and the response, from the 2005 email exchange with Alexander Forbes (quoted in the Appendix for reference). Fortum believes that the response to this question "expressly states that there would be no top up on leaving employment."
16. The benefits could not have been kept perfectly in line with those of the BP scheme.
17. It is unclear how the Adjudicator can reach a conclusion that Fortum is aware that the appropriate assumptions were not used.

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18. For employees leaving employment the treatment of any shortfall was a negotiating point with the Unions.
19. If there had been no TUPE transfer, there would have been no top up and contributions would have been adjusted annually to target a benefit equivalent to the BP scheme at retirement.
20. Fortum needed the Unions' agreement to change the method of targeting.
21. Any redress should be conditional on the Applicants providing information about their pensions so that calculations can be carried out.

Ombudsman's decision

22. Fortum has said that its aim was to 'target' pensions. It has said that the documents stated the aim was to adjust contributions so that members' pensions would have equivalence to the benefits payable from the BP scheme.
23. I agree that it did not offer to keep the Fortum benefits 'perfectly in line' with the BP benefits however this is not what has been suggested. There is no doubt that the documentation given to the Applicants confirmed that the targeting exercise would occur every year and that the necessary contributions would be paid by the employer in order to keep the Fortum pension broadly in line with those that would have been payable by the BP scheme. The terms contained no detail about how the review was to be carried out. However I find it was necessary to give business efficacy to the contract for Alexander Forbes to use suitable assumptions when they carried out the annual reviews.
24. What has happened in this case, which GFS, the Scheme administrator, has acknowledged, is that appropriate assumptions were not used. Fortum therefore needs to correct this issue. The very fact that Fortum has adjusted pensions for remaining employees shows its acceptance that the targeting assumptions were not appropriate.
25. This is not a case of carrying out a 'final' targeting exercise upon leaving employment, this is a case of correcting a historic mistake which amounted to a breach of an implied term over years while the complainants were still employed. Had those targeting exercises been performed correctly, the Applicants would have been in the correct position upon leaving employment. That is not to say that, on leaving employment, the Applicants' pension benefits would have matched the BP benefits exactly, but that they would have likely been more in line, had the appropriate assumptions been used and reviewed each year.
26. Fortum's comment on the response to question 12, in the 2005 email exchange with Alexander Forbes, is therefore redundant. The argument is not that a shortfall should be topped up on leaving service, but that the benefits ought to have been kept in line each year before this.

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27. I see no evidence that the representing Union had to be involved with the review and amendment of the assumptions used each year.
28. I agree that the Applicants should cooperate with providing any necessary information required for the redress calculations and payment. However, I will stress that the redress outlined below involves only the pension contributions that ought to have been made by the employer, up to the date that each of the Applicants remained in employment with Fortum. The redress should account for the contributions that would have made, had the annual targeting exercise used the appropriate assumptions. For this reason, Fortum will have access to the majority, if not all of, the required information.
29. In 2011, GFS recognised that the previous assumptions and contribution levels were not correct. This would have given Fortum ample time to correct the position. I see no reason why Fortum's delay should negatively impact the Applicants' pension benefits. The correct contributions should have been made annually, from the date of leaving the BP scheme, up to their dates of leaving employment, in line with all the documentation given to the Applicants from 2005.
30. Therefore, I uphold the Applicants' complaints.
31. In performing calculations to redress the remaining employees' pensions, GFS used historic annual assumptions issued by FOS. I therefore consider it reasonable to instruct Fortum to use the same assumptions when calculating the top up of employer contributions required for the Applicants' pensions.

Directions

32. Within 21 days of the date of this Determination, Fortum should make arrangements for new calculations to be performed as follows:
 - i) Retrospective targeting exercises will be performed, using the corresponding FOS assumptions for that year. These targeting exercises will be performed for each year the Applicants were in the Scheme, up to their respective dates of leaving employment.
 - ii) The required employer contributions for each year will then be established by the new targeting exercise and compared to the actual contributions made.
 - iii) Where there is a difference, the required 'top up' contribution will be added to each of the Applicants' funds.
 - iv) Interest should be added to each 'top up' contribution, from the date the contribution ought to have been made, to the date of settlement, at the rate quoted by reference banks.

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33. Within 21 days of the date of this Determination, Fortum will pay £500 to Mr D and £500 to Mr L to recognise the significant distress and inconvenience it has caused in denying them benefits to which they are entitled.

Karen Johnston

Deputy Pensions Ombudsman
5 June 2018

Appendix

“12. If an individual leaves the scheme (leaves Fortum employ) is there a final targeting exercise carried out to ensure on track at date of leaving?”

(Response) When you left the BP scheme, they will have taken your final salary as at leaving and assume that this is going to increase by 2.5% until retirement and then you will have your however many 60ths at retirement. With regards to the new scheme, if you leave, no further contributions will be paid in to that scheme and therefore whatever the fund at retirement will buy you your top-up pension”