

Ombudsman's Determination

Applicant	Dr S
Scheme	W & J Leigh Staff Pension Scheme (the Scheme)
Respondents	Kerr Henderson (the Actuaries) W & J Leigh Staff Pension Scheme Trustee (the Trustee)

Outcome

1. Dr S' complaint is upheld and to put matters right the Trustee should enhance Dr S' pension with St James' Place (**SJP**) and, it should also pay Dr S compensation for the distress and inconvenience this situation has caused him.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr S has complained because he is unhappy with the way that the Trustee has calculated the shortfall of the transfer value of the pension he had in the Scheme.

Background information, including submissions from the parties

4. Dr S became a deferred member of the Scheme in 2003. The annual statements he received while he was a deferred member showed discretionary increases had continued to be applied to his benefits until approximately 2007/2008, after which time the increases ceased.
5. On 9 October 2011, Dr S wrote to the Scheme administrator to tell them that he was thinking about taking his pension before 65. He requested:
 - a quotation for his pension entitlement if he took it at age 64 compared with what it would be at age 65; and
 - a transfer value as at age 64, which he recalled was the last date he could transfer out if he wished to.
6. The scheme provided estimates but told Dr S he would have to wait for the transfer value as the Trustee had asked the Actuaries to look at the current assumptions and parameters used in the calculation of transfer values. As a result the Trustee had put

the calculation of transfer values on hold until the completion of the Actuaries' study. On 30 November 2011, Dr S notified the Scheme that he intended to "take his pension" from his 64th birthday on 3 March 2012, but he assumed that as he would not get a valuation until sometime in the new year he would not have to decide whether or not to transfer out until he had the valuation, and said "...but at the moment I think that's highly unlikely – most probably I'll want to take the maximum commutation and start drawing my pension from the above date".

7. Dr S also raised a query with the Pensions Advisory Service (**TPAS**) about the approach which the Scheme had taken to revaluation and in December 2011 was informed that he appeared to be entitled to statutory revaluation.
8. On 2 January 2012 Dr S raised a query with the Scheme Administrator about the failure to grant discretionary increases over the previous three years. He flagged the statutory right to revaluation, an issue pointed out to him by his independent financial adviser (**IFA**) and TPAS, and queried why he appeared to have lost his right to revaluation since he had left.
9. On 9 January 2012 the Scheme Administrator emailed Dr S the relevant rule 5.1 and told him that increases were discretionary for deferred members, therefore "it is impossible to provide any certainty of the level of future increases (if any) that may be awarded."
10. In 2012, Dr S was provided with a cash equivalent transfer value (**CETV**) quotation. This informed him that the value of his Scheme benefits amounted to £37,288.51 per year with a cash equivalent value of £768,051 as at 31 January 2012. Disappointed that his benefits in the Scheme had not increased since 2008, in May 2012 Dr S transferred his benefits from the Scheme to SJP. He says his reason for making that decision was because he calculated that the market rates for annuities were only a little worse than the conversion rates in use by the Scheme and he would be better off investing the transfer value than accepting nil increases.
11. In 2013, the Trustee sent a letter to all members of the Scheme, active and deferred to make them aware that there had been a mistake in the Trustee's historic approach to valuation of benefits which had arisen because of two issues: a failure to equalise the scheme until June 1997 and an inconsistency between the provisions of the Scheme Rules and overriding requirements of statute. As a result members' pensions were being revalued and revaluation of deferred pensions would be calculated in line with statutory requirements. Dr S said that he did not receive a copy of the said letter from the Trustee so he contacted the Trustee to find out if his pension that was transferred in 2012 was also going to be revalued.
12. In August 2014, Dr S received a letter from the Trustee informing him that, following a review of his pension benefits, it was established that the transfer value of his benefits had been calculated incorrectly, and this resulted in the value he transferred being £72,452 less than it should have been. The Trustee informed Dr S that it was willing to make an additional transfer payment of the shortfall into his SJP pension

along with interest at 2.5% per annum. Dr S questioned why the adjusted figure was not higher and requested a detailed explanation of the actuarial calculation. He also asked for lost interest at the rate on the investment he had in fact made with the transfer, rather than the rate offered.

13. in September 2014, the Trustee sent Dr S a further letter enclosing documents from the Actuaries that showed how his transfer value had been recalculated. The Actuaries explained the factors which tended to increase the value (impact of equalisation and use of statutory increases prior to retirement) and those which tended to decrease it (removal of the discretionary post retirement increases which they believed had been included in the original CETV calculation). The letter also informed Dr S that it had agreed to enhance his shortfall to include loss of investment return.
14. Dr S remained dissatisfied with the Trustee's proposal to rectify the error and referred his complaint to this Office.
15. As well as providing a detailed background of the events that led to his complaint, Dr S made the following points:-
 - He would not have transferred his pension from the Scheme in 2012, had he been told the correct value of his benefits.
 - He does not consider a one off payment of £72,452 would provide sufficient compensation for the loss of £7,832.49 per annum pension, which was lost through incorrect accruals up to 2012. The best annuity quote he has received for this sum is less than £3,000 per annum.
 - The incorrect transfer value resulted from the Trustee's error. He does not understand how the Trustee can change the rules two and a half years later and apply the new rules retrospectively to revalue a 2012 transfer that has already been paid under the rules that applied at the time. He feels like he is being penalised retrospectively for the Trustee's error.
 - The 'correction' figure proposed by the Trustee applying the 2014 transfer value rules retrospectively to his revised 2012 accrual – would completely change the factors he would have had to have considered in 2012. He would certainly have chosen to remain in the Scheme if accruals had been applied in accordance with statutory requirements. He now has a £7,832 pension shortfall which the extra £72,452 offered will not deliver.
16. In response to Dr S' complaint, the Trustee gave a chronology of the events that led to the complaint and made the following points:-
 - The Trustee does not agree that Dr S' compensation should be calculated on the basis that he has suggested or that he should receive more compensation.

- The Trustee does not agree that, on the balance of probabilities, Dr S would have remained in the Scheme if he was correctly told the value of his benefits and therefore he should be reinstated into the Scheme.
- The Trustee accepts that Dr S received a benefits statement in October 2011 and a subsequent CETV in November 2011. It considers that had Dr S accepted those statements and had transferred his benefits without entering into substantive additional correspondence there may have been an argument that it was reasonable for him to have relied on the statements.
- However, between October 2011 and January 2012 there were numerous email exchanges between Dr S, the Trustee and TPAS which ought to have made him aware that there may have been something wrong with the way his benefits had been calculated.
- Therefore, Dr S should have been aware that there was a clear risk that his earlier benefit statement and subsequent CETV statements may have been incorrect. Therefore, it would have been imprudent for him to have relied on those statements and other correspondence from the Trustee in respect of a decision as significant as transferring his benefits out of the Scheme without further investigation.
- As Dr S decided to transfer out of the Scheme with the knowledge that there may have been problems with his benefit calculation, he cannot reasonably argue that he would never have transferred out of the Scheme had he been informed of his correct level of benefits.
- The Trustee did not seek to exclude Dr S from consideration for any compensation by reason of ceasing to be a member. The Trustee wished to ensure that Dr S was compensated in a manner that put him in the position that he would have been in, had the correct approach to equalisation and revaluation applied at the time of his initial transfer.
- The Trustee took legal advice regarding how Dr S' revised transfer value was calculated and the legal advisers confirmed that in their view, the Trustee's approach was reasonable.
- The Trustee considered that it had acted reasonably and fairly in the circumstances and did not agree with Dr S' assertion that he should be entitled to additional compensation from the Scheme.

Adjudicator's Opinion

17. Dr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Actuaries but, further action was required by the Trustee. The Adjudicator's findings are summarised briefly below:-

- There was no dispute that Dr S was given an incorrect transfer value in 2012, when he transferred his benefits from the Scheme to SJP and this amounted to maladministration. In the Adjudicator's opinion, on the balance of probabilities, if Dr S was given the correct value of his benefits in the Scheme, in 2012, he would have remained a deferred member of the Scheme instead of transferring his benefits.
 - Therefore, the Adjudicator considered the right way to correct the maladministration was to put Dr S back into the position he would have been in, but for the maladministration and, in her opinion, that was to reinstate Dr S into the Scheme.
 - Unfortunately, for various reasons such as the cost that both parties would incur, neither Dr S nor the Trustee agreed for him to be reinstated into the Scheme. In addition, the Trustee did not consider that Dr S' sole reason for transferring his benefits from the Scheme was because he had received incorrect information about the value of his benefits. Therefore, the Trustee considered the offer it had made to transfer the shortfall into Dr S' SJP pension arrangement, along with interest, was a sufficient remedy for the maladministration.
 - The Adjudicator acknowledged that the Trustee had offered to pay into Dr S' pension the shortfall of the transfer value, along with interest. The Adjudicator also understood that Dr S did not want to accept the Trustee's offer because he disagreed with the way it was calculated. However, the Adjudicator had previously explained to Dr S that the Ombudsman would not interfere with the calculation basis on which the shortfall of the transfer value was calculated by the Actuaries.
 - Although the Ombudsman would not interfere with the way in which the Actuaries calculated Dr S' shortfall, the Adjudicator did not consider that paying the shortfall into Dr S' SJP pension along with 2.5% interest per annum was sufficient to put Dr S back into the position that he would have been in, in 2012, if he had been given the correct transfer value. In the Adjudicator's view, there was also a loss of investment to consider.
 - In the Adjudicator's opinion, to fully put Dr S back into the position he would have been in but for the maladministration, the Trustee needed to establish from SJP, the current value of Dr S' pension and what the current value of his pension would have been, had the higher (correct) transfer value been invested in May 2012. The Trustee then needed to enhance Dr S' pension by the difference in the two values and also pay the £72,452 shortfall into Dr S' pension.
18. The Trustee replied to the Adjudicator's Opinion and said that although it agreed with the general approach to compensate Dr S that the Adjudicator suggested, it wanted the following points to be considered:-
- It does not agree that Dr S would have remained a deferred member of the Scheme if he had been provided with details of his correct benefit entitlement in 2012 and it gave its reasons for its view.

- It believes the method the Adjudicator suggested in her Opinion, to compensate Dr S would result in double counting because the method would involve two payments of £74,452 into Dr S' SJP pension in addition to any compensation to take account of investment performance.
 - It assumes this was an oversight and the Adjudicator's intention was that Dr S should receive £72,452 plus the investment performance that would be attributable to that £72,452 if it had been invested in Dr S' SJP pension in May 2012.
 - The Trustee considers that the suggested period over which Dr S' loss of investment is calculated should not extend beyond the end of the 2014 calendar year. This is because in September 2014, the Trustee had offered Dr S a remedy for the maladministration which included compensating him for any investment loss he had incurred. If Dr S had accepted the Trustee's proposal at that time, the matter could have been resolved without the involvement of this Office.
 - Therefore, the Trustee considered that it would be reasonable for Dr S' loss to be calculated from May 2012 until December 2014 as this is a reasonable point of time by which the matter could have been resolved, on substantially the same terms as those the Adjudicator has suggested.
19. Dr S did not accept the Adjudicator's Opinion as he remained dissatisfied with the basis on which the Trustee had calculated his shortfall and therefore he was unhappy with the redress the Adjudicator had proposed.
20. As a result, the complaint was passed to me to consider. I agree with the Adjudicator's Opinion subject to the points below and I will therefore only respond to the key points made by Dr S and the Trustee for completeness.

Ombudsman's decision

21. It has been agreed by all parties to the complaint that maladministration occurred in 2012 when Dr S' transfer value was incorrectly calculated.
22. Dr S maintains that had he been given the correct benefit figures in 2012 he would not have transferred out at all. The burden of demonstrating that he would not have transferred if he had been given the correct information about revalued benefits is on Dr S and I have to assess what he was most likely to have done without the benefit of hindsight.
23. From the evidence which he has submitted, I note that Dr S had informed the Trustee of his intention to take his Scheme benefits on his 64th birthday which was in March 2012. However, as a result of his discontent at the fact that his pension had not increased from 2008, he decided to transfer his benefits.
24. Given the fact that Dr S had made his intentions known to the Trustee in November 2011, I find that, on the balance of probabilities, had Dr S been provided with his

correct level of benefits in the Scheme, he would have remained and taken the benefits on his 64th birthday. I do not agree with the Trustee's assertion that Dr S should have remained in the Scheme while he was in further correspondence with the Trustee as he ought to have been aware that there may have been an issue with the way his benefits had been calculated.

25. Both parties agree that Dr S cannot now be put back into the Scheme. The exact measure of equivalent financial loss would be the correct value of his benefits at age 64, in the Scheme, less the investment return on his pot in the SJP plan. This is objectively unquantifiable and will remain so until Dr S passes away. Therefore, I conclude that I cannot put him back into that position so the best I can do is award a measure of loss based on the fact that he did transfer. I find that this would be best achieved by the Trustee paying Dr S the shortfall in his transfer value as calculated by the Actuaries, ie £72,452, plus the investment performance that would be attributable to that £72,452 if it had been invested in Dr S' SJP pension in May 2012.
26. Turning to the cut off date for lost investment return, ordinarily, if an adequate offer of compensation has been made prior to a member bringing a complaint to this Office I would not direct an additional remedy. I have considered the offer which was made by the Trustee in this case but consider that in this case it would be more just for investment loss to run to the date on which the complaint is finalised. This is because to do otherwise would provide a windfall to the Trustee. Although the Trustee recognised the undervaluation of his benefits and made an offer to Dr S in 2014, no additional benefits were paid to Dr S at that time. Therefore, Dr S was not able to invest the investment growth between 2014 and now, while the Trustee on the other hand, has had the benefit of those funds itself in investments achieving a rate of return similar to that which Dr S would have achieved had the money been paid to him in 2014.
27. I am content that the revised CETV calculation includes adjustments for equalisation and statutory revaluation and am satisfied by the Actuaries' explanation of why the difference between the old and new CETV basis is not as great as Dr S expected it to be. I cannot see any evidence that Dr S has suffered from a change in the CETV basis introduced in 2014. Rather, he has been given the benefit of changes introduced to correct historic failure to equalise and correct the use of an incorrect revaluation basis.
28. I see no basis to interfere with the Scheme's Actuaries' calculation of the shortfall which is due. I am satisfied by the Trustees' explanation that had the correct approach to equalisation and revaluation been applied to the Scheme, at the time when Dr S' transfer value was calculated in 2012, his transfer value would have been calculated on the same basis that his shortfall has now been calculated.
29. Therefore, I partly uphold Dr S' complaint against the Trustee.
30. I do not uphold Dr S' complaint against the Actuaries.

Directions

31. Within 28 days of the finalisation of this determination, the Trustee must:

1. Find out from SJP the current value of Dr S' pension, in respect of the benefits he transferred from the Scheme in May 2012.
2. Establish from SJP what the current value of Dr S' transferred Scheme benefits would be now, if he had transferred £946,938, in May 2012.
3. The Trustee should then deduct 1 from 2 and pay the difference into Dr S' SJP pension arrangement, as this would represent the loss of investment that Dr S has incurred, as a result of the incorrect value being transferred, in 2012.
4. The Trustee should also pay Dr S £500, for the significant distress and inconvenience this situation has caused him.

Karen Johnston

Deputy Pensions Ombudsman
22 March 2018