

Ombudsman's Determination

Applicant	Mr G
Scheme	Lloyds Bank Pension Scheme No 2 (the Scheme)
Respondents	Lloyds Banking Group Pensions Trustees Limited (the Trustee) Lloyds Bank Plc (the Employer) Willis Towers Watson (the Administrator)

Complaint Summary

Mr G's complaint is that the Employer and Trustee have calculated his pension benefits incorrectly; Mr G seeks their recalculation from 2015 to date. Mr G says that the Employer and the Trustee have incorrectly applied a pension cap of £36,000 to both his basic salary and bonuses, rather than applying the pension cap to his bonuses only. The effect of this approach is that his bonuses have been excluded from the calculation of his pension benefits. He believes he is contractually entitled to have his bonuses included in the calculation of his pensionable pay. Alternatively, if it is not accepted that he is contractually so entitled, the bonuses should in any event be included, as he has been told, over many years, that this would be done. He also says that the Employer has applied the pension cap in a discriminatory way.

Mr G's complaint against the Administrator is that it provided him with incorrect benefit statements and failed to provide him with particular information that he requested in 2014.

Summary of Ombudsman's Determination and reasons

The complaint against the Employer is upheld in part. There is no evidence that it has incorrectly applied the pension cap to Mr G's pensionable pay, or that it provided him with incorrect information in circumstances that entitle him to a recalculation of his benefits. Nor is there evidence that the Employer applied the pension cap in a discriminatory manner. However, the Employer did fail to provide Mr G with prompt information regarding the concerns he raised, which amounts to maladministration. Its maladministration caused Mr G serious distress and inconvenience over a number of years, for which the Employer shall pay Mr G £1,000 in recognition of the distress and inconvenience which he has suffered.

There is no finding of maladministration against the Trustee or the Administrator; the complaint against the Trustee and the Administrator is not upheld.

Detailed Determination

Material facts

1. In 1995, Mr G joined the Employer as a financial consultant. On 7 August 1997, he became a member of the Scheme. Section 2 of the Scheme Rules (**the Rules**) provides the following definitions:

“Basic Salary” means, in relation to a Member, his basic salary or basic wage from the Employer. No account shall for this purpose be taken of territorial allowance, overtime or other additional or fluctuating emoluments.

“Final Pensionable Salary” meansBasic Salary during that period of 12 consecutive months in the final 3 years of Pensionable Service which, when aggregated with the annual average of the Fluctuating earnings received over the 36 consecutive months (or such shorter period since the member first became entitled to receive Fluctuating Earnings) ending on the Relevant Date, produces the highest amount....

“Fluctuating Earnings” means, in relation to a Member, such earnings (if any) in monetary form from the Employer in excess of Basic Salary as the Employer, with the consent of the Principal Company, from time to time designates to be pensionable...”

2. Section 65.2 of the Rules states:

“The Trustee may treat as conclusive any information or data relating to a Member supplied to it by (a) the Member or (b) the Employer or (c) the trustees or administrator...”

3. In or around December 1995, the Scheme issued a “TSB Group Pension Scheme - Member Booklet” (**the Booklet**). Under “Calculation”, the Booklet stated that:

“Your Final Pensionable Salary is based on your basic salary plus your commission calculated at the time you leave or retire. Your basic salary is an average of your best 12 consecutive months out of your final 3 years and your Final Pensionable Salary is capped at a maximum of £36,000.

Your basic salary is always pensionable in full and if it produces a higher Final Pensionable Salary than this formula it will override the £36,000 cap.

Your commission is normally averaged over the 36 months ending with the same 12 months used to calculate your basic salary.

If, at a future date, you change jobs within TSB and so cease to be a Savings and Investment Adviser your Final Pensionable Salary will be calculated in two parts:

- (1) For the Pensionable Service you will have completed up to your date of change, your Final Pensionable Salary will be based on your basic salary plus your full commission at the time you leave or retire

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- (2) For the Pensionable Salary you complete after your change of job, your Final Pensionable Salary will be based on your basic salary only.

References to 'Commission' include: Savings and Investment Adviser Sales Bonus; Branch Manager Team Bonus; Branch Controllers Bonus; Area Director Bonus."

4. The Booklet also stated:

"Pensionable Salary" is your basic salary (excluding, for example, overtime or bonuses but including commission averaged over the last three years where this is designated to be a permanent part of your salary by your employer) ...

"Final Pensionable Salary" is your highest 12 consecutive months' Pensionable Salary in the three years immediately before retirement, leaving, or death. If you are paid by way of commission only, then the highest annual average of your commission over three consecutive years out of the last ten will be taken."

5. Clause 4 of Mr G's contract of employment stated:

"Subject to the provisions of the trust deed and rules, you are eligible for membership of the TSB Group Staff Pension Scheme... Details of the main provisions are set out in the TSB Group Pension Scheme booklet which is held by your local Personnel Department...

Your pensionable earnings will be based on your annual basic salary, plus annual team and personal sales bonuses up to a maximum of £36,000."

6. In or around April 2000, the Employer issued a pension statement to Mr G which stated that: "Final Pensionable Salary to 6.4.2000: £19,357.67...."

7. Mr G queried these figures, On 18 April 2001, the Employer wrote to him and said:

"I can confirm that your record has now been updated to reflect your correct pensionable status. Your correct pensionable salary will be based on an average of your basic salary plus bonuses and commission. I apologise that our records were not updated in time for last year's statement. We are current [sic] working on the 2001 Annual statements and yours should be with you within the next couple of months. This will be the up to date value of your benefits, and any figures we could now produce as at April 2000 would be obsolete. Unfortunately, I am unable to give a more accurate estimate of the date of issue for the statements at this time."

8. In June 2004, the Employer sent Mr G a Total Reward statement. It stated: "Basic salary: £23,266.00...Final Pensionable Salary: £32,606.55...."
9. Between 2001 and 2009, Mr G received various benefit statements. In Mr G's view, some of these statements were incorrect in that they did not include bonuses within his pensionable salary and when he contacted the Employer to query this, he thinks the statements were corrected to include his bonuses.
10. Over the years, the Employer introduced a new contract for sales staff (**the FC99 Contract**). On 30 November 2009, Mr G emailed the Administrator, saying that his benefits had been calculated incorrectly, again based on a salary that he had never received. He said he had contacted the Administrator the previous year about inaccurate statements but received no response. Following Mr G's email, the Administrator wrote to Mr G and said:

"I confirm that your category of membership is now known as "COMM4MIG" ie you were previously in the commission category group 4, but you have now "migrated" to the FC99 [Contract]. As such, the annual benefit statements are now calculated on the migrated basis... After 1 July 2010, your pensionable salary will be calculated on the migrated basis in accordance with your contract of employment."
11. On 5 February 2013, the Administrator wrote again to Mr G and said:

"Further to our recent communication regarding the incorrect salary being used in your annual benefit statement, please accept my apologies for the time taken to reply. We have been waiting for [the Employer] to supply us with up to date information to enable us to calculate your pensionable salary."
12. On 8 February 2013, the Administrator sent Mr G a revised statement which stated that his final pensionable salary, as at 5 April 2012 was £41,902.64. It also stated:

"Further to our telephone conversation which took place on 7th February, having reviewed the figures issued under cover of my colleague's letter dated 5th February it became apparent they had been based on a "COMM1MIG" rather than a "COMM4MIG" which applies [to] you, please accept my apologies for this inconvenience."
13. Mr G says that he believed his statements had been corrected and that his bonuses were being included in the calculation of his pensionable pay.
14. In January 2015, Mr G discovered that colleagues in the same position as him had received confirmation that their bonuses were included in the calculation of their final pensionable pay. At around the same time, an Employer representative and former Scheme trustee called Mr Howard Marsden e-mailed Mr G about this matter and said:

"The cap is £36000 of Bonus [sic]. This is in addition to your salary."

15. From January 2015 to February 2015, Mr G corresponded with the Employer on the issue of whether bonuses were included in his pensionable pay, with a view to obtaining correct benefit statements. On 19 February 2015, the Employer e-mailed Mr G and said: "I am having to extract old policy and contractual documents and I may need to take external guidance before I can respond fully. I will revert as soon as possible."
16. In April 2015, the Employer issued Mr G's 2015 pension statement, which said: "Your basic pay at 1 April 2015: £53,485.00...Your pensionable pay at 1 April 2015¹: £44,909.75...¹Your pensionable pay has been restricted by the pensionable pay cap..."
17. At around the same time, the Employer e-mailed Mr G and said:

"... your employment history appeared to place you in a category called COMMMIG4. That category has a specific calculation supporting it which means that an overall cap applies to final pensionable pay subject to your pensionable pay not being less than that derived from your base pay alone if this turns out to be higher than the cap. Do you believe COMMMIG4 does not apply to you? If so, you would need to let me know what in your employment history you believe we are not considering or we are missing when we've taken the judgement that you are in the COMMMIG4 category? Alternatively, or equally, if it is the calculation of final pensionable salary pay associated with the COMMMIG4 category that you believe is incorrect similarly you would need to let me know the basis you believe is correct with any associated information or documentation to support that."
18. On 27 April 2015, Mr G spoke with an Employer representative called [RB] about this matter. Mr G said he had received written confirmation, from a Scheme trustee, that the cap applied to his bonuses only. He said he understood why there was a cap for some categories of staff, that is, because they were selling on commission and their bonuses could be 100-150% of their salaries. But his category did not have such a cap. Further, other employees on the same contract as him had received letters saying their bonuses would be included in their pensionable salary, but he had not. [RB] noted Mr G's interpretation of the bonus contract clause, and it was agreed that he would investigate the matter further.
19. On 5 May 2015, [RB] told Mr G he had found some documents which stated that the £36,000 cap was "inclusive" of base pay; and, where pensionable pay from base pay was higher than the cap, the cap prevailed. The documents were dated December 1995, although it was unclear to whom the documents were issued. On 23 May 2015, Mr G said he had been querying this since January 2015, however the Employer had provided nothing to rebut his claim that bonuses were included in his pensionable pay. Mr G made another complaint to the Employer because he did not think it had resolved the main issue he had raised.

20. On 18 August 2015, the Employer contacted Mr G and said that, based on notes from advisers back in the 1990s, it appeared the intention had always been to cap pensionable pay at £36,000. Therefore, the question was whether that had been “consistently and correctly communicated and applied”. On 18 August 2015, Mr G said he was disappointed with the length of time it had taken for the Employer to provide him with an answer; and, that it appeared he had been misinformed over several years about the pensionability of bonuses.
21. In April 2016, the Employer issued Mr G’s 2016 pension statement, which said: “Your basic pay at 1 April 2016: £54,822.00...Your pensionable pay at 1 April 2016: £44,909.75...Your pensionable pay is subject to the pensionable pay cap...”
22. In September 2016, the Employer wrote to Mr G and said:

“...In [RB’s] absence, I regret that I am unable to progress your enquiry however I can confirm that at this point we have no evidence to suggest that the £36,000 cap only applies to your bonus. Our understanding is that as your base pay exceeds £36,000 that only your pay (not including commission or bonus) counts for pension purposes. I understand that [RB] is continuing to investigate the communications to members about pensionable bonus/commission arrangements so in my view this matter is not closed but if you wish to initiate The Pension Ombudsman proceedings now please treat this email as a final outcome for present purposes.”
23. In April 2017, the Employer issued Mr G’s 2017 pension statement, which said: “Your basic pay at 1 April 2017: £56,193.00...Your pensionable pay at 1 April 2017: £44,909.75...Your pensionable pay is subject to the pensionable pay cap...Your pensionable pay includes any relevant pensionable commission and/or bonus payments...”
24. Mr G complained under the Scheme’s internal dispute resolution procedure (**IDRP**). In August 2017 and February 2018, the Trustee responded under stages one and two of the IDRP but did not uphold the complaint. In summary, it said the Rules provided that it was entitled to rely on information from the Employer about which elements of Mr G’s pay were pensionable.
25. Mr G also formally complained to the Employer but it did not uphold his complaint. In summary, it said the wording of Mr G’s employment contract and the Rules were clear in that his basic salary and bonuses were pensionable until both reached the £36,000 pension cap, After that, only his basic salary was pensionable.
26. As the matter remained unresolved, Mr G referred his complaint to The Pensions Ombudsman (**TPO**).

Summary of Mr G’s position

27. His employment contract says his bonuses are included in his pensionable pay. The placement of the comma in the term “Your pensionable earnings will be based on

your annual basic salary, plus annual team and personal sales bonuses up to a maximum of £36,000” supports his belief that the cap applied only to his bonuses.

28. He received pension statements on several occasions, from 2000, where bonuses were not included in his pensionable pay. When he queried the statements with the Employer, the Employer told him bonuses should be included in the calculation; he believes his statements were corrected to include bonuses.
29. Specifically, he believes statements issued by the Employer between 2001 and 2009 were correct as they showed his pension benefits based on his basic pay plus bonuses, which in total were used to calculate his pensionable pay. Different methods of calculation from the method asserted by the Employer have been used to calculate his benefits over the years. He no longer has a copy of the statements, however none of the statements he received mentioned an overall cap on benefits, nor use of basic pay only after his pay exceeded £36,000.
30. He believed that the Employer had corrected the calculation of his benefits after he queried this with the Employer. However, in around January 2015 he discovered that colleagues in the same position as him, had received confirmation that their bonuses were included in the calculation of their final pensionable pay.
31. If for any reason his employment contract reads differently from how he believes it should read, and total bonuses are not included in his pensionable pay, this would be contrary to what he has been told on many occasions, that bonuses are included; with the result that his retirement planning has been based on incorrect information.
32. He knows of colleagues with the same contract and employment history who have received pension benefits in line with his interpretation of the contract and Rules. So, he is being treated differently, which is unfair. In his view, it is clear he was missed off a list of people who were allowed to include bonuses in their pensionable pay, and the Employer could clarify this issue by providing further evidence.
33. The Employer has provided no further evidence to rebut his claim that colleagues on the same contract as his one have been treated more favourably than him in relation to bonuses. All advisers were moved onto the FC99 Contract and their bonuses were included in the calculation of their pensionable pay. However, although his colleagues received letters confirming this, he did not. The evidence the Employer has provided on this aspect of his complaint is not new; it has only provided an explanation of the pensionable pay categories. The Employer ought to provide further information on why he was placed in the COMMIG4 category rather than in the FC99 category. The Employer has not explained why he is not in the same pool as his colleagues.
34. He seeks recalculation of his benefits on the basis that the pension cap is applied to his bonuses only. He estimates that his loss is about £150,000.
35. In 2014, he asked the Administrator for the input amount and input period so he could receive advice on increasing his overall retirement provision. He was looking at using his full annual allowance, plus carry forward; that is, make maximum contributions for

the year and up to a maximum of the previous three years. But the Administrator was unable to provide this information (it had said, in 2014, bonuses were not included in pensionable pay). Therefore, the bonus inclusion issue needed to be resolved first.

36. He has therefore been unable to make contributions up to his annual allowance, he has missed out on tax relief at 40% on contributions for the period this issue has been ongoing and he has missed out on several years' potential investment growth.
37. He has suffered the stress of chasing the Employer and the Administrator, not knowing what level of benefits he will receive and being unable to plan his retirement by, if need be, supplementing his other pension provision.
38. The Employer should: acknowledge its poor administration and correct this via a formal statement of benefits showing his pension accrual based on inclusion of bonuses from 2015/2016; reissue a transfer value that is based on a larger amount with the inclusion of bonuses; apologise for all the inconvenience he has suffered; and compensate him for years of chasing and the distress involved. He understands the Ombudsman proposes to award him £1,000 in respect of serious distress and inconvenience. He does not think this sum adequately compensates him for the distress he has suffered. Nor does it take into account the reduction in transfer value since he initiated his complaint in January 2015. The Ombudsman should instruct the Trustee to provide a new transfer value based on calculations from 2015/2016, so that he receives the correct benefits as if there had been no delay settling his complaint.

Summary of Employer's position

39. It disagrees with Mr G's interpretation of Clause 4 of his contract. His contract reflects the Rules, which allow the Employer to designate which parts of a member's earnings are pensionable.
40. Mr G is only entitled to basic salary plus bonuses on top of his salary to be included in the calculation of his Final Pensionable Salary until such time as his basic salary plus bonuses reach a combined maximum of £36,000. After that, only his basic salary is to be included to the calculation of his Final Pensionable Salary.
41. Its position on the interpretation of Mr G's contract is consistent with the Booklet and the Rules. The Booklet confirmed that a member's Final Pensionable Salary is based on the member's basic salary plus commission, and the Final Pensionable Salary is capped at a maximum of £36,000. It has no reason to believe the Booklet was not provided to relevant members at the time or following enquiries about how the calculation around Final Pensionable Salary worked.
42. The Rules provide that "fluctuating emoluments" are to be included in the definition of Final Pensionable Salary to the extent that it, as the Employer, "with the consent of the Principal Company, from time to time designates to be pensionable".

43. Under the Rules, the Employer categorises the extent to which bonuses and commission are pensionable. It carries out this categorisation by reference to the member's job role and the date the role commenced. Mr G's role was designated a Category 4 member. In the case of a Category 4 member, it decided that the cap on Final Pensionable Salary, including bonuses, is £36,000.
44. It has calculated Mr G's benefits correctly in accordance with the Rules, his contract and the Booklet. It has correctly calculated Mr G's benefits by using pensionable pay derived from his basic salary, which has exceeded the £36,000 cap put on combined basic salary and bonuses.
45. It does not consider extracts from phone calls, between Mr G and Mr Burnet, are binding on it. [RB] has since had the benefit of considering all of the information in detail, which supports its overall position.
46. There are four categories of pensionable pay calculation in respect of the salesforce, of which Mr G is designated Category 4. There are differences in how bonuses are treated for purposes of pensionable pay in each of the categories. Mr G falls into the "COMMIG4" group under Category 4. It believes Mr G is aware of this and reasons for the categorisation. All the colleagues referred to by Mr G are in different commission categories, based on their employment history, so they are not comparable to Mr G.

Summary of Trustee's position

47. Under the Rules, Final Pensionable Salary consists of Basic Salary plus an average of fluctuating earnings. Whether Mr G's fluctuating earnings include bonuses and/or commission depends on whether they have been so designated by the Employer; the Trustee does not make this decision.
48. In relation to Clause 4 of Mr G's contract, the Trustee's understanding is that it is only Mr G's annual team and personal sales bonuses that the Employer has designated as pensionable. These are the bonuses referred to in Mr G's contract, which the Trustee interprets as a "designation".
49. Under Section 65.2 of the Rules, the Trustee may treat as conclusive the information provided by the Employer regarding designations, including whether the member's bonuses are pensionable. Therefore, it has no direct role in deciding whether a member's pensionable salary includes bonuses and, if so, up to what level.
50. Any communications from the Administrator on behalf of the Trustee on Mr G's pensionable pay were not definitive or binding and did not confer rights to benefits.

Conclusions

51. I should firstly clarify that Mr G seeks recalculation of his Scheme benefits from 2015, and other remedies, based on information he received around January 2015. My decision is principally based on the matters occurring from January 2015, unless the context requires otherwise.

The complaint against the Employer

52. Mr G believes that he has a contractual right to a £36,000 pension cap on his bonuses alone, based on: the terms of his contract; what the Employer has told him severally over the years; and, how some of his benefits statements were calculated. I have considered the terms of Mr G's contract. I have also considered whether Mr G may have a defence in estoppel, or a valid claim based on negligent misstatement or discrimination. But I do not find that his complaint succeeds on any of these grounds.

Contract interpretation

53. The disputed term of Mr G's employment contract is: "Your pensionable earnings will be based on your annual basic salary, plus annual team and personal sales bonuses up to a maximum of £36,000."
54. Mr G argues that the £36,000 pension cap only applies to his bonuses and says the placement of the comma in the above term supports his interpretation. The Employer says that the £36,000 pension cap applies to both Mr G's basic salary and bonuses; and, that his statements have been calculated in accordance with this interpretation.
55. It is generally accepted in caselaw that the punctuation used in contractual terms is not always conclusive on matters of interpretation, although, subject to the factual matrix and commercial context, the punctuation used could assist with interpretation (see, for example, *Houston & Others v Burns and Another* [1918] AC 337; the Supreme Court's decision in *Wood v Capita Insurance* [2017] UKSC 24; and, the High Court's decision in *Vitol v New Age Limited* [2018] EWHC 1580).
56. I do not believe that the placement of the comma in the term, set out in paragraph 53 above, is conclusive on its interpretation. Taking into account the relevant caselaw, it is my view that the term ought to be interpreted in the context of the contract as a whole and in the relevant pensions context. Mr G's contract says his eligibility to join the Scheme was subject to the Rules. His contract also said the details of the main provisions of the Rules are set out in the Booklet, which is held by Mr G's local Personnel Department. In view of this, it is my view that Mr G's contract was subject to the Rules, and that it is necessary for me to consider the contract in light of the Rules and the relevant Scheme documentation.
57. Under the Rules, the Employer was responsible for deciding which parts of Mr G's salary were included in his Final Pensionable Salary. The Employer has confirmed that Mr G was designated a category 4 member; and, that under category 4, the £36,000 pension cap applies to both a member's basic salary and bonuses. It has further confirmed that after the member's Final Pensionable Salary reaches the pension cap, only the member's basic salary is pensionable.
58. Taking the Rules into account, in particular: (i) the Employer's responsibility to designate Mr G's category of membership; (ii) Mr G's categorisation as a category 4 member; and (iii) the manner in which the pension cap applies to category 4 members, I am satisfied the proper construction of Mr G's contract is that the pension

cap applies to both his basic salary and his bonuses. I should add that I see no evidence of maladministration in the Employer's categorisation of Mr G as a category 4 member. Therefore, I find that the Employer correctly interpreted Mr G's contract.

59. In addition, this interpretation is consistent with the information set out in the Booklet, which Mr G ought to have had notice of. The Booklet says: "Your Final Pensionable Salary is based on your basic salary plus your commission calculated at the time you leave or retire. Your basic salary is an average of your best 12 consecutive months out of your final 3 years and your Final Pensionable Salary is capped at a maximum of £36,000..."
60. I am satisfied that Mr G had been put on notice, via his contract, that the main provisions of the Rules are set out in the Booklet and that the Booklet was held by his local Personnel Department. Mr G could have made direct enquiries to obtain the Booklet, and underlying Rules, to clarify how his pension was calculated.

Estoppel by convention

61. It is possible for parties to a contract to be bound by a state of affairs different from that set out in a contract, where an "estoppel by convention" applies. An estoppel by convention can arise where: (1) the parties to a contract act on an assumed state of facts or law; (2) the assumption is shared by the parties, or at least "made by one party and acquiesced in by the other", and is communicated between the parties; and (3) the party claiming the benefit of the convention relied on the common assumption. This was set out by the High Court in *Mears Limited v Shoreline Housing Partnership Ltd* [2015] EWHC 1396.
62. There is no evidence on contract formation, or thereafter, that there was an "assumed state of facts" between Mr G and the Employer on which they both acted. The majority of correspondence I have seen tends to support the Employer's position that it was acting in accordance with its understanding that the pension cap applied to both Mr G's basic salary and bonuses. There is no evidence the Employer notified the Trustees to calculate Mr G's benefits on any other basis.
63. Therefore, I do not find that Mr G's complaint can be upheld on the basis of an estoppel by convention.

Negligent misstatement

64. Having carefully reviewed the evidence, I find no basis on which Mr G's complaint might succeed by reason of negligent misstatement. It is not entirely clear, on Mr G's evidence, what information he was provided with over the years, verbally or in writing, via pension statements or other correspondence. Mr G says that he was provided with incorrect information about his benefit calculation over many years. Based on the available evidence, it appears that there were four occasions to which any claim for incorrect information might relate. First, having queried the calculation of his benefits

set out in the pension statement he was issued in or around April 2000, the Employer wrote to Mr G in April 2001 and said:

“I can confirm that your record has now been updated to reflect your correct pensionable status. Your correct pensionable salary will be based on an average of your basic salary plus bonuses and commission. I apologise that our records were not updated in time for last year’s statement.”

65. Second, in January 2015, Mr Marsden, an Employer representative and former Scheme trustee, said: “The cap is £36000 of Bonus [sic] This is in addition to your salary [my emphasis].”
66. Third, on 27 April 2015, [RB] told Mr G: either that he agreed that £36,000 was a cap on bonuses only; or, that it appeared, based on what Mr G had said and on the information he had provided at that stage, that there was a £36,000 cap on bonuses only, but that he would look into the matter.
67. Fourth, Mr G says that the statement he received in February 2013 was calculated in line with his interpretation. Specifically, it said his pensionable pay was £45,844 at the time; and, his pensionable pay, including the cap imposed by the Employer on basic pensionable pay, was £42,654. His average bonus for the three-year period being £3,190, that made his total pensionable pay £45,855. In short, this statement said he was entitled to have bonuses included in pensionable pay.
68. I find any claim for negligent misstatement arising from the statement in the April 2001 letter (**the 2001 complaint**) has been made outside the time limits for bringing complaints to us, and the limits stipulated in the Limitation Act 1980 (**the Limitation Act**).
69. Regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (see Appendix), concerns the time limits for making complaints and referring disputes to TPO. Under Regulations 5(1) and 5(2), a complaint to TPO must be made no later than three years from the date the events complained of; or, within three years of when the Applicant knew or ought reasonably to have known of these events. I also have discretion under Regulation 5(3) to consider a complaint made outside the three-year time period if it is reasonable to do so.
70. Any alleged misinformation was made in the letter of April 2001 and Mr G would have been aware of the misinformation when he received that letter. Mr G submitted his complaint to us in April 2017, and it is my view that any claim arising from the 2001 complaint has been submitted to us outside the time limits in Regulations 5(1) and 5(2). I see no reasonable grounds for the delay in bringing this complaint to justify the exercise of discretion under Regulation 5(3). In any case, the 2001 complaint is also time-barred under the Limitation Act, for reasons set out in paragraph 71 below.
71. The 2001 complaint is one which a Court would recognise as a claim made in negligence, the relevant period for bringing the claim is six years from the negligent

act or omission (Section 2 of the Limitation Act); or (if later) three years from the date of knowledge (Section 14A of the Limitation Act). This is subject to an overriding time-limit (or “long stop”) of 15 years from the date when the negligent act or omission occurred (Section 14B of the Limitation Act).

72. The relevant date for purposes of the Limitation Act is 18 April 2001. Had Mr G pursued the 2001 complaint through the Courts, he would have needed to bring his claim within fifteen years from 2001, that is, by 2016. But Mr G’s complaint to TPO was received in April 2017, which falls outside the long stop for claims in negligence. The 2001 complaint is also statute-barred, so, even if Mr G’s complaint were to be upheld, I cannot provide him with a remedy.
73. This approach is supported by the High Court’s decision in *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch). In that case, the Court held that the powers available to the Ombudsman when investigating a complaint that is time-barred are the same as those which are available under the Limitation Act, except in cases of pure maladministration. The remedy must not go beyond what a court could order. The 2001 complaint is not a complaint about pure maladministration; it involves the alleged infringement of a legal right based in negligence.
74. With regard to the statements made by Mr Marsden, in January 2015, and [RB] in April 2015, the position remains that members are only entitled to receive those benefits which they are due under the Rules, except in limited circumstances where the Rules may be overridden by law, and I do not believe this is such a case. The question I must consider is whether there was a clear and unequivocal statement from the Employer which Mr G reasonably relied on to his detriment.
75. I see no evidence of detrimental reliance on of the statements made in January 2015 or April 2015. This is because before both statements were made, Mr N was already aware his bonuses were not included in the calculation of his pensionable pay, and he could have taken steps to protect his pension position while seeking to resolve the dispute with the Employer. It cannot therefore be said that he incurred any loss in reliance on the statements, and I do not consider that any claim for negligent misstatement succeeds on these facts.
76. It is not entirely clear on Mr G’s evidence when Mr G was provided with incorrect pension statements. Mr G says he was provided incorrect statements on several occasions over the years, but on the available evidence it appears that it was possibly only one of Mr G’s statements that was calculated incorrectly; that is, the statement which was replaced by the revised 2013 statement. The Administrator admitted that the statement was incorrect, and it issued the revised 2013 statement.
77. I do not consider that any claim for negligent misstatement can arise from any inaccuracy in the incorrect 2013 statement, as I do not consider that Mr G has shown any clear and unambiguous statement which affirmed his belief that the pension cap only applied to his bonuses.

78. Mr G also says that several times since he first complained, including in the phone call in April 2015, he asked the Employer for a copy of the Booklet but it refused to provide this. I have considered this point, but, as stated in Mr G's employment contract, copies of the Booklet were held by his local Personnel Department. So, copies could have been requested directly from them. I find that there is insufficient evidence that the Employer refused to provide a copy of the Booklet upon request.
79. Mr G also says the Employer must have missed him off the list of employees whose bonuses were included in the calculation of their pensionable pay. But I have found no evidence that Mr G was incorrectly omitted from a such a list. Nor is there further evidence that the Employer has designated Mr G's pensionable pay in a way that contravenes the provisions of his employment contract, or the Rules.

Discrimination

80. Mr G believes that he has been treated differently from colleagues who had the same employment history and were on the same contract as him. I have investigated this aspect of Mr G's complaint and he has had the opportunity to comment on the additional information the Employer has provided. Mr G has asked that I request further information from the Employer about his discrimination complaint. But, I do not consider the further information Mr G would like me to request is likely to advance his complaint.
81. Mr G's complaint, that he has been treated differently, appears to be a complaint of direct discrimination. For this complaint to succeed, he would need to show that the Employer treated him less favourably than a person in a comparable situation from him (a comparator) because of a protected characteristic under the Equality Act 2000.
82. Mr G has not specified the protected characteristic(s) on which he considers he is being discriminated and it is not clear to me, on the evidence, what characteristic could apply to Mr G. Mr G's complaint of discrimination cannot succeed unless he can show less favourable treatment that has arisen as a result of a protected characteristic. The Employer has explained that there are various categories within COMMIG4 and I have no reason not to accept the Employer's submissions that Mr G falls into COMMIG4, whereas the colleagues he has mentioned fall into different commission and pensionable pay categories based on their employment histories. I find that the colleagues Mr G has referred to do not seem to be appropriate comparators to Mr G.
83. I sympathise with Mr G. I have no doubt that he sincerely believes his circumstances are identical to his colleagues'. But as the Applicant bringing the complaint, the burden of proof is on him to prove he has been discriminated against in circumstances that amount to maladministration. I do not find there is evidence of discrimination amounting to maladministration, so I do not uphold this part of the complaint.

Non-financial injustice

84. Mr G has experienced non-financial injustice in relation to this matter. It would appear that Mr G initially raised his complaint with the Employer in January 2015. He had made a number of enquiries previously, but it was in January 2015 that he contacted the Employer after discovering that colleagues in ostensibly the same position were being treated more favourably.
85. Although, the Employer attempted to answer Mr G's queries. But there were avoidable delays. For example, Mr G contacted the Employer in January 2015 and [RB], the Employer's representative, said he would respond as soon as possible. But the next substantive contact was not until April 2015, when the Employer confirmed Mr G's contract and requested that he provide further evidence in support of his case. Following the contact in April 2015, there was a telephone call, in which Mr G argued his case that bonuses should be pensionable. The Employer eventually agreed to investigate the policy intention of the contract term. It appears that no further response was sent until August 2015.
86. There is then a gap in the timeline. The Employer did not contact Mr G again until September 2016, over twelve months later. It re-confirmed its position on how bonuses should be treated for pension benefit purposes, but the Employer also said it was continuing to look into the matter. There does not seem to be any further contact for around six months, until March 2017, when the Administrator sent Mr G an indicative transfer value.
87. I find that the Employer did not provide Mr G with a definitive response to his complaint within a reasonable timescale. The delay, from January 2015 to September 2016, in providing a definitive response to Mr G's request would have caused serious distress and inconvenience. In my provisional decision, I indicated that I was minded to determine that the Employer should pay Mr G £1,000 in recognition of this. Mr G has said in his submissions that £1,000 does not make up for the level of distress he has suffered. Nor does it take into account the fall in the level of his benefits from January 2015, when he first complained to the Employer, until January 2019.
88. I do not consider that there was a guarantee that Mr G would receive a transfer-out in line with his own interpretation of the contract. Whilst I sympathise with Mr G for the distress and inconvenience he has suffered as a result of this matter, I do not find that a higher award is justified.

The complaint against the Trustee

89. I find that under Section 2 and Section 65.2 of the Rules, it was for the Employer to determine which parts of Mr G's pay were pensionable; the Trustee was entitled to rely on the information it received from the Employer in relation to the designation of his pay.
90. I have no reason to reject the Trustee's submission that Mr G's pension benefits were calculated based on information that the Employer supplied to the Trustee, with

bonuses being excluded from his Final Pensionable Salary once the total amount of basic salary and bonuses exceeded the £36,000 pension cap.

91. Mr G has asked to have sight of the data regarding the designation of his pay which the Trustee received from the Employer, and in respect of which the Trustee seeks to rely on Section 65.2. I find that this data is not relevant to this complaint because it is unlikely to assist in the analysis of the key issue of whether the Employer correctly designated Mr G's earnings.
92. I do not uphold the complaint against the Trustee.

The complaint against the Administrator

93. It appears to me there are three parts to Mr G's complaint against the Administrator. First, the Administrator provided him with incorrect statements over the years. Second, it was unable to provide him with the information that he requested in 2014. Third, it missed him off a list of relevant persons whose bonuses were included in the calculation of their pensionable pay. I deal with each aspect of the complaint against the Administrator in turn.
94. I do not uphold Mr G's complaint that the Administrator provided him with incorrect statements over the years. Based on the information available, it appears that the Administrator was not involved with the administration of the Scheme until 2009.
95. The first correspondence from the Administrator to Mr G, which I have seen is the Administrator's letter of 30 November 2009, informing him his membership category was known as COMMIG4. The Administrator corresponded with Mr G in February 2013, to clarify that his statement for the preceding year was based on the incorrect pensionable pay category. I have not seen evidence that the Administrator provided Mr G with incorrect statements over the years. Rather, there appears to be one occasion in 2013, where the Administrator admitted the statement for the preceding year was incorrect. However, I note that the Administrator issued Mr G with a revised statement showing his correct entitlement.
96. Nor do I uphold Mr G's complaint that the Administrator was unable to provide him with information upon request in 2014. Mr G says that in 2014, after receiving the 2013 statement, he asked for the input amount and period, so that he could receive advice on increasing his retirement provision. I have considered this, but there is insufficient evidence that the Administrator was unable to provide Mr G with this information upon request in 2014, or subsequently. Nor is there evidence that the Administrator gave Mr G incorrect input information. I find that it would have been reasonable for Mr G to base any retirement planning on the assumption that he was not entitled to have his bonuses included in his pensionable pay.
97. Nor do I uphold the complaint that the Administrator incorrectly omitted Mr G from a relevant list, as there is no evidence to support this particular allegation.
98. For these reasons, I do not uphold the complaint against the Administrator.

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Directions

99. I direct that within 28 days of the date of this Determination, the Employer shall pay Mr G £1,000 for the serious distress and inconvenience he has suffered as a result of its delay in providing a definitive response to his complaint.

Anthony Arter

Pensions Ombudsman
18 December 2019

Appendix

The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996

“Time limit for making complaints and referring disputes

5.—(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable.”