

Ombudsman's Determination

Applicant	Mr H
Scheme	Rolls-Royce & Bentley Pension Fund (the Scheme)
Respondents	Bentley Motors Limited (Bentley) The Trustees of the Rolls-Royce & Bentley Pension Fund (the Trustees)

Outcome

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

Complaint summary

3. Mr H complains that Bentley and the Trustees have wrongly declined his application for payment of his pension in the Scheme on an unreduced basis from his 57th birthday. He also contends that the Respondents did not notify him at any time that this option was no longer available to him.

Background information, including submissions from the parties

The Trust Deed and Rules and Bentley's Early Retirement Policy

4. The relevant provision relating to the early payment of deferred pension applicable to Mr H is Rule 22 (b) (III) of the Trust Deed and Rules dated 10 March 1989 (as amended) (**the Scheme Rules**) which states that:

“...may, with the consent of the Employers (which consent shall not be unreasonably upheld), retire under the Scheme before Normal Pension Date (**NPD**) and receive an immediate pension...”
5. This provision goes on to stipulate that:-
 - a reduction factor would be applied to deferred pensions which Bentley agreed to put into payment prior to NPD; but

- there would be no actuarial reduction from age 60 if Bentley provided such consent for deferred pensioners whose period of pensionable service ended after 31 August 1992 (such as Mr H)
6. Bentley also operated a policy of not applying an actuarial reduction if an applicant who was in active membership on or after 1 April 1998 had attained age 57.
 7. In the past, Bentley was able to exercise this discretion to grant consent to deferred members applying for early payment of their pensions in all cases. However due to the deterioration in the Scheme's funding position over time, this policy was changed.
 8. From December 2011, Bentley adopted a new policy for early retirement applications from deferred members (**the Policy**) which provided for such applications to be considered on an individual basis rather than consent being given in all cases (further details may be found in paragraph 15 below).

Material facts

9. Mr H joined the Scheme in February 1989 and became a deferred pensioner when he left Bentley in April 2001.
10. The Scheme administrator sent Mr H a "certificate of deferred retirement benefits" (**the Certificate**) with a covering letter dated 23 May 2001 which said that:-
 - he could transfer his deferred pension to another suitably approved pension scheme;
 - he also had the option to take either an actuarially reduced pension at any time after age 50 or an unreduced one at any time after age 57; and
 - he should return the Certificate at the relevant time if he wished to choose one of these options available to him
11. Mr H received a Scheme booklet (**the Booklet**) which stated under the heading "Early Retirement":

"With the Company's agreement, you may retire at any time after age 50 and start receiving a pension...

If you retire between ages 57 and 65, your pension will be calculated in the same way as for Normal Retirement Age (**NRA**)... There will be **no reduction** for early payment..."

The Booklet also contained a proviso that it was only a guide, the contents of which might be subject to revision and would be overridden by the Scheme Rules should there be any discrepancies between the two documents.
12. A member announcement dated June 1999 (**the 1999 Announcement**) explained that significant benefit improvements were made to the Scheme following the 1998 valuation results including improved early retirement terms as follows:

“With the Company’s agreement, an active member may retire at any time after age 50 and start receiving a pension...

For active members retiring after 1 April 1998, the ages for which no reduction is applied to early payment had been extended from 60 to 57...”

13. Bentley says that a copy of the 1999 Announcement was sent to all affected members including Mr H in June 1999.

14. In February 2003, the Trustees sent Mr H a letter which said that:

“We confirm that the closure of the scheme to new members has no effect on your deferred benefits and your options regarding your pension are unchanged.”

15. On 13 December 2011, the Scheme’s Pension Manager issued a note detailing the new company policy applicable from this date for processing requests for deferred members drawing their pension benefits before NRA. The note stated that:

“It is currently the case that Company consent has always been required for deferred members of the Scheme who request to receive their pension before NRA. The Company is adopting a robust process for any future requests.

Current Company practice has been a blanket approval to all requests even though such retirements require the Company to make additional contributions to ensure that the funding position is not worsened. However, due to the significant deficit in the Scheme and a funding level of 75% as at the last actuarial valuation (1 April 2010) the Company is going to be paying significantly increased contributions and so will now review each request for early retirement on an individual basis.

Along with other factors, the Company review will take account of affordability and it is therefore probable that requests that require the Company to pay significant additional contributions will be refused.

The deferred member will also be required to complete a special circumstances questionnaire (**the Questionnaire**) which will provide details of the member’s circumstances for Company consideration.

From time to time the Company will review the factors it takes into account when exercising its discretion and will make such changes as it considers appropriate.”

16. In June 2015, shortly after his 57th birthday, Mr H requested details of the immediate unreduced early retirement benefits available to him from the Scheme in line with the information provided to him in May 2001 and February 2003.

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17. The Scheme administrator replied in July 2015 that his request would be subject to Bentley's agreement in accordance with the Scheme Rules and payment of additional contributions into the Scheme. It also informed Mr H that:-

- if he wished to proceed with early retirement, he should complete and return the Questionnaire which it would then forward to Bentley for consideration; and
- if his request was granted, he could receive a pension of around £9,520 pa or a maximum tax-free cash sum of around £46,670 plus a reduced pension of around £7,000 pa.

18. Mr H returned the completed Questionnaire in August 2015 with a covering letter which said that:

“In support of my request...I have also attached a copy of the letter I received...dated 23 May 2001...which, in my opinion, is unambiguous in setting out the company's proposals in terms of its provision of deferred benefits.

With reference specifically to the company's commitment to pay “a non-reduced pension at any age after attaining age 57” there is no mention of payment of the benefit being subject to approval of any kind or of it being dependent on any criteria being met; the letter simply instructs me to return the Certificate of Deferred Retirement Benefits...”

19. In September 2015, Bentley informed Mr H that it was currently unable to grant his early retirement request due to the Scheme's poor funding position, but he could reapply in the future if there were significant changes to his personal circumstances.

20. In October 2015, Mr H asked Bentley to reconsider its decision because he felt that the letter of 23 May 2001 had misled him into choosing a deferred pension instead of transferring it to his new employer's pension arrangement. He completed another Questionnaire which said that receipt of the maximum tax-free cash sum and reduced pension would relieve “pressing issues involving real or potential anxiety” for him and his family such as:-

- caring for his frail mother on a full-time basis because his sister was no longer able to do this due to ill health;
- paying off his partner's mortgage debt; and
- supporting his daughter financially when she hopefully goes to university

21. Bentley informed Mr H in November 2015 that its original decision stood and said that:

“Because paying an unreduced pension places an additional funding strain on the Scheme, the Company is required to make an additional contribution to the Scheme whenever it gives its consent to the early payment of a deferred pension. In your case if the Company gave consent to the early payment of a

deferred pension from age 57 it would be required to make an immediate additional contribution of around £94,100...

...the main factor taken into account by the Company when deciding whether or not to consent to the early payment of a deferred pension is the additional cost to the Company of doing so...

When we took our decision in relation to your application for early retirement, we were provided with information setting out the cost to the Company of consenting to early payment and a copy of the completed Questionnaire which you submitted with your application. You submitted a revised Questionnaire...and the additional information was taken into account when reaching this decision.

We note...that, on leaving pensionable service, you received a letter ...dated 23 May 2001 which stated that you would be able to take an unreduced pension from age 57, which did not refer to the requirement for Company consent. It is unfortunate that this letter did not accurately reflect the position under the Rules....and that it was inconsistent with other member literature in circulation at the time, which set out the requirement for Company consent for early retirement from deferred status. For example, this was contained in the member booklet dated March 2000...which was sent to all active members of the Scheme at the time. ...the letter does not confer an entitlement to retire early without the Company's consent or the amount to the Company having already given consent for you to take early retirement from age 57."

22. Mr H says that:-

- he had planned to take unreduced benefits available to him from the Scheme and his current employer's pension scheme at ages 57 and 60 respectively;
- if he had known that he might have to wait until 65 to receive an unreduced pension from the Scheme, he would have transferred it to his current employer's pension scheme which still allows him to take unreduced benefits at 60;
- transfers into his current employer's pension scheme have not been permitted for some time though;
- the Booklet did not contradict what was shown in letter dated 23 May 2001 but reinforced his view that unreduced benefits would most probably be paid from age 57 in the Scheme;
- he has suffered significant financial loss and emotional strain by choosing to receive a deferred pension from the Scheme;
- the obligation to provide clear and correct information must rest with Bentley;
- it is unreasonable to expect that he had the expertise to identify a potential discrepancy in the early retirement information provided by "a pension specialist" and obtain a copy of the Scheme Rules to seek clarification;

- to discount a promise as unambiguous as that made in the letter of 23 May 2001 would mean that “no item of correspondence from a pension scheme should ever be taken at face value...and render the letter(s) to be nothing more than an aggressive sales pitch; an attempt by the employer to procure members’ savings secure in the knowledge that early payment would never have to be made”; and
- Bentley made an explicit offer to him which he accepted in good faith. He remains firmly of the opinion that Bentley are in clear breach of their agreement initiated on 23 May 2001.

23. He also says that:

“Having previously transferred my occupational pension benefits from British Rail into...the Scheme I was fully aware of the option and of the process itself.

I had been with my new employer less than two weeks before receiving the offer letter from Bentley. I considered the company’s terms; a non-reduced pension to be paid unconditionally eight years earlier than my NRD in return for choosing to defer my pension, to be acceptable, thus negating any need for me to pursue or even explore the possibility of a transfer...

Had Bentley honoured the agreement, I would have begun drawing an unreduced, deferred pension from age 57. I am now over 60 years old and have yet to receive a penny. That is a tangible, calculable financial loss.”

Adjudicator’s Opinion

24. Mr H’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Bentley or the Trustees. The Adjudicator’s findings are summarised briefly below:-

- In accordance with the Scheme Rules, before early payment of deferred benefits can be made Bentley’s consent is required. The Trustees consequently have no role to play in consenting to the early payment of deferred benefits in the Scheme. There has consequently not been any maladministration on the part of the Trustees and Mr H’s complaint against them cannot be upheld.
- Where a body connected to a pension scheme has discretion such as Bentley, that body does not have to pay a benefit but can do so if it wishes. The Pensions Ombudsman can look to see whether: (a) the discretionary powers have been applied consistently within the rules or regulations governing the scheme and any other relevant legislation and (b) if a correct process was followed in arriving at the decision.
- Bentley had to exercise its discretion on whether to allow Mr H to take his deferred benefits early. Where there is an exercise of discretionary power under the rules of a pension scheme, the decision-maker, Bentley in this case, has an implied duty of

good faith to its employees. This, broadly, requires that Bentley's exercise of discretion must be genuine and rational (as opposed to empty or irrational) and must not produce an improper decision. It must also ensure that it takes account of relevant factors and ignores any irrelevant factors. However, the implied duty of good faith is not a fiduciary duty, meaning that Bentley may take its own interests into account (and, indeed, to favour those). This includes an employer's commercial interests.

- Bentley's refusal to consent to Mr H's request for early payment of his deferred benefits allowed for the additional contribution of £94,100 it would have had to pay. It was entitled to take this cost into account when making its decision.
- It is clear from the 1999 Announcement that for members in active membership of the Scheme on or after 1 April 1998 such as Mr H, Bentley had a policy of not applying a reduction for early payment of benefits where they have reached age 57 but only if it agreed to the early retirement. As the early payment of deferred benefits was at the discretion of Bentley, there was consequently no legal requirement on its part to inform members when it later changed its policy on this.
- Mr H says that the letter of 23 May 2001 influenced his decision to retain his deferred benefits in the Scheme. This letter showed that he could take his deferred benefits early either actuarially reduced or unreduced after ages 50 and 57 respectively, or alternatively transfer them to another pension arrangement.
- At the time the letter was written it was the practice of Bentley to grant unreduced early retirement pensions to all deferred members so its failure to mention that early retirement was subject to its agreement was understandable albeit rather unfortunate. Bentley could not have foreseen the subsequent deterioration in the Scheme's funding position over time which resulted in this policy having to be changed from December 2001. Whilst I accept that this letter might have led to Mr H's mistaken belief that he was entitled to take his benefits without reduction from age 57 in the Scheme, Bentley was entitled to change its policy and did not need to inform him of the change for the reason given above.
- There is no evidence to show that Mr H was considering in 2001 a transfer of his benefits in the Scheme elsewhere. Even if such evidence does exist, there is nothing to demonstrate that he would have been better off doing so. Furthermore, Mr H cannot claim for a loss that he could have mitigated, whether he in fact did so or not. In this case, it remains open to Mr H to transfer his pension rights in the Scheme to his current employer's pension scheme and thus enabling him to take unreduced benefits (if the current embargo on such transfers is lifted).
- Mr H has not suffered a financial loss for which he should be compensated. For the Ombudsman to direct the payment of such compensation, Mr H would have to show that money has actually been lost as a result of expenditure or decisions that would not have been made if the correct information had been quoted at the outset. The losses which Mr H has described do not represent actual losses, but

rather a loss of expectation. Mr H has not provided any evidence that he entered into any binding financial commitments as a result of the incorrect information or that he relied on the information to his detriment in some other way.

- Before making its decision, Bentley also considered both Questionnaires which Mr S completed. Bentley had therefore applied the Scheme Rules properly and followed a correct process in reaching its decision in Mr H's case.

25. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his 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 Mr H for completeness.

Ombudsman's decision

26. Mr H is adamant that Bentley made him an unconditional offer in its letter dated 23 May 2001 that he could retire early from age 57 without its consent which he accepted in good faith and Bentley is therefore now in clear breach of this agreement.

27. The evidence, in my view, does not support Mr H's allegations though because:-

- the Scheme administrator had sent the Certificate and covering letter to him on behalf of the Trustees and not Bentley;
- the documents were sent for information purposes only and not to create a binding contract between Bentley and Mr H as he seems to believe; and
- although it was unfortunate that the covering letter did not explicitly mention that Bentley's consent was required for early retirement, this requirement was made clear in other documentation which Mr H had already received or readily available to him on request from which he could have learnt about this;

28. Moreover, I agree with the Adjudicator that Mr H has not produced any concrete evidence to show that he was considering a transfer of his benefits in 2001 or at any time subsequently and that he would have been financially better off by doing so.

29. Although I sympathise with Mr H's circumstances, I do not uphold his complaint against Bentley or the Trustees.

Anthony Arter

Pensions Ombudsman
29 August 2018