

## Ombudsman's Determination

Applicant	Mrs H, on behalf of the Estate of Mr H
Scheme	Motorola UK Benefits Plan ( <b>the Plan</b> )
Respondent	The Trustee of the Motorola UK Benefits Plan ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Mrs H's complaint and no further action is required by the Trustee.

## Complaint summary

2. Mrs H complains that:-
  - There were delays in the Trustee dealing with Mr H's request for an Enhanced Transfer Value (**ETV**) prior to his death and the Trustee failed to mention the 14-day cooling-off period for acceptance of the ETV.
  - Following Mr H's death in May 2017, the Trustee refused to allow the ETV to be completed and has offered Mrs H a spouse's pension instead.

## Background information, including submissions from the parties

3. Mr H contributed to the Plan between 4 August 1994 and March 2003. He left with an entitlement to a deferred pension.
4. On 16 December 2016, the Trustee wrote to all Plan members offering them an opportunity to transfer out of the Plan with an ETV. The Trustee also offered to pay Mr H's fees for financial advice with its preferred financial adviser (**the Adviser**).
5. On 15 January 2017, Mr H wrote to the Trustee saying that he had been diagnosed with Stage four throat cancer which prevented him from working. Mr H requested a cash equivalent transfer value (**CETV**) of his entitlement, queried whether any widow's benefit was payable and whether he could apply for immediate payment of his Plan pension.
6. On 27 January 2017, the Trustee wrote to all Plan members saying that all ETV quotes would be issued one month later than planned, at the end of February 2017.

The Trustee also said that the ETV exercise was optional and that transferring an entitlement out of the Plan was an irrevocable decision.

7. On 30 January 2017, the Trustee wrote to Mr H and its response to his queries is summarised below:-
  - Provisional workings for Mr H's CETV were with the Plan's Actuary for calculation.
  - The Trustee said it could consider an application for serious ill health retirement if Mr H supplied reports from his medical specialists and it enclosed the relevant forms for Mr H to complete.
  - In the event of Mr H's death, Mrs H would be entitled to a widow's pension calculated based on 50% of his entitlement.
  - Mr H would receive his ETV quote shortly.
8. On 24 February 2017, Mr H received his ETV quote. The ETV quote included an information booklet (**the Booklet**) that stated the terms and conditions of the ETV exercise. The Booklet said that:-

“If you accept the offer, you will have a two-week cooling-off period during which you can change your mind. This period starts on the date we receive your Offer Acceptance Form. After the cooling-off period ends, your benefits will be transferred to the alternative arrangement as soon as possible.[ there would be a “two-week cooling-off period during which you can change your mind”].
9. On 13 March 2017, Mr H telephoned the Adviser to make an appointment to receive financial advice.
10. On 14 April 2017, Mr H had a telephone consultation with the Adviser about his intention to transfer out of the Plan.
11. On 21 April 2017, the Trustee sent Mr H a retirement quote as at 1 May 2017.
12. On 19 May 2017, Aon Hewitt, the Plan Administrator, received confirmation from LEBC that Mr H had received financial advice. Aon Hewitt also received Mr H's signed transfer paperwork and the cooling off period started.
13. On 23 May 2017, the provider that Mr H intended to transfer to, Aviva, wrote to the Trustee requesting payment of the ETV. Mr H died later the same day.
14. On 2 June 2017, the cooling-off period ended.
15. On 7 July 2017, Mrs H emailed Aon Hewitt to query whether the transfer could still proceed in spite of Mr H's death.
16. On 6 September 2017, the Trustee wrote to Mrs H saying that it had sought legal advice and the ETV payment could not be made after Mr H's death. The Trustee also said that Mrs H was entitled to a widow's pension from the Plan.

17. On 20 September 2017, Mrs H complained to the Trustee via the Plan's internal dispute resolution procedure (**IDRP**). Mrs H said that she had waited nearly nine weeks for a reply to her July email and she did not understand why the Trustee refused to pay the ETV. Mrs H also said she did not consider it reasonable for the Trustee to only offer her a widow's pension as Mr H had completed the necessary steps in order to transfer his Plan entitlement prior to his death.
18. On 6 October 2017, in response to a query from Mrs H, Aviva wrote to her saying that it was notified of Mr H's death on 8 June 2017 and that it could not now accept the ETV payment. Aviva said that:-
- "A contract cannot be formed without consideration (i.e. in this case the payment/ transfer) unless it is made by deed, so if there is no consideration there cannot be a contract. As there was no consideration and no contract (because the monies were never transferred) we cannot accept the transfer now."
19. On 27 October 2017, the Trustee provided its response to Mrs H's complaint under the Plan's single-stage IDRP. The Trustee's response is summarised below:-
- The transfer was not complete at the date of Mr H's death. In accordance with the terms stated in the Booklet, acceptance of the ETV offer was subject to the cooling-off period. Payment of the ETV could not be made until after the cooling-off period ended on 2 June 2017.
  - In accordance with the Plan Rules, the Trustee could not pay the transfer to Mrs H directly or to any pension provider.
  - Aon Hewitt acted promptly in dealing with Mr H's transfer.
  - Mrs H was only entitled to receive a widow's pension from the Plan of £4,496.28 a year.
20. Mrs H referred her complaint to us in July 2018. Mrs H maintained that the Trustee should pay the transfer to another pension provider and Mrs H also said that:-
- Mr H met all the conditions to transfer his Plan entitlement.
  - The cooling-off period was not written into the Plan Rules. The purpose of a cooling-off period was to provide protection to Plan members and the Trustee could not rely upon it to refuse the transfer.
  - The cooling-off period only started after all parties had fulfilled their "contractual obligations" and payment of the ETV became binding and enforceable at that point.
21. In response to the complaint made against it, the Trustee provided a further response to us in December 2018 and its response is summarised below:-

- The Trustee acknowledged that the cooling-off period was not written into the Plan Rules. However, it was a condition of the ETV offer in accordance with industry guidance on incentive exercises and good practice. Mr H was notified of this condition in advance of accepting the ETV offer and it was not in the interest of Plan members for the Trustee to waive this condition.
- Aon Hewitt acted promptly in administering Mr H's transfer and requested the disinvestment of his Additional Voluntary Contribution (**AVC**) the same day it received Mr H's discharge forms. Even if the cooling-off period had not applied, there was insufficient time for the transfer to be paid before Mr H's death.
- The Trustee informed Mr H that serious ill health retirement might be an option and Mr H's final decision was to accept the ETV offer. The Trustee had no knowledge that the transfer request was extremely urgent and "there was no reason for the Trustee to believe that Mr H's death was sufficiently imminent that they should proactively consider waiving the cooling-off period".
- Aviva confirmed to Aon Hewitt and Mr H's financial adviser that it would not accept the ETV after his death. The Trustee cannot force Aviva to accept the transfer payment and there was no prospect of the transfer proceeding.

## **Adjudicator's Opinion**

22. Mrs H's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised below:-

- The Adjudicator appreciated that Mr H's death caused Mrs H a great deal of distress and re-visiting events in pursuing her complaint has been difficult. The Adjudicator also empathised with the situation in which Mrs H finds herself. However, the Trustee cannot pay out the ETV after Mr H's death.
- Mr H's death frustrated the contract agreed between him and the Trustee. Although the cooling-off period is not included in the Plan Rules, it was a condition of the ETV offer that must be fulfilled before payment of the ETV was made. The terms and conditions of the ETV exercise were adequately explained in the Booklet. Mrs H is correct that a transfer out of the Plan would be "irrevocable" but only in situations where all other conditions were met and payment of the ETV was already made.
- Mr H had advanced cancer and notified the Trustee of that diagnosis. However, Mr H also decided to discontinue treatment with the National Health Service (**NHS**) for personal reasons. None of the parties (including Mr H) were aware of his future prognosis. Consequently, the Trustee could not reasonably have foreseen that Mr H would die before the end of the cooling-off period based on the facts.

- The sequence of events is not disputed by either party. In the circumstances, the Adjudicator was of the view that the Trustee dealt with all of Mr H's requests promptly and was not responsible for delaying the transfer of his Plan entitlement. Mrs H believes that the Trustee should honour Mr H's application to transfer out of the Plan and that she considers this would offer her more financial security in future. However, the Trustee can only pay Mrs H a widow's pension in accordance with the Trust Deed and Rules.

23. Mrs H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs H provided her further comments which do not change the outcome. Except as clarified below, I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs H for completeness.

### **Ombudsman's decision**

24. Mrs H maintains that Mr H's death did not frustrate the contract between him and the Trustee. Mrs H says that the discharge forms did not provide for the contract's termination in the event of Mr H's death during the cooling-off period. Mrs H says that it is inappropriate for the Trustee to use the cooling-off period as a justification not to pay the ETV.

25. Although not part of the Plan Rules, the cooling-off period was stated and explained in the Booklet as part of the ETV offer. As the Adjudicator noted, it was an integral term of the offer that Mr H accepted. I appreciate that Mrs H disagrees with the Trustee's implementation of a cooling-off period. However, the inclusion of a cooling-off period is recommended as industry good practice during incentive exercises, such as an ETV offer, and I do not consider it to be inappropriate in the circumstances.

26. Mr H surviving the cooling-off period is not an explicit element of the contract, as Mrs H notes. I accept that Mr H had done all that was necessary to accept the offer of the enhanced CETV prior to his death. However, the cooling off period did not itself create a delay which caused the transfer not to proceed. I am satisfied on the facts, that Mr H died before the transfer could have been processed even if there had been no cooling off period.

27. Ultimately, the reason the transfer could not proceed was because Aviva refused to accept the ETV payment after it learnt of Mr H's death. I agree that the Trustee could not force Aviva to accept the transfer and it had no discretion to pay it to Mrs H directly, or to any other Scheme. Consequently, and in accordance with the Trust Deed and Rules, Mrs H is only entitled to a spouse's pension from the Plan.

28. Mrs H also says that her husband's intentions were "extremely clear and conclusive from the very beginning". She considers there to be significant delays that the Trustee, Aviva and the Adviser should have eliminated in view of Mr H's poor health. She also says that Aviva had no legal basis for refusing to accept the transfer.

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29. Neither Aviva nor the Adviser are parties to the complaint. Consequently, their actions are outside my jurisdiction and I shall not comment on them further. Specifically, I make no finding about Aviva's reason for refusing to accept the transfer.
30. I have considered the Trustee's conduct and whether it was timely. I do not agree that the Trustee delayed Mr H's application for an ETV. In his January 2017 letter, Mr H requested a CETV quote, an early retirement estimate, and submitted the ill health questionnaire before later deciding to accept the ETV offer. Within the context of the Trustee conducting a Plan-wide ETV exercise, Mr H's queries were answered in a timely and comprehensive fashion.
31. Discussions about Mr H applying for ill health retirement were also ongoing as late as April 2017. Consequently, it was not clear from the outset that Mr H would accept the ETV offer. I appreciate why Mrs H believes that Mr H's choice not to continue NHS treatment is private and irrelevant to her complaint. I also acknowledge that Mr H notified the Trustee of a severe cancer diagnosis. However, I find that Mr H's circumstances and choices are material to the complaint. Mr H was not aware, and so could not advise the Trustee, that his cancer was terminal. All parties were unaware of how ill Mr H was at the time he submitted discharge forms to the Trustee. I agree with the Adjudicator's view that it was not foreseeable that Mr H would die before the transfer could be completed.
32. I empathise with the situation in which Mrs H finds herself. However, her entitlement can only be determined in accordance with the Plan Trust Deed and Rules. Consequently, Mrs H is only entitled to receive a spouse's pension from the Plan.
33. I do not uphold Mrs H's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
5 November 2019