PO-20485

Ombudsman's Determination

Applicant	Mr K
Scheme	Deloitte UK Pension Scheme (**the Scheme**)
Respondent	D&T Pension Trustees Limited (**the Trustee**)

Outcome

1. Mr K's complaint against the Trustee is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) the Trustee should pay Mr K, £500 for the significant distress and inconvenience this situation has caused him.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr K's complaint concerns the Trustee's decision not to increase his deferred benefits by 50%.

Background information, including submissions from the parties

4. In May 2012, approximately six months prior to Mr K's normal retirement date (**NRD**), which was his 65th birthday, the Scheme's Administrator (**the Administrator**) sent Mr K a retirement benefits statement, showing the benefits he could receive at age 65. In response, Mr K asked the Administrator if he could defer taking his benefits.

5. On 21 June 2012, Mr K wrote to the Administrator and said:

   > "I do not intend to retire from my present employment when I reach 65 in November, but to continue to work as a company director for an (as yet) indeterminate period. Is it possible to defer payment for my…pension and, if so, what are the implications?...

6. On 27 June 2012, the Administrator wrote to Mr K and informed him that:

   > "…it is possible for you to defer taking your benefits from the Scheme after your normal retirement date. A late retirement factor would be

> applied to your benefit which is determined by how many months and years past your normal retirement you take retirement."

The letter also provided details of the late retirement factors and showed that if Mr K deferred taking his pension for five years, his benefits would increase by 50%.

7. Consequently, Mr K deferred taking his pension.

8. In June 2017, Mr K decided to claim his deferred benefits. He was informed that the late retirement factor that would be applied to his benefits was 41% and not 50%. Disappointed with the percentage increase, Mr K complained to the Scheme through its internal dispute resolution procedure (**IDRP**). It was his view that, he was offered and had accepted pension figures, which formed a contractual agreement. He also complained that since June 2012, he was never informed of the possibility that the late retirement factors could be changed.

9. In the IDRP stage one response, dated 10 October 2017, the Trustee did not uphold Mr K's complaint. It explained that the benefits statement he had received in May 2012, informed him that the figures were only estimates and not guaranteed. The Trustees also said:

> "On 27 June 2012 [the Administrator] issued a letter to you which quoted the late retirement factors in force at that time. Whilst the letter may not explicitly quote that the factors are subject to regular review and change, neither does it say that the factors are guaranteed."

10. Dissatisfied with the IDRP one decision, Mr K appealed through stage two of the Scheme's IDRP. In the IDRP stage two decision, dated 1 December 2017, the Trustee said:

> "while the letter dated 27 June 2012 sent to you describing the late retirement factors did not include any caveats, it was sent to you in the context of the retirement benefits statement sent to you in May 2012 (as a result of your query on it dated 21 June 2012). The Trustee considers that the letter dated 27 June 2012 should be read in light of the Notes in the retirement benefits statement, which state that the numbers are estimates for information only and subject to review before payment; and
>
> the Trustee is only able to pay benefits in accordance with the trust deed and rules of the Scheme…In accordance with the rules, the Trustee has updated the late retirement factors from time to time acting on actuarial advice. It can only pay you a late retirement pension which is calculated using these revised actuarial factors."

11. The Trustee also said that it had provided Mr K with all the communication it was legally obliged to provide and, that it was under no legal duty to inform Mr K, when it revised the Scheme's actuarial factors, as it is not normal market practice to communicate factor changes to members. Consequently, the Trustee did not uphold Mr K's complaint.

12. Unhappy with the IDRP decisions, Mr K referred his complaint to us. As well as explaining the background that led to his complaint, Mr K made the following points:-

- When he made enquiries concerning deferring his pension, he was provided with a table showing the rates of increase. This informed him that if he deferred taking his benefits for five years, its value would increase by 50%.

- When he decided to take his benefits in 2017, he was informed that the increase to his deferred benefits would only be 41%. At no time, prior to 2017, was he informed that the Trustee could unilaterally, materially change the terms of what it had offered and which he subsequently accepted.

- If he had been informed that the late retirement factors were not guaranteed, he may still have deferred but not for five years, as he is a cautious individual.

- He recognises that the Trustee had offered to put him back in the financial position he would have been in if he had drawn his pension in 2012. However, this would have involved payment of a lump sum of pension arrears and he was advised that he would be required to pay tax on that sum.

- As the payment would have been for over five years' worth of pension, it would have been liable to tax at the higher rate in the year of receipt. Consequently, he would not have been in the same financial position as he would have been, had he taken his pension (and paid no or basic rate tax) when he reached his NRD.

- The offer did not consider the enhanced investment value of the money over the past six years or the fact that he believed he had a written agreement which guaranteed a 50% uplift.

13. In response to Mr K's complaint, the Trustee maintained the view of its IDRP decisions and made the following comments: -

- Mr K said that he was unable to make an informed decision in respect of his pension benefits. Consequently, the Trustee offered to pay him his benefits, calculated as if he had taken them at his NRD, and arrange for arrears of pension to be paid, along with any pension increases that would have been applicable during that time.

- Mr K did not accept that offer and has since transferred his benefits from the Scheme. The transfer value was calculated using the current technical provision assumptions and, as a late retirement case, deferred valuation was applied up to his NRD and the current late retirement factors were used for the relevant period thereafter, up to the date he transferred.

Adjudicator's Opinion

14. Mr K's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustee. The Adjudicator's findings are summarised below:-

- Following receipt of the 27 June 2012 letter, Mr K decided to defer his pension for five years as the letter informed him that his pension benefits would be increased by 50% if he did.

- However, in the Adjudicator's opinion, it was always Mr K's intention to defer taking his benefits because on 21 June 2012 Mr K wrote to the Administrator and said:

  > "I do not intend to retire from my present employment when I reach 65 in November but to continue to work as a company director for an (as yet) indeterminate period. Is it possible to defer payment for my…pension and, if so, what are the implications?..."

- Therefore, Mr K had the benefit of an income from his employment while his pension continued to increase as a result of his decision to defer. Further, although Mr K deferred his pension for five years, he had the option of taking the benefits earlier if he wished to.

- Mr K had no way of knowing if, or when, the factors might have changed. Therefore, whenever he might have taken his benefits during the five years, it was always possible that the late retirement factors would have been different to what was set out on the table in the 27 June 2012 letter.

- In the Adjudicator's opinion, Mr K suffered a loss of expectation and not an actual financial loss. This is because, by deferring his pension for five years, Mr K's pension had increased in value but not to the level that he was expecting.

- The Trustee must administer the Scheme in accordance with the Trust Deed and Rules (**the Rules**). The Adjudicator appreciated that the June 2012 letter did not include a caveat that the late retirement factors were not guaranteed. However, the Rules in effect state that a late retirement increase is at a rate to be decided by the Trustee on advice from the Scheme's actuary. Therefore, the level of the increase is at the discretion of the Trustee. In the Adjudicator's opinion, a change in the increase for someone who is yet to draw their pension is not a change to an accrued right.

- The Adjudicator accepted that the June 2012 letter did not explicitly say that the late retirement factors were likely to change. However, the letter equally did not guarantee that Mr K would receive those factors when he came to retirement, at whatever age he decided. In the Adjudicator's opinion, the information contained in the letter did not form a binding contract between Mr K and the Scheme.

- It was the Adjudicator's view, that there had been no maladministration by the Trustee because the factors that were in force at Mr K's retirement date were applied to calculate the transfer value of his benefits.

- The Adjudicator accepted that the Trustee did not inform Mr K that the late retirement factors had changed, prior to him applying for his benefits. However, it is common practice for schemes to review their late retirement factors on a regular basis and, there is no legal requirement to communicate these reviews to members who had not yet retired.

- It was the Adjudicator's opinion that, the letter sent to Mr K in June 2012 should have included the caveat that, the factors quoted were not guaranteed and might be amended in the future. It was the Adjudicator's view that finding out five years later, that his deferred benefits would be increased by a lower percentage than he was initially informed it would be increased by, would have caused Mr K significant distress and inconvenience.

- Therefore, the Adjudicator believed that the Trustee should compensate Mr K for this.

- The Adjudicator appreciated that Mr K had transferred his benefits. Therefore, any offer the Trustee made to backdate his pension to 2012, was no longer applicable. However, the Adjudicator thought it was worth noting that it was her view that the Trustee's offer to backdate Mr K's pension to 2012 by paying him a lump sum was not unreasonable.

- The Adjudicator accepted that if Mr K had accepted the offer, he would have been liable to pay income tax in the year he received the lump sum. However, the Adjudicator also believed it would not have been unreasonable for the Trustee to have offered to pay any excess tax that Mr K would have had to pay on the lump sum.

- Mr K did not accept the Adjudicator's Opinion, and this led to further correspondence between us, Mr K and the Trustee. Mr K remained dissatisfied that the late retirement factors had reduced, and he requested that his complaint was referred to me for a final, binding decision.

15. In referring his complaint to me, Mr K made the following points:

- Members who had deferred within the preceding 12 months would have known the enhancements were under review as the Trustee had changed its standard paperwork to expressly tell them. Therefore, those members had the chance to make an informed decision on whether to claim their pensions at the 'old' enhancement rates, or to continue to defer and be subject to the 'reduced' rate.

- He, on the other hand, was not given the same opportunity and remained under the misapprehension that his enhancement rates were as per the June 2012 letter. He was not given the same information and opportunities as some if not all deferred pensioners. As a result, he never had the chance to consider and make decisions that would have been in his financial interest.

- He is a cautious person and had he known in December 2015, that if he did not claim his pension immediately, his pension would be enhanced by a lower rate, he would have claimed his pension in December 2015.

- The Adjudicator does not think that he has suffered a financial loss and therefore he is only entitled to £500 for the distress and inconvenience he has experienced. However, he disagrees.

- Between 2012 and 2017, he and his wife made a number of life changing financial decisions about their future, based on what they believed his Scheme benefits would be, as this was by far the biggest contributor to their future income. These decisions including retiring from work early and the winding down and closure of his business.

- Even if he accepted that the reduction of future pension payments was a loss of expectation and not a financial loss, it is still the case that he is in a worse financial position, than he would have been, had the Trustee done its job correctly.

- He feels very aggrieved by how the Trustee has treated him. He does not think he has done anything wrong throughout this situation, apart from perhaps being too naïve and trusting, but he is the one who is paying the price.

16. Having considered Mr K's complaint, I agree with the Adjudicator's Opinion. I will therefore only respond to the key points made by Mr K for completeness.

Ombudsman's decision

17. There is no dispute that Mr K intended to defer taking his pension, prior to receipt of the June 2012 letter from the Administrator. I say this because, it was in response to his query concerning deferment that the Administrator had sent him the June 2012 letter.

18. I appreciate Mr K is disappointed that although he had deferred his pension for five years, his deferred benefits were increased by 41% and not 50%. However, this does not mean that Mr K is entitled to a higher percentage increase on his deferred benefits, than what he received.

19. The Trustee has a duty to administer the Scheme in accordance with the Rules that govern it. In this case, the Rules allow the Trustee to amend the late retirement factors, following advice from the Scheme's actuary. It is unfortunate that, on this

occasion, the amendment resulted in a lower percentage increase being applied to deferred benefits.

20. Although the percentage increase applicable to deferred benefits was reduced, when Mr K transferred his benefits from the Scheme, he received the benefits he was entitled to. Therefore, I find that Mr K suffered a loss of expectation and not a financial loss.

21. I have reviewed the letter that Mr K received in June 2012. It stated that 'a late retirement factor would be applied to your benefit which is determined by how many months and years past your normal retirement you take retirement. The late retirement factors are as follows.' It then set out a table with years late in column 1 and percentage of pension payable in column 2. I accept that the letter needs to be read in the context of the previous benefit statement, that it was intended as an expression of the scheme rules and did not create a binding contract between Mr K and the Trustees. However, it was not an accurate explanation. At IDRP 2 the Trustees explained that 'the letter went on to state what the late retirement factors were *at the time*' [my emphasis]. However the letter did not include the words 'at the time', and I can well see how the reader could come away with the impression that the percentages were fixed in the rules.

22. I have therefore considered carefully what Mr K has said about his reliance on the letter of 12 June 2012 and whether he would have done anything different if the percentage table had been prefaced by the words 'at the present time.' I cannot conclude, on the balance of probabilities, that he would. He has said that he would have deferred anyway. The issue comes down to how long for. He has recently said that he would have claimed the pension in 2015 with a 27% increase under the old factors. However, that timing is predicated on knowing when the factors were going to change and the Trustees were under no obligation to notify members when that was about to happen. Therefore, I do not consider that it would have been possible to optimise the timing in that way. In any event there is no evidence from which I can conclude whether the benefit payable from 2015 with a 27% increase would, ultimately, prove to be more or less valuable than the one which was payable in 2017 with a 41% increase. I appreciate that finding out in 2017, that the late retirement factors had changed would have caused Mr K significant distress and inconvenience. Consequently, it is my view that he should be compensated for the non-financial injustice he has incurred.

23. Therefore, I partly uphold Mr K's complaint.

Directions

24. Within 28 days of the date of this Determination, the Trustee shall pay Mr K £500 for the significant distress and inconvenience this situation has caused him.

Karen Johnston

Deputy Pensions Ombudsman
22 March 2019