

## Ombudsman's Determination

Applicant	Mr N
Scheme	TT Group (1993) Pension Scheme ( <b>the Scheme</b> )
Respondents	TTG Pension Trustees Limited ( <b>the Trustee</b> )

## Outcome

1. I partly uphold this complaint against the Trustee. To put matters right, for the part upheld, the Trustee shall pay Mr N £500 in recognition of the significant distress and inconvenience caused to him.

## Complaint summary

2. Mr N maintains that the Trustee misinformed him about his entitlement under the Scheme. The Trustee paid a pension to him for over two years before the Trustee discovered that it had been transferred out many years previously. He allegedly relied on the misinformation to his financial detriment, to the extent that he ceased trading as Chaseside Limited. The Trustee has now suspended his pension and is seeking to recover the overpayment with interest.

## Background information, including submissions from the parties

3. Mr N joined the AB Electronic Products Group Retirement Benefit Plan (**the AB Plan**) on 1 January 1986, and became a deferred member on 31 March 1989, when he ceased employment.
4. On 25 June 1990, Mr N made an application to transfer his defined benefits, which amounted to £5,482, to a personal pension arrangement with Equitable Life. The relevant transfer form was signed by Mr N.
5. Equitable Life confirmed it received two payments totalling £5,482 on 17 December 1990, which was allocated to Mr N's personal pension.
6. TT Electronics Plc (TT) acquired AB Electronic Products Group Plc and its various subsidiaries in 1992. The AB Plan merged with the Scheme in 2007.

7. Mercer were appointed as administrators of the Scheme in 2005. The records inherited by Mercer wrongly indicated that Mr N had pension benefits retained in the Scheme.
8. On 17 February 2010, based on the erroneous records, Mercer provided a benefit statement to Mr N setting out his entitlement under the Scheme.
9. From March 2011 onwards, Mr N actively pursued Mercer for quotations and clarity on his normal retirement date in the Scheme and information on the Scheme's funding position.
10. At no stage did Mr N inform, or make Mercer aware, that he had in fact transferred out his benefits.
11. Mercer wrote to Mr N on 10 October 2012, and said:

“...we have fully reviewed your benefits in the scheme and can therefore now enclose a retirement benefits statement showing the benefits available to you as at your Normal Retirement Date, based on the information that is currently held on our records. This statement is based on the information currently held by the administrator of the scheme and is produced for information only. It is not proof of entitlement and confers no right to benefits. All benefits must be calculated and paid only in accordance with the trust deed and rules of the scheme and UK and European law and are therefore subject to review before payment.”
12. On 3 July 2013, Mercer wrote to Mr N and confirmed that arrangements had been made to pay him a pension of £10,679.52 a year with effect from 12 July 2013.
13. On 12 July 2013, Mercer commenced paying Mr N retirement benefits from the Scheme and continued to do so until 1 February 2016 when, following a bulk reconciliation exercise (the Reconciliation), conducted with HM Revenue & Customs (HMRC), it came to light that Mr N had no entitlement under the Scheme.
14. In December 2015, Mercer wrote to Mr N concerning the outcome of the Reconciliation. Mercer said that on reviewing Mr N's file, it had identified that he was receiving benefits that he was not entitled to. Mercer stated that HMRC had confirmed his benefits had been transferred to Equitable Life. Consequently, he should never have received a pension from the Scheme.
15. Mercer said that Mr N's pension of £11,146.44 per annum would therefore cease with effect from 1 February 2016. Mercer explained that, where an overpayment had been made, the Trustee had a duty to recover it. Mercer said that it would write separately in due course regarding the overpayment.
16. On 11 January 2016, Mr N replied to Mercer setting out the chronology of correspondence and contact between himself and Mercer since 2010. Mr N requested the name of the trustee, and the employee at HMRC who carried out the Reconciliation. He asked for evidence that the Trustee was permitted to access his

HMRC records and for a complete copy of his file, including all correspondence relating to the Reconciliation.

17. On 20 January 2016, Mercer requested the following from Mr N:

"In order that we may investigate this further I would be grateful if you could confirm if you do or did hold any pension benefits with Equitable Life. If so, please could you please [sic] complete and return the attached form which would enable us to contact Equitable Life with regards to your policy."

18. Mr N did not assist with providing the requested authority to the Trustee.

19. Consequently, the Trustee made an application to the High Court (the Proceedings), and secured an order requiring Equitable Life to disclose details of any transfer of pension benefits from the AB Plan to Equitable Life for the benefit of Mr N. This resulted in an affidavit from Equitable Life with supporting evidence confirming that on 17 December 1990, it received a total of £5,482.

20. On 10 April 2017, Mr N invoked stage 1 of the Scheme's internal dispute resolution procedure (**IDRP**) requesting that his pension be reinstated. The Trustee provided its stage 1 decision on 26 June 2017, rejecting his request.

21. On 30 January 2018, Mr N invoked stage 2 of the IDRP appealing the stage 1 decision. He said that the Scheme had broken the terms of the contract it had made with the AB Plan to pay him a pension.

22. Mr N said that the Scheme was poorly governed causing the current situation to arise. He argued that the Trustee and Mercer had, over a period of five years, made clear statements that they would pay him a pension, which they stopped after two years. He had relied on this information to plan his retirement and therefore the equitable defence of estoppel should apply.

23. In rejecting his appeal on 18 April 2018, the Trustee said that it had received credible information from HMRC that he transferred out his accrued benefits to Equitable Life, and therefore, had no such entitlement.

24. The Trustee highlighted that the documentation disclosed by Equitable Life, showed that he transferred his benefits out of the AB Plan in 1990. Therefore, any records "indicating that [he] retained a continuing right to receive benefits were clearly erroneous", as the Scheme had no liability to pay him a pension.

25. However, the Trustee acknowledged that Mercer made statements to Mr N concerning what Mercer assumed at the time were his projected benefits in the Scheme. The Trustee explained that these statements were made in good faith, based on erroneous historical data passed to Mercer by the Scheme's previous administrators.

26. The Trustee explained that it had a legal obligation to pay out benefits in accordance with the Scheme's Trust Deed and Rules, and under pension law. In relation to "estoppel", the Trustee stated:
- "Estoppel requires that detrimental reliance be demonstrated and evidenced objectively which has not happened; furthermore, as an equitable remedy, the party seeking it must show "clean hands" i.e. that they have acted transparently and in good faith.... estoppel cannot operate to provide you with a windfall of two pensions."
27. The Trustee does not accept that Mr N has suffered the loss that he is claiming. They maintain that an error was made at some historic point in time by the former administrators of the Scheme. The Trustee has since attempted to discover the true position and rectify any inaccuracies in the Scheme data.
28. On 19 April 2018, the Trustee's legal advisers wrote to Mr N and made the following offer, that he:
- repay the sum of £27,948,77 representing the total overpaid pension; and
  - reimburse the Trustee's legal costs of £5,558 incurred in relation to the Proceedings.
29. Mr N was advised that should he accept this offer, a Deed of Settlement would be drawn up to reflect the terms. However, if the offer was not accepted within 21 days from the date of the letter it would automatically be withdrawn, and legal proceedings would be issued. Mr N was provided with a copy of the draft particulars of claim, which included a claim for interest at 8% compounded monthly from 12 July 2013 to 12 April 2018 amounting to £8,843.01 of the total overpaid pension.
30. The Trustee agreed to put these legal proceedings on hold, pending the decision by the Pensions Ombudsman.

### **The Pensions Ombudsman's position on the provision of incorrect information**

31. The basic principle for negligent misstatement (in the absence of any additional legal claim) is that a scheme is not bound to follow incorrect information, for example, retirement quotes, transfer values or early retirement. A member is only entitled to receive the benefits provided for under the scheme rules, that is those based on correct information accurately reflecting the scheme rules.
32. Broadly, the Ombudsman will provide redress if it can be shown that financial loss or non-financial injustice has flowed from incorrect information given. For example, the member may have taken a decision in the expectation of receiving the higher benefits which they would not otherwise have done, such as retiring early. The Ombudsman will also consider whether it is more likely than not that a member relied on the incorrect information to their detriment and that it was reasonable for them to do so.

An example of this is where the member had already decided to take early retirement before receiving the incorrect information. In this case it is unlikely that any claim for financial loss would be upheld on that basis alone.

33. This sets out the Ombudsman's views very generally on the application of, negligent misstatement. It is for guidance only; each case will be decided on its own facts.

### **The Pensions Ombudsman's position on the recovery of overpayments**

34. In general, money paid in error can be recovered, even if the party responsible for the error has been careless. The trustees or managers of a pension scheme can only pay the benefits specified in the scheme rules. However, there are circumstances where the recipient may not be required to repay some or all of the overpayment; those circumstances are where a defence against recovery applies. The Ombudsman will consider whether any defence applies.

### **Adjudicator's Opinion**

35. Mr N'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 parties do not dispute the evidence provided by Equitable Life, which confirmed that Mr N transferred his pension from the AB Plan to a policy with Equitable Life.
  - Mr N says, many years later, he did not recall transferring out and relied upon the information given to him about the pension he would, and did, receive in planning his retirement. The Trustee accept that Mercer incorrectly informed Mr N that he was entitled to pension benefits from the Scheme and then made payments to him to which he was not entitled.

### **Misinformation**

- Mr N says that he relied on the incorrect information he received from Mercer concerning his entitlement when he decided to cease trading and close his business.
- When assessing cases of negligent misstatement, one of the first considerations is whether it was reasonable for the applicant to rely on the misstatement.
- Mr N signed a transfer form and elected to transfer his pension to his Equitable Life policy in 1990. The Trustee has obtained credible evidence from Equitable Life that the transfer payment was made. I appreciate that there was a significant passage of time between the transfer and Mr N being told that he was entitled to benefits in the Scheme. However, given that it is likely that Mr N would have been receiving regular information from Equitable Life about his personal pension, Mr N should have recollected that he had transferred his pension benefits from the AB Plan to Equitable Life.

- Furthermore, TT did not acquire AB Electronic Products Group until 1992, more than two years after Mr N had left the company; the AB Plan did not merge with the Scheme until 2007, some 15 years later. Presumably, Mr N had never received any correspondence about the merger, or had any dealings with TT, the Trustee or Mercer in relation to the Scheme before 2010, when he received the benefit statement. Therefore, Mr N ought reasonably to have been alerted at that point that a mistake had occurred.
- In the view of the Adjudicator, it was unreasonable for Mr N to have relied on the misinformation, as claimed. Consequently, a change of position argument cannot succeed in this case.
- There are certain situations where a member may be compensated because of the misinformation they have received. The term "detrimental reliance" is where a member is worse off than they would have been financially, had the misinformation not been provided. It is applicable in situations where a member has, for example, entered into financial arrangements, which cannot be reversed, in reliance on information that they assumed in good faith was accurate.
- For a detrimental reliance argument to be considered, there must be no suggestion that the individual knew, or ought reasonably to have known, that a mistake had occurred. As mentioned earlier, this does not apply in Mr N's case.
- Mr N requests that his pension be reinstated and that the Trustee is prevented "estopped", from going back on the pension promise. The effect of an estoppel in this scenario would be that the Trustee would be held to comply with the incorrect information provided by Mercer and estopped from 'going back' on the pension payments. For the defence to succeed, Mr N must show that he will suffer detriment if the Trustee is not held to the status quo.
- The requirements for estoppel necessitate that the member demonstrates that the change of position resulted from:
  - an incorrect statement made by the trustees (representation). That is, representation of entitlement and that the applicant was not at fault; or
  - facts or law assumed to be correct by the trustees and the member, but which are incorrect (by convention).
- Broadly, we would be looking for something unequivocal, more akin to a promise or confirmation in response to a specific enquiry, intended to be acted upon, which it would be unconscionable for one of the parties to renege on the agreed assumption where it would be wholly unfair or unjust to do. The case should be viewed as whole.
- It is a high burden for an Applicant to succeed with an estoppel argument and Mr N does not meet that criteria, as he ought to have known that the transfer had taken place.

- Mr N has already benefited from the transfer, as he was granted alternative benefits in his Equitable Life policy in exchange for the transfer payment.
- To allow the Scheme to continue to make pension payments to Mr N, would not only mean that he would be receiving benefits that he reasonably ought to have known from the outset that he was not entitled to but would be unfair on the Scheme and its members.

### **Recovery of overpayment**

- There is no doubt that the action of Mercer, in providing pension statements to Mr N, was maladministration. The fact that some of the statements included disclaimers, does not change this.
- Mr N was provided with negligent misstatements and false assurances over a protracted period that indicated that he had a deferred pension. While the mistake in the Scheme records was the fault of administrators at the time, the Trustee is ultimately responsible for the administration of the Scheme.
- However, in the absence of a valid legal claim, it was right, in the Adjudicator's view, that the Trustee sought to recover the pension overpaid to Mr N as the mistake did not give rise to an entitlement in the Scheme.
- In failing to sign the consent form, to enable Equitable Life to confirm the transfer had taken place, the Trustee has incurred legal fees it would not otherwise have incurred had Mr N provided his authority for the Trustee to obtain the information. In the Adjudicator's view, the Trustee is entitled to seek recovery of those expenses.
- However, any claim for interest would not succeed in this case. It is unreasonable for the Trustee to apply interest, when the overpayment occurred partly because of a mistake by the administrators acting for and on behalf of the Trustee.
- In the Adjudicator's view, Mr N's complaint should be upheld to the extent that the unfair claim for interest would likely have caused him significant distress and inconvenience. Furthermore, the Trustee acted unreasonably by failing to offer a suitable timeframe in which to repay the sums owed. The Trustee has subsequently offered to discuss a repayment plan and the legal fees, but Mr N instead decided to refer his complaint to me for Determination.
- The Ombudsman generally expects that the recovery period should only be set after carefully considering the financial circumstances of the individual; and any recovery period would normally be at least as long as the overpayment period.
- To put things right, it was the view of the Adjudicator that the Trustee should pay Mr N £500 in recognition of the significant distress and inconvenience caused to him.

### **Ombudsman's decision**

36. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N has 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 main points made by Mr N for completeness.

37. Mr N made the following submissions in response to the Opinion, he:

- has challenged whether the transfer out of his benefits was made from the Scheme and not the company. He asserts that if it was made from the company then he must still retain benefits in the Scheme;
- has challenged whether checks were made with HMRC before his pension was erroneously put into payment in 2012, and whether the error could have been identified at this point;
- now disputes that he signed the transfer form requesting a transfer to Equitable Life, and that, as the request for the transfer was received by the company, not the pension scheme, then it is questionable whether the funds were paid by the AB Plan;
- asserts that the transfer form is false as it was altered in a significant way after he signed it, and he was never informed of the changes or agreed to them;
- says that he was never informed by either Equitable Life or Trustees of the AB Plan, that the transfer had taken place and never agreed to it; and
- asks whether it was reasonable for him not to assist the Trustee in obtaining information from Equitable Life.

38. It is unfortunate that Mr N could not have helped facilitate the request for information about his arrangement with Equitable Life, but this was his choice. In the absence of assistance from Mr N, I do not consider it unreasonable that Mercer pursued this through the courts thus incurring the subsequent costs.

39. I am also satisfied that the transfer was made from the AB Plan not the company, so Mr N would not have any benefits retained in the Scheme today. If Mr N now suspects that criminality was involved in the facilitation of this transfer, then that is not something I or my office can assist with. I can only determine as to whether Mr N ought to have known that the transfer to Equitable Life had been made, and he should not therefore have accepted any payment from the Scheme.

40. If Mr N maintains that he did not agree to transfer his benefits, he is entitled to raise this with Equitable Life, but I cannot comment on his likelihood of success, given that a subsequent transfer out of Equitable Life was also made, and it is arguable that any dispute concerning this should be raised at this point.

41. I accept the case note now provided by Mercer as evidence that a check was made with HMRC prior to Mr N's benefits being put into payment. Admittedly, there has



been some confusion as to which government department the check was made with, or whether it was only checked on Mercer's own internal system.

42. The Trustee has provided a telephone number that was used for its checks at the time, and it relates to an HMRC Contracted Out Pension Helpline, not The Department for Work and Pensions (**DWP**), as was stated by Mercer.
43. This is in line with industry practice at the time and confusion between the two government departments does not mean that the check was not conducted.
44. The Trustee further clarified that at the time that Mercer conducted these checks, it would class this activity as liaising with DWP, and its phone notes state the same, that is the phone call with DWP.
45. In my view the evidence, indicates, on the balance of probability, that a check did take place, and if Mr N is unhappy that an error was made at this point, then I suggest that he take this up with HMRC.
46. Even if a check was not made at this point it would not have excused Mr N from the responsibility to inform the Trustee that he had already transferred out this pension.
47. I note that the Trustee has made a claim for interest on the amount owed, but I agree with the Adjudicator that it is unreasonable for the Trustee to apply interest. This is because the overpayment occurred partly because of a mistake made by the administrators acting for and on behalf of the Trustee but I make no direction on this.
48. Although, Mr N ought to have known that he no longer retained benefits in the Scheme, The Trustee does have to take responsibility for not identifying the error sooner, causing significant confusion and doubt to Mr N.
49. Therefore, I partly uphold Mr N's complaint.

## **Directions**

50. Within 21 days of the date of this Determination, the Trustee shall pay Mr N £500 in recognition of the significant distress and inconvenience caused to him.
51. Also, within 21 days of the date of this Determination the Trustee is to contact Mr N to arrange a repayment plan for the monies owed. I would expect that the recovery period shall only be set after carefully considering the financial circumstances of Mr N; and the recovery period would normally be at least as long as the overpayment period.

**Anthony Arter**

Pensions Ombudsman

15 May 2020