

Ombudsman's Determination

Applicant	Mr R
Scheme	TPT Independent Schools' Pension Scheme (the Scheme)
Respondent	TPT Retirement Solutions Limited (TPT)

Outcome

1. Mr R's complaint against TPT 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, TPT shall continue to apply the 1.33% increase to Mr R's final pensionable salary.

Complaint summary

2. Mr R's complaint concerns the incorrect information he received in October 2014, regarding Added Years Additional Voluntary Contributions (**Added Years AVCs**). He claims that had he received the correct information at the time, he would not have entered into the agreement. So, he would like TPT to honour its original terms.

Background information, including submissions from the parties

1. On 1 January 2005, Mr R joined the Scheme, which was a defined benefit occupational pension scheme.
2. In 2010, Mr R agreed to make additional payments for five years through an Added Years AVCs agreement (**the first Added Years AVCs agreement**).
3. On 9 October 2014, before the first Added Years AVCs agreement ended, Mr R called TPT to ask how much it would cost to purchase an additional two years of service through Added Years AVCs, starting in 2015. TPT responded on 24 October 2014 and said that the cost of purchasing two years' service from age 65 to 67 would be 13.68% of his salary a year, and that this would purchase 3.33% of Mr R's final pensionable salary (**the 2014 Quotation**).
4. In December 2014, Mr R's independent financial advisor (**IFA**) recommended that Mr R opt for the further Added Years AVCs, to make use of the 2014 Quotation's "very generous terms." The IFA then contacted TPT on 16 March 2015 and enquired how Mr R should complete the Added Years AVCs application form. At this point, TPT said that the 2014 Quotation was still valid.

5. On 8 May 2015, Mr R applied for the further Added Years AVCs. The application form contained the following statements:

“I would like to pay 13.68% of my salary as AVCs to buy 2 added years from normal pension age (dependent on your scheme rules). Please note that added years costs are subject to regular actuarial review. The cost of purchasing your added years contract may vary on the advice of the scheme actuary.”

...

“I authorise my employer to deduct the above rate of AVCs from my salary with effect from [10 May 2015].”

6. On 1 June 2015, TPT wrote to Mr R and confirmed that it had received and processed his application for the further Added Years AVCs (**the second Added Years AVCs agreement**). It also said that the first Added Years AVCs agreement had closed and had purchased an additional 2.93% of his final pensionable earnings at age 65.
7. On 21 April 2017, the IFA called TPT to ask about the expected benefits from the second Added Years AVCs agreement and the date at which payments would stop.
8. On 8 May 2017, TPT wrote to Mr R to confirm these details and said that the second Added Years AVCs agreement was running from 20 May 2015 to 20 May 2020. It also said that if Mr R cancelled the contract prior to the end date, the benefits would be prorated.
9. The IFA queried the second Added Years AVCs agreement length and highlighted that this contradicted the 2014 Quotation.
10. On 16 May 2017, TPT responded, saying that it had misunderstood the information provided by its Actuary, which resulted in its providing Mr R with incorrect information. TPT said that, at that point, Mr R had accrued 1.33% of his final pensionable salary under the second Added Years AVCs agreement.
11. On 22 May 2017, Mr R informed TPT that he wished to stop paying the Added Years AVCs from 10 May 2017. As this date had already passed, he said that he would pay for the whole month of May but asked for a prorated refund. Mr R also complained about the following:-
- He had entered into the second Added Years AVCs agreement based on the 2014 Quotation. This said that by paying an additional 6.84% of his salary for two years, he would receive an additional 3.33% of his final pensionable salary.
 - TPT subsequently informed him that he would need to make Added Years AVCs for five years rather than two, in order to purchase two additional years of service.

- He argued that TPT's acceptance of his application created a formally binding contract, based on the terms offered on 24 October 2014.

12. On 13 June 2017, TPT responded and, in summary, said:-

- It was clear that the information provided by the Actuary was used incorrectly when calculating Mr R's Added Years AVCs and the period over which these should have been paid. As a result, TPT incorrectly notified Mr R (in the 2014 Quotation) that by paying an additional 13.68% of earnings for two years, he would receive an additional two years' service.
- It apologised for this error and for the inconvenience caused, but it said that a pension scheme could only pay out the benefits which a member is entitled to under the scheme rules. So, it considered that its error had caused a loss of expectation rather than an actual financial loss.
- It cited the case of *Westminster City Council v Haywood*¹, where it was held that compensation should put the Applicant in the position that they would have been in had they been provided with correct information. It should not put them in the position in which they would have been had the incorrect information been correct.
- Taking this into account, TPT did not agree with Mr R's request of honouring the 2014 Quotation. However, it recognised that it had caused him distress and inconvenience and offered him £500 to recognise this.

13. Mr R did not accept TPT's offer as he believed the error had caused him an actual financial loss, namely, he had planned on having a certain level of income in retirement, which included the Added Years AVCs from the second Added Years AVCs agreement. By providing incorrect information, TPT had given Mr R the impression that he was purchasing more Added Years AVCs than he was entitled to. As he had reached age 67 and was no longer working, he could not make up this loss and so it constituted a "change of position".

14. TPT responded under the Scheme's internal dispute resolution procedure (**IDRP**). In summary, it said:-

- It recognised that Mr R had not received the service he should have received and so it increased its offer to £1,000 for the distress and inconvenience caused.
- The law recognises that no-one should benefit from a mistake. Based on the information provided, it did not accept that Mr R had made irreversible decisions or spending commitments based on the additional income he had been anticipating. It recognised that the 2% difference in Mr R's final pensionable salary was not insignificant. However, it also noted that he had opted to increase the survivor's

pension in order to avoid exceeding his lifetime allowance, which was a risk due to pension benefits held in his other pension schemes.

- It also noted that Mr R stopped paying the Added Years AVCs in May 2017, whereas if he had continued to pay them until he retired on 1 January 2018, he would have mitigated some of the additional lost income he was now claiming.

TPT's position

15. It does not agree that Mr R's application formed a legally binding contract, for the following reasons:-

- The application does not have the wording "one would expect to see in a formal offer document, the quotation was exactly that, a quotation". It also contained the provision about the added years costs being subject to regular actuarial review, and that the cost of purchasing may vary on the advice of the Scheme actuary.
- While the term 'contract' had been used in correspondence, including the Added Years AVC application form completed in May 2015, TPT submitted that this terminology was widely used in the pensions industry and was "not intended to connote a formal legal contract".
- To establish a contract, there is a requirement for certainty which is not present in the Added Years AVCs process, as this is subject to the Trust Deed and Rules of the Scheme. This was governed by trust law, rather than contract law.
- It accepts that it made an error, as it misinterpreted the Actuarial advice it received. However, it maintained that this was a simple calculation error and that it is established law that a beneficiary of a pension scheme should not receive a higher level of benefits than the provisions of the trust provide. If that were the case, typographical errors would be binding, which would be unreasonable.

16. In an attempt to put Mr R into the position he would have been had there been no error, TPT has:-

- Paid the benefits that have been secured by the Added Years AVCs actually paid by him, from age 65 to 67;
- Honoured, at its own expense, the benefits currently in payment, even though the Actuary has confirmed they are higher than they ought to be (this was discovered after a secondary check, post-IDRP); and
- Apologised to Mr R and offered him £1,000 for the distress and inconvenience caused.

17. TPT argues that had Mr R's IFA compared the 2014 Quotation to other Added Years AVCs agreements, it would have been clear that the 2014 Quotation was promising an exceptional return of 12.2% in the first year alone. Considering that the total contributions over five years would see a return of around 4.9%, it would have been

reasonable for the IFA to identify that there was an error, particularly as Mr R had previously paid Added Years AVCs towards the first Added Years AVCs agreement. So, the difference between the two agreements could have alerted the IFA.

Mr R's position

18. TPT's position on the use of 'contract' is unacceptable. If adopted, all communications from TPT could be amended even after they had been acted upon.
19. All four elements required to create a contract are present in this case. The original figure was issued with the proper authority and he acted on this to his detriment. TPT agrees that the offer was made negligently, so it was not the same as a typographical error and he was entitled to an award.
20. TPT should be able to demonstrate that it has a contingency fund to deal with cases of this nature.
21. His contractual obligations were discharged before the error was found; so, contrary to what TPT had said, he had no opportunity to mitigate his loss. If he had known the correct position, he would probably have invested an equivalent amount in stocks and shares to provide an income in his retirement. Alternatively, he would have invested the money in his own account, depending on his IFA's recommendations.
22. TPT's argument that the IFA could have noticed the disparity in returns between the first Added Years AVCs agreement and the 2014 Quotation was irrelevant to the main issue.

Adjudicator's Opinion

23. Mr R's complaint was considered by one of our Adjudicators, who concluded that as it had already offered a £1,000 award, no further action was required by TPT other than to continue applying the 1.33% increase. The Adjudicator's findings are summarised below:-
 - For a contract to exist, there must be an offer, acceptance, consideration, the intention to enter legal actions, and certainty of terms. The 2014 Quotation could be considered as an offer, which specified that the additional two years' service would cost 13.68% of Mr R's salary and would purchase 3.33% of his final pensionable salary. The application for the Added Years AVCs could be seen as an acceptance of this offer. However, the application form contained statements saying that costs would vary, meaning there was no explicit agreement that the specified rate equated to the purchase of 3.33% of Mr R's final pensionable salary. So, the Adjudicator was not satisfied that the 'consideration' or 'certainty of terms' elements were fully established and therefore did not believe that there was a contract.

- The Adjudicator then considered whether a claim for financial loss resulting from the misstatement could succeed. She thought that Mr R had relied on the 2014 Quotation in good faith, and that it was reasonable for him to have done so.
- Mr R argued that had he been provided with correct information, he would not have entered into the second Added Years AVCs agreement. However, he had not provided evidence of the alternative option he would have chosen. Further, the stocks and shares or personal investments that Mr R had mentioned might have provided the same if not less than what he had received from the second Added Years AVC agreement. So, the Adjudicator could not conclude that Mr R had suffered a financial loss in reliance on the 2014 Quotation.
- Even if she had thought that Mr R had suffered a financial loss, Mr R could have mitigated this. For example, he could have invested the benefits received under the second Added Years AVCs agreement in an attempt to make up the shortfall. So, if there had been a financial loss, she took the view that it could not be classed as irreversible.
- Mr R had suffered a loss of expectation but TPT's offer of £1,000 adequately recognised the serious distress and inconvenience this had caused. In addition, although TPT had found that Mr R was not entitled to the 1.33% increase to Mr R's final pensionable salary (as an early retirement factor should have been applied), TPT had agreed to honour this. Insofar as this was over and above Mr R's actual entitlement, this offer was reasonable.

24. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R and TPT provided further comments, which are summarised below.

Mr R's comments

25. A contract had formed because: his application was reliant on the 2014 Quotation, the terms of which did not change; he had paid the two years' payments in accordance with the 2014 Quotation; and, he was unable to change this. He was induced into entering it as a result of the negligent misrepresentation by TPT. So, he is entitled to specific performance of the contract or to damages in lieu.
26. There is a duty of care in tort owed by TPT to him, which TPT has failed to discharge in the circumstances of the case. So, the entitlement to damages arises from contract as well as the "tortious relationship of the parties."
27. He has suffered the following financial losses, which is supported by a report from his IFA dated March 2016:-
- He opted for Individual Protection 2016 as a result of TPT's 2014 Quotation, which meant that he may suffer a loss of £30,719 to £67,581 depending on the benefit crystallisation event. He provided a separate report from 2016 to demonstrate this, which said:

“The third option, which as we agreed is the most sensible way to proceed, is to apply for Individual Protection 2016. This will give you a personalised Lifetime Allowance whilst maintaining your membership of the [the Scheme].

Maintaining your accrual with the [Scheme] until you retire will allow you to continue to build up very valuable benefits from April...

Maintaining your membership of the scheme means you will still receive the benefit of valuable additional pension which is effectively purchased at a very low cost to you given the significant employer contributions continuing to be made as well as the benefit you receive of effective 60% Income Tax relief on the AVCs.”

- Capital cost of purchase of benefits not honoured by TPT: £84,308
- Legal costs in connection with this complaint: £2,400.

TPT's comments

28. It disagrees with Mr R's comments about its owing him a duty of care in tort. It said that while the Trustee has a duty to consider members' interests in trust law, the overriding duty is to administer the Scheme. If there were an overarching duty of care in tort, this would put the Trustee in an impossible position as in certain circumstances it would have to choose either to comply with its trust law obligations or follow a duty of care which could give rise to a breach of trust.
29. The additional comments do not change the outcome. I agree with the Adjudicator's Opinion and will therefore only respond to the main points made by Mr R for completeness.

Ombudsman's decision

30. The requirements for contract formation are: offer and acceptance; consideration; intention to enter legal relations; and, certainty, as set out in *Carlill v Carbolic Smoke Ball Co* (1892) and reaffirmed in *Blue v Ashley* (2017). I do not consider that a contract has been formed in this particular instance.
31. Having looked at the points Mr R has raised, I appreciate why he believes that a binding and enforceable contract has been formed, namely, the 2014 Quotation was issued with the proper authority, which was accepted by him by way of his application on 8 May 2015. He says that this was made solely, and in complete reliance, upon the representations as to the pension to be purchased in the quote. TPT accepted his application without comment, and he paid the required contributions. He argues that his application was supported by full consideration, as his obligations from the

agreement were discharged before the error was found. So, he believes that the parties entered into formal, legal relations.

32. Nevertheless, after reviewing the 2014 Quotation and the application form, it is clear that there was no certainty of terms:-
- The application form contained a clear disclaimer that the costs may vary.
 - There was nothing express on the application form itself stating that by paying 13.68% of Mr R's salary, this would, as a consequence, purchase him exactly 3.33% of his final pensionable salary as a benefit under the Scheme.
 - There was no mention of how long Mr R was expected to pay 13.68% of his salary in order to purchase the two additional years of benefits.
 - The application form did not link the application to the 2014 Quotation, or make express reference to it.
 - Both the percentage and the added years to purchase were input by hand.
33. The 2014 Quotation detailed what the Added Years AVCs would cost and the proposed 'current' value of the additional pension. It included an application form to complete to allow Mr R to apply to make AVCs. So, at this point there was no intention to create legal relations. Instead, this would be considered as an "invitation to treat". TPT had invited Mr R to apply for an Added Years AVC, but any application would be subject to the disclaimer on the application form, which said that AVCs were subject to regular actuarial review and could vary on the advice of the Scheme actuary. As a result, it cannot be argued that a contract was formed. Mr R is only entitled to benefits as prescribed by the Scheme.
34. While I do not find that a contract has been formed, I have also considered whether Mr R has a claim of negligent misstatement under tort law in these circumstances. This is on the basis that TPT had a duty of care to provide Mr R with correct information, it was reasonably foreseeable that Mr R would rely on the 2014 Quotation and TPT breached this duty by providing the incorrect 2014 Quotation. The remedy for this would be damages, namely, to put Mr R back in the position that he would have been in, had he received the correct information. Mr R has put forward an argument for financial loss. In order for such a claim to succeed, Mr R would need to demonstrate that: he relied on the misstatement in good faith; it was reasonable for him to have done so; the direct reliance caused a financial injustice; and, the financial loss is irreversible. I am not satisfied that these criteria have been met.
35. The 2014 Quotation, outlined the terms of the second Added Years AVCs agreement, which the IFA checked in March 2015. Prior to entering into the agreement, Mr R had completed the first Added Years AVCs agreement, which had a term of five years with a lower return. While Mr R could have questioned the difference, the 2014 Quotation was questioned before Mr R submitted his application, so I do not consider that Mr R ought reasonably to have known that the 2014 Quotation was incorrect.

Further, as Mr R was not informed about any changes to the costs involved in purchasing the second Added Years AVCs, it was reasonable for him to rely on the figures quoted in the 2014 Quotation.

36. Where the claim for financial loss fails is the direct reliance on the 2014 Quotation and whether these losses are irreversible. Having looked at the advice Mr R received on applying for LTA protection, I am not persuaded that the second Added Years AVCs agreement was the sole reason that he applied for Individual Protection 2016. The advice clearly emphasises the benefits of continuing as a member of the Scheme because of the employer contributions. As there were other considerations underlying Mr R's decision to apply for Individual Protection 2016, it would be unreasonable to hold TPT responsible for any loss as there is no direct causal link between the detrimental reliance and the misstatement. In addition, while Mr R's AVC payments purchased less than the sum he was expecting, he has not shown precisely what he would have done, had he been provided with the correct information. I accept that he would have followed his IFA's recommendations in this regard. However, without a clear demonstration of another option that had been considered but rejected in favour of the second Added Years AVCs agreement, I am unable to accept, on the balance of probability, that he has experienced an actual financial loss rather than a loss of expectation.
37. Moreover, while errors such as the 2014 Quotation are unacceptable, I must take into account the question of mitigation. If I had been able to identify a financial loss in this instance, there are a number of options that Mr R could have chosen to try and make up the loss. While I appreciate Mr R did not opt for this, he could have continued to pay the Added Years AVCs until 20 May 2020. Alternatively, he could have invested in stocks and shares as he has suggested he might have done, had he known the correct term for the second Added Years AVCs agreement. Consequently, even if a financial loss had been demonstrated, TPT would not be required to cover it.
38. I note Mr R is also arguing that his legal costs should be met TPT as a result of its error. I appreciate he believes that legal advice was required due to the nature of his complaint. However, I cannot see why professional help would have been required to complain to either TPT or to us. So, TPT is not required to cover these costs.
39. During the course of our investigation, TPT identified a further error, namely, that it had not applied an early retirement factor that should have been applied when Mr R ceased paying contributions under the second Added Years AVCs agreement. However, it has offered to continue to meet the additional 1.33% of Mr R's final pensionable salary. Although, Mr R is not actually entitled to this benefit, I consider that it is reasonable for him to receive it given the circumstances.
40. With regard to non-financial injustice, I agree that Mr R has experienced a loss of expectation. TPT could have identified the mistake when Mr R's IFA questioned the 2014 Quotation in March 2015, and it was not until May 2017 that the error was identified. As a result, Mr R has suffered a serious level of distress and

PO-24918

inconvenience. TPT has already offered £1,000 for this, which is in line with my published guidance.

41. Mr R should liaise directly with TPT regarding acceptance of its offer of £1,000 in respect of the distress and inconvenience which he has suffered.
42. I uphold Mr R's complaint in part.

Directions

43. TPT shall continue to apply the 1.33% increase to Mr R's final pensionable salary.

Anthony Arter

Pensions Ombudsman
08 June 2020