

Ombudsman's Determination

Applicant	Mr M
Scheme	Huhtamaki (UK) Pension and Life Assurance Scheme (the Scheme)
Respondent	Huhtamaki (UK) Ltd (Huhtamaki)

Outcome

1. I do not uphold Mr M's complaint and no further action is required by Huhtamaki.

Complaint summary

2. Mr M's complaint is that Huhtamaki, his former employer, acted unfairly by not inviting him to transfer to the Scheme from its non-contributory money purchase scheme, between 1993 and 2003, when other employees were given this option.

Background information, including submissions from the parties

3. In 1983, Mr M was employed by Huhtamaki Ltd, to work in the Production Department (**Production Department**) at its Devizes and Gosport sites, as a shift supervisor and department manager, respectively. He joined the company's non-contributory defined contribution scheme with a third-party provider (**the DC Scheme**).
4. In 1992, Polarcup Limited acquired a company called Sweetheart International Limited (**Sweetheart**) and, from December 1992, the Devizes production site relocated to Gosport. Mr M and about 20 to 30 other production workers (**the Former Devizes Employees**) also moved from Devizes to Gosport, as part of a negotiated relocation package. No trade union representatives were involved.
5. Sweetheart's employees were entitled to join the Scheme, a final salary scheme, then called the Sweetheart International Retirement Benefits Scheme, established on 23 January 1984. On 1 January 1993, Sweetheart changed its name to Polarcup Ltd, and on 1 May 2001, to Huhtamaki. Consequently, the Scheme was renamed the Polarcup (UK) Pension and Life Assurance Scheme on 31 December 1992 and the Huhtamaki (UK) Pension and Life Assurance Scheme from 23 April 2002. In February 2003, the Scheme closed to new members.

6. Mr M claimed that in the relocation negotiations in 1993, which did not involve a trade union, neither he or any of the Former Devizes Employees in the Production Department were offered the opportunity to join the Scheme, in writing or verbally and he remained a member of the DC Scheme until he left Huhtamaki in 2003.
7. In May 2018, Mr M found out that some Former Devizes Employees had been offered the opportunity to transfer from the DC Scheme to the Scheme both, in 1993 when Sweetheart was acquired, and in 2003, before the Scheme was closed to new members. On 28 May 2018, Mr M raised a formal complaint with Huhtamaki because he had not been invited to join the Scheme, unlike other employees.
8. On 8 June 2018, Ms N, on behalf of Huhtamaki, replied that she would investigate his complaint although records might not be available, given the time lag and the legal requirement to destroy documents after six years.
9. On 24 July 2018, Ms N provided Mr M with a copy of an email that an executive at Huhtamaki had sent on 24 February 2003 (**the February 2003 Email**) to “# all Gosport users”, entitled “Final salary pension scheme”. She claimed that this was evidence that Huhtamaki had offered membership of the Scheme to all Former Devizes Employees who were working at Gosport. The February 2003 Email said:

“This is a reminder to anyone not currently in the Huhtamaki pension [Scheme] who received information and an invitation from [Mr W] to join that the closing date is this coming Friday. I confirm for clarity that this invitation does also apply to employees currently in the [DC Scheme]. If you are still considering whether to join or not you will need to take independent [financial] advice as quickly as possible as the deadline cannot be extended beyond Friday.

For employees who’ve applied to join you should have received or will be receiving in the next few days normal membership forms – we must receive these back by return as we need to start deducting the employee contributions at the first appropriate date after 28 February.”
10. On 31 July 2018, Mr M replied that he did not receive the February 2003 Email nor any letter from Mr W inviting him to join the Scheme. He added that the invitation should have been extended to all Former Devizes Employees, including those who used to work in the Production Department as no additional selection criteria applied.
11. On 8 August 2018, Ms N responded that the February 2003 Email showed that all “affected staff” were informed about the option to join the Scheme and Huhtamaki was satisfied that all legal obligations regarding Mr M’s potential membership of the Scheme had been complied with.
12. Dissatisfied with this response, Mr M complained that:-
 - He had not been offered membership of the Scheme in 1993, but he was now aware that at least two Former Devizes Employees who worked in the finance department had joined the Scheme in 2003. He did not know of any Former

Devizes Employees from the Production Department who had been offered membership of the Scheme.

- He did not receive the February 2003 Email. He was on medical sick leave at the time. Huhtamaki could not provide evidence that he was given the opportunity to join the Scheme either in 1993, or before it closed to new members in 2003.
- He would have joined the Scheme when it was initially offered to Former Devizes Employees in 1993 if he had known about it, as it was financially better for him than the DC Scheme. He should be compensated appropriately for a shortfall of about £66,000.

13. In a further response, Huhtamaki confirmed that it did give Mr M an opportunity to join the Scheme with other Former Devizes Employees in 1993 and again in 2003 and explained that:-

- The key information and evidence about employees being invited to join the Scheme was the February 2003 Email.
- Although absence records have been destroyed due to data protection requirements, Huhtamaki believed that Mr M received the February 2003 Email because payroll records showed that his medical leave began on 26 February 2003. So, he was at work when the February 2003 Email was sent on 24 February.
- Huhtamaki also reaffirmed that it was not legally obliged to offer Scheme membership to its employees at the time, only access to a stakeholder scheme. The DC Scheme was very generous, with company contributions, of between 5% and 10% of salary so there was no basis for Mr M to complain. In 2003, Huhtamaki had discussed the closure of the Scheme with existing members but there were no legal requirements to consult more widely.
- Employees had no right to join the Scheme without completing an application form (**Application Form**) and no new members have been admitted since 2003. Huhtamaki did not believe that there was a business case for re-opening the Scheme to allow Mr M to become a member. He was given the opportunity to join the Scheme in 1993 and 2003 but decided not to do so.
- It was also not clear why this issue was not raised at the time.

14. On 17 December 2018, Mr M responded to Huhtamaki's comments, as follows:-

- The February 2003 Email was not evidence that he had received or seen the invitation to join the Scheme, or that he was offered and declined membership of the Scheme.
- The February 2003 Email was a reminder to those who had already received an invitation from Mr W to join the Scheme. He did not receive this invitation, so it did

not apply to him. It appeared that the invitation was only extended to selected employees.

- The February 2003 Email was sent ten years after the initial invitation in 1993. It was not a letter personally addressed to him. The deadline was also 28 February 2003, and he was absent around that time.
- He was not aware of any opportunity to join the Scheme until 2018, so he did not raise a complaint earlier.
- He was not asking to join the Scheme but for financial compensation.

15. In April 2019, Huhtamaki confirmed that there was no right under the Scheme Deed and Rules, dated 9 December 1995 (**the Rules**), for eligible employees to join the Scheme without completing an Application Form and no new members had been admitted since 2003, when the Scheme closed. Extracts from the Scheme Rules are set out in the Appendix.
16. Huhtamaki also confirmed that it did not have a copy of Mr M's employment contract or any other announcements relating to membership of the Scheme, due to the lapse in time. However, it provided copies of Application Forms from seven individuals that it claimed were Former Devizes Employees, based in Gosport, who had joined the Scheme between 19 January 2003 and 26 February 2003. The Application Forms included a box for completion by employees to indicate if they did not want to join the Scheme. It said it did not have any records of those employees who had declined membership but claimed that these forms were evidence that all Former Devizes Employees had been invited to join the Scheme.
17. Huhtamaki added that Mr M was a manager at Gosport and should have received the February 2003 Email inviting him to join the Scheme. Its records showed he was absent on sick leave from 26 February 2003, but he should have had access to it on 24 February 2003. Mr M had left employment with Huhtamaki on 31 December 2003 so under Rule 9 of the Scheme Rules, he would only have been entitled to a return of contributions had he joined the Scheme in February 2003.
18. In July 2019, Huhtamaki provided additional information:-
 - An extract from the minutes of a meeting of Scheme Trustees (**the Trustees**) held in May 2002, to discuss the closure of the Scheme to new members in February 2003. The minutes noted that all employees who were eligible to join the Scheme as at 31 December 2002 and had indicated that they wished to do so by 28 February 2003, would be able to join the Scheme. Huhtamaki claimed that this was inconsistent with Mr M's assertion that the Scheme was only offered to certain employees.
 - An extract from the minutes of a meeting of the Trustees held in February 2003, which noted that a total of 39 new members had joined the Scheme. This included one member from Gosport who had posted his Application Form before the

deadline of 28 February 2003, and Huhtamaki and the Trustees had allowed him to join the Scheme even though they did not receive it in time. Huhtamaki claimed that this showed that all employees were given a fair opportunity to join the Scheme and there was no reason why it would not offer Scheme membership to Mr M and other Former Devizes Employees.

- A signed affidavit dated 6 July 2019 (**the Affidavit**), from a former employee (**the Employee**) who worked at Huhtamaki from 1990 to 2017, as financial controller and then director. He said he was based at Devizes from 1990 to 1995 at the time of the acquisition of Sweetheart, and Gosport from 1995 until 2014. The Employee stated that he was involved in the Sweetheart acquisition negotiations in 1994, and that pensions were a key component in the relocation packages. He stated that all employees relocating from Devizes to Gosport were offered membership of the Scheme during briefing meetings and were advised to take financial advice. The Employee also stated that the “vast majority” of Former Devizes Employees, like himself, had decided to remain in the DC Scheme because it was non-contributory. Huhtamaki claimed that the Affidavit showed that all Former Devizes Employees were offered the opportunity either to join the Scheme or remain in the DC Scheme in 1993 and 2003, before it closed to new members.

19. In response, Mr M submitted the following comments:-

- Huhtamaki had still not provided any evidence that he had been invited to join the Scheme in 1993 or 2003 and Huhtamaki could not provide a copy of his Application Form, where he indicated that he did want to join the Scheme.
- The Affidavit contained inaccuracies. He recalled attending briefing meetings in 1993, but there was no mention of pensions and Huhtamaki had provided no evidence that he attended any meetings about pensions.
- He would have joined the Scheme if he had been invited, even though the DC Scheme was non-contributory. Although the Employee says in the Affidavit that he had personally decided not to join the Scheme, he was in a different financial position to Mr M.
- Even though he had left Huhtamaki in 2003, he would have joined the Scheme at the first opportunity in 1993, if he had known about it. Consequently, he had lost pension benefits from 1993 to 2003.

Adjudicator’s Opinion

20. Mr M’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Huhtamaki.

21. The Adjudicator’s findings are summarised below:-

- In the Adjudicator's opinion, the Scheme Rules provided that Mr M was not automatically entitled to join the Scheme. Eligible employees were required to complete and return an Application Form to the Trustees and he did not do so.
- The Adjudicator found, in respect of employees being invited to join the Scheme in 1993, that there was no definitive documentary evidence from the negotiations at the time of the transfer from Devizes to Gosport. In the Affidavit, the Employee had confirmed that all employees were informed about the option to join the Scheme as part of the relocation negotiations. However, no other evidence was presented by either Huhtamaki or Mr M to prove or disprove this statement.
- With regard to employees invited to join the Scheme in 2003, although Huhtamaki had provided some documentary evidence from 2003, including Application Forms and the February 2003 Email, The Adjudicator believed that it was not proved conclusively that Mr M, or other Former Devizes Employees, had been invited to join the Scheme. But, in the Adjudicator's opinion, there was also no firm evidence that only Former Devizes Employees, who were working in the finance department, were invited to join the Scheme, as Mr M claimed.
- Accordingly, in the Adjudicator's view, the evidence was not clear cut either way. For example, if Mr M was absent, the February 2003 Email should still have been accessible on his computer. Mr M does not say that he was not included in the "all Gosport users" distribution list, just that he did not receive the email. Again, no other evidence has been presented by either Huhtamaki or Mr M on this point.
- The Adjudicator found that there was little firm evidence available due to the passage of time and the destruction of personal records but, on the balance of probability, it was more likely than not that the option to join the Scheme was generally known throughout the workforce in 1993 and 2003.
- The Adjudicator found that even if Mr M had been invited to join the Scheme in 1993, without the benefit of hindsight, there was no firm evidence, on the balance of probability, that he would have joined the Scheme, had he been invited. In the Adjudicator's view, membership of the Scheme might not have been a good proposition for Mr M in 1993 or 2003, as he was already a member of the non-contributory DC Scheme, with high employer contributions.
- In the Adjudicator's view, there was insufficient evidence to conclude that Mr M was not made aware of or invited to join the Scheme in 1993 or 2003 and the complaint should not be upheld.

22. Mr M did not accept the Adjudicator's Opinion and made the following comments:-

- Huhtamaki had provided no evidence that he or any Former Devizes Employee who worked in the Production Department had been invited to join or joined the Scheme in 1993 or 2003.

- Huhtamaki claimed that the February 2003 Email was evidence that it had offered membership of the Scheme to all Former Devizes Employees. However, most of the Former Devizes Employees from the Production Department worked on the shop floor and had no access to emails, making this claim incredible.
- He was on sick leave from 26 February 2003 until 25 April 2003 and had no recollection of receiving the February 2003 Email, which was sent on 24 February 2003. In fact, it did not relate to him as he had not been offered membership of the Scheme by Mr W in 1993. Even if he had received the February 2003 Email, he would have had one day to review it, seek financial advice and complete the forms (which he also never received) by 28 February 2003.
- The Adjudicator should not have given more weight to the Affidavit than his account of what happened, considering the many misrepresentations it contained. The Affidavit stated that Former Devizes Employees were invited to attend briefings regarding pension options and were encouraged to seek independent financial advice. However, there is no evidence of this and it seemed highly improbable that all employees would have elected to stay in a lower benefit pension plan. He would have sought independent advice, which would have led him to the decision to join the Scheme.
- Huhtamaki claimed that it had an obligation to destroy documents after six years but provided Application Forms that were 16 years old to show current and past employees who joined the Scheme in 2003. Yet, it was not able to produce records to show employees who had declined the offer. In addition, only two of the seven Application Forms were from Former Devizes Employees, both of whom worked in the finance department. All others were based at Gosport and were not Former Devizes Employees.
- Furthermore, based on his salary and expenses at the time, he would have elected to pay the necessary contributions (5% of his salary from 1993 to 2003) had he been invited to join the Scheme in 1993. He is also now willing to pay contributions to fund his membership of the Scheme from 1993 to 2003.
- Mr M also provided the following statements (**the Statements**) from Former Devizes Employees who had worked in the Production Department in 1993. He claimed that these confirmed that neither he nor they had been offered membership of the Scheme in 1993 or 2003.
- Employee A provided a sworn Statement. He stated that he was Mr M's direct manager in Devizes in 1993. He was involved in discussions regarding the relocation and would have been aware if any employees in the Production Department had he been offered membership of the Scheme. He himself was not invited to join the Scheme but would have done so, if he had been invited. In 2000, he joined a similar contributory scheme at Huhtamaki, when working in Australia.

- Employee B provided a signed Statement. He stated that he was a trainee printer at the site in Devizes in 1993. He transferred from Devizes to Gosport within the Production Department. He was not offered membership of Scheme in 1993 and did not hear about any other employees in the Production Department being offered membership. The negotiations with management about the relocation concerned salary and not pensions. There was no mention of either joining the Scheme or transferring to it from the DC Scheme. He had received a salary increase following relocation and could have afforded to pay contributions to the Scheme.
- Employee C provided a signed Statement. He stated that he was employed as a mechanical engineer in the Production Department at Devizes in 1993. He was not offered membership of the Scheme at any time and did not hear about any other employees in the Production Department being offered membership. If it had been offered, he would have joined the Scheme.
- Mr D, an independent financial advisor (IFA) provided a Statement. He stated that he had advised clients about joining final salary schemes from 1987 to 2017. He confirmed that it had always been his (and the regulatory) view that a defined benefit scheme was the best option for employees, due to the guarantee of a fixed pension, based on salary and length of employment, rather than potential growth in a money purchase plan. He added that the employer bears the financial risk of providing the pension in a final salary scheme but in a money purchase scheme, the employee bears the risk that investment returns might fail to produce sufficient funds to provide a reasonable pension.

23. In response to Mr M's comments, Huhtamaki confirmed its previous submissions and made the following points:-

- There was no legal obligation at the time to provide any pension for its employees so it did not have to offer Mr M membership of the Scheme.
- It had voluntarily extended membership of the Scheme to employees and made every effort to do so, including waiving deadlines, so there was no reason to believe that it was not offered to Mr M.
- Mr M ceased employment with Huhtamaki on 31 December 2013, so if he had joined the Scheme in 2003, he would only have been entitled to a return of contributions (Rule 9).
- It denied the suggestion that it had not offered Mr M membership of the Scheme because it did not wish to increase costs. It provided copies of financial accounts that showed that it was on a contribution holiday from 1993 until 1999 and, in 2003, even when there was a deficit, employees had been allowed to join the Scheme.

24. Mr M's complaint was passed to me to consider. These further submissions did not change the outcome of the complaint. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr M, for completeness.

Ombudsman's decision

25. I consider that I need to decide the following aspects of this complaint:-

- Did Huhtamaki inform Mr M and other Former Devizes Employees, about the option to join the Scheme in 1993 and 2003?
- If Mr M was not invited to join the Scheme, and other employees were, was this maladministration by Huhtamaki?
- If so, was it likely, on the balance of probabilities, that Mr M would have joined the Scheme in 1993 or 2003, if invited?

26. I note from the submissions from Mr M and Huhtamaki that no substantive documentary evidence has been provided to show what happened in 1993 or 2003. So, I need to weigh up carefully the evidence provided by each of them.

27. With regard to what occurred in 1993, Huhtamaki has not provided any definitive evidence to show that Mr M and other Former Devizes Employees were invited to any briefing meetings to discuss pensions options or invited to join the Scheme during the relocation negotiations. It claimed that there were no records to prove this, due to the passage of time and its main evidence is the Affidavit from the Employee, stating that all Former Devizes Employees, including Mr M, were invited to relocation briefings in 1993 and were informed about the option to join the Scheme.

28. Mr M claimed that there were inaccuracies in the Affidavit. He asserted that the Employee was not working in the Production Department in Devizes in 1993 at the time of the relocation negotiations and provided Statements from Former Devizes Employees in the Production Department disagreeing with the Affidavit. Each employee contended that he was not told about the option to join the Scheme but would have joined, if he had been informed about it. A Statement from Mr M's manager in the Production Department also confirmed that he was not aware of the option to join the Scheme when, as part of management, he would ordinarily have been informed about it.

29. With regard to 2003, Huhtamaki relied on the February 2003 Email as evidence that Mr M and Former Devizes Employees were invited to join the Scheme. However, it also supplied Application Forms from 2003 to show that at least two Former Devizes Employees joined the Scheme. In addition, it provided minutes from a Scheme Trustee meeting showing that a total of 39 employees joined the Scheme in 2003.

30. Mr M claimed that he did not receive the February 2003 Email nor any other communication about the Scheme. He says the two Former Devizes Employees who

joined the Scheme in 2003 worked in the finance department, not the Production Department and were given special invitations. Mr M added that Huhtamaki could not provide a copy of any Application Forms declining membership of the Scheme, so there was no proof that he or other Former Devizes Employees knew about the Scheme and decided not to join it.

31. I accept that it is difficult for Mr M to provide evidence to show that he was not informed about the Scheme. His evidence consists of Statements from other Former Devizes Employees from the Production Department confirming that they were also not informed about the option to join the Scheme in 1993 and 2003.
32. However, I find that there is no clear cut, objective documentary evidence on either side, or a determining factor that is decisive. As the events took place in 1993 and 2003, it is not now possible to decide the matter with any certainty. This is the case, despite the Statements provided by Mr M. For that same reason, the Affidavit provided by Huhtamaki is also not a conclusive factor.
33. There is insufficient evidence for me to find that Huhtamaki did not inform Mr M or other Former Devizes Employees from the Production Department about the option to join the Scheme in 1993 and 2003, and consequently that there was maladministration.
34. Even if I did find there was maladministration, I would have to require Huhtamaki to put Mr M back into the position he would have been in, if he had been invited to join the Scheme. This requires me to consider whether Mr M would have joined the Scheme, if invited, in 1993 or 2003.
35. Despite Mr M's assertions, it is difficult to consider this issue without the benefit of hindsight. Mr M says that if he had been informed about the Scheme, he would have taken financial advice. In addition, he provided a Statement from an IFA who confirmed that a final salary scheme would have been more valuable than the DC Scheme, in 1993. However, I consider that it is by no means certain that a financial advisor would have advised Mr M to join the Scheme in 1993 when he was already a member of a non-contributory defined contribution scheme, with the benefit of 5% to 10% of salary in employer contributions.
36. The risk of underfunding is a problem with final salary schemes that the IFA did not fully consider. Huhtamaki provided accounts showing that the Scheme took a contribution holiday, from 1993 to 2000, but also that there was a funding deficit in 2003, when it closed to new members. This shows that a final salary scheme contains risks for members and, in 1993, these might have been a significant factor when compared to the DC Scheme. Mr M bore the risk of poor investment performance in the DC Scheme, but he had the benefit of building up a fund, without contributing to it.
37. Mr M also claimed that he was financially able to pay contributions to the Scheme, in 1993 and 2003, and is now willing to pay the contributions required to fund his membership of the Scheme from 1993 to 2003. This is a helpful suggestion. However,

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on the balance of probabilities, and on the evidence available, I am unable to find that Mr M would have joined the Scheme in 1993 or indeed in 2003, if he had been invited to do so, instead of remaining in the DC Scheme.

38. Consequently, I do not consider that sufficient evidence has been provided by Mr M to show that Huhtamaki did not inform him about the option to join the Scheme in 1993 or 2003, or that he would have joined the Scheme in place of the DC Scheme, if he had been invited to do so.
39. I do not uphold Mr M's complaint.

Anthony Arter

Pensions Ombudsman
27 November 2019

Appendix

An extract from the Scheme deed and rules dated 23 January 1984

Schedule A

Definitions

Members means...an Eligible Employee who satisfies the conditions for admission to membership...and who (unless the Trustees otherwise determine) completes and submits and in respect of whom the Trustees have accepted an application for membership of the Scheme in such form as shall be determined by the Trustees.

An extract from the Scheme deed and rules dated 19 December 1995

Section 2.1.

Eligibility

Employees who are eligible for membership are all full- time permanent employees who are over the age of 18 and under the age of 60 and have completed 6 months' service with the Employer. Membership of the Scheme shall be optional...

Section 2.3

Application for membership

Every Employee who has the option to join the Scheme and wishes to exercise his option must do so in writing in a form approved by the Trustees...