



Ombudsman's Determination

Applicant	Mr T
Scheme	Aviva Staff Pension Scheme (the Scheme)
Respondent	Trustees of the Aviva Staff Pension Scheme

Complaint summary

1. Mr T has complained that the Trustees have refused to commute all, or part, of his pension for a Tax Free Cash lump sum (**TFCLS**) at age 60, the Scheme's normal retirement age (**NRA**).
2. Mr T has also complained that the Trustees did not respond to his emails or provide information when requested, and as a result, a number of serious issues occurred. He has stated he suffered financial loss as his subsequent transfer was calculated on an incorrect benefit basis and a further transfer payment is required.

Summary of the Ombudsman's preliminary decision and reasons

3. The complaint is upheld against the Trustees because there was sufficient information available to the Trustees to pay Mr T a TFCLS, an option under the Scheme Rules, without prejudicing the ability to meet the cost of the Guaranteed Minimum Pension (**GMP**) at state pension age (**SPA**).

Detailed Determination

Material facts

4. Mr T was a member of the Norwich Union Pension Scheme, with an NRA of 60, which Mr T reached on 30 March 2018.
5. The Scheme Booklet, provided to Mr T when he joined the Norwich Union Pension Scheme, contained the following heading “May I exchange part of my pension for a Tax-Free Cash Sum at Retirement” and set out the following guidance:
 - “You will normally be entitled to ‘commute’ (exchange) part of your pension for a tax-free cash sum”.
 - “This is subject to Inland Revenue limits and is restricted to benefits in excess of GMP”.
 - “Details of the options available will be given to you shortly before you retire to help you to make your decision on commutation”.
6. On 14 October 1994, Mr T ceased to be an active member of the Norwich Union Pension Scheme, and was provided with a deferred benefit statement, which set out the following:
 - “As your Normal Pension Age (NPA) for this Plan is earlier than the SPA, the pension at 65 under present legislation will not be less than £13,603.00 per annum being your entitlement plus the revalued GMP”.
7. In 2002 the Norwich Union Pension Scheme was merged into the Scheme.
8. Mr T stated that he intended to retire at his NRA and take a TFCLS with any residual amount providing a pension.
9. On 1 November 2017, Mr T received an illustration of the benefits payable as at 31 March 2018, the day after his NRA. The illustration detailed a pension of £8,978 but said there would be no TFCLS.
10. On 14 November 2017, Mr T called Aviva querying why the illustration did not include an option for a TFCLS. On the same day Mr T requested a transfer value.
11. On 24 November 2017, Aviva sent Mr T a transfer pack which provided a transfer value guaranteed until 24 February 2018.
12. On 7 December 2017; 11 December 2017; and 12 December 2017, Mr T emailed Aviva complaining that he had been denied the opportunity of taking a TFCLS option at NRA. Mr T was also unhappy that Aviva would not provide confirmation of his benefits due at age 65, and what he perceived as a generally poor level of service.
13. On 15 December 2017, Aviva wrote to Mr T setting out the value of his pension at age 60. It stated that his pension was made up of two elements; a basic pension plus a GMP. A breakdown of both elements of his pension was provided.

14. Aviva stated that there were circumstances where the Scheme Rules prohibited members from converting their pension into a TFCLS. As set out in the 1980 Deed of Variation, Variation No. 5, amending Rule 12(i):

“(i) commutation of any part of the Member’s pension in excess of one quarter or which would cause payments of pension from the State Pensionable Age to be less than the Equivalent Pension benefit plus (where the member has been in Contracted Out Employment) the Guaranteed Minimum Pension increased in the manner prescribed in sub-paragraph (i)(B) or paragraph (c) of Rule (7) shall not be permitted”.
15. Aviva argued that according to Rule 12(i), on retirement, members could only commute part of their pension for a TFCLS if the remaining pension was sufficient to cover the revalued GMP at age 65. This test was applied to all members.
16. In Mr T’s case, at age 60 the residual pension would have been less than the revalued GMP and in accordance with Rule 12(i), he was prohibited from taking a TFCLS.
17. Aviva set out the following alternatives for Mr T to consider:-
 - Deferring his pension to a later age, where currently a late retirement uplift would apply.
 - Transferring his pension benefits to another scheme.
18. On 21 December 2017, Aviva received a signed consent form from Mr T giving it authority to transfer his pension.
19. On 25 January 2018, a transfer payment of £386,116 was made into an alternative SIPP arrangement and invested in the Quilter Investors Cirilium Balanced Portfolio Fund. The cost of the advice was £7,722, leaving a net investment of £378,394.
20. In March 2018, Mr T took a tax free cash payment from the SIPP of £30,000 and an income payment of £10,000.
21. On 5 June 2018, Mr T issued a formal complaint to the Trustees.
22. On 6 July 2018, the Trustees wrote to Mr T under the internal dispute resolution procedure (IDRP).
23. The Trustees confirmed that the Scheme Rules contained a provision that on retirement, members could only commute part of their pension for a TFCLS if the remaining pension was sufficient to cover the revalued GMP. In Mr T’s case it did not.
24. The Trustees also confirmed that whilst the administrator had provided Mr T with correct information as to his rights to a TFCLS, it could have been better explained and offered £500 for any distress and inconvenience this had caused.
25. On 11 July 2018, Mr T wrote to the Trustees again. He stated that it had failed to respond to his complaint in accordance with its own IDRP process. Mr T requested a

formal response direct from the Trustees confirming their decision regarding his complaint.

26. On 2 August 2018, the Trustees wrote to Mr T confirming that the decision was based on the Scheme Rules and copies of the 1980 Deed of Variation were provided to him. The Trustees confirmed it could only pay benefits in accordance with the Scheme Rules, and therefore it was unable to uphold this part of Mr T's complaint.
27. On 7 August 2018, Mr T made a further complaint stating that the Trustees had failed to address his concerns or provide specific reference to the Scheme Rules which supported its decision not to allow a TFCLS. He reserved his right to take his complaint further.
28. On 16 August 2018, the Trustees wrote to Mr T reiterating the position and confirming they had opted for a one stage IDRPs processes as set out in the Pension Regulators guidance, code of practice No.11. The Trustees also confirmed the Rules regarding GMP requirements and contracting out had been a feature of the Scheme since its inception.
29. On 20 August 2018, Mr T wrote a final letter to the Trustees. The Trustees did not provide a response.
30. On 2 April 2019, Mr T took a further income payment from the SIPP of £10,000.
31. As at 15 October 2019, Mr T's pension was valued at £331,302.

Summary of Mr T's position

32. The Trustees have acted in breach of trust by applying the test that the pension equal the revalued GMP at NRD, rather than at SPA. In doing so it has removed his right to a TFCLS.
33. It is agreed that the relevant rule applicable to the complaint is Rule 12, as amended by the 1980 Deed of Variation. The Rule is definitive in setting the test at SPA.
34. There is no legislative requirement that the GMP be met from age 60. The only test required is from SPA. The Ombudsman has previously determined that "The GMP and the so called 'anti-franking' requirements only apply at SPA"¹.
35. The Trustees' legal advisers state:-

"The underlying principle is that at the point the member gets to GMP age there needs to be sufficient pension to meet the GMP (and avoid any top up by the Scheme). Applying this principle, if it is certain that following commutation, at GMP age the member's pension will be sufficient to meet the revalued GMP, this would meet the requirements of the legislation and the Rules."

¹ <https://www.pensions-ombudsman.org.uk/determinations/2007/q00303/the-harwich-international-port-pension-scheme/>

36. Mr T argues that this position supports his view that he ought to have been entitled to take TFCLS from the Scheme.
37. All parties agree that from SPA, the pension will exceed the GMP, but despite this, the Trustees seek to apply the test at NRA. This is not a requirement of the legislation.
38. The pension payable at SPA ought to have been a total of £16,871, made up of the GMP at the point of leaving, £1,514, the revalued pension in excess of GMP, £7,465, and the GMP revaluation, £7,892.
39. The legislation requires that the pension exceed the revalued GMP, which at SPA would have been £9,406. Therefore, the total pension payable, £16,871 would exceed this and allow for some commutation.
40. The Trustees have determined that the benefits payable at NRA were £8,979 per year and paid a transfer value on the basis of benefits at that level. However, the Trustees have subsequently stated that in their view the pension from NRA must be at least £9,406. As a result, the transfer value should be increased to equate to that higher level of benefits payable at NRA. To not pay the correct benefits is a breach of trust.
41. There is no Scheme Rule or legislation that requires the pension at NRA to equal the revalued GMP.
42. The Trustees have wrongly referred to a more recent set of rules which are not relevant to his complaint. The only rule relevant to the complaint is Rule 12(i).
43. A test should be undertaken at NRA, but only to verify that the pension payable at SPA will meet the GMP, not to test the NRA pension against the GMP. If the correct test is applied, then the pension payable at SPA will exceed the GMP and therefore he should be entitled to access a TFCLS.
44. The Trustees have referred to a Scheme Booklet that he never received and which contains no specific wording to support their position. There is one sentence that states "...in order to ensure that the remaining pension is never less than the guaranteed minimum pension...", but the Scheme Booklet does not override the Scheme Rules, which at Rule 12 states:-

"which would cause payments of pension from the State Pensionable Age to be less than the Guaranteed Minimum Pension, increased..."
45. The Trustees had: provided him with incorrect information, figures and misleading statements; blocked his access to the Scheme Rules; attempted to change the meaning of document wording; and, failed to inform him of his benefits from SPA.
46. Because of the poor information provided in late 2017, he was placed under a time pressure to meet the CETV deadline in order to access a TFCLS at his NRA. As he was under mounting financial pressure, this additional stress had a detrimental impact on his mental health due to working long days and until late at night researching and preparing reports for this complaint.

47. In order to place him back into the position he ought to have been in, the Trustees should offer to pay the cost of revised advice taking account of the correct TFCLS position. Should the advice be to have remained in the Scheme on the basis of the correct information, the Trustees should reinstate him at no cost to him.

Summary of the Trustees' position

48. As a minimum, the pension paid by the Scheme must be no less than the revalued GMP at the point it becomes payable, age 65. Rule 12(i) restricts access to a TFCLS where the pension is insufficient to meet the revalued GMP. At age 60, Mr T's pension would have been insufficient to meet the revalued GMP and therefore he was not permitted to access a TFCLS.
49. The Trustees can only pay benefits in accordance with the Scheme Rules.
50. Legal advice received explained that there is no prescribed test for the application of Rule 12(i), but the principle is to avoid the need to pay a top-up at SRA. The Scheme's practise of not permitting a TFCLS in these circumstances fulfils the requirements of the Rules and legislation.
51. Had Mr T taken benefits at age 60 he would have received a pension including the GMP at that date, including any revaluation payable on the excess. That would then have been increased in payment, in line with the Scheme Rules, until age 65.
52. At age 65 the GMP revaluation would also have become payable, resulting in a significant step up.
53. It is accepted that the revalued pension, together with GMP at SRA would allow TFCLS to be paid.
54. In order to benefit from a TFCLS Mr T would need to have deferred his retirement until SRA, but Mr T wanted access to TFCLS sooner and so transferred elsewhere.
55. At the time Mr T left service, he was provided with a benefit statement that did not mention commutation and the Scheme Booklet at the time explained that TFCLS may be restricted by the GMP.
56. The Trustees considered that the information provided to Mr T at the outset could have better explained the reason for the restriction and had it been better explained these issues would not have arisen. In respect of this the Trustees awarded Mr T £500.
57. On the basis that the complaint is upheld, the Trustees will cover the cost of advice Mr T may wish to seek up to a maximum of £7,800 including VAT.

Conclusions

58. Mr T's primary concern is his belief that the Trustees were wrong, both in law and under the Scheme Rules, to deny him access to a TFCLS at his NRD. He has a secondary argument that if his position is wrong on the first point, he should have

received a transfer value that accurately reflected the benefits payable to him at his NRD.

59. Both parties agree that the question of the TFCLS and whether it is payable is determined by Rule 12(i), as amended by the 1980 Deed of Variation (set out in Paragraph 14 above).
60. The Trustees consider that the decision not to offer a TFCLS at NRD is justifiable under the Scheme Rules because the pension in payment from NRD would not meet the GMP payable from SRA and an increase would need to be made. Whilst I understand the reasoning for the Trustees' stance, I do not agree that the stance accords with the Scheme Rules or that there are any external requirements placed upon it to operate the Scheme in this way.
61. Under Rule 12(i), the test is not a comparison between the pension paid at NRA and the GMP due at SPA, but instead a test between the benefits paid at SPA and the GMP due at SPA. On this basis, provided Mr T receives a pension of £9,406.06 at SPA, under the Scheme Rules he is entitled to receive a TFCLS of up to 25%. There are no other Scheme Rules that affect this position.
62. While I accept the exact pension paid at SPA cannot be known because the pension increases in payment between age 60 and 65 are based on inflation, the anti-franking requirements require that the Trustees pay Mr T any GMP revaluation in addition to the non GMP excess at the date of leaving. The excess cannot be used to meet the cost of the GMP revaluation.
63. The Trustees have agreed that the pension would be due an increase at SPA, as a result of GMP revaluation, of £7,892. As a result, as long as the pension in payment from NRA makes up the difference between £7,892 and the GMP, the requirements of Rule 12(i) have been met. Any residual pension in payment since NRA could therefore be used to fund a TFCLS.
64. As it is beyond doubt that the GMP would have been paid at SPA I find that the requirements of Rule 12(i) were met at Mr T's NRA and there was headroom in the excess pension to pay a TFCLS.
65. Because of this failure on the part of the Trustees, Mr T should have the opportunity to seek financial advice on whether or not he ought to have transferred in 2017 on the basis of the correct information about his entitlement to a TFCLS.
66. If the revised advice Mr T receives is that he ought to have remained in the Scheme, the Trustees should reinstate him, meeting the cost of any loss he may have suffered in the decision to transfer. Mr T has summarised his actions post transfer in a document already supplied to the Trustees.
67. Additionally, this matter will have caused Mr T a serious level of distress and inconvenience, and that justifies a distress and inconvenience award of £1,000.
68. I uphold Mr T's complaint against the Trustees.

Directions

69. In order to put Mr T back into the position he ought to have been in, within 28 days of the date of this Determination the Trustees shall confirm the correct benefits Mr T was entitled to receive at his normal retirement date, including the maximum TFCLS entitlement.
70. I understand Mr T will then seek revised advice on the basis of that information. On receipt of an invoice for that advice, the Trustees have agreed to meet its cost up to a maximum of £7,800, including VAT.
71. If the advice Mr T receives is that he should nevertheless have transferred, the Trustees do not need to do anything more.
72. Alternatively, if the advice Mr T receives is that he ought to have remained in the Scheme; within 28 days of the date of the advice, the Trustees shall, subject to the adjustments that may be necessary, as set out in sub paragraphs 73.1 and 73.2 below, arrange for the remaining funds in Mr T's SIPP to be transferred back into the Scheme and used to reinstate the benefits to which he ought to have been entitled, putting the correct pre-GMP pension into payment immediately.
73. The Trustees shall undertake a comparison between the amount Mr T has accessed from his drawdown arrangement, which, at the time of the preliminary determination, I understand to have been a total of £50,000, and the amount he would have received to date had he received the maximum TFCLS available to him from the excess portion of his NRA pension, and pension income payments.
 - 73.1 If Mr T has suffered a loss on the basis of that calculation, the Trustees shall pay the difference to Mr T.
 - 73.2 Alternatively, if Mr T has made a gain from his drawdown arrangement the Trustees shall be entitled to recoup the difference from the pension in payment.
74. At SRA, Mr T's pension shall be increased by the GMP revaluation that he would have been entitled to had he not transferred.
75. Within 14 days of the date of this Determination the Trustees shall pay Mr T £1,000 in respect of the severe distress and inconvenience which he has suffered. If Mr T has already been paid £500 by the Trustees this sum may be deducted from the £1,000 award.

Anthony Arter

Pensions Ombudsman
19 December 2019