

Ombudsman's Determination

Applicant	Mr K
Scheme	The Royal College of Nursing Pension Scheme (the Scheme)
Respondents	Royal College of Nursing (RCN), TPT Retirement Solutions (TPT)

Outcome

1. I do not uphold Mr K's complaint and no further action is required by RCN or TPT.

Complaint summary

2. Mr K complains that RCN and TPT failed to advise him of the late retirement factor (**LRF**) provided in the Scheme Rules as he was approaching his normal retirement age (**NRA**) in 2013.

Background information, including submissions from the parties

3. In 2007, the Scheme Administrator changed to TPT. In May 2007, the Scheme Trustee wrote to all members (**the 2007 Announcement**) stating that the Final Salary section of the Scheme would close to further accrual. Mr K opted to join the new Career Average Revalued Earnings (**CARE**) section and retain his NRA of age 60.
4. In April 2008, the Scheme Booklet was revised by TPT.
5. On 5 September 2012, RCN wrote to Mr K in advance of his NRA stating that he needed to confirm in writing which of the options, shown below, he wanted to choose. Mr K could choose to:-
 - Request payment of his pension and cease working at NRA.
 - Continue contributing to the Scheme after NRA and retire later.
 - Cease contributing to the Scheme, defer his pension and continue to work.
 - Request payment of his pension and continue to work.
6. RCN also stated that Mr K should contact it directly if he wanted further information about his retirement options. Mr K did not notify RCN of his choice and it continued to deduct contributions from his salary in accordance with option two.

7. On 1 March 2013, TPT wrote to Mr K enclosing a form for him to return to request a retirement estimate (**the Estimate**) of his Scheme entitlement. TPT also said that Mr K was under no obligation to retire at NRA and that he should contact it if he had any queries.
8. In July 2013, TPT sent Mr K his annual benefit statement (**the ABS**), as at 31 March 2013, which included an appendix of frequently asked questions (**the FAQ**). The FAQ stated that:-

“If you are considering retiring you should request final figures from The Pensions Trust approximately three months before the date you intend to retire.

At retirement your benefits will be calculated as defined in the Scheme’s ‘A Guide for Members’ booklet, which is available on request or can be downloaded from our website.”
9. In September 2013, TPT sent Mr K a retirement quote, at his request, as at 31 October 2013 (**the Quote**). The Quote stated that:-
 - “Certain actuarial factors are used when calculating your pension benefits, for instance if you are retiring earlier or later than your normal pension age or taking part of your pension as a lump sum.”
 - It recommended that Mr K should consider taking financial advice and sign-posted him to Scheme literature on TPT’s website.
 - There was also a Scheme Booklet that members could refer to.
10. On 13 October 2015, TPT sent Mr K a retirement quote, at his request, as at 1 July 2016 and 1 July 2017.
11. Mr K decided to stop working on 31 January 2016, and his Scheme pension came into payment.
12. On 24 March 2016, Mr K complained to TPT under the Scheme’s internal dispute resolution procedure (**IDRP**) that:-
 - TPT and RCN failed to adequately inform him of his retirement options in 2013. Mr K said that he had only learnt about the LRF of seven percent a year from the October 2015 retirement quotes. Mr K argued that the LRF was not mentioned in any correspondence before the October 2015 quotes.
 - RCN did not obtain his permission to deduct further contributions and he had needlessly contributed several thousand pounds to the Scheme. Mr K argued that his pension should have automatically been deferred at NRA.
 - He received a lower pension on retirement by continuing to contribute to the Scheme, compared to deferring his Scheme entitlement and receiving it later. Consequently, TPT should refund his contributions after NRA and re-calculate his pension as if it was deferred on that date, with the applicable LRF.

13. On 23 June 2016, TPT responded to Mr K's complaint and said that:-

- Mr K's entitlement must be calculated in accordance with the Trust Deed and Rules and TPT had applied the Rules correctly.
- RCN and TPT separately notified Mr K, in September 2012 and March 2013, of his options at NRA.
- The 2007 Announcement also stated the options available to Mr K at NRA, including an explanation of LRF.
- Mr K had opportunities to obtain further information on his Scheme entitlement and had not done so before October 2015.

14. On 28 December 2016, Mr K requested that his complaint be considered under Stage 2 of the IDRP and said that:-

- No mention of the LRF, the Scheme Booklet or the 2007 Announcement, was made in either of the September 2012, or March 2013, letters. He argued that a description of the LRF had been omitted either "deliberately or through neglect" by TPT or RCN.
- He had telephoned TPT twice within four months of reaching NRA, to query whether the Scheme had an LRF. He disputed that he could have taken further action to learn more information about his Scheme entitlement and maintained that he was provided with insufficient information to decide.
- The Scheme Booklet had never been sent to him, nor to any of the former colleagues that he had contacted.

15. On 17 March 2017, TPT provided its IDRP Stage 2 response not upholding Mr K's complaint. TPT maintained all its previous arguments and said that just because Mr K would have been better off by deferring his entitlement at NRA, it did not follow that this would necessarily be the case for all members. TPT argued that continuing to contribute to the Scheme past NRA, was a matter of personal choice for Mr K and it could not provide him with financial advice.

16. In response to Mr K's complaint TPT said:-

- Information about the Scheme, including the Scheme Booklet, was freely available on RCN's intranet and TPT's website. This had always been standard practice for important information.
- It was open to Mr K to approach RCN's human resources (**HR**) team at any time to seek further guidance. Mr K had a meeting with RCN's HR Manager, who had encouraged him to request retirement quotes from TPT. The HR Manager had subsequently left RCN.

- Mr K was provided with adequate information about his entitlement and it was incumbent on him to seek further information or guidance, if required.

Adjudicator's Opinion

17. Mr K's complaint was considered by one of our Adjudicators who concluded that no further action was required by RCN or TPT; the Adjudicator's findings are summarised below:-

- Mr K believes that he has sustained a financial loss because RCN continued to deduct contributions from his salary. He argues that his Scheme entitlement is less than it would have been than if he had deferred his entitlement at NRA and an LRF had been applied. RCN and TPT are not authorised to provide Mr K with financial advice. Some Scheme members would likely be better off by deferring their entitlement at NRA. However, this is not certain and entirely a decision for Mr K to make. The Adjudicator had seen no evidence to suggest that RCN or TPT has not administered Mr K's Scheme entitlement in accordance with the Rules.
- The Adjudicator appreciated that Mr K was disappointed to learn that his Scheme entitlement at retirement was less than if he had decided to defer it at NRA. RCN and TPT adequately informed Mr K of his four options in advance of NRA. Having reviewed the papers, the Adjudicator noted that Mr K requested the Quote in September 2013. The Quote stated that Mr K had the option of retiring later than NRA and signposted him to where he could find further Scheme documentation, including the Scheme Booklet.
- Mr K consulted informally with RCN's HR Manager about his entitlement. However, no records of that conversation were retained by either party. The HR Manager subsequently left RCN's employment. The Adjudicator reviewed the telephone notes from Mr K's 2013 telephone calls to TPT and had seen no evidence to suggest that RCN and TPT misinformed Mr K about his entitlement or the LRF.
- The revised Scheme Booklet was not sent directly to members in 2008. However, RCN and TPT were under no obligation to send every member a copy. The Scheme Booklet and other information was readily available to Mr K. It was adequately signposted in Scheme correspondence such as the Quote. Consequently, the Adjudicator was of the view that Mr K should have learnt the correct position much earlier than he did.
- Mr K argues that RCN should not have continued to deduct pension contributions without his express consent. Mr K states that his pension contributions totalled over £8,500 a year. This was a substantial deduction from Mr K's salary. If Mr K believed, or expected, his Scheme contributions to cease at NRA the Adjudicator would reasonably have expected him to query why the deductions continued after that date.

18. Mr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr K 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 points made by Mr K for completeness.

Ombudsman's decision

19. Mr K argues that the duties owed to him by TPT and RCN are different, and the duty owed to him by RCN, as his employer, is a higher one. Mr K maintains that RCN was in breach of its duties to inform him of a valuable aspect of his Scheme entitlement before NRA. Case law authorities suggest that there cannot be a standalone tortious duty¹, for there to be a duty in tort to provide information there must be a duty in contract. Mr K says that RCN did not provide him with necessary information, which differs from advising him, and that the outcome of his complaint is influenced by the judgement in the case of *Scallly v Southern Health & Social Services Board* [1991] PLR 195 (**Scallly**).
20. In *Scallly*, the complaint was that the member should have been given more information by his employer about valuable rights that he could have accessed in his pension. The Court recognised that a valuable right is less valuable if an employee is not aware of it. Consequently, the employer was obliged to take reasonable steps to bring the provision to the attention of employees so that they could benefit from it. Accordingly, a term could be implied into a contract to bring the pension right to the employee's attention.
21. However, the Court avoided a general principle that employers should bring unknown pension rights to the attention of members or protect their overall economic wellbeing. The duty only applies where:-
- The terms of the contract have not been negotiated with the individual employee;
 - A particular term of the contract provides a valuable right contingent upon action being taken by the employee; and
 - The employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his or her attention.
22. I do not agree that a *Scallly* duty arises in this case. Having reviewed the papers, I am satisfied that the respondents informed Mr K of the option to defer his pension, which he could have exercised. In reaching this finding I have considered the views of TPO's Early Resolution Team and I acknowledge that RCN's letter of September 2012 does not provide, in itself, a detailed explanation of Mr K's options. However, this letter does not represent the sum of the information that Mr K received from RCN

¹ See *Outram v Academy Plastics* [2000] PLR 283 per Tuckey LJ at [21] and Chadwick LJ at [33], and, also, *Lennon v Commissioner of Police of the Metropolis* [2004] 1 WLR 2594 at [29] per Mummery LJ.

and TPT whilst contributing to the Scheme. TPT is the Administrator and is responsible for the bulk of the Scheme's day-to-day administration. The ABS and the Estimate both signposted Mr K to the Scheme Booklet. The latter also stated that actuarial factors would be applied in the calculation of Mr K's pension if he retired after NRA. I have seen no evidence that Mr K queried his Scheme entitlement options before October 2015.

23. Mr K also argues that TPT is under a statutory duty arising from the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (**the Regulations**). Mr K is correct that RCN owes him a duty to provide him with necessary information about his Plan entitlement. However, the Regulations do not impose a duty for TPT or RCN to provide guidance on which of Mr K's retirement options will likely prove the most beneficial to him. Provided that TPT and RCN meet their obligations under the Regulations, it is for them to decide how information in the Scheme Booklet is communicated.
24. Mr K acknowledges that an explanation of LRF is included in the Scheme Booklet. However, he argues that "there is one reference to the LRF in this booklet...the reference is as brief as possible and it is not explained". Having reviewed the Scheme Booklet, I do not agree that it provides insufficient adequate, necessary information about Scheme entitlements and LRF. In reaching this finding I do not expect Mr K to be an expert on pensions. My normal position is to consider what an average person should reasonably be expected to do and understand. I appreciate that pensions terminology can be complicated to the layperson. In the circumstances, I am satisfied that Mr K was adequately informed about his entitlement and where he could seek further information. Consequently, I agree with the Adjudicator's view that Mr K should have learnt the correct position much sooner than he did.
25. Mr K argues that the lack of reference to an LRF in Scheme correspondence led to him 'acquiescing' to RCN's decision to keep deducting Scheme contributions. Mr K maintains that this was to his financial disadvantage. However, it is not for RCN or TPT to determine what is in Mr K's financial best interest. This is solely a matter for Mr K to decide. I have seen no evidence that Mr K queried his entitlement before NRA or before requesting its payment. Consequently, I judge that Mr K's assertion that he would have acted differently, is made solely with the benefit of hindsight. As the Adjudicator noted, Mr K contributed a significant portion of his salary to the Scheme for over three years after NRA. If Mr K anticipated that his entitlement would be deferred at NRA, and his contributions would cease, I would have expected him to query the ongoing deductions.
26. I do not uphold Mr K's complaint.

Anthony Arter

Pensions Ombudsman
17 March 2020