

Ombudsman's Determination

Applicant	Mr Y
Scheme	MMC UK Pension Fund (the Fund)
Respondent	MMC UK Pension Fund Trustee Limited (the Trustee)

Outcome

1. Mr Y's complaint against the Trustee is partly upheld. To put matters right for the part that is upheld, the Trustee shall award Mr Y £2,000 for the severe non-financial injustice which he has suffered while dealing with this matter.

Complaint summary

2. Mr Y has complained that the Trustee informed him repeatedly over a number of years that he was entitled to a deferred pension in the Fund despite the benefit having been transferred to the Bankside Underwriting Agencies Pension Scheme (**the Bankside Scheme**) on 1 November 1985. He contends that he had relied upon the incorrect information from the Trustee to his considerable financial detriment by:
 - applying unnecessarily for enhanced protection in 2006, the result of which was that he could no longer pay contributions into his other pension arrangements and benefit from tax relief/potential investment growth on them;
 - reducing his working hours in 2006 and thus experiencing a subsequent loss of earnings; and
 - deciding not to seek another lucrative job after being made redundant in late 2009.

Background information, including submissions from the parties

3. Mr Y was a deferred member of the Fund and transferred his pension rights in it to the Bankside Scheme on 1 November 1985.
4. Following the transfer, the administrator of the Fund at the time failed to update the records for Mr Y and they continued to show that Mr Y was entitled to a deferred pension in the Fund.

5. Mr Y said that the Trustee had sent him regular newsletters about the Fund since the late 1990s or early 2000s.
6. In June 2004, the Trustee informed Mr Y that he still had deferred benefits in the Fund. It sent him a Statement of Benefits in October 2004, as requested by Mr Y.
7. On 11 April 2006, Equitas, Mr Y's employer at the time, sent him a letter which said:

"I am pleased to confirm the change in your work hours from 35 to 28 per week ...as agreed. Your salary has been pro-rated accordingly to £116,000 per annum to reflect the change in hours. These changes will be effective from 1 May 2006..."
8. In August 2006, the Trustee sent Mr Y a Lifetime Allowance Statement (**LAS**), at his request. This statement showed that Mr Y was entitled to a deferred pension of £8,419 per annum in the Fund with a value of £186,219.
9. The Trustee also informed Mr Y that:
 - its records showed that he had been an active member of the Fund between 1973 and 1985;
 - his deferred pension would be payable from his Normal Retirement Date (**NRD**) on 1 February 2017; and
 - the Statement of Benefits sent to him in October 2004 was incorrect because the Guaranteed Minimum Pension (**GMP**) of £602.16 per annum had been included twice in the total deferred pension figure.
10. Mr Y said that in August 2006 he had established the values of his pension funds for lifetime allowance purposes to be as follows:

The Fund	£ 186,219
His other pension plans	£1,380,410
Total	£1,566,629
Lifetime Limit	£1,500,000
11. Mr Y said that he successfully applied to HMRC for enhanced protection based on this information. According to HMRC guidelines to retain enhanced protection, he could no longer pay Additional Voluntary Contributions (**AVCs**) into the Equitas Group Pension Plan (**the Equitas Plan**) or contribute into his other pension arrangements.
12. In May 2008, Mr Y was diagnosed with cancer. Following successful medical treatment, he returned to work in February 2009.
13. Mr Y received notice of redundancy in November 2009. He said that he decided not to look for another well paid job at the time because:
 - he wished to concentrate on his other business interests;

- he was still experiencing adverse side effects from his cancer treatment; and
- he was satisfied with “the overall valuation” of his pension funds.

14. In June 2016, the Trustee asked Mr Y to consider taking the benefits available to him in the Fund from his NRD. It subsequently discovered that, according to HM Revenue & Customs (**HMRC**), Mr Y’s GMP in the Fund had been transferred to the Bankside Scheme in 1985 and informed Mr Y accordingly in September 2016.
15. In November 2016, the Trustee apologised to Mr Y for having failed to update the records for him correctly following the transfer of his pension rights in the Fund to the Bankside Scheme. It informed him that it had to administer the Fund in accordance with its Trust Deed and Rules (**the Rules**) and could not therefore pay him benefits to which he was not entitled. The Trustee offered Mr Y a goodwill award of £250 in recognition of the distress and inconvenience caused by the mistakes.
16. Mr Y’s Independent Financial Adviser (**the IFA**) replied on his behalf in December 2016 as follows:

“...your letter does clearly and unequivocally accept liability for your failures. The derisory level of your compensation offer demonstrates your lack of understanding of the long-term consequences of your negligent acts and accordingly your offer is hereby rejected...”

This is a case of continuing negligence and misrepresentations over a very long period...

Your negligent misstatements have led Mr Y into believing that he held much higher pension funds...This was reckless in the extreme. This is particularly so in respect of the LAS since it was reasonably foreseeable for what purpose it was going to be used and it seems to me that given this, you held an even higher duty of care to ensure it was correct and you failed...”

17. In its letter dated 20 January 2017, the Trustee informed the IFA that:

“The only circumstances under which Mr Y may be able to claim an amount to which he would not otherwise be entitled is if he is able to show that he has suffered a financial loss due to a change of position in reliance on communications he received from the Trustee and that it was reasonable to rely on those communications.

Mr Y took a transfer from the Fund on 1 November 1985. This being the case, it was not reasonable for him to rely on subsequent correspondence received from the Fund in drawing a conclusion that he still had benefits in the Fund. He ought reasonably to have been aware that his benefits in the Fund had been extinguished by the transfer and he should have queried with the Trustee whether he had any remaining entitlement...

In seeking to determine the value of his pension benefits for lifetime allowance purposes, Mr Y presumably obtained details of his benefits in the Bankside

Scheme. If he was aware that he had benefits in the Bankside Scheme he ought reasonably to have been aware of the source of those benefits, and that he no longer had an entitlement in the Fund...

The Trustee makes every effort to ensure that details of the benefit entitlement of Fund members are accurately held on our system. The administrative practice of the Fund is to check member's benefits against records held with HMRC at retirement, but this does occasionally highlight errors in the records held by the Trustee.

In acknowledgement of any inconvenience caused, the Trustee is prepared to offer £1,500 as compensation in full and final settlement of any claim Mr Y might have."

18. Mr Y declined this payment and made a complaint to the Trustee under the Fund's Internal Dispute Resolution Procedure (**IDRP**) via the IFA in April 2018 as follows:

"...Your letter of 8 May 2017 invited Mr Y to submit further evidence that he relied on the erroneous information supplied...and the consequential financial decisions taken. This request has necessitated Mr Y undertaking an exhaustive investigation into his financial affairs...

Recognising that the lifetime allowance cap restricted the tax efficacy of continuing to draw a high salary without the ability to utilise the taxation advantages afforded by further pension funding, Mr Y...concluded that it was uneconomic to continue in full time employment...

Consequently, believing he had reached the "pension funding ceiling", Mr Y reduced his working hours...and Equitas ceased all further pension contributions in 2006 – as did Mr Y from his other income streams.

...had Mr Y been aware that his benefits had been overstated by the Trustee and that further pension funding was possible without breaching the lifetime allowance threshold, he would have:

- a) continued to work full time, and
- b) continued to maximise pension contributions...

...upon waiving further entitlement to pension contributions, Mr Y was able to negotiate a salary uplift which, when proportionately reduced to reflect his four days (per week), produced a similar net income to his full-time role...

At this point...Mr Y had reasonable confidence that his role would continue to approximately 2012...This was the basis of the "financial plan" prior to the (assumed) impact of the lifetime allowance...

It is unrealistic to place an expectation on Mr Y to recollect a transaction that took place in 1985 when every communication which followed from the

Trustee during the subsequent two decades served to reinforce his belief that the entitlement to benefits was real...

...to assess the impact of incorrect information being provided and its consequential impact on the lifetime allowance and cessation of pension contributions, this is likely to require an actuarial assessment.

Likewise, the client's move to part-time, on the assumption of a higher level of financial security, is also likely to require actuarial assessment, as well as accountancy input.

...this professional input is likely to incur considerable costs, which ultimately will be your responsibility.

Having previously offered Mr Y a notional £1,500 for his inconvenience and distress, no account appears to have been taken of the monetary loss incurred and as such we look forward to receiving your advices on a level of compensation which more adequately reflects the adverse financial outcome.”

19. The Trustee did not uphold Mr Y's complaint at either stage of the IDR in June and October 2018 respectively.

20. In its Stage One IDR letter dated 1 June 2018 to Mr Y, the Trustee said that:

“...it was not reasonable for you to have relied on the correspondence received...You knew, or ought to have known, that you had transferred out of the Fund in November 1985. You certainly would have been aware of the transfer at the time it took place, and you subsequently had a benefit entitlement in the Bankside Scheme that was greater than that to which you would have been entitled to if no transfer had taken place. This being the case, you should have questioned the continued correspondence that you received...and it was not reasonable for you to rely on the correspondence without doing so.

Even if it were reasonable for you to rely on the course of correspondence received..., I do not accept that you did rely on the incorrect LAS...when making the material decisions to reduce your working hours and to stop working altogether. Your total pension benefits (disregarding the incorrect LAS) had a value in excess of £1.38M. You were provided with an incorrect LAS...suggesting that you had a pension in the Fund of £8,419 per annum with a value for lifetime allowance purposes of £186,219. I think it unlikely that incorrect information overstating your benefits by less than 15% was the key factor in your decision making, particularly when considered alongside your evidence that you were able to negotiate a pay increase which offset the impact of your reduced working hours, that you had significant benefits in the Bankside Scheme, that you had “other business interests” and in relation to your decision to stop working on your redundancy, that you had experienced a period of ill health. I note also that the documents you have provided show

that you reduced your working hours in April 2006 but did not receive the incorrect LAS...until August of that year.

The Trustee has...acknowledged that incorrect information was provided to you and has offered £1,500 to you as compensation for the inconvenience this may have caused. This offer remains open to you.”

Mr Y's position

21. In November 1985, he was aged 33, with a young family and pursuing a very busy career. He would not have been “fully focused” on having “a detailed understanding of his pension benefits” at that time.
22. He does not recall receiving any correspondence concerning the transfer of his pension rights from the Fund or benefit statements for the Bankside Scheme.
23. The Bankside Scheme was “converted into a money purchase scheme sometime during my employment there”.
24. He is not seeking benefits from the Fund but “commensurate compensation” for the Trustee’s negligence in providing him with incorrect information at a time critical to his decision making which has had a significant detrimental impact on his finances.
25. Mr Y said that:

“The main driver to work part time commencing in 2006 (4 days a week rather than 5) was:

- a) The introduction of the lifetime allowance. I could with the agreement of my employer receive an uplift in salary equivalent to their pension contributions and my special payment. Pro-rata the new salary to reflect 4 days’ employment rather than 5 and in effect receive approximately the same net of tax monthly income.
- b) Quality of life. With the Government introducing the lifetime allowance why would anyone in my position and in sound mind want to continue working a full week to only benefit the Government?
- c) More time to devote to my farm business following material expansion in 2006.”

“...I have attempted to establish the financial impact on my pension pot of complying with the erroneous imposition of the lifetime allowance and...what the position would have been excluding any investment movements...in the timeframe in question...it can be reasonably established that at no time during my employment at Equitas...was I likely to exceed the lifetime allowance given (a) the subsequent increases in the lifetime allowance...and (b) the appalling investment environment following the financial crash of 2008. (However, my pension pot was self-invested and was converted to almost all cash in 2007 and avoided...the impact of the 2008 crash).

...My plan B was put in place in 2002 with the purchase of a small farm and was enhanced in 2006 with the purchase of a somewhat larger farm... This business has produced a steady stream of income from which a pension contribution could have been made post October 2009 given the increases in the lifetime allowance. Thus, the early application of the lifetime allowance in April 2006 has further aggravated the situation and impacted my available pension funds.

...given sufficient headroom with the lifetime allowance before the reduction to £1.5M in 2012/2013, I would have made the maximum contributions allowed by law from my farm income...

2 items of significant spending occurred:

2009 I purchased new a Porsche 911C4C which I still have today. Purchase price £80,000.

2012 I purchased a 30ft cabin cruiser second hand which I still have today. Purchase price £41,000.

Funds were available for these purchases and were cash purchases. It was the comfort of knowing my considerable pension pot was available in the future to pay for the ongoing running costs...that had a major bearing on my decision-making process”

The Pensions Ombudsman’s position on the provision of incorrect information

26. 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.
27. 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.
28. The above sets out the Ombudsman's views very generally on the application of, negligent misstatement. It is for guidance only; each case will turn on its own facts.

Adjudicator's Opinion

29. Mr Y's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of the Trustee. The Adjudicator's findings are summarised below.
30. Because of the Fund's administrative failure to update the records properly at the time, the Trustee continued to send Mr Y information about the Fund since the late 1990s/early 2000s. It was not until 2016 that the error was discovered, and the Trustee could begin to rectify the situation.
31. The provision of incorrect information, over many years, concerning a Fund benefit which Mr Y did not have, clearly constituted maladministration on the part of the Trustee.
32. The Trustee made a clear representation to Mr Y in August 2006 that he had a benefit in the Fund by providing him with a LAS. This was a statement about Mr Y's pension entitlement which was clear and unequivocal because the figures shown were not qualified as being illustrative or estimates.
33. To bring a complaint of negligent misstatement, the representation must be false and not something that could have been made by somebody who was exercising reasonable care. In this case, the representation identified was false because Mr Y no longer had any benefits in the Fund. Mr Y should have been given the correct information and the failure to do so is clearly maladministration on the part of the Trustee who had a duty to ensure that any information provided was accurate.
34. The Trustee can be expected to have realised that Mr Y was likely to form a decision based on the information it provided. It was foreseeable that the LAS would be used by Mr Y to inform retirement planning.
35. The Adjudicator was not persuaded, on the balance of probabilities, that Mr Y could show he would have made different decisions had he known the correct figures in August 2016.
36. Mr Y had made an individual decision to transfer his pension rights from the Fund to the Bankside Scheme on 1 November 1985 and would have had to complete the relevant transfer paperwork to do so. This should have been, as the Trustee contends, "a significant and memorable event" to him.
37. It was inconceivable that Mr Y could have transferred his pension rights from the Fund without having received the relevant transfer documents which he had to sign and return to the Trustee prior to the transfer. If Mr Y had not received this documentation, he would have remained a deferred member in the Fund. It is unfortunate that the Trustee has not retained Mr Y's transfer documents but since it was no longer legally required to do so after completing the transfer, it was reasonable for the Trustee not to have kept them indefinitely.

38. In seeking to determine the value of his benefits for lifetime allowance purposes, Mr Y presumably obtained details of his benefits in the Bankside Scheme and should therefore have been reasonably aware of the source of those benefits and that he no longer had any entitlement in the Fund.
39. Mr Y is expected to have taken steps to mitigate the loss of the pension he expected to receive from the Fund once he was notified of the error. He cannot claim for a loss that he could have mitigated, whether he in fact did so or not. It had been open to Mr Y to sell the car and cabin cruiser once he was notified of the error in 2016.
40. As Mr Y had acted to his detriment based on an unreasonable belief that the figures shown on the LAS were correct, he had not suffered any actual financial loss for which he should be compensated because of the financial decisions which he made.
41. It is always difficult for a person to prove what they would have done differently had they believed something other to what they did actually believe. In the circumstances the Adjudicator was not persuaded that the misrepresentation was a significant cause of the financial decisions taken by Mr Y.
42. There was no dispute that Mr Y has suffered severe distress and inconvenience dealing with this situation. The Trustee had offered Mr Y an improved award of £1,500 as a gesture of goodwill in recognition of this. However, in accordance with the Pensions Ombudsman's current guidelines on redress payments for non-financial injustice, this amount was, in the Adjudicator's view, still lower than the sum the Ombudsman would likely direct the Trustee to pay Mr Y in a formal determination of his complaint, that is, £2,000.
43. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y's IFA provided further evidence and comments as follows:
 - Mr Y is not alone at not being able to recollect the passage of his pension benefits. There are numerous individuals that lose track of their pension benefits given the constant change within the pension industry, both in terms of legislation and change of providers. It is almost impossible for a layperson to trace the source of pension benefits given this constant change. This is highlighted by the Pension Tracing Service provided by the Government, within which it is estimated that there is over £400 million in unclaimed pension savings.
 - It is also relevant to have a greater understanding of Mr Y's focus during the time of the alleged transfer, back in November 1985. Mr Y was a Lloyds' underwriting member with unlimited liability. The Lloyds Asbestosis Crisis which was taking place at the time could have potentially ruined him financially.
 - The Bankside Scheme was incorporated into the Limit Group Pension Scheme (**the Limit Scheme**), a money purchase occupational pension scheme, following the purchase of Bankside by Limit.
 - On 6 April 2001, new regulations governing transfers from approved occupational pension schemes to personal pensions came into force.

- In March 2001, Mr Y had sought its assistance with an urgent transfer from the Limit Scheme to a personal pension plan before 5 April 2001.
- The assumed transfer from the Fund to the Bankside Scheme for Mr Y consequently “could have been party to numerous future transactions, creating extreme difficulty in remembering the original source, especially given the passage of time”.
- According to a statement of benefits as at 1 October 2000 for the Limit Scheme sent to Mr Y, (a) he joined this scheme on 1 February 1994 and left it on 30 November 1994 and (b) his total fund value was £637,990 28.
- Aon Consulting (**Aon**), the administrator of the Equitas Plan sent Mr Y a letter on 31 May 2005 concerning the new pensions tax regime that came into force on 6 April 2006 (**A-Day**).
- According to this letter, Mr Y had provided Aon with details of the pension benefits available to him from five schemes in addition to those from the Equitas Plan and two of these schemes were the Fund and an AXA personal pension which had a fund value of £647,544.39 as at 12 October 2004.
- Prior to A-Day, Mr Y looked to maximise pension contributions which undoubtedly would have continued post A-Day had there not been the restrictions imposed by the legislation at the time requiring enhanced protection.
- By relying upon the incorrect information provided from the Trustee, he applied unnecessarily for enhanced protection in 2006 to his considerable financial harm because he could no longer pay contributions into his other pension arrangements and benefit from tax relief/potential investment growth on them.
- Given that the historical record of pension funding is factual not subjective, even allowing for Mr Y’s change of direction from insurance underwriting to farming, he could have continued pension funding.
- Prior to A-Day, in order to establish the maximum pension funding of occupational pension benefits, the calculation required establishing the aggregate benefits from all sources. By incorporating the benefits within the Fund this will have restricted the maximum pension funding.
- The failings of professional pension experts far outweighs “the memory requirement of a layperson, given the complexity surrounding pensions, as well as the constant change”.

44. I note the additional comments made by Mr Y’s IFA, however they do not change the outcome, I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

45. The evidence is clear that for many years Mr Y repeatedly received incorrect details of the benefits available to him from the Fund. This does not, confer on him a right to these benefits quoted by mistake. However, if he had acted to his financial detriment based on the reasonable belief that the figures were correct, then he may be compensated for the harm.

46. Mr Y said that he had relied upon the incorrect information from the Trustee to his considerable financial detriment by:
- applying unnecessarily for enhanced protection in 2006, the result of which was that he could no longer pay contributions into his other pension arrangements and benefit from tax relief/potential investment growth on them;
 - reducing his working hours in 2006 and thus experiencing a subsequent loss of earnings; and
 - deciding not to seek another lucrative job after being made redundant in late 2009.
47. I agree with the Adjudicator that the outcome of Mr Y's complaint mainly depends on whether, or not, he can demonstrate that he reasonably relied on the incorrect information which he received and in particular, the LAS when he made the decisions which he said has caused him the loss he now claims.
48. For essentially the reasons given by the Adjudicator and also the Trustee in its Stage One IDR letter, dated 1 June 2018, I do not consider that, Mr Y has been able to demonstrate, on the balance of probabilities, that:
- he had acted to his financial detriment based on a reasonable belief that the figures show on the LAS were correct; and
 - he would have made different decisions had he known the correct figures in August 2016.
49. It is unfortunate that the transfer of pension rights from the Fund to the Bankside Scheme occurred at a very difficult time for Mr Y. Although I sympathise with Mr Y's circumstances, the Trustee was entitled to assume that Mr Y would conduct his financial affairs with ordinary diligence. Given that he had made an individual decision to transfer sizeable pension rights from the Fund to the Bankside Scheme in November 1985, it is reasonable to expect that this transfer would have been "a significant and memorable event" regardless of his work situation at the time. Furthermore, in my opinion, it is highly unlikely that Mr Y would have forgotten about such a substantial and valuable pension available from the Fund which would require the use of the Pension Tracing Service to locate it.
50. Mr Y said that the Bankside Scheme was converted into a money purchase scheme sometime during his employment with Bankside. According to his IFA, the Bankside Scheme was subsequently incorporated into the Limit Scheme. The statement of benefits as at 1 October 2000 for the Limit Scheme shows that Mr Y's total fund value was £637,990 28 for his short period of membership between 1 February 1994 and 30 November 1994. In my view, Mr Y's fund value could only have become so large if it included his pension rights available in the Bankside Scheme. In accordance with HMRC's records, Mr Y's had transferred his GMP (and consequently the whole pension available to him in the Fund) to the Bankside Scheme in 1985 and I see no reason not to accept the validity of these records.

51. As Mr Y had acted to his detriment based on an unreasonable belief that the figures shown on the LAS figures were correct, I do not consider that he has suffered any actual financial loss for which he should be compensated because of the financial decisions which he made.
52. It is clear to me that Mr Y has, however, suffered severe distress and inconvenience because of the maladministration identified. I note that the Trustee has offered Mr Y an improved award of £1,500 in recognition of this. My awards for distress and inconvenience are modest and not intended to punish the party directed to pay. In this case, given the seriousness of the maladministration identified, I consider an award of £2,000 is justified.
53. Therefore, I partly uphold Mr Y's complaint to the extent that he has suffered severe distress and inconvenience and make the appropriate directions below to remedy this injustice.

Directions

54. Within 28 days of the date of this Determination, the Trustee shall pay Mr Y £2,000 for the severe non-financial injustice which he has suffered dealing with this matter.

Anthony Arter

Pensions Ombudsman
18 August 2020