

Ombudsman's Determination

Applicants	Mr D & Mr AR, Mr AD, Mr CN, Mr RE & Mr GR (together the Additional Applicants)
Scheme	Tarmac UK Pension Fund (the Scheme)
Respondents	Tarmac Group Limited (Tarmac) Capita The Trustee of the Tarmac UK Pension Fund (the Trustee)

Outcome

1. The complaints brought by Mr D and the Additional Applicants about events which occurred in 2009, have been referred to The Pensions Ombudsman (**TPO**) outside of the permitted timeframe in which TPO can normally accept a complaint and so are outside of my jurisdiction.
2. The complaint concerning Tarmac's delay in dealing with the matter in 2018, is within my jurisdiction, but I do not uphold that complaint and no further action is required by Tarmac.

Complaint summary

3. Mr D and the Additional Applicants have complained that Tarmac failed to act in good faith during the course of the consultation period which resulted in the Scheme being closed to further accrual. They say that Tarmac provided insufficient time for them to seek financial advice on whether to accept early retirement and misrepresented its financial position, implying that it was on the brink of collapse, when in fact it and the Scheme have recovered well.
4. They say that, had they not been pressured to accept early retirement, they would not have done so.
5. They have also complained about the time it took Tarmac to respond to the complaints.

Background information, including submissions from the parties

6. In 1969, Mr D joined Tarmac. He remained employed by it for 47 years.
7. On 14 September 2009, Tarmac announced that it intended to close the Scheme, a defined benefit arrangement, to further accrual and establish an alternative defined contribution arrangement.
8. On 1 October 2009, the consultation period formally commenced.
9. On 3 December 2009, Tarmac issued a letter to members as part of the consultation process. This outlined a pension enhancement that was offered if members accepted early retirement.
10. On 15 December 2009, Tarmac issued a follow up letter urging members to respond to the earlier letter. The pension enhancements were dependent on the member's consent. If a member did not return the form, Tarmac would assume that consent was not granted and subsequently would consider termination of the member's contract and re-employment on revised terms.
11. On 29 December 2009, the consultation period ceased.
12. On 31 March 2010, the Scheme closed to future accrual.
13. I understand Mr D accepted an offer of early retirement and his pension benefits were put into payment whilst he continued working.
14. On 7 June 2018, Mr D wrote to the Trustee to complain about the way in which the Scheme was closed. The Trustee provided Mr D with its opinion that the complaint should be forwarded to Tarmac to respond to, as Tarmac was responsible for the closure of the Scheme and how it was conducted.
15. On 10 August 2018, Mr D wrote to Tarmac with his complaint.
16. On 9 November 2018, Tarmac responded. It outlined the timeline of the consultation and disagreed that Mr D had not had the opportunity to seek advice. It noted that by the close of the consultation, the employee representatives supported the proposals and all affected employees had provided consent.
17. Tarmac also highlighted a number of enhancements that had been made as part of the proposal and concluded that it could not accept Mr D's claim that he was pressured into taking his pension early. It said it had been transparent when it confirmed that the ongoing funding of the Scheme was a factor in the decision, but also that it was committed to meeting its future obligations to the Scheme.
18. On 20 November 2018, the complaints were referred to TPO.

Adjudicator's Opinion

19. Mr D and the Additional Applicants' complaint was considered by one of our Adjudicators who concluded that the main issue of complaint was outside our jurisdiction and, for the part that was in jurisdiction, no further action was required by Tarmac. The Adjudicator's findings are summarised below:-

- Mr D's complaint relates to events in 2009. Mr D has described his complaint at various points in the following ways:

"...put in the simplest terms we would not have taken our pensions early if we hadn't been bullied into it by the firm's tactics which resulted in lower pay outs than those being made now to colleagues with less service."

"I believe that I was bullied into taking my pension early because the Pension fund was running in arrears at the time and those responsible had a brief to reduce costs and make up the short fall. The firm's responsibility as a duty of care employer were clearly given little or no priority and, as a result, we were given insufficient time to seek financial advice for such a critical decision. If I had been fully informed of all the facts at that time I would not have taken my pension early. In summary, we were 'mis-sold' the closure of the fund as a result of the excessive use of corporate power."

"It is my contention that I would not have taken my pension early if the firm hadn't pressured me into the decision and in consequence, I feel the Pension fund is obliged to compensate this small group of men who gave such loyal commitment to the firm which had previously treated us well."

- The Additional Applicants had submitted complaints framed in similar ways.
- Under the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (**the Regulations**), The Pensions Ombudsman is unable to investigate complaints brought to us more than three years after the event complained of (Section 5(1)), unless the Applicant only became aware of the cause for complaint at a later date. In which case the three years starts at the point the applicant ought reasonably to have been aware of the cause for complaint (Section 5(2)). This time limit can be waived at the discretion of the Ombudsman where they consider it reasonable for the complaint not to have been made sooner (Section 5(3)).
- Having applied the Regulations to the circumstances of the case, the Adjudicator took the view that the complaints had been brought out of time.
- Mr D had complained about the approach taken to close the Scheme in 2009 and therefore it was outside the initial three-year time limit as set-out in the Regulations.
- Whilst Mr D argued the delay in complaining was due to only now being aware of other members receiving substantially higher transfer values, the Adjudicator did

not think it was a valid argument and also, it was unreasonable to compare current transfer values with the pension that Mr D has been in receipt of since 2010. There is no simple comparison between them and there are numerous factors that determine transfer values which will have changed in the interim.

- Regardless, the recent knowledge or increased transfer values cannot have changed Mr D's perception, in 2009, of Tarmac's approach to the closure of the Scheme. If he was bullied, pressured, or did not have enough time to make an informed decision, he must have been aware of this at the time and therefore ought to have complained then.
- If it was not bullying or inappropriate to the extent that Mr D ought to have complained at the time, then it can be inferred that he had concluded that it was reasonable, even if he disagreed with the closure of the Scheme. The Adjudicator did not believe there was a legitimate reason to say the position had changed such that he had only now become aware of the issue complained of.
- The same principle applied to whether Mr D was given sufficient time to seek what he describes as "critical" financial advice to make an informed decision.
- Mr D had acknowledged in his discussions with the Adjudicator that he and the Additional Applicants had considered complaining at the time, but they were not aware of TPO. The Adjudicator took the view that if Tarmac's actions were as unreasonable as Mr D asserts, then a complaint should have been made at the time. Had that happened Tarmac or the Trustee would have been required to inform him of his right to refer the matter to TPO. Further, it is reasonable to say in those circumstances, Mr D ought to have researched his rights and in doing so become aware of TPO.
- Mr D highlighted a reluctance to be seen as a "trouble maker", and whilst the Adjudicator acknowledged that concern, if in their view, Tarmac was acting in the way Mr D had described, there was an onus on the employee to complain at the time.
- In the circumstances, the Adjudicator did not believe there was legitimate reason for the Ombudsman to use his discretion to waive the three-year time limit.
- The Adjudicator concluded that although it had taken Tarmac three months to respond, and this may have been frustrating for Mr D, this was within the four-month timeframe expected by The Pensions Regulator. In that context and given this was a complaint about events some years earlier, the Adjudicator took the view that this was not maladministration and did not warrant any distress and inconvenience award.
- Following referral to TPO, the Applicants had raised an issue regarding "make up" pension. The Adjudicator acknowledged the complaint but explained that as it had not been considered by Tarmac or the Trustee in the original complaint, it was not appropriate for it to be considered now. The Applicants would need to make a

separate complaint which, subject to our jurisdiction, might be something we could consider at a later date.

20. Mr D and the Additional Applicants did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D and the Additional Applicants provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr D and the Additional Applicants for completion.

Ombudsman's decision

21. I can only comment on the events in 2009 and their legitimacy if I have lawful jurisdiction to do so. Much of what Mr D and the Additional Applicants have said following the opinion is on the legitimacy of what happened in 2009 rather than the issue of jurisdiction.
22. The issue for me to determine is whether I have jurisdiction to investigate the underlying complaint. The complaint is clearly out of time under Section 5(1) of the Regulations, in that it has been brought more than three years after the event complained of.
23. With regard to whether the applicant ought reasonably to have been aware of the cause for complaint (the Regulations Section 5(2), I agree with the Adjudicator that given the terms of the complaint, I cannot see a justification to say that in 2018 there was any new reason for the Applicants to question the approach taken by Tarmac in 2009. They may have become aware of increased transfer values, and that may have reminded them of concerns they had in 2009, or, perhaps, when they heard of the current transfer values they thought it unfair, so became unhappy about the decision that they had taken several years earlier. However, whatever the reason for raising a complaint now, I have concluded that given what they have said they must have had concerns at the time, and indeed, Mr D has confirmed that was the case.
24. Whilst I acknowledge the Applicants may not have been aware of TPO in 2009, it will often be the case that an individual will not be fully aware of all possible remedies at the point at which an injustice may have occurred. However, if they knew or ought reasonably to have known that an injustice has occurred, then there is an onus on that individual to investigate their options. Had a complaint been made to Tarmac or the Trustee in 2009, I would have expected them to have informed the Applicants of their right to refer the matter to TPO, but no complaint was made.
25. In these circumstances, I find that the Applicants ought to have complained within three years of the event complained of, and therefore the Regulations Section 5(2), does not provide me with the jurisdiction necessary to determine the underlying complaint.

PO-27670

26. No arguments have been submitted as to why I should exercise my discretion under Section 5(3) of the Regulations (see paragraph 19 above) , and I see no reason to do so.
27. In respect of the complaint that is within my jurisdiction, the time it took for Tarmac to respond, as the Adjudicator has said, was a reasonable timeframe for a response and does not constitute maladministration.
28. Therefore, I do not uphold Mr D or the Additional Applicant's complaints.

Anthony Arter

Pensions Ombudsman
6 August 2019