

Ombudsman's Determination

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

Outcome

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

Complaint summary

2. Mr D's complaint is that Huhtamaki, his employer, did not inform him that he could transfer to the Scheme from its non-contributory money purchase scheme, in 1993 and 2003, when other employees were given this option.

Background information, including submissions from the parties

3. In May 1991, Mr D was employed by Polarcup Limited, as a maintenance fitter in the Production Department (**Production Department**) at the Devizes site. He joined the company's non-contributory with profits 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 D 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 D's employment contract, dated 1 October 1991, contained no reference to pension scheme membership and was not amended when he relocated to Gosport. He is still employed by Huhtamaki and is still a member of the DC Scheme.
7. In August 2016, Mr D learnt from one of the trustees of the Scheme (**the Trustee**) 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. The Trustee told him that all Former Devizes Employees should have been offered membership of the Scheme in 1993 and again in 2003. Mr D claimed that none of the Former Devizes Employees in the Production Department were aware of this.
8. On 14 August 2016, Mr D raised a formal complaint with Huhtamaki, claiming that he had been excluded from joining the Scheme in 1993 and 2003. He said he would have joined the Scheme as it had "undoubted financial advantage" over the DC Scheme. Huhtamaki rejected his complaint, saying that it was satisfied that all Former Devizes Employees, at all levels, had been invited to join the Scheme.
9. Dissatisfied with Huhtamaki's response, Mr D submitted a complaint as follows:-
 - He believed that he had been treated unfairly by Huhtamaki because he had recently become aware that other employees had been offered membership of the Scheme and he had not.
 - Huhtamaki claimed that it had offered membership of the Scheme to all Former Devizes Employees, including him, in 1993, during the relocation negotiations, or in 2003, before the Scheme closed, but had provided no evidence of this.
 - He would have joined the Scheme if he had known about it, as it would have been financially better for him than the DC Scheme. He claimed that he should be compensated appropriately for his total loss, about £531,316.
 - He noted that a similar complaint against Huhtamaki had been received from Mr M, under reference PO-25119, and he asked for both complaints to be considered together.
10. Following receipt of Mr D's complaint, Huhtamaki responded as follows:-
 - It had offered membership of the Scheme to all Former Devizes Employees.
 - On 24 February 2003, an email was sent to "# all Gosport users" from an executive at Huhtamaki (**the February 2003 Email**) as follows:

"Final Salary Scheme

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 for joining the Final Salary pension scheme 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 28th February."

- Huhtamaki claimed that the February 2003 Email was evidence that it had offered membership of the Scheme to all Former Devizes Employees, but they did not apply.
- It said 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 (**Application Form**) and new members had not been admitted since 2003, when the Scheme closed. Extracts from the Scheme Rules are set out in the Appendix.
- It did not believe there was a business case for reopening the Scheme as Former Devizes Employees were offered the opportunity to join the Scheme in 1993 and 2003, but they decided not to do so.
- At that time, there was no legal requirement for Huhtamaki to provide employees with access to a final salary scheme, only a stakeholder scheme. It had complied with that obligation.
- The DC Scheme was very generous, with company contributions of 5% to 10% of salary, so there was no basis for complaint. It did not have copies of any announcements relating to membership of the Scheme, due to the time lapse of 16 and 26 years respectively, and the fact that personal data must be destroyed after six years.
- 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.
- Huhtamaki said it did not have any records of those employees who had decided not to join the Scheme, when invited, but claimed that the Application Forms were evidence that all Former Devizes Employees had been invited to join the Scheme.

11. In July 2019, Huhtamaki provided additional information, as follows:-

- It provided an extract from the minutes of a Scheme Trustees' meeting in May 2002, stating 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 showed that all eligible employees were able to join the Scheme and contradicted Mr D's assertion that the Scheme was only offered to certain employees.

- It provided an extract from minutes of a Scheme Trustees' meeting in February 2003, noting that a total of 39 new members had joined the Scheme. This included one member from Gosport who had submitted an Application Form before the deadline of 28 February 2003, but it had not been received in time and the Trustees had allowed him to join the Scheme. It is Huhtamaki's position that this shows that all employees were given a fair opportunity to join the Scheme and there was no reason why it would not offer the Scheme to all eligible employees, including Mr D.
- A signed affidavit dated 6 July 2019 (**the Affidavit**), was provided from a former employee (**the Employee**) who said that he had been employed by Huhtamaki, full-time, from 1990 to 2017, as financial controller and then director. The Employee stated that he had been based at the Devizes plant from 1990 to 1995, at the time of the acquisition of Sweetheart, and at the Gosport site, from 1995 until 2014. The Employee also stated that he was involved in the Sweetheart acquisition negotiations in 1994, and that pensions were a key component in the relocation packages for Former Devizes Employees. He said membership of the Scheme was offered to those relocating from Devizes to Gosport, during briefings and they were advised to take financial advice about their pension options. He added that the "vast majority" of Former Devizes Employees, like himself, decided to remain in the DC Scheme, because it was non-contributory. He confirmed that, in 2003, all employees were again offered the opportunity to join the Scheme before it closed to new members.

12. Mr D did not accept Huhtamaki's comments and said the following in response:-

- There was no documentary evidence that Huhtamaki had offered him membership of the Scheme in 1993 or 2003. He had not received any information about the Scheme nor the invitation referred to in the February 2003 Email. He had a file of correspondence but it contained no evidence that he had ever been invited to join the Scheme. He knew of several Former Devizes Employees who were also not aware of the option to join the Scheme.
- He noted that Huhtamaki had no records of the numbers of Former Devizes Employees who had joined the Scheme. Of the seven employees whose Application Forms had been disclosed, only two joined Huhtamaki before 1993 and so the remaining five were not Former Devizes Employees who had transferred to Gosport in 1993. Mr D suggested that they might have been invited because they were not members of the DC Scheme. In addition, two of them worked in the finance department and he suggested that special invitations had been extended to them because of their positions in the company.

- He claimed that the Affidavit contained inaccuracies. The Employee stated that he had worked at the Devizes site in 1995. However, Mr D knew that the plant closed in 1993 so the Employee could not actually have worked there at that time. Mr D also knew that the Employee went to work in the USA from 2004 until 2017. Accordingly, Mr D alleged that the Employee's comments about the negotiations in 1993 were inaccurate and Huhtamaki could not provide evidence that he was offered a transfer to the Scheme or that pensions were discussed at the relocation meetings. He said it was feasible that the Employee had been invited to join the Scheme in 2003, as he claimed, but did not do so because he was relocating to another country.
- Huhtamaki did not encourage employees to join the Scheme because of the financial burden and, hence, it only invited selected employees to join the Scheme in 1993 and 2003, and then closed the Scheme to new members.

Adjudicator's Opinion

13. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by Huhtamaki.
14. In the Adjudicator's opinion, there were two issues:-
 - Did Mr D have an automatic right to join the Scheme in 1993 or 2003 or was membership granted by invitation only?
 - In 1993 and 2003, did Huhtamaki invite employees, except Mr D or Former Devizes Employees, to join the Scheme?
15. The Adjudicator's findings are summarised below:-
 - In the Adjudicator's opinion, the Scheme Rules showed that Mr D was not automatically entitled to join the Scheme as a Former Devizes Employee or employee of Huhtamaki. He was an eligible employee who was required to complete and return an Application Form to the Trustees and he did not do so.
 - Regarding employees being invited to join the Scheme in 1993, in the Adjudicator's view, there was no definitive documentary evidence from the negotiations at the time of the transfer from Devizes to Gosport. In the Affidavit, the Employee 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 D to prove or disprove this.
 - In addition, in the Adjudicator's opinion, although Huhtamaki had provided some documentary evidence from 2003, including the February 2003 Email, this did not prove conclusively that Mr D, or other Former Devizes Employees, had been invited to join the Scheme.

- The Adjudicator found that, although there was little firm evidence available due to the passage of time and the destruction of personal records, 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.
 - In the Adjudicator's opinion, there was no firm evidence that only Former Devizes Employees, who were working in the financial department, were invited to join the Scheme, as Mr D had claimed.
 - In the Adjudicator's view, without the benefit of hindsight, there was no firm evidence that Mr D would have joined the Scheme. If he had been invited to join membership of the Scheme might not have been thought to be a good proposition in 1993 or 2003.
 - The Adjudicator concluded that there was insufficient evidence that Mr D was not made aware of, or invited to join the Scheme in 1993 or 2003, and the complaint should not be upheld.
16. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D 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 main points made by Mr D, for completeness.
17. Mr D claimed that the Affidavit had been given more weight by the Adjudicator than his account of what happened. Accordingly, he provided signed and dated statements (**the Statements**) from six Former Devizes Employees from the Production Department who had transferred to Gosport and had similar complaints against Huhtamaki. He said he hoped that these would provide sufficient weight to disprove the position put forward by Huhtamaki. In the Statements, these employees disagreed with the Affidavit and said:-
- They were not offered the opportunity to join the Scheme.
 - They were not invited to, nor attended briefing sessions regarding pension options.
 - They did not receive any information regarding different pension plans or guidance to seek financial advice.
 - They did not agree that the contributions to the Scheme would have been prohibitive as the benefits were significant.
18. Mr D also provided a statement from his former Warehouse Supervisor who had been involved in discussing individual relocation packages in Devizes in 1993 and confirmed that there were no discussions about the Scheme. He was never offered the chance to join the Scheme throughout his 13 years with Huhtamaki, and he did not agree with the points made by the Employee in the Affidavit.

19. In addition, Mr D asked for statements provided by Mr M to be considered as further evidence to support his complaint, in particular, a statement from a financial adviser who confirmed that he would have advised employees to join the Scheme in 1993 and 2003.
20. Collectively, Mr D said he believed that this additional evidence further demonstrated that Huhtamaki had failed to offer him and other Former Devizes Employees, an opportunity to join the Scheme. He said he would have been in a sufficiently strong financial position to be able to join the Scheme in both 1993 and 2003. He added that the Scheme was financially better for him in the long term, and he had been deprived of the opportunity to obtain financial advice to consider his options. He felt that Huhtamaki did not want him and other Former Devizes Employees to join the Scheme in order to save costs.
21. In response to Mr D's comments, Huhtamaki denied the suggestion that it had not offered him 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.

Ombudsman's decision

22. I consider that I need to decide the following aspects of this complaint:
 - Did Huhtamaki inform Mr D and other former Devizes employees, about the option to join the Scheme in 1993 and 2003?
 - If Mr D 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 D would have joined the Scheme if invited, in 1993 or 2003?
23. I note from the submissions that no definitive documentary evidence has been provided by either Mr D or Huhtamaki about what happened in 1993 or 2003. So, I need to weigh up carefully the evidence provided by each of them.
24. As regards 1993, Huhtamaki has not provided any substantial evidence to show that Mr D and other Former Devizes Employees were invited to any 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.
25. Huhtamaki's main evidence was the Affidavit from the Employee, confirming that all Former Devizes Employees, including himself, were invited to relocation briefings in 1993 and were informed about the option to join the Scheme. Mr D claimed that there were inaccuracies in the Affidavit and that the Employee was not working in the Production Department in Devizes in 1993. Mr D has subsequently provided the Statements from other Former Devizes Employees disputing the Affidavit and

confirming that they were not told about the option to join the Scheme but would have done so, if informed. A statement from Mr D's supervisor also stated that he was not aware of the option to join the Scheme and, as a manager, he would ordinarily have been informed about it.

26. With regard to 2003, Huhtamaki relied on the February 2003 Email as evidence that Mr D and other 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. Huhtamaki provided minutes from a Trustee meeting that showed that a total of 39 employees joined the Scheme in 2003.
27. Mr D said he did not receive the February 2003 Email nor any other emails about the Scheme. He says the two Former Devizes Employees who joined the Scheme worked in the finance department, not the Production Department and were given special invitations. Mr D noted that Huhtamaki could not provide a copy of his or any other Application Form declining membership of the Scheme and so there was no proof that he or Former Devizes Employees from the Production Department were invited to join the Scheme.
28. I accept that it is difficult for Mr D to provide evidence to show that he was not informed about the Scheme. I acknowledge that his evidence amounts to Statements from himself and other Former Devizes Employees from the Production Department confirming that they were not informed about the option to join the Scheme in 1993 and 2003.
29. 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 D. For that same reason, the Affidavit provided by Huhtamaki is not a conclusive factor. Accordingly, there is not enough evidence for me to find that Huhtamaki did not inform Mr D about his option to join the Scheme in 1993 and 2003, and that there was maladministration.
30. Even were I to find that there was maladministration, I would have to require Huhtamaki to put Mr D back in the position he would have been in, if he had been invited to join the Scheme. This requires me to consider whether Mr D would have joined the Scheme, if invited, in 1993 or 2003.
31. Mr D says if he had been informed about the Scheme, he would have taken financial advice. He referred to a statement provided by Mr M's financial adviser that a final salary scheme would have been more valuable than the DC Scheme, even though it was non-contributory. Mr D also says he was financially able to pay contributions to the Scheme, in 1993 or 2003, and is also now willing to pay contributions to fund his membership of the Scheme from 1993.
32. Despite Mr D's assertions, it is difficult to consider this without the benefit of hindsight. In 1993 or 2003, it is not certain whether a financial advisor would have advised Mr D

to join the Scheme 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. Huhtamaki has provided evidence that there was a contribution holiday for the Scheme, from 1993 to 2000, but a deficit from 2003, when it closed to new members. The risk of underfunding is the problem with final salary schemes whereas in a defined contribution scheme, like the DC Scheme, Mr D would bear the risk of poor investment performance. On the balance of probabilities, I am unable to find that Mr D would have joined the Scheme if invited, in 1993 or 2003, instead of remaining in the DC Scheme.

33. Consequently, I do not consider that Mr D has produced sufficient evidence 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.
34. I do not uphold Mr D'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...