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Ombudsman's Determination

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| Applicant | Mr Alan Belk |
| Scheme | Air Products Plc Pension Plan (the Plan) |
| Respondents | Mercer Ltd (Mercer) The Trustees of the Air Products Plc Pension Plan (the Trustees) |

Complaint summary

Mr Belk complains that Mercer, the Plan's administrators, and the Trustees have:

- illegally reduced his monthly pension from the Plan because they failed to provide him with any evidence of their calculations and also did not obtain his consent before doing so; and
- unfairly sought recovery of overpaid pension payments totalling £1,416.

He also alleges that Mercer:

- failed to arrange payment of one of his Additional Voluntary Contribution (**AVC**) funds on a timely basis and offer him compensation calculated on an equitable basis; and
- improperly offered him financial advice in their letter of 2 November 2012.

In Mr Belk's opinion, Mercer's actions constitute illegal harassment as defined in the Employment Equality (Age) Regulations 2006.

He also contends that the Trustees incorrectly terminated the second stage of the Plan's Internal Dispute Resolution Procedure (**IDRP**) by refusing to provide a comprehensive reply to the issues which he raised in response to the first stage decision letter dated 31 October 2013.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against Mercer and the Trustees because:

- they were legally entitled to correct Mr Belk's retirement benefits from the Plan and recover the pension overpayment given his circumstances;
- it was not unreasonable for the Respondents to offer Mr Belk the opportunity (which he duly accepted) to obtain full details of how his revised lower pension payable from Plan had been calculated after the reduction was made;
- Mr Belk has provided insufficient documentary evidence to prove that he is either, entitled to compensation higher than already offered for the late payment of his Standard Life AVC funds, or that he cannot repay the portion of the overpayment which Mercer legitimately proposes deducting from that compensation because of financial hardship;
- they have offered Mr Belk adequate compensation for the late payment of the benefits available to him from his Standard Life AVC policy. This includes £1,000 in recognition of the distress and inconvenience which he has suffered in dealing with this matter:
- Mercer cannot be expected to increase what is already a satisfactory offer without such evidence;
- Mercer did not give Mr Belk financial advice at any point and did not act illegally; and
- Mr Belk's complaint under the IDRP was followed through to its conclusion and was not terminated prematurely.

Detailed Determination

Material facts

1. Mr Belk retired on 1 April 2009. He received a tax free cash lump sum of £209,720 plus an initial gross pension of £63,972 pa from the Plan and two (of his three) associated AVC policies.
2. In September 2012, Mercer wrote to Mr Belk on behalf of the Trustees to inform him that:
 - having reviewed the Plan's administration, they discovered that some members of the Plan had erroneously received incorrect statutory increases to their pensions in payment;
 - they calculated that he had received a net overpayment of £1,694;
 - they would like to apologise to him for this genuine administrative error;
 - they have a duty to ensure that all members receive their correct pension calculated in accordance with the Plan's Trust Deed and Rules (**the Trust Deed**);
 - therefore, they would be reducing his pension to the lower amount of £65,664 pa from £66,388 pa (payable monthly) from 25 September;
 - in order to avoid causing him any undue financial hardship, they would only be seeking recovery of £1,416, i.e. that part of the overpayment which accrued after March 2010; and
 - repayment could be made by either a single lump sum or a monthly £59 reduction to his pension from January 2013 until January 2015 (when it would revert to its correct level).
1. After seeking advice from the Pensions Advisory Service (**TPAS**), Mr Belk replied on 8 October, as follows:
 - since Mercer had not provided him with details of how they calculated his new pension, he could not check whether their calculations were correct;
 - therefore, he did not consent to the reduction and according to TPAS, such an unauthorised reduction was illegal;
 - Mercer should consequently reinstate his monthly gross pension to £5,532 (£66,388 pa) from £5,472 (£65,644 pa) and reimburse £59 to him; and
 - he had already spent the overpayment and to repay it now would cause him financial hardship.
2. In their letter dated 2 November 2012, Mercer informed Mr Belk that:
 - they had identified a second error and would like to apologise to him for it;
 - upon his retirement in April 2009, they had arranged for the benefits from only two of his three AVC policies to be paid by mistake;
 - the value of the outstanding AVC policy (held with Standard Life) as at 1 April 2009, was £123,903;

- they would take appropriate steps to rectify their mistake once they received his instructions on how he wished to take these AVC benefits;
- as more than 12 months had passed since he retired, they had to perform a check to ensure that his retirement benefits did not now exceed the lifetime allowance;
- therefore they required him to complete and return a “Lifetime Allowance Declaration Form” (**the Form**);
- he had the option of either purchasing a lifetime annuity with this AVC fund or take 25% of its value as a further tax free lump sum and use the residual fund to purchase an annuity; and
- once he had notified them of his preferred option, they would send him an annuity quotation and also determine whether or not he had suffered any financial loss due to late payment of these AVC benefits.

3. Mercer also responded to the issues which Mr Belk raised about the reduction to his pension from the Plan as follows:

- they were obliged to correct any errors which they found;
- it was therefore not illegal for them to reduce his pension to the correct level;
- they enclosed details of their calculations, as requested, so that he could check them;
- his pension in the Plan comprised of three components: (a) Pre 1977 pension which would not be subject to any statutory increases in payment; (b) Post 1997 - Pre 2005 pension which would receive annual statutory increases each April in line with the Consumer Prices Index (**CPI**) up to a maximum of 5% pa; and (c) Post 2005 Pension which would receive annual statutory increases each April in line with CPI up to a maximum of 2.5%;
- prior to April 2012, statutory pension increases had been based on the Retail Prices Index (**RPI**);
- the errors in his pension increases occurred because an incorrect reference month for the measurement of RPI/CPI, i.e. February instead of September had been used;
- in order for them to consider any claim that recovery of the overpayment would cause him financial hardship, they would need from him proof of how he had spent the overpayment as well as evidence of his “incomings and outgoings”; and
- in light of the issue with his AVCs, they suggested that both matters were considered simultaneously once he had decided how he wished to invest the AVC fund.

4. Mr Belk replied on 13 November, it was his understanding that he did not have to take either of the AVC benefit options specified in their letter and also that he could take up to 25% of his Lifetime Allowance at retirement (£1.65M and not £1.5M as shown on the Form) as tax free cash.

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5. Mercer apologised to Mr Belk on 12 December 2012, for the length of time taken to respond to the outstanding points. They informed him that:
 - as he had not taken all the benefits available to him from the Plan at the same time, he had effectively partially retired;
 - the Trust Deed did not contain any provisions for this eventuality;
 - the Lifetime Allowance at his retirement date (i.e. his Benefit Crystallisation Event (**BCE**)) was £1.65M but as more than 12 months had elapsed since 1 April 2009, HM Revenue and Customs (**HMRC**) would not allow a further payment under this BCE;
 - his remaining AVC fund would therefore have to be paid under a new BCE; and
 - this was why he had to complete the Form showing a new retirement date and a lower Lifetime Allowance of £1.5M for the 2012/13 tax year.
6. Mr Belk was dissatisfied with this response and insisted that Mercer arrange for the whole of his Standard Life AVC fund to be paid to him immediately as cash with interest and without any tax liability.
7. Mercer responded on 21 December 2012, that they would not be able to comply with his instructions because the Trust Deed only permitted a maximum of 25% of this AVC fund to be taken as tax free cash. They reaffirmed their position to him in a letter dated 10 January 2013. Mr Belk was unhappy with this response and made a complaint against Mercer under IDRP.
8. Mercer sent an e-mail to Mr Belk on 31 January 2013, which said:

“...please accept my apologies for the delay in replying. We are looking at the settlement of benefits due to you at your retirement date including your AVCs and we want to be in a position to settle your benefits appropriately with no financial loss to you. As you will appreciate, we need to ensure we are meeting all requirements in treating customers fairly and our full response will be with you as soon as possible.”

9. On 15 February 2013, Mercer informed Mr Belk that:
- having finished their investigation into the tax consequences of paying his Standard Life AVCs late, they were now able to pay to him, as requested, this AVC fund entirely as tax free cash;
 - they had instructed Standard Life to disinvest his AVC funds and would assess whether the amount payable was more or less than what he would have been paid back in April 2009; and
 - they would like to apologise for their error and the time taken to rectify it.
10. Mercer notified Mr Belk on 22 February 2013, that they had received the AVC funds and would arrange for the monies to be paid into his bank account. They said that:
- he should allow three to five working days for this payment to clear his bank account;
 - the amount payable was £123,614 which was £289 less than what he would have been entitled to if it had been paid on his retirement date;
 - they proposed to make up this shortfall (with interest) in a separate payment;
 - if the AVC payment arrived in his account next Friday, 1,428 days would have passed since 1 April 2009;
 - as the Bank of England base rate remained at 0.5% throughout this period, an interest payment of £2,428 would be payable;
 - they would like to offer him £250 compensation for any distress and inconvenience which they have caused him due to their errors; and
 - a compensation payment totalling £2,967 was therefore on offer to settle his complaint amicably.

The Standard Life AVC funds were credited to Mr Belk's account on 1 March 2013.

11. In his e-mail dated 26 February 2013, to Mercer, Mr Belk rejected their offer which he considered illogical and unreasonable. In his view, "no right minded person" would have invested the AVC funds in an account merely attracting the Bank of England base rate and their compensation offer for distress and inconvenience was derisory. He also said that:

"Had you paid the AVC at my retirement, it would have been used along with my other AVCs and cash pay-outs to supplement my retirement investment portfolio in low risk investments in the Stock Market. It would have been placed into the Market, alongside other of my investments, via a general tracker fund or the like to minimise volatility and risk. This is my lost opportunity, and my loss is due to your errors, delays, incompetence and negligence.

Having taken financial and legal advice, my expectation of your compensation is to adjust the value of the AVC upon my retirement for the change to the FTSE All Share Index to current time...that is what would have happened to the funds, and the path that the vast

majority of retirees would have taken (and endorsed by Financial Advisors). My compensation methodology is the most logical, likely and reasonable for a right minded retiree to have pursued...

Regarding my "distress and inconvenience", a reasonable metric is the number of e-mails that I have had to send to you. Assuming each e-mail took approximately 15 minutes to compose and issue, and valued at my current hourly rate of pay (as a self-employed consultant), this computation provides a reasonable metric for my "inconvenience". Due to your procrastination, you have made the whole issue needlessly more stressful, and therefore this amount should be doubled...

You stated in your e-mail of 31 January 2013 that my compensation would incur "no financial loss to me". Therefore please confirm your acceptance of my payment methodology for my lost opportunity and "my distress and inconvenience" without further delay as this is the only methodology that would incur "no financial loss to me".

12. Mercer replied on 4 March 2013, that in order to consider increasing their offer along the lines of his request, they would need to see evidence that he would have invested the Standard Life AVC fund. As he had said that he would have invested this AVC fund along with his other AVCs and cash pay-outs, they would also need to look into how he invested his other AVCs and what returns he achieved on them. Mercer also asked him to provide details of the other investments which he had made. They stressed that they could only compensate him based on the decisions which he would have made at the time of retirement without the benefit of hindsight.
13. In his e-mail dated 5 March 2013, to Mercer, Mr Belk said that to support his request for reasonable compensation, he could provide details of his investment history during the period pre and post retirement. He said that:

"My investment portfolio includes investments in the UK and the US stock-market since the early '80s. In preparation for my retirement, I have adjusted my portfolio from riskier stocks to safer unit trusts, e.g. Fidelity UK Index tracker fund.

In October 2008, 6 months before my retirement...I added a significant sum to my existing investment in Invesco Perpetual High Income Fund.

In 2012, subsequent to my retirement further significant investments were made into this fund.

Should you have not delayed the AVC, it would have been invested into the Invesco Perpetual High Income Fund or similar from other providers in the UK Equity Income sector, as I have done pre and post retirement. My holding in this sector alone is significantly in excess of the amount of the delayed AVC funds. As your errors prevented me from investing the funds into the Market at the time of

my retirement, it is most logical and reasonable for my compensation to be based on changes to the UK Market metrics, i.e. the FTSE All Share Index. I intend to invest the majority of the delayed AVC into the UK Equity Income sector, as I would have done at my retirement (as demonstrated by my pre and post retirement investments).

...the UK Equity Income sector of the market increased by 13.2% last year, compared with the FTSE All Share Index of only 12.3%. I could argue that the compensation metric should be based on the higher UK Equity Income sector, but I believe the lower FTSE All Share Index to be most equitable...unlike your Bank of England rate offer..."

14. On 15 March 2013, Mercer asked Mr Belk again to supply the evidence which they had requested on 4 March, together with details of his financial planning and/or advice which he received.
15. Mr Belk replied by reiterating that he would have reinvested the AVCs on retirement in the UK equity income sector and provided copies of documents to corroborate his statement including:
 - contract notes for his investments pre and post retirement showing that he had invested in this sector;
 - various generic advice from his broker, Sunday papers, wealth seminars etc. advising investment in the UK equity income sector for those of retirement age; and
 - a breakdown of his investment portfolio showing the UK equity income sector to be the largest component.

He said that he was reluctant to provide Mercer with details of all of his personal investments because he regarded them to be confidential.

16. Mercer did not consider the evidence supplied adequate for their purposes. They said that the contract notes predated the date on which Mr Belk should have received the Standard Life AVCs by six months and the advice which he received from his broker was generic rather than specific. They reassured him that they would treat any information received in confidence.
17. In their letter dated 23 May 2013, to Mr Belk, Mercer proposed a new solution to compensate his loss of investment opportunity. They said that:
 - as he had told them that he would have invested the Standard Life AVCs in line with the AVCs he received at retirement, the easiest way for them to

assess his loss would be to review the investments he made with the other AVCs and also how he had invested the Standard Life AVCs on receipt;

- they were prepared though to make one final offer to resolve matter if he did not want to provide the requested information;
- they proposed to increased their compensation offer to £19,774 representing interest at 4% pa of £18,985, the AVC loss of £289 and a payment of £500 in recognition of any distress and inconvenience; and
- as part of this offer, Mercer would deduct the £1,416 statutory pension increase overpayment resulting in a net payment of £18,358.

18. Mr Belk rejected this offer because, in his view, it was still unreasonable. He said that he had provided evidence to show that any available funds would have been invested in UK Equity Funds pre and post retirement and it was therefore logical that the withheld AVCs would also have been invested in this sector.

19. Mercer sent Mr Belk a letter on 24 June 2013, which said that:

- they were prepared to put Mr Belk back into the position he would have been in had the AVC fund been settled at his retirement but it was not possible for them to assess what this position would have been without having sight of the requested evidence; and
- their offer which represented an interest rate of 4% was as high as they were able to offer in view of the lack of documentary evidence.

20. Mr Belk had a teleconference with Mercer on 16 July 2013, during which he says:

- Mercer told him that their latest proposal was based on 4% interest income (as available in the UK equity income sector of the market at that time);
- he rejected their proposal on the grounds that it did not meet their offer to settle his benefits with no financial loss to him because his investment would also have benefitted from significant growth during years that the AVCs had been withheld;
- he agreed to Mercer's request to provide more evidence regarding his investments; and
- he said that any information concerning his investments some four years after when the Standard Life AVCs should have been paid was irrelevant.

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21. Mercer was unable to reach an agreement with Mr Belk whose complaint under Stage One IDRPs was not upheld in October 2013. Mr Belk provided a detailed response to the first stage decision letter on 5 December 2013. The Trustees informed Mr Belk in their Stage Two IDRPs response dated 28 January 2014, that having considered his comments, as their “view of events remained far apart”, they recommended the “intervention of an independent arbiter”. The Trustees therefore confirmed the first stage response and concluded the IDRPs so that Mr Belk could take matters further with TPAS or me.
22. During the course of my investigation, Mercer has informed me that they are now willing to increase their goodwill compensation for distress and inconvenience from £500 to £1,000.

Summary of Mr Belk’s position

23. Mercer said that they would compensate him for late payment of the Standard Life AVCs based on the decisions he would have made at the time of retirement. The evidence which he has supplied meets this criterion and clearly demonstrates that he would have invested the withheld AVCs in the UK equity income sector of the market back in April 2009. Mercer already has all the evidence necessary to consider his compensation claim. Their additional demands for evidence of all his income and outgoings and how he subsequently invested the Standard Life AVCs are irrelevant to his circumstances at the time of his retirement.
24. He only agreed to the offer made by Mercer in their e-mail of 31 January 2013, i.e. to settle his benefits appropriately with no financial loss to him (**the Agreed Offer**). By accepting their offer, under contract law, this constitutes a contract.
25. Mercer’s current compensation offer based on the simple return of a cash investment was made “to reduce the time and effort to reach an amicable solution”. He rejected their offer because Mercer has not provided any evidence to show that it met the conditions of the Agreed Offer despite repeated requests from him. He considers their offer unacceptable because it would result in a financial loss to him. He has provided adequate evidence to support his compensation proposal which meets the Agreed Offer.
26. Mercer ended the teleconference prematurely to give him an opportunity to obtain evidence on capital growth in the UK equity income sector. They reneged on an agreement, however, to reconvene after he had submitted his evidence.

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27. Mercer's original compensation offer of 0.5% interest was a "disingenuous cheap fix" and their current offer of 4% interest is still unjust. Accordingly, to an EU directive for late payments, compensation should be based on an interest rate of at least "8% + LIBOR". Mercer has been trying to mitigate their loss rather than to settle his benefits with no financial loss to him.
28. By demanding additional evidence beyond their original request and responding tardily several times to trivial matters, Mercer has frustrated his attempts to achieve a satisfactory resolution without my formal involvement. He considers this to be harassment on Mercer's part for which he is seeking suitable compensation.
29. He has not provided either further evidence of financial hardship, or a reasoned argument as to why he considers the calculations of his revised lower pension to be flawed because Mercer, in their letter of 2 November 2012, proposed that both their pension and AVC errors should be considered simultaneously.
30. Any reduction to his pension would clearly cause him financial hardship.
31. According to the precedent set in the case of Avon County Council vs Howlett (1983), he is under no legal obligation to return the overpayment because Mercer is "estopped" from recovering it. The legal precedent set in the case of Derby vs Scottish Equitable (2001), does not apply because the circumstances under which the overpayment arose in that case are different to his.
32. It is illegal for Mercer to try obtaining a refund of the overpayment by deducting it from the compensation due to him for late payment of the Standard Life AVCs.
33. His long term financial goal plan was to buy a house on retirement for £499,000. He did this without a mortgage by using a variety of funds (including AVCs, redundancy payment and savings). If the Standard Life AVCs had been available to him at retirement, it would have been regarded as surplus funds to be invested in stock market and not required for the house purchase.
34. Mercer has never disputed what he told them during the teleconference, in particular that the other two AVCs were used to fund the house purchase.
35. As part of his retirement planning, he had always invested any "surplus funds" in the UK equity income sector. He is still following this strategy in order to reduce investment risk and invested the Standard Life AVCs into this sector when he

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received the payment. These AVCs were “surplus funds” by the very nature that he was unaware that Mercer had overlooked its payment to him on his retirement.

36. He has submitted as evidence copies of contract notes (issued both before and after his retirement in April 2009) demonstrating that his “surplus funds” have been invested in the UK equity income sector. The breakdown of his investment portfolio also showed that he did not hold any cash. There is consequently no evidence that the Standard AVCs would have been held as cash in line with Mercer’s proposals.
37. He received a superficial and factually incorrect response to his first stage IDRП complaint. He responded at stage two with evidence to discredit it but the Trustees chose not to reply and suggested that he complained to me instead. For IDRП to be completed properly, the Trustees should have provided a comprehensive response to either accept his allegations, or to refute them with their own evidence. By abdicating the unresolved issues to me, the Trustees have illegally terminated the IDRП process by denying him an appropriate response at stage two and also violated his rights as a member of the Plan.
38. It is presumptuous for the Trustees to claim that he would not have accepted any further explanation. In his view, any acknowledgement by the Trustees of his evidence would have been seriously prejudicial to their defence and it is for this reason that they have tactically chosen not to respond. IDRП was unilaterally terminated because the Trustees had nothing to lose but everything to gain by making him refer his complaint to me. The failure to complete IDRП properly constitutes harassment on the part of the Trustees which prevented a possible resolution to his complaint and caused him additional distress and inconvenience. He is still awaiting a full response to his questions submitted at stage two IDRП from the Trustees and will pursue this matter further, if necessary.
39. By using so many different people to deal with his complaint, factual errors and inconsistencies have crept into the replies supplied by both Respondents. He has had to spend a lot of time addressing their erroneous and unsupported claims. This contradicts the Trustees’ position that by terminating IDRП his complaint could be investigated by me without incurring extra effort on his part.
40. The Respondents have claimed that he has made factually incorrect statements without any proof. When he challenged their groundless claims, the Respondents ignored him because they are unable to defend their allegations.

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41. By outsourcing the Plan's administration to Mercer, the Trustees are jointly and severally liable for Mercer's actions. In his view, Mercer has acted illegally by withholding his first monthly pension payment, unilaterally reducing his monthly pension, miss-selling annuities and providing financial advice. He brought these mistakes to the attention of the Trustees who failed to fulfil their duties to him by intervening on his behalf.
42. Mercer merely informed him that they had made a mistake calculating the increases to his pension. Their failure to provide him with details of their calculations before reducing his pension was unlawful (according to TPAS). He should have been given the opportunity to understand why the reduction had to be made and check that his revised lower pension had been calculated correctly. Mercer did not provide sufficient details to justify their reduction to his pension until 30 May 2013. This information should have been supplied without him having to request it.
43. The information eventually provided was difficult to understand for a layperson in pensions. He could not check the validity of their calculations without seeking assistance from an expert in these matters.
44. The letter which Mercer sent him in November 2012, offered illegal and misleading financial advice. They advised him that he only had two options with his AVCs, i.e. to purchase an annuity or take 25% of the fund as tax free cash and use the residual to purchase an annuity. An IFA informed him that he had more options, however, e.g. to take his AVCs entirely as tax free cash which was far more advantageous to him (but not to Mercer as it meant that they did not have to provide annuity quotations and also incur a tax liability which they would have to pay for). Mercer did not include in their letter a proviso stating that they were not offering financial advice. In his view, their advice was deliberate "in order to sell annuities."
45. It was only through his persistence that Mercer eventually agreed to pay the withheld AVC fund entirely as tax free cash. The funds were finally available to him on 1 March 2013, and the delay in payment was entirely due to Mercer's continued errors and failure to respond in a timely manner. Mercer has acknowledged that their reduction of his pension by £59 per month was made without his consent and without any detailed explanation. TPAS advised him that Mercer was not permitted to make such a unilateral change without providing him with evidence to substantiate it.

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46. Mercer deliberately withheld calculation details in their first letter to him concerning the reduction to his pension. They then failed to respond urgently to his letter of 8 October 2012, accusing them of illegally reducing his pension. Mercer's failure to respond quickly was another mistake on their part. The information supplied by Mercer in their letter of 5 November 2012, contained more errors and they did not provide all the requested information until 30 May 2013. Taking over eight months to do this was unacceptable and illegal.
47. He was harassed at the time of his retirement because Mercer deliberately withheld his initial pension payment until he capitulated and signed a waiver. He accepted the advice of TPAS that Mercer's actions were illegal and he should threaten legal action. It was after a second letter to Mercer in May 2009, that he received his monthly pension, albeit a couple months late. By withholding his pension in an attempt to force him to drop his claim is clear harassment on Mercer's part.
48. Mercer incorrectly stated that his Lifetime Allowance was £1.5M (instead of £1.65M) and that his retirement date was 1 December 2012 (when it was 1 April 2009). It was possible under his correct Lifetime Allowance to take all the Standard Life AVCs as tax free cash. These additional mistakes made by Mercer should be taken into account when determining the amount of compensation payable to him in recognition of the distress and inconvenience which he has suffered. Mercer's current offer of £500 for distress and inconvenience is derisory.
49. He used a legal service available to members of the Institute of Directors to seek an opinion on Mercer's letter of 2 November 2012. The legal advice received confirmed his IFA's view that this letter contained blatant financial advice which Mercer had provided illegally (since they were not registered to give such advice) upon which he had to make a financial decision. Regarding the Trustees' conduct in the IDRP process, he received legal advice that he had the right for his complaint to be properly considered at both stages of IDRP in accordance with the Trust Deed. The Trustees did not have the discretion to abort IDRP in order to suit their needs.
50. Mercer made it clear in their letter of 17 June 2013, what evidence they required. He has supplied all the relevant evidence and therefore fully satisfied their request. The Respondents continued denial of the existence of this evidence (i.e. his contract notes supporting his investments at the time of retirement, his portfolio breakdown etc.) is therefore extraordinary. He has always been prepared to supply

additional relevant evidence, if necessary, but has not received a valid request from Mercer.

Summary of the Respondents' position

51. There was no reduction to Mr Belk's underlying pension at date of retirement. Mr Belk has alleged that he disagrees with the new correct pension figure but has not provided any evidence to corroborate his allegation. Mr Belk's pension was already in payment when it was corrected for an overpayment in relation to wrongly applied statutory increases.
52. They do not accept that the reduction to Mr Belk's pension and their request for reimbursement of the overpayment to be wrong or unlawful. Mr Belk is not entitled to the incorrect pension and they have a duty to reduce it to the correct level. They were not required to give Mr Belk any calculation details, either before, or after reducing the pension in these circumstances. They are content that no prior consent or authorisation from Mr Belk was necessary for the correction of an overpayment relating to statutory pension increases rather than the underlying benefit. Mr Belk has not provided any evidence to corroborate his statement that TPAS advised him that their actions were illegal.
53. They corrected statutory pension increase overpayments for several pensioners of the Plan including Mr Belk. All the affected pensioners were informed of the statutory pension increase error and given advance notice of the change to their pensions prior to any reduction. They are content that the explanation given to Mr Belk at the outset was sufficient and that further adequate information was given to him on request. They refute his allegation that they failed to provide him with adequate computational evidence for the necessary reduction to his pension. They are confident that the corrected pension is the one which Mr Belk is entitled to in law.
54. Mr Belk was given the opportunity of checking the calculations but he has not reported any further mistakes.
55. The legal position is that Mr Belk must repay the overpayment unless he can show that he has spent the money on something that he would not otherwise have bought. This cannot just be everyday expenses and is supported by case law (*Derby v Scottish Equitable plc* [2001]). Mr Belk says that he could have spent the

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overpayment on ice creams for his grandsons, beer, lobster suppers, etc. which are everyday expenses. A court would therefore require him to return the overpayment.

56. Mr Belk has not provided any documentary evidence of financial hardship arising from the correction of his pension and the proposed recovery of the overpayment. If he provides a reasoned argument towards financial hardship, they would consider it.
57. They have agreed not to demand return of the overpayment until Mr Belk's claim for compensation for late payment of his AVC fund has been resolved.
58. They do not consider that they have caused undue delays throughout this process. They have always responded courteously to Mr Belk within a reasonable time frame. Mr Belk's expectations/requirements are not realistic. The nature and extent of his allegations and the compensation he has asked for are disproportionate to the issues at hand.
59. They did not give Mr Belk financial advice in their letter of 5 November 2012. It merely set out the options which Mercer understood to be available to Mr Belk at the time.
60. Mr Belk ought to have been aware that the benefits available to him from his Standard Life AVCs had not been paid on his retirement and queried this with them. His failure to do so has contributed to his financial loss.
61. Taking four months to pay the Standard Life AVCs to him was not unreasonable in light of the numerous tasks which had to be completed before payment could be made.
62. In order for Mr Belk to demonstrate that he has suffered a financial loss, he must first establish he was unaware that the Standard Life AVCs had not been paid on his retirement and then produce evidence to show that he would have invested these funds. It is also important for them to see how he has invested the AVC funds since receiving them. He also said that he has invested other funds since 2009 but has not provided any evidence to corroborate this despite repeated requests.
63. Having said that he had invested his tax free cash in the stock market, Mr Belk revealed during a subsequent telephone call that he used his AVCs to buy a house.

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64. Mr Belk has misunderstood the nature of Mercer's position which was to compensate him for any evidenced actual loss (which is consistent with normal legal practice) and not to his subjective satisfaction based on hindsight. They have offered to put him back in the position he would have been in had there been no delay in paying his AVCs. However, this does not mean that they have offered to pay Mr Belk whatever he says he is owed without seeing the documentary evidence to support those claims.
65. Evidence of the investments Mr Belk made and any financial advice he sought (or financial planning he made himself) around the time of his retirement would help to show how he might have invested the Standard Life AVCs back in 2009. Any evidence of his income, outgoings, savings and investments could be used to corroborate his claim that he cannot afford to repay the overpaid pension. The generic information supplied by him so far did not support his claims.
66. Mercer proposed an alternative compensation offer to Mr Belk given his refusal to provide evidence of his actual loss in order to try resolving this matter as quickly and effectively as possible. It was intended to give him an opportunity to receive generous compensation without producing documentary evidence of his loss. This is a perfectly reasonable course of action to take.
67. Mr Belk has declined the offer and failed to provide any documentary evidence of actual loss which is unreasonable. If he were to bring a compensation claim to the courts, he would have to submit such documentary evidence of his losses.
68. As Mr Belk has not supplied such evidence despite repeated requests, they cannot offer him more than £19,774 in compensation less £1,416 for that part of the overpayment made after March 2010. This fair and generous offer remains open for acceptance in the absence of any satisfactory documentary evidence of loss being put forward by Mr Belk.
69. There has been no offer and acceptance such as to create contractual relations. Mercer's offer is simply to make good any evidenced loss.
70. There is nothing unlawful in transparently proposing to offset one obligation against another in order to find a way of concluding matters in the simplest way for Mr Belk.

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71. They did not terminate the IDRP before its conclusion. In their stage two reply on 28 January 2014, they confirmed the first stage decision and the reasons therein. In their opinion, Mr Belk would not accept any further explanation given to him and could not be brought closer towards a mutually agreeable position. They did not intend to deal with every point again at the second stage because they were aware that “all points would be aired again” and had been extensively aired before referral to me. As a result, they invited Mr Belk to seek independent adjudication from TPAS, or me, since mediation process had run its course. This was an entirely reasonable position to take.
72. They consequently reject Mr Belk’s allegation that they “tactically abused the IDRP process to frustrate his claim”. They have been firm but fair in dealing with Mr Belk.
73. They have provided Mr Belk with clear, courteous and timely explanations as to why certain actions have been taken on numerous occasions. Mr Belk has been unwilling to properly consider them and his stance has been responsible for his extensive and repetitive correspondence. They do not believe any award for distress and inconvenience calculated on a time cost basis to be justified because Mr Belk’s time and effort have principally been spent maintaining this unreasonable stance. They have made an offer of compensation for distress and inconvenience in line with what I would likely ask them to pay but Mr Belk has rejected this offer.
74. They reject Mr Belk’s allegation that he has suffered “harassment” under Regulation 11(2) of the Employment Equality (Age) Regulations 2006, whether at the time of his retirement, or at any time since then. In 2009, Mr Belk was unhappy with the amount of an augmentation package granted to him by Air Products Plc and he refused to accept payment of his pension until the issue had been resolved to his satisfaction. This was what caused a delay in paying his pension. Mercer did not “bully” him into receiving a lower pension as he alleges (and they have seen no evidence to support these allegations). They were simply unable to put his pension into payment until he agreed to the amount of the pension (which was a matter between Mr Belk and Air Products Plc).

Conclusions

Reduction to Mr Belk’s Pension and Recovery of Overpayment

75. There is no dispute that an overpayment of Mr Belk’s pension benefits in the Plan has occurred. In my opinion, the overpayment constitutes maladministration on the

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part of both Mercer and the Trustees. The starting point is that the Respondents have a legal right to recover that overpayment from Mr Belk.

76. The Respondents may be failing in their duty if they allowed Mr Belk to keep the overpayment to the detriment of other beneficiaries in the Plan.
77. But in some circumstances where an overpayment has arisen as a result of a mistake there will be a defence to an action for recovery. For example, if Mr Belk had entered in good faith into an irreversible financial commitment in the belief that his pension was more than he was entitled to.
78. The onus, however, is on Mr Belk to show that he changed his position as a result of the overpayment.
79. Mr Belk contends that the overpayment cannot be recovered by the Respondents because:
 - it arose as a result of their maladministration; and
 - he had already spent the overpayment and having to repay it now would cause him financial hardship.
80. However, Mr Belk has not provided any documentary evidence to corroborate his assertion that the overpayment was spent on exceptional expenditure despite having being asked several times by the Respondents to do so.
81. In my opinion, it was reasonable for the Respondents to have asked Mr Belk to prove that he had spent the money on something which he would not otherwise have done and that it could not be recovered before considering his request to be allowed to keep the overpayment. I would expect the Respondents to be pragmatic and not apply a very strict standard of proof though when doing so.
82. There must be a causal link though between the exceptional expenditure and the overpayment, i.e. the expenditure must not be on something Mr Belk would have paid for anyway. Mr Belk cannot rely on a change of position if the money would have been spent, for example, on living expenses and repayment of debts. Consideration must also be given by Mr Belk on the extent to which any exceptional expenditure could be undone.

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83. But by refusing to provide any documentary evidence to substantiate his statement that he has changed his position in reliance on the overpayment, Mr Belk cannot rely on this argument as a defence to prevent the claim made by the Respondents for repayment of the overpaid pension.
84. There are also circumstances when an overpayment is made where the payer is estopped from recovering the overpayment. The leading case is *Avon County Council vs Howlett* (1983). The requirements for an estoppel defence are broadly comparable to those for change of position. But in addition to the applicant having changed in good faith his position as a result, I have to be satisfied that there was a representation of entitlement and that the applicant was not at fault. Therefore, the Respondents must have made a representation of fact, or promise, which led Mr Belk to believe that he was entitled to treat the money as his own and the overpayment must not have been primarily caused by the fault of Mr Belk.
85. The Court of Appeal in *Avon* held that the defence of estoppel by representation operates on an all or nothing basis. So if made out, the whole overpayment would be prevented from being recovered even though the applicant had only spent part of the money. The court expressed reservations about the operation of that principle where, for example, its application would give rise to an injustice and it would be unconscionable to keep the whole payment.
86. In *Scottish Equitable vs Derby* ([2000] 3 All ER 793), and on appeal ([2001] All ER 193), the courts looked to distinguish that case (as opposed to making any general principle of statement) and did not apply the defence on an all or nothing basis believing it unconscionable and inequitable to allow the defendant to keep the whole overpayment of approx. £170K when he had spent approximately £9K.
87. Broadly, the judge's view was that for overpayments, the better approach was to consider change of position to avoid an unjust result and the general rule was that, unless there were compelling reasons to the contrary, there was an entitlement to recover overpayments.
88. As the Respondents are not in a position to ascertain whether Mr Belk has changed his position, there is no basis for me to find that the Respondents are unable to recover the full amount of the overpayment.

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89. Furthermore although Mr Belk may have raised his standard of living in reliance on continual receipt of the higher pension, this does not entitle him to continue to be overpaid in the future. There is generally no requirement for the Respondents to pay Mr Belk a pension higher than the correct entitlement.
90. It is difficult for Mr Belk to assert a change of position relying on money which has yet to be paid and spent. In the absence of any suggestion that Mr Belk has entered into ongoing financial commitments which he cannot get out of in the belief that his pension was more than he is actually entitled to, I do not see that he can successfully claim that he has any entitlement to a pension at the higher level. I therefore also find that the Respondents did not act unlawfully in reducing his pension.
91. The Respondents must provide reasonable evidence that Mr Belk is not entitled to the amount he has received and agree a reasonable basis for recovery according to Mr Belk's ability to pay. I consider that the Respondents did this in Mr Belk's case. They explained clearly to him in September 2012, the reason why his pension had to be reduced before the lower figure became effective on 28 September and how they proposed to recoup part of the overpayment. It had been open to Mr Belk to obtain detailed calculations of how the figures were calculated before the change took place. Mr Belk asserts that it was illegal for the Respondents not to have given him this information before reducing his pension, but I have seen no documentary evidence corroborating such an allegation.
92. Therefore, I do not uphold the first part of Mr Belk's complaint.

Late Payment of Standard Life AVCs

93. The evidence is clear that Mercer also failed to arrange payment of the Standard Life AVC benefits to Mr Belk upon his retirement on a timely basis. This error constitutes maladministration on the part of both Respondents.
94. Mercer was willing to take appropriate remedial action of their own accord to rectify their error and put Mr Belk back in the position which he would have been had they not made this mistake but only if he was prepared to supply the documentary evidence which they requested. Mercer have proposed that the easiest way to assess his loss would be to review the investments which he made with the other two AVC funds and also how he invested the Standard Life AVC funds on receipt as detailed.

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95. In my opinion, the additional evidence which Mercer has asked Mr Belk to provide to review their compensation offer is not unreasonable. I consider the rationale behind their request to be sensible because the best indicator of how he would have invested the Standard Life AVC fund is clearly how he had invested the other two AVC funds at retirement.
96. My role, however, is to put Mr Belk, as near as possible, back in the position he would have been in had the maladministration not taken place at the time of his retirement. I tend to agree with his view that any evidence requested to establish how his Standard Life AVC investments might have changed from his date of retirement until when they were actually paid to be irrelevant.
97. Mr Belk initially asserted that he invested the proceeds from his other two AVC policies in stock market investments. He then said that he had used a variety of his funds including his two AVCs in purchasing a property for £499,000 without requiring a mortgage. In my opinion, the evidence which he has provided so far is inadequate to substantiate his claim that he would have invested the Standard Life AVCs in the UK Equity Income sector. In order for Mercer to consider making a revised compensation offer Mr Belk should have provided them with sufficient documentary evidence

In the circumstances I believe that Mercer's Agreed Offer is a reasonable settlement.

98. Therefore, I do not uphold the second part of Mr Belk's complaint.

Improper financial advice

99. Mr Belk alleges that Mercer improperly offered him misleading financial advice in their letter of 2 November 2012, by stating that he had only two options with his Standard Life AVCs. There is obviously a fine line between explaining an option and its benefits and actively discouraging alternatives, whether explicitly or implicitly. In my view, Mercer's letter should have been more comprehensive and provided details of all the benefit options, rather than just two, to Mr Belk from his Standard Life AVCs. Their failure to provide full information about the AVC benefit options constitutes further maladministration on the part of the Respondents which has caused Mr Belk some distress and inconvenience. However, I do not consider that their failure can be regarded as improper financial advice as Mr Belk contends.

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Mercer simply set out the options which they understood to be available to Mr Belk at the time.

Distress and Inconvenience

100. I can see that a very considerable amount of time was spent by Mr Belk dealing diligently with the various issues and that this has been a difficult time for him. A payment for distress and inconvenience is typically modest and not intended to be compensation in the legal sense of the term, rather it is an ex gratia payment intended as a tangible recognition that mistakes and delays have been intrusive and have eaten into Mr Belk's time causing him upset. However, it would be quite inappropriate, in my view, to approach this by way of a payment for anything akin to an hourly rate for the time spent as suggested by Mr Belk. I am satisfied that the revised payment offered of £1,000 is in the broad range I would expect to see in circumstances comparable to Mr Belk's.
101. In light of my conclusions set out above, I do not consider Mercer have harassed Mr Belk through their actions.
102. I also accept the reasons given by the Trustees for completing Stage Two of the IDRP in the manner which they did so that Mr Belk could refer his complaint to me. I do not conclude that the Trustees had terminated this stage of IDRP incorrectly therefore, I do not uphold this final part of his complaint.

Anthony Arter

Pensions Ombudsman
30 November 2015