Ombudsman's Determination

Applicant	Mr Richard Bax
Scheme	Teachers' Pension Scheme (the **Scheme**)
Respondents	(1) Department for Education (**DfE**) (2) Teachers' Pensions (**TP**)

Complaint summary

Mr Bax received an estimate of the benefits which might be secured by an incoming transfer payment, but which was in fact overstated. When informed after the transfer value was received of the correct amount of additional benefits, he complained that the respondents refused to grant him the earlier incorrect amount which he says he relied on.

Summary of the Ombudsman's determination and reasons

The complaint is upheld against TP because its maladministration deprived Mr Bax of a proper choice as to whether to transfer. It would not be right however simply to require Mr Bax to be credited with the wrong benefits. He should be given the option of having the transaction unravelled at no cost to him.

Detailed Determination

Material facts

1. Mr Bax entered full-time teaching employment in September 2010. In 2012 he enquired about transferring the value of his earlier benefits with Skandia Life into the Scheme.

2. Under the Scheme regulations, there is a time limit for incoming transfers of 12 months from the date of joining pensionable employment. However, because of uncertainties about the Scheme information provided to him by his employers, TP agreed exceptionally to waive this requirement and an illustration was issued to him on 20 August 2012.

3. TP's letter informed him

> "…we have calculated that [the transfer payment] will buy an **estimated** service credit of **9 years** and **362 days** pensionable service … if there are delays in responding to this offer there may be an effect on the actual service credit that you receive. If you decide to proceed, a further calculation will be undertaken to determine your actual amount of service after we have received the payment from your previous provider." (Original emphasis)

4. The letter then said "You should now consider if you wish to proceed with the transfer of your benefits. General information is available from the following organisations …" (It went on to give details of the Pensions Advisory Service, the Financial Service Authority [strictly this ought to have been the Financial Conduct Authority] and The Pensions Regulator.)

5. The transfer payment was received on 26 November 2012 by which time it had increased somewhat. On 3 January 2013 TP asked him to confirm his full time salary at that date, so the transfer calculation could be performed. Apparently TP had already tried contacting his employer, without success, although Mr Bax questions whether the employer received such a request.

6. On 24 January 2013 TP then informed Mr Bax that the August 2012 calculation was incorrect. The correct additional pensionable service secured by the transfer payment would be 5 years 131 days. Apart from the first and last paragraphs, the letter was in the same standard terms as the 20 August letter, including the paragraph that began "You should now consider if you wish to proceed…" The final

paragraph asked him to complete a decision form saying whether he still wished the transfer to proceed, but did not say what would happen if he did not.

7. Mr Bax complained, saying that he relied on the figures given in August, and that these should be honoured.

8. On 17 February 2013 TP replied declining Mr Bax's request. TP explained that his benefits had been calculated correctly in accordance with the regulations, and offered to approach Skandia Life on his behalf "to establish if they are prepared to accept the return of the transfer value". On 16 March 2013 Mr Bax said that neither the 5 years 131 days of service, nor the approach to Skandia Life was acceptable. He said that there would be lost value because of market movements and he would need to pay his IFA to find out what was the better option. He said that he would not have made the transfer if he had known the correct service credit, but he did not expressly ask to be put back in the position he would have been in if the transfer had not taken place.

9. Mr Bax subsequently invoked the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

10. At stage one of the IDRP, on 7 June 2013 TP said: "TP has offered to return the transfer payment to Skandia Life but is unable to consider making an additional payment without details of the financial loss that you have incurred."

11. In replying on 8 June 2013, Mr Bax argued that because the transfer value had increased between the 20 August 2012 letter and its payment he should receive more than the 9 years 362 days' credit. He said: "In regard to any suggestions of returning the funds to Skandia this will only be relevant when assessing compensation via the ombudsman. This would include, not exclusively; stock market losses, independent financial advice for the process and setting up a new pension scheme, pension set up fees and my time at my rate as a chartered accountant."

12. In the final letter under the IDRP, from the DfE, there was no further mention of returning the transfer value to Skandia Life.

Mr Bax's position

13. Mr Bax says that TP should honour the August 2012 figures, because he relied on them in deciding to proceed and that, if he transferred back, he would, if he had accepted the proposal made on 17 February 2013, have lost out because of charges and market movements. He has said that the onus of proof of a failure to mitigate loss (by not accepting the offer of repayment) falls on TP, and that he was not required to make unreasonable sacrifices in order to mitigate loss.

14. He suggests that the appropriate approach is to consider there to have been a contract entered into under a unilateral mistake by TP.

TP's position

15. TP's position is that it acknowledges and regrets the error. Apparently the principal cause was the mistaken use of earlier transfer value factors. The factors are determined from time to time by the Government Actuary's Department, but the latest factors had not been uploaded to the relevant database. Additionally, TP said that the August 2012 letter had explained that the figures quoted were an estimate, and might change if there was a delay in proceeding. As well as there being a delay, Mr Bax's salary had increased in the intervening period, thereby reducing the calculation of additional pensionable service.

16. TP explained that Mr Bax's benefits had now been calculated correctly in accordance with the Scheme regulations, that it is not permitted to proceed differently, and that he is not entitled to benefit from a mistake. He was however offered £250 compensation for any distress or disappointment he may have suffered.

17. Towards the end of the Pensions Ombudsman Service's investigation, TP offered tp pay Mr Bax £750 compensation if he accepts the 5 years and 31 days' service credit.

The DfE's position

18. The DfE agreed with TP, saying that TP was responsible for the day-to-day administration of the Scheme.

Conclusions

19. Mr Bax is not entitled to benefit from a mistake. His correct additional entitlement based on the accepted transfer value is 5 years 131 days, which has been offered to him, not 9 years 362 days. In this sense he has suffered no loss.

20. There was no contract formed when Mr Bax decided that he wanted the transfer to go ahead. The 20 August 2012 letter, from which I quote more fully above, clearly said that the service credit was estimated and that there would be a further calculation performed at the time the transfer value was received. While Mr Bax could have expected the service credit to be of the order quoted, he could not have expected it to be a precise period. There cannot have been a contract for a credit of an estimated period. (There are a number of other reasons that there was no contract, which I do not need to go into, given the lack of certainty as to the credit.)

21. However, Mr Bax should have had a choice between transferring in exchange for 5 years and 131 days' service and leaving his pension with Skandia Life. Mr Bax might have been happy with the service credit of 5 years 131 days, had it been offered to him from the start, but he should not have been deprived of choice in the matter.

22. Because of maladministration by TP he transferred on a false premise, being that he would be granted 9 years 362 days or thereabouts. In principle, therefore, TP should be required to reinstate the Skandia Life arrangement at their expense, as if the transfer had not taken place.

23. However, in February 2013, TP offered to investigate on his behalf whether Skandia Life would have accepted the return of the transfer value, but Mr Bax declined that offer before knowing what Skandia Life might have said and what the terms for doing this might have been.

24. If TP had made an adequate offer to settle the complaint before it came to me, I would not uphold it. That is because a complaint has to be that maladministration has caused "injustice". If, at the time the complaint is made, a fair offer has been made but rejected then there is no injustice. That is not the case here, but I ought to take into account the extent, if any, to which Mr Bax's stance has increased the harm he has suffered.

25. My powers are inquisitorial. In that context, the onus of proof, to which Mr Bax refers in relation to mitigation, is not quite apt. TP do not have to prove that Mr Bax has failed to mitigate – I can look at the facts myself, taking into account that the mistake was made by TP and that Mr Bax did not have to take unreasonable steps.

26. I have taken into account that the offer in February did not say that TP would ensure that Mr Bax was no worse off (that is, that his pension would be reinstated as if no transfer had taken place).

27. I have also taken into account that Mr Bax rejected the offer in robust terms. He continued to pursue the original, wrong, service credit. In June TP opened the door to Mr Bax himself defining what the loss was. He rejected the suggestion of reinstatement robustly again, saying that the assessment in relation to reinstating funds with Skandia Life would be a matter for when the case reached my office. He listed his additional requirements such as independent financial advice and his costs as an accountant.

28. So, on the one hand TP did not ever make a clear offer to reinstate Mr Bax's Skandia Life pension as if the transfer had not taken place, which in my judgment they should have done. I would go further and say that, in the 7 June IDRP letter, they ought to have undertaken to find out what the loss was, rather than merely saying they could not offer to pay compensation without evidence as to the loss.

29. On the other hand, by 8 June 2013 if not before, Mr Bax had closed his mind to the possibility of reinstatement and said he would not consider the matter before the case reached my office (I do not read what he said to be a negotiating position). If he had taken that position in the face of a clear acceptance of liability by TP, I would have said that the injustice beyond mid-June was in effect self-inflicted.

30. Taking into account, though, that the error was TP's and that they did not accept full liability or clearly offer to make sure that there was no loss to Mr Bax, I consider that he should be given the option of reinstatement as at now.

31. However, if Mr Bax decides not to accept reinstatement, TP shall establish for him an additional 5 years 131 days' Scheme service credit, as this was the correct entitlement secured by the transfer payment from Skandia Life.

32. Finally, I do not consider that Mr Bax should be personally compensated for his time, or for the cost of independent advice. He has in fact already said that he would not have transferred for the 5 years 131 days, and if that is true the choice would be a fairly straightforward one. He says he needs to take advice now because circumstances have changed. But strictly the question is what would he have done at the time – not what should he do now with the luxury of hindsight.

Directions

33. If, within 28 days of this Determination Mr Bax has not told TP that he rejects their offer of £750 and the 5 years 131 day service credit, then TP are to pay him that sum and confirm to him that he has a service credit of 5 years 131 days.

34. If within 28 days Mr Bax writes to TP to say he does not accept that offer, then within 28 days of his letter, TP shall approach Skandia Life and ask it to calculate how much it would now cost to reinstate Mr Bax's personal pension in full, including any associated set up costs, with the value it would have had on that day if the transfer had not happened.

35. Once TP has the answerTP shall forthwith write to Mr Bax asking him whether he wishes to have his pension reinstated with Skandia (or elsewhere at equivalent cost) or whether he will accept the additional Scheme service credit of 5 years 131 days.

36. If Mr Bax elects reinstatement that amount shall then be paid to Skandia Life or to an alternative provider of Mr Bax's choice. Payment would of course expunge the additional 5 years 131 days' Scheme service.

37. Additionally if Mr Bax elects reinstatement, TP shall pay £250 to him in compensation for the disappointment and inconvenience caused to him by its mistake.

Tony King
Pensions Ombudsman

8 May 2015