

Ombudsman's Determination

Applicant	Mrs N
Scheme	Old British Steel Pension Scheme (OBSPS)
Respondent	Open Trustees Ltd (Open Trustees)

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by Open Trustees.

Complaint summary

2. Mrs N's complaint about Open Trustees is that it will not allow her to transfer her contingent widow's pension benefits from the OBSPS to the British Steel Pension Scheme Two (**BSPS2**).

Background information, including submissions from the parties

3. Initially, Mr N was a member of the OBSPS.
4. In March 2016, Tata Steel UK, a subsidiary of Tata Steel Ltd, owner of British Steel and sponsoring employer of the OBSPS, announced plans to re-structure the business, including "decoupling" the OBSPS. In December 2016, Tata Steel Ltd decided to close the OBSPS to further accrual from March 2017.
5. An employer can apply to The Pensions Regulator (**TPR**) for a "regulated apportionment arrangement" (**RAA**), which allows a financially troubled employer to detach itself from its liabilities in respect of a defined benefit pension scheme. This usually happens if continuing to support the scheme would result in insolvency. If an RAA is agreed, the scheme is separated from the sponsoring employer and usually enters the Pension Protection Fund (**PPF**).
6. In May 2017, the PPF announced that terms for an RAA had been reached. Under the terms of the RAA, Tata Steel UK would set up and sponsor a new scheme, the BSPS2, and members of the OBSPS would be given the option to transfer to the BSPS2 before the OBSPS entered the PPF by default in early 2018.
7. Around the same time, Mr N was diagnosed with terminal cancer. He was a deferred member of the OBSPS at the time. There is no evidence that he or any parties acting

on his behalf told the administrator of the OBSPS (**the OBSPS Administrator**) or the trustees of the OBSPS (**the OBSPS Trustee**) of his diagnosis at the time or after.

8. From October 2017, a “Time to Choose” exercise (**Time to Choose**) was carried out to allow OBSPS members to elect to transfer to the BSPS2. Time to Choose included general newsletters; personalised information packs; reminder option forms; and, member meetings. As the BSPS2 would pay different, and potentially lower, benefits, members of the OBSPS had to elect to join the BSPS2, by providing written consent. This was in line with Section 67 of the Pensions Act 1995.
9. On 10 October 2017, a Time to Choose information pack and option form was issued to Mr N by Real Digital, a communications firm acting for the OBSPS Administrator and the OBSPS Trustee. On page 5 of the information pack, it said:

“The [BSPS2] pays out a **lump sum if you die** less than five years after you start taking your pension. This sum is equal to the total pension you would have got for the rest of those five years. This is on top of any spouse’s pension that the [BSPS2] pays. The [PPF] doesn’t pay this lump sum.”
10. On page 28 of the information pack, it said:

“We’ve set up a free, impartial helpline which you can call to talk through your options with an expert. But they can’t tell you what they think you should do. The same is true for the Trustee, Tata Steel UK and the administration team - they can’t say what they think you should do. If you want someone to say what they think you should do, talk to an independent financial adviser. You can find one near you by going to www.unbiased.co.uk...”
11. Mr N then completed, signed and returned the Time to Choose form. He selected the following option: “I want to move with the current scheme into the [PPF].”
12. On 9 November 2017, the OBSPS Administrator sent Mr N an ‘Interim Time to Choose confirmation letter’, which confirmed his election.
13. On 22 December 2017, the deadline for transferring to the BSPS2 expired.
14. On 10 January 2018, the OBSPS Administrator sent Mr N a ‘Final Time to Choose confirmation letter’, which re-confirmed his election.
15. On 29 March 2018, Open Trustees was appointed trustee of the OBSPS, which then entered PPF assessment period. Around the same time, Barnett Waddingham was appointed the new administrator of the OBSPS.
16. On 18 August 2018, Mr N died.
17. In October 2018, Mrs N contacted Barnett Waddingham. She said she understood that she would receive a widow’s pension of about £4,900 a year in the PPF. However, no lump sum was available; this would have been paid under the BSPS2.

18. Mrs N's concerns were investigated as a formal complaint. In December 2018 and March 2019, Open Trustees responded under stages one and two of the OBSPS's internal dispute resolution procedure (**IDRP**). However, the complaint was not upheld.

Mrs N's position

19. Mrs N submits that:-

- Mr N was asked to make a decision when he was very ill. Clearly, he did not make the correct decision for someone who had very little time left to live.
- The forms were "extremely lengthy and complicated". At no point did they ask him to tell the OBSPS Administrator, the OBSPS Trustees or Real Digital if he was ill or otherwise unable to complete them.
- At the time, Mr N was a deferred member of the OBSPS, so there was no reason for him to tell the OBSPS that he was suffering from a terminal illness. He did not know how long he had to live, though he did not expect to live until pension age.
- Open Trustees had said that meetings were offered to explain Time to Choose. However, Mr N was in no position to attend meetings; he needed all his strength just to attend hospital appointments.
- According to a consultant's letter of January 2020, "it is highly likely that [Mr N's] emotional and physical symptoms plus the development of brain metastases had a significant impact on decisions that he made during his cancer journey".
- Mr N's decision meant she did not receive a lump sum under the OBSPS. Had he been in "the right frame of mind", he clearly would have chosen to join the BSPS2.

Open Trustees' position

20. Open Trustees submits that:-

- Where a scheme enters a PPF assessment period, the trustees may no longer allow members to transfer to another scheme. This is in line with Section 135(4)(a) of the Pensions Act 2004 (**the PA 2004**).
- Only where an administration error occurred as part of Time to Choose could the receiving scheme potentially accept a transfer-in after the exercise. An example of this would be failure to process a valid election form. There was no sign of such an error in Mr N's case.
- In October 2017, Mr N was issued with a copy of the Time to Choose information pack by Real Digital. This set out, in detail, the differences between the OBSPS and the BSPS. He was treated the same as other OBSPS members in this regard.
- About 130,000 members received Time to Choose information packs. These were reviewed and revised by the OBSPS Trustee, legal and actuarial advisers and representatives of the PPF and TPR.

- Mr N then completed, signed and returned the forms, selecting to remain in the OBSPS. In short, he made a “clear and unambiguous” election to remain.
- In November 2017 and January 2018, the OBSPS Administrator wrote to Mr N and confirmed his election. At no time did Mr N contact the OBSPS Administrator or the Time to Choose member helpline to say he had made the wrong election.
- Although Mr N was suffering from cancer at the time, he did not make the parties aware of this. Therefore, they were unable to consider special measures to assist.
- Even if Mr N had been deemed incapable of making his own decision under Time to Choose, absent a Power of Attorney authorising another party to act for him, he would always have remained in the OBSPS by default.
- Neither the OBSPS Administrator nor the OBSPS Trustee was in a position to second-guess Mr N’s decision; it was reasonable for them to accept his election.
- In summary, there was no sign of an error that would allow it to override the general prohibition on transferring to the BSPS2 after the deadline, and so Mrs N could not be treated as if Mr N had elected to join the BSPS2 and died a member of that scheme.

Adjudicator’s Opinion

21. Mrs N’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by Open Trustees. His findings are summarised below:-

- When a scheme enters a PPF assessment period, the trustees may no longer allow transfers-out, as outlined in the PA 2004. However, a transfer to the BSPS2 could potentially be allowed if an error occurred as part of Time to Choose. Thus, Mrs N could potentially transfer her contingent rights under the OBSPS to the BSPS2 if such an error were identified.
- Mrs N said, among other things, that the Time to Choose forms did not make clear that Mr N should inform the OBSPS Administrator if for whatever reason he was unable to make an election.
- The Time to Choose literature could have made clear that Mr N should raise any issues that might prevent his making the best decision; had it done so, it was possible he would have sought guidance or advice and elected to switch to the BSPS2 instead. However, the literature did say that members could contact a helpline to discuss their options; they were also signposted to independent financial advisers.
- Nor was there any dispute that Mr N made a clear election; he completed, signed and returned the Time to Choose form, ticking the box to remain in the OBSPS.

- Neither the OBSPS Trustee, the OBSPS Administrator or any other parties were made aware that Mr N was terminally ill. Only if they had been aware would they have potentially come under an additional duty to assist him.
 - The Time to Choose information pack outlined the key differences between the OBSPS and the BSPS2. It explained that a lump sum was potentially available under the BSPS2, but not under the OBSPS. So, it would have been possible for Mr N to have elected to switch to the BSPS2 to take advantage of this option.
 - Although the consultant's comments indicated that Mr N's condition would have affected his decision-making, this did not change the outcome of the complaint because there was no sign that the OBSPS Trustees or the OBSPS Administrator was told about this. So, it was reasonable for them to assume that he was capable of making a decision with the standard information issued to all members.
 - In summary, there were no administrative errors in the Time to Choose process that would allow Open Trustees to override the general prohibition on transferring to the BSPS after the deadline. Therefore, Mrs N could not be treated as if Mr N had elected to transfer to the BSPS2 and died a member of that scheme instead.
22. Open Trustees accepted the Adjudicator's Opinion. However, Mrs N did not. She said she was very upset with the outcome. Mr N dedicated most of his working life, more than 30 years, to the steel industry and had been badly let down by them. He would never have envisaged or intended that this would happen.
23. Mrs N provided her 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 Mrs N for completeness.

Ombudsman's decision

24. There is no sign that Mr N informed the OBSPS Administrator or the OBSPS Trustee that he was suffering from ill-health and/or that he was unable to make a decision as part of Time to Choose.
25. Had he done so, I might have considered whether the OBSPS Administrator or the OBSPS Trustee came under an additional duty to inform or advise on Time to Choose.
26. It is understandable that Mr N and his family had other matters on their minds at the time. However, I do not find the OBSPS Administrator or the OBSPS Trustee acted in error in relation to Time to Choose.
27. As the Time to Choose deadline has expired, there are no grounds on which I can require Open Trustees to allow Mrs N to be treated as though Mr N elected to transfer to the BSPS2 and died a member of that scheme.

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28. Further, Mr N's election to transfer with the OBSPS into the PPF was unambiguous. I appreciate that Mrs N says Mr N clearly did not intend to select this option. However, aside from her testimony, the only evidence to support this is the consultant's letter of January 2020, as mentioned at paragraph 19 above. Regrettably, I find that this is not sufficient evidence that Mr N did not intend to transfer with the OBSPS to the PPF.
29. I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
18 May 2020