PO-8035

Ombudsman's Determination

Applicant	Mr Christopher Mayo
Schemes	The Kodak Pension Plan (**KPP**) and the Kodak Pension Plan (No. 2) (**KPP2**)
Respondents	The Trustees of the Kodak Pension Plan (**the KPP Trustees**) The Trustees of the Kodak Pension Plan (No.2) (**the KPP2 Trustees**)

Complaint Summary

1. Mr Mayo complains that the KPP Trustees and the KPP2 Trustees failed to inform him until after he had already retired early on 1 April 2013 that by deferring early retirement until 1 November 2013 the pension available to him from KPP would be calculated using the more generous Pension Protection Fund (**PPF**) early retirement factors.

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld against the KPP Trustees and the KPP2 Trustees because I do not consider that they provided him with misleading or inadequate information about KPP/KPP2 at the time he requested early payment of the retirement benefits available to him in KPP.

Detailed Determination

Background

3. On 19 January 2012, Eastman Kodak Company (**EKC**), the parent company of Kodak Ltd (**Kodak**), filed for chapter 11 bankruptcy protection (**the Filing**) in the USA. By doing so, creditors were prevented from unilaterally taking action against EKC until a restructuring plan had been finalised.

4. Kodak was the sponsoring employer of KPP. EKC provided direct support to KPP through a guarantee in favour of the KPP Trustees.

5. The KPP Trustees, EKC's largest creditor, were involved in complex discussions with both Kodak and EKC about the implications of the Filing on KPP. They kept KPP members and the Pensions Regulator regularly updated on the situation.

6. On 26 January 2012, Kodak consulted the active members of KPP about their proposal to amend KPP so that no future benefits would accrue in it from 31 March 2012. They stressed that the proposal was not directly related to recent events affecting EKC but had been developed as part of the KPP valuation process which began in 2011. This showed that pension costs and the financial risks associated with KPP had continued to increase. If their proposal was accepted, the active members would:

   - become deferred pensioners of KPP; and
   - be offered active membership in the new Kodak Group Personal Pension Plan (**KGPPP**) from 1 April 2012.

7. It was still possible to take early retirement from age 55 in KPP but the enhanced early retirement reduction factors which had applied to those retiring from active service would be replaced by less favourable factors applicable to early retirement from deferment. The KPP Trustees would continue to apply the enhanced early retirement factors on a transitional basis but only in relation to early retirements with an effective date no later 1 April 2012 for members who had applied for early retirement from active service before 26 January 2012.

8. There were several further communications from both Kodak and the KPP Trustees about the consultation process and the early retirement terms prior to KPP's closure to future accrual from 31 March 2012.

9. From July 2012 to March 2013, there were additional statements made by KPP Trustees which provided information about:

   - the financial position of Kodak;
   - Kodak's failure to pay a contribution of around £37.1 million which was due by 30 June 2012 into KPP;

- their negotiations with Kodak and EKC over this missing payment;
- their claim against EKC for an amount of around US$ 3 billion to the US Bankruptcy Court;
- EKC's sale of its intellectual property in order to raise money to pay its creditors;
- EKC becoming a smaller company when the Filing process was completed which meant that it could no longer fund KPP as it had in the past;
- working with EKC to amend KPP benefits in order to make it sustainable; and
- the possibility of winding up KPP and transferring to the PPF if they were unable to negotiate the best possible settlement with EKC for KPP members.

10. In April 2013, the KPP Trustees reached an agreement with EKC which would give KPP members better benefits than those available in the PPF. In accordance with this agreement, KPP would acquire two of Kodak's businesses as assets and a new pension plan, the Kodak Pension Plan 2 (**KPP2**), would be established if enough KPP members voted to join it. In return, KPP would have no further claim on EKC or Kodak.

11. KPP2 was designed to offer benefits which were less generous than those available in KPP but better than those available in the PPF. KPP2 adopted the PPF early retirement factors which were more favourable than the KPP ones.

12. The KPP Trustees introduced a moratorium on early retirements on 29 April 2013 in KPP and gave KPP members the option to transfer to KPP2 or remain in KPP. When all the consenting KPP members had been transferred to KPP2, KPP would enter a PPF assessment period.

13. In May 2013, the KPP Trustees issued a document summarising the differences between the PPF benefits and those available in KPP2.

14. In September 2013, the two Kodak businesses were transferred to Kodak Alaris Holdings Limited (**Kodak Alaris**).

15. In November 2013, the KPP Trustees announced that:

    - KPP2 would commence on 31 March 2014;
    - they would make some changes to how they ran KPP in the meantime;
    - from 1 November 2013 until 31 March 2014, they would calculate early retirement pensions in KPP using the more generous PPF early retirement factors available in KPP2; and

- if a member had applied for early retirement before the date of this announcement and his/her request had been put on hold, they would start processing it from 1 November.

16. On 31 March 2014, the consenting KPP members were transferred to KPP2 and KPP began its PPF assessment period.

17. KPP was transferred into the PPF in September 2015.

Material facts

18. In August 2012, Mr Mayo, a deferred pensioner of KPP who was still employed by Kodak at the time, received from Aon Hewitt (**Aon**), administrator of KPP, a retirement quotation showing the estimated pension and tax free lump sum available to him from KPP assuming he retired early on 1 April 2013 to be:

    - a full pension (including AVC benefits) of £19,055 pa; or
    - a tax free lump sum of £98,952 (comprising of £54,045 from the main KPP and £44,907 from his AVC fund) plus a residual pension of £14,843 pa.

19. On 18 September 2012, Aon sent Mr Mayo a Retirement Benefit Pack (**the Pack)**. The covering letter said that:

    - the Pack confirmed (on behalf of the KPP Trustees) the benefit options available to him on retirement;
    - the enclosed Retirement Benefits Statement provided an estimate of how much his pension would be and the choices he had;
    - the enclosed Retirement Checklist was designed to help him provide Aon with the information they needed to settle his benefits; and
    - he should use the Retirement Checklist to help him fill in and send back the Retirement Benefits Options Form with the requested information in order for Aon to pay his benefits as close as possible to his selected retirement date.

20. The Retirement Checklist asked the question “Do you want your pension to start now?”. If Mr Mayo’s response was “yes”, he had to:

    - inform Aon of any discrepancies in the personal information used by them to calculate his retirement benefits;
    - provide Aon with evidence of his and his spouse’s identity, e.g. birth and marriage certificates; and
    - complete, sign and date the Retirement Benefits Options Form and the Bank/Building Society Payments Instructions Form.

    If Mr Mayo’s response was “no”, he had to:

- tell Aon that he did not intend to retire to stop them contacting him again until he was ready to do so; and
- inform Aon accordingly if he knew when he was planning to retire so that they could amend their records.

21. On 24 September 2012, Mr Mayo applied to receive the full pension available to him from KPP from 1 April 2013. Aon returned the birth/marriage certificates for him and his wife on 26 September 2012.

During a trustees meeting held on 28 March 2013 the KPP Trustees were asked to approve the benefit redesign package for KPP2. At the end of that agenda item it was noted that ‘a lot of the active deferred members aged over 55 could see a potential windfall as a result of the impact of changing the Plan’s early retirement and cash commutation factors to be in line with those provided by the PPF’ and the KPP Trustees agreed to model the cost and cashflow impact of this aspect of the design ‘assuming 100% of such members acted in this way’. On the same day, the KPP Trustees informed Mr Mayo that his early retirement application had been approved and he would receive a pension from 1 May 2013 which would be backdated to 1 April 2013.

22. On 8 May 2013, the KPP Trustees were presented with an AOB recommendation that there should be a moratorium on early retirement from 29 April, the date that the deal with EKC was announced, for two reasons:

- because the early retirement terms of KPP2 were more generous than under the current plan;
- because dealing with member requests for early retirement was a practicality to be avoided during the communication exercise required to implement it.

23. When Mr Mayo learned that KPP2 would be using the more generous PPF factors to calculate early retirement pensions, he made a complaint under the Internal Dispute Resolution Procedure (**IDRP**) of KPP which was unsuccessful at both stages.

24. Mr Mayo voted to transfer to the KPP2 in July 2013 rather than remain in KPP.

25. Mr Mayo says that:

- he is currently receiving an early retirement pension of £18,966 pa from KPP2;
- if his deferred pension at Normal Retirement Date (**NRD**) had been reduced by the PPF early retirement factors, his pension would now be £26,151 pa;
- this represents an ongoing loss of £7,185 pa to him (increasing in line with the pension increase provisions of KPP2); and
- the capital value of that loss would be (using a 5% annuity rate for illustrative purposes) in the region of £144,000.

Summary of Mr Mayo's position

26. The KPP Trustees failed in their duty to act in his best interests by agreeing to pay him an early retirement pension from KPP calculated on terms which were prejudicial to him. They knew that there was a strong likelihood that if he deferred his decision to retire early, better terms would have applied.

27. He had made his decision to retire early during a period of great financial uncertainty within Kodak and KPP. Many changes were made within a short period of time and there was a steady stream of communications from Kodak and the KPP Trustees presenting a very negative picture of the funding position and the future of KPP.

28. In February 2012, he attended a pension seminar which highlighted that:

    - despite significant cash injections into KPP, the deficit and future service costs were still both steadily increasing; and
    - the current cost of pensions was unaffordable and represented "one of Kodak's most significant risks".

29. The Kodak document "Proposal in respect of the future service benefits in the Plan February 2012" showed that the funding deficit in the KPP was about £714 million in 2009. Furthermore, a "Q&A" document issued in February 2012 said that "even if more funds became available, benefit improvements would only be considered by the Trustee and the Company once the KPP was fully funded." He did not therefore expect that preferential early retirement terms would be made available in KPP at any time (if at all).

30. In July 2012, he was informed that Kodak had not paid a contribution of around £37.1million into KPP and that the KPP Trustees had put in a claim for $US3 billion against EKC to the US Bankruptcy Court. He was unsettled by this information and, in particular, he was worried about:

    - the possibility of KPP entering the PPF;
    - the risk of more changes to KPP which might further adversely affect early retirement benefits in KPP; and
    - whether he would continue to have a job with Kodak or be in a position to "rebuild his savings" at his age.

31. If the KPP Trustees had provided him with information which made it clear that there was even a remote possibility of KPP providing improved benefits in the future, he would most probably have deferred early retirement for a year or so.

32. His concerns about KPP had put him under considerable duress to take his pension early. He had thought that by doing so he would protect the value of his pension from reducing further. Although the KPP Trustees did not improperly persuade him to retire

early, they did not correct his misunderstanding that taking early retirement would protect his benefits. Furthermore, whilst the KPP Trustees should not be held to account for the announcements made by Kodak, it is reasonable to expect that they would have corrected any misconceptions in them.

33. Early retirement from deferment is permitted at the KPP Trustees' discretion and therefore subject to their duty to exercise discretionary powers in his best (financial) interests after taking into account all relevant factors. They should therefore have made appropriate enquiries into why he had applied for early retirement (particularly when he was still actively employed by Kodak and would not normally have been expected to retire). In his view, the KPP Trustees' failure to do this meant that their decision was flawed.

34. The KPP Trustees were already negotiating with both Kodak and EKC for more favourable early retirement terms in KPP2 at the time he submitted his early retirement request in September 2012. The minutes of the meeting of the KPP Trustees on 1 November 2012 referred to a proposal having been initially presented to the PPF and TPR at a meeting on 9 October 2012. That proposal must have been formulated earlier and was presumably based on advice received by the KPP Trustees including that it was highly unlikely EKC would be able to support the KPP over the long term. The possibility of more favourable PPF factors being adopted was therefore accepted as early as 1 November 2012. It is also clear from these minutes that the possibility of the establishment of KPP2 (albeit still subject to extensive negotiation) was not only foreseeable by the KPP Trustees but in their actual contemplation during late September/early October 2012.

35. He could not reasonably be expected to know this unless the KPP Trustees brought it to his attention. Although he accepts that the KPP Trustees could not have provided full details of their negotiations, they could have given him some indication of the type of deal they were hoping to reach. It was improper for the KPP Trustees to agree to his early retirement request without informing him of this possible benefit improvement (however remote).

36. It is improper for the KPP Trustees to argue that they could not reasonably be expected either to treat his application (made on the basis of incomplete information) as not binding or to provide any hint that deferring the decision (which in any case could not be implemented for some months) might be to his benefit.

37. It should have been clear to the KPP Trustees in April 2013 that it would not be in his best interests to take his pension in KPP early. They should not have paid his pension without first taking reasonable steps to ensure that he fully understood the consequences. Their failure to do so was maladministration and also a breach of their fiduciary obligations.

38. The statutory disclosure regulations only set out the minimum fiduciary requirements for the KPP Trustees. Given the exceptional prevailing circumstances, the information which they provided was insufficient for him to make an informed decision about whether or not to retire early. In his view, the KPP Trustees did not therefore take the steps necessary to ensure that their exercise of discretion to permit his early retirement was in his best (financial) interests. They should have done more than merely comply with statutory requirements before granting him early retirement.

39. Whilst other options including no change to KPP were possible, the probable outcome of failure to reach a deal would have been an eventual (although possibly not immediate) insolvency of the employer and transfer to the PPF. In his view, the KPP Trustees have not taken into account that if this occurred, the more favourable PPF early retirement factors would apply and they have not considered whether their existing policy for early retirement should have been reviewed as a result.

40. Although payment of his pension was backdated to 1 April 2013, the first payment was not paid into his bank account until 1 May 2013 (i.e. after the settlement was announced on 29 April 2013).

41. It is clear that the KPP2 Trustees have assumed liability for the past actions of the KPP Trustees.

42. The KPP Trustees did not consider during the meeting on 28 March 2013 whether it would be appropriate to revisit their decision to put his pension into payment early because their decision was made irrevocably on 24 September 2012. They commissioned financial modelling to consider the implications of the change on future applications for early retirement only. It is not apparent from the extracts of the minutes disclosed that they gave any consideration to his case (or other members who had applied for early retirement after 26 January 2012).

43. The KPP Trustees did not take into account all relevant factors in deciding where to draw the line in applying the moratorium and change of actuarial factors. They failed to consider the possibility of revisiting their standing policy or its impact on individual cases either at the meeting on 28 March 2013 or at any time.

44. The KPP Trustees should also have provided him directly with information about PPF instead of relying on a link to the PPF website.

45. He has clearly suffered a financial loss by taking his pension from KPP at the time he did. In his opinion, compensating him would not set a precedent which, in any case, would only apply to those members who had retired early between 26 January 2012 and 29 April 2013.

46. The KPP Trustees cannot use the complex negotiations with Kodak and EKC as an excuse for failing to deal appropriately with ongoing issues in the administration of KPP. Furthermore, as the KPP Trustees were aware that insolvency of the sponsoring employer was likely, they should have considered whether this would

have an impact on their policy on how they exercised discretion. By failing to review/suspend their existing policy, the KPP Trustees did not consider whether they were acting fairly between the different classes of beneficiaries in KPP. They should have taken additional steps to protect his (financial) interests and not simply continue to apply a policy formulated in easier times.

47. It is unfair that a moratorium was only imposed on early retirement applications with effect from 29 April 2013 and not earlier when there had been potential for the transfer of KPP to the PPF. The uncertainty surrounding the possible outcomes for KPP justified a moratorium being introduced earlier than 29 April 2013 particularly when the more favourable PPF factors would have been adopted if no other solution was found.

48. A “cliff edge effect” is always likely when scheme factors are updated. The exceptional circumstances surrounding his case justified the KPP Trustees taking additional steps to prevent this occurring or, at least, to soften its impact.

49. Some trustee boards adopting new actuarial factors also used them for members whose retirement benefits have not yet been put into payment even if they had applied when the old factors had been in force. Moreover, many ongoing schemes (with a robust employer) do consider the impact of updating actuarial factors as a matter of routine on both ongoing retirements/transfers and recently processed decisions. In some cases, they also take steps to mitigate the effect on members (even if they are not required to do so).

50. Having decided to adopt the more generous PPF early retirement factors for KPP2, the KPP Trustees should have introduced them earlier in KPP so that they could have been used to calculate the early retirement pension available to him. This would have been fairer than offering these improved early retirement terms only to KPP members who applied after the introduction of the moratorium.

51. The response to his appeal at stage one IDRP showed that the KPP Trustees generally did not allow members to rescind their decision to retire early unless they had been inadvertently misled by the KPP Trustees (or their agents) into making “a bad choice”.

52. In his view, the KPP Trustees misled him into making a poor decision by supplying a lot of information which gave a very discouraging financial view of KPP, omitting to provide relevant details of the PPF early retirement benefits and failing to make appropriate enquiries into the circumstances behind his decision to retire early.

53. In order to put matters right, he would like his pension recalculated using the more generous PPF early retirement factors.

Summary of the position of the KPP Trustees and the KPP2 Trustees

54. It is unfortunate that Mr Mayo took early retirement before the more generous PPF early retirement factors were introduced in KPP but he is not legally entitled to have his pension recalculated. Although they have the power to award a discretionary increase to Mr Mayo’s pension, they do not consider that it would be appropriate to do so in his circumstances.

55. It was Mr Mayo’s decision to apply for early retirement in September 2012. Although there was clearly doubt over the future of both Kodak and KPP at the time of his decision, they disagree with his view that he was forced into making it because of this uncertainty. They did not put him under any duress to retire early.

56. Mr Mayo may have been worried about the security of his KPP pension given the financial position of EKC but no communication from them encouraged him to take early retirement. They are sympathetic to his feelings of uncertainty but they cannot be held responsible for them. These feelings were inherent to the situation. Their correspondence indicating that KPP was in a precarious financial position was accurate.

57. During the Filing process and, in particular, prior to Mr Mayo requesting early retirement, they made it clear in their communications that if Kodak became insolvent, KPP would enter the PPF and KPP members would then be entitled to benefits at PPF compensation levels. Moreover, some of their letters sent after 19 January 2012 directed KPP members to the PPF’s website which set out the benefits available.

58. It was only when establishment of KPP2 became a realistic option that they decided the early retirement factors in KPP2 should mirror those in the PPF.

59. Prior to the agreement made with EKC (in April 2013) and obtaining approval from the PPF that KPP2 could be set up there were many occasions when entry of KPP into the PPF still looked a realistic possibility for all members. They were therefore unable to communicate with any degree of certainty to KPP members what the benefits and factors in KPP2 might look like until settlement had been reached.

60. It is only with the benefit of hindsight that KPP members who have taken early retirement after 19 January 2012 but before 29 April 2013 can determine that it would have been better for them to defer their retirement.

61. They have to act in the best interests of all members of KPP. Their duty to act impartially did not mean that there was a duty to treat all members the same.

62. Apart from his pension rights under KPP, they were unaware of Mr Mayo’s personal financial circumstances. Their obligations were limited to providing Mr Mayo with information about KPP benefits and did not extend to:

    - considering whether his personal decision to retire early was in his best interests; and

- providing information above what was given in order to assist him decide whether or not early retirement would be appropriate.

63. They did not mislead Mr Mayo into thinking that taking early retirement would protect his pension. In fact, they had sent him correspondence explaining that retiring early would not benefit him. (I note that Mr Mayo refutes this statement. He asserts that even if that message could be said to be implicit in the communications that were sent it was not apparent him because he is not a pensions expert.)

64. They were under no legal duty to provide him with information on how his benefits would be calculated if KPP transferred to the PPF. In any case, they had made it clear to him that the level of PPF compensation would depend on whether his age was above or below NRD and not whether his pension was in payment or not.

65. They could not have provided Mr Mayo with more information on KPP2 or the future of KPP than they actually did at the time he made his decision in September 2012 to retire early. This was before they had even considered the possibility of using PPF early retirement factors in KPP and also some six months before a formal decision had been made on KPP2's benefit design. They should not be held responsible for informing Mr Mayo about a potential change to the early retirement factors in KPP before he decided to retire early.

66. Furthermore due to the confidential nature of their discussions with Kodak, they were not required to provide him with more information on KPP2 than they did.

67. At the time of Mr Mayo's decision to retire early, they did not know if KPP would be entering the PPF or whether KPP2 would need to be set up and the level of benefits it would provide. Establishment of KPP2 needed the approval of both the PPF and the Pensions Regulator and this only occurred in April 2013. Prior to that date, other options - including no changes being made to KPP - were still real possibilities.

68. They implemented a moratorium on early retirement from 29 April 2013 to prevent the issues which Mr Mayo is complaining about. This was the earliest date upon which they had sufficient information to do so. The moratorium lasted until 1 November 2013 when they adopted PPF early retirement factors for KPP. By doing so they allowed KPP members to take early retirement without having to consider whether it would be better to wait until KPP2 commenced.

69. They stand by their decision to impose the moratorium in the way which they did. The timing was reasonable and it is not for Mr Mayo to second guess their decision (unless it was perverse or their decision making was flawed).

70. They accept that the move to the PPF early retirement factors only benefitted (deferred) members who had not reached their NRD but it was necessary in order to make KPP2 feasible. In order to obtain PPF consent for the establishment of KPP2, they had to ensure that the vast majority of KPP members agreed to transfer to

KPP2. To achieve this, they had to guarantee that members would not be worse off in KPP2 than in the PPF in order to allow a clear comparison between the two schemes.

71. Increasing Mr Mayo's early retirement pension to the level it could have been if the PPF early retirement factors were used to calculate it might set a number of precedents e.g. deferred pensioners of KPP who had retired between 31 March 2012 and 29 April 2013 (i.e. the dates on which KPP was closed to future accrual and the moratorium on early retirement in KPP was introduced respectively) might argue that this favourable treatment should be extended to them.

72. It did not become clear that members would either transfer to KPP2 or the PPF until 23 April 2013. Up to that point, members might still have received full KPP benefits with actuarially neutral early retirement terms.

73. Their obligations in terms of providing information are set out in the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 and the Pension Protection Fund (Provision of Information) Regulations 2005. It would be an onerous obligation (and well in excess of statutory requirements) to demand trustees of a pension scheme with a distressed employer to inform members of the benefits they would receive if the scheme transferred to PPF. If the trustees made a public statement on the prospects of the employer, this could cause an avoidable insolvency or jeopardise an orderly insolvency process. It is also questionable whether the trustees are in a position to make such a statement.

74. In any case, it would not necessarily have been helpful to give KPP members a lot of information about PPF compensation. It would have been difficult for them to have used this information in a useful way without an understanding of the likelihood of transferring to the PPF.

75. Given the complexity of the negotiations, it was extremely difficult for them to assess the chance of reaching a successful outcome until the settlement terms were agreed on 26 April 2013. Implementation of the settlement was still subject to a number of contingencies after this date.

76. KPP actuarial factors were amended from time to time resulting in either more generous or worse terms being offered. It has never been their practice to notify KPP members of the changes made to the actuarial factors so they would not have been aware if they had benefitted or lost out due to the changes.

77. The switch to PPF early retirement factors was part of a fundamental redesign of KPP member's benefits negotiated in the settlement of claims of a complicated multi-jurisdictional bankruptcy.

78. At the time of EKC's insolvency, Kodak was still solvent and trading. EKC's restructuring plan depended on Kodak remaining solvent. Kodak was advised separately from EKC because their interests were not always aligned. If Kodak had

entered an insolvency process, all KPP members would have transferred to the PPF and received lower benefits than they were entitled to from KPP.

79. Both KPP and KPP2 have significant deficits and increasing Mr Mayo's pension (and those of others in similar circumstances) could jeopardise the security of the remaining members' benefits.

80. They have applied their policy on early retirement fairly and consistently. A member taking early retirement received the value of the benefit he/she was promised that was neutral in terms of the funding of KPP and it did not damage the security of other KPP members' benefits. It is regrettable that whenever a policy is changed there is likely to be a "cliff edge effect" for KPP members. This happened throughout the life of KPP, for example - with the withdrawal of favourable early retirement terms for active members, and is a feature common to the life of pension schemes.

81. Until the moratorium was introduced, they had a standing policy of granting consent to early retirement for all KPP members requesting it. They agreed to Mr Mayo's early retirement on 18 September 2012 when they sent the Pack to him setting out his retirement options from 1 April 2013 (and not during the trustees' meeting which took place on 28 March 2013).

82. It is clear from the wording of the documents in the Pack that it was an offer to retire on the terms contained therein. Having given their consent to Mr Mayo's early retirement request, all that remained was for him to select which benefit option he wanted. Mr Mayo accepted the terms for early retirement by completing the relevant payment instruction forms on 26 September 2012. The documents do not state that they had to reconsider Mr Mayo's request or that they can withdraw their consent once given. It would have created an unworkable situation if this was not the case.

83. They did seek to withdraw consent for a few KPP members who had elected early retirement before the moratorium was introduced but whose pensions were not due to start until after the moratorium became effective. They felt that they were only able to take this step once the settlement was agreed and it was certain that a member would either join KPP2 or transfer to the PPF. In either case the member would be able to take early retirement on more generous terms. At this point they could therefore confidently inform the member the reason why consent was withdrawn and also show that he/she would be better off deferring taking early retirement. They are sympathetic to those whose early retirement pensions started before the settlement was announced but cannot stop these payments.

84. Although Mr Mayo's first pension instalment was paid on 1 May 2013, for pension tax purposes HMRC would treat Mr Mayo as "entitled" to his pension on 1 April 2013 (see s167 (3) Finance Act 2004). Therefore if the pension was stopped after 1 April 2013, it would have breached HMRC's pension rules (for example, a pension must be payable for life).

85. The KPP Trustees did consider reviewing early retirement pensions already granted and decided to withdraw consent in some cases. There had to be a watershed moment and unfortunately for Mr Mayo, he fell on the wrong side of the line. He therefore received a pension which was actuarially neutral rather than one calculated using the more generous PPF early retirement factors.

General Observation

86. At the outset of the investigation into Mr Mayo's complaint, KPP was in the PPF assessment period and so ownership of the scheme rested with the KPP Trustees. Submissions were requested from both the trustees of KPP and KPP2. The KPP2 Trustees made a joint response to the complaint on behalf of the former KPP Trustees and themselves. During the course of the investigation matters moved on and, in September 2015, KPP entered into the PPF at which time ownership of the scheme transferred from the KPP Trustees to the PPF.

87. I have made findings about both sets of trustees based on the understanding that the representations made by the KPP2 Trustees, which included details about the actions of the KPP Trustees, were made with the approval of the KPP Trustees. I have not found there to be maladministration by either set of trustees and for that reason I have not considered further whether the KPP2 Trustees inherited any responsibility for the past actions of the KPP Trustees.

Conclusions

88. It is clear from the evidence that when Mr Mayo applied in September 2012 for early payment of the retirement benefits available to him from KPP he had already received a lot of pessimistic information about the financial position of EKC, Kodak and KPP from both Kodak and the KPP Trustees. It was, therefore, perfectly understandable for Mr Mayo to be worried about how these troubling circumstances would the affect the security of both his job at Kodak and his benefits in KPP.

89. At the time of his early retirement application, the winding up of KPP and transfer to the PPF was still a realistic possibility. Another potential outcome was that EKC and Kodak would continue to support KPP after significantly altering its structure so that it could remain feasible. I am satisfied that in September 2012 there was no way of knowing what the actual outcome would be.

90. KPP2 was only established in December 2013 after receiving the approval of both the PPF and the Pensions Regulator (**TPR**). This particular eventuality could not have been foreseen by anyone at the time Mr Mayo decided that he wished to take his early retirement benefits from 1 April 2013 (by completing the Retirement Benefits Options Form) on 24 September 2012.

91. Mr Mayo contends that the KPP Trustees failed to inform him at the time he applied for early retirement of the possibility that more generous early retirement factors might be used to calculate his benefits if he deferred taking his decision.

92. The purpose of the information which Kodak and the KPP Trustees sent Mr Mayo between January and September 2012 was to keep him updated on the outcome of the discussions between the KPP Trustees, EKC and Kodak on the implications of the Filing on KPP. It is unreasonable for Mr Mayo to expect that the information supplied up to this point would have covered the benefits potentially available in KPP2 when it was not yet clear that the new scheme would even be required or, if it was required, whether it would be approved by the PPF and the Pensions Regulator. I do not therefore consider that there was any maladministration on the part of the KPP Trustees for not supplying information on KPP2 (including information relating to potentially more generous early retirement factors).

93. The information Mr Mayo received up to September 2012 was incomplete in that it did not describe what actually happened. But at that time, what happened in the event could only have been described as a possible scenario. It is, I think, therefore with hindsight that Mr Mayo says he would have behaved differently with more information. It follows that I do not share Mr Mayo's view that the KPP Trustees failed to act in his best interests, particularly when they were under no legal obligation to provide him with advice on whether his decision to take early retirement - which was a personal financial decision - would be suitable for him. There is also nothing to indicate that the trustees adopted a duty to advise in this case. Their responsibilities were limited to providing him with accurate information about his KPP benefits available at the time which, in my view, they did. It has been pointed out that Mr Mayo could not have known of the changes to come unless he was told. However, this is not a case where the member has the opportunity to gain a valuable pension right that he cannot by his own reasonable endeavours discover. No further disclosure was owed to Mr Mayo by reason of that principle; under the KPP rules as they stood he had no rights other than those he in fact applied for.

94. I am also satisfied that the information distributed by the KPP Trustees did not put Mr Mayo under undue pressure to make his application to retire early. Mr Mayo's decision to apply for early retirement was ultimately made because of his (understandable) concern about the security of his pension in KPP given the weak financial positions of EKC, Kodak and KPP itself.

95. In exercising their discretion to agree to Mr Mayo's application for early retirement, the KPP Trustees were required to take into account all relevant factors and disregard all irrelevant factors. Mr Mayo has argued that the likelihood of a future increase in early retirement factors was a factor that they should have considered before exercising a discretion in his particular case, and which should have driven them to a different decision. I am satisfied that the trustees did consider the change in factors once it was clear what their impact would be. Unfortunately it came too late to affect the decision in his case. On 28 March 2013, the trustees were aware of the 'windfall' which would come to members over 55 if TPR and the PPF agreed the proposed benefit redesign, and if sufficient numbers of members voted in favour of it. That awareness caused them to commission financial modelling of the cost

implications for what was a severely underfunded scheme. Plainly they were aware of the significance of the factor by that date, but I cannot get from there to Mr Mayo's proposition that the likelihood of the benefit becoming available to him in the future was so strong that the trustees came under a fiduciary duty to make a different decision in his case. The trustees were entitled to have regard to their usual policy which reflected the actuarially neutral impact of his early retirement. I cannot, therefore, see anything unreasonable in the KPP Trustees' decision.

96. I have considered the argument that the trustee should have reviewed their usual policy earlier because the PPF factors would have applied to Mr Mayo even had the KPP2 proposal failed. However, there is no indication that the significance of the factor was apparent at the point when the policy was applied to Mr Mayo's application.

97. I also consider it reasonable in the sense of not perverse for the KPP Trustees to have introduced the moratorium on early retirement applications from 29 April 2013, and then to have applied the change in early retirement factors back to that date. They had to choose a watershed moment for the change of factors. At that date, it had become clear that TPR and PPF agreed to the KPP2 proposal[1], and implementation depended only on gaining member consent in sufficient numbers. That was a factor which the trustees planned to control to some extent by the terms of the member communications. It was rational to introduce the watershed at a point where trustees could be reasonably confident that KPP members would either transfer to KPP2 or, if they refused, to the PPF. I do not agree that it would have been fairer to choose an earlier point in time.

98. With the benefit of hindsight, it is regrettable that Mr Mayo took early retirement before the more generous PPF early retirement factors were introduced to the KPP, but I concur with the KPP Trustees and the KPP2 Trustees that in light of the circumstances, they are not obliged by law to recalculate his pension and award him a discretionary increase.

99. It follows that, whilst I have sympathy with the position Mr Mayo has found himself in, I do not uphold his complaint.

Karen Johnston

Deputy Pensions Ombudsman
18 March 2016

[1] The agreement took place on 26 April 2013 and was implemented on 29 April 2013..

APPENDIX

Relevant Clause from the KPP Trust Deed and Rules dated 21 March 2005

18. Benefits on Leaving Service Before Normal Retirement Date

18.1 Where a member leaves Service after two or more years' Qualifying Service he shall be entitled to a deferred pension. Such pension shall be calculated in the same way as Normal Retirement Pension. The deferred pension shall be payable at Normal Retirement Date unless the Member makes an election under Rule 18.5 or 18.6.

18.6 A Member who is aged 50 or more and who is entitled to a deferred pension under Rule 18.1 may with the consent of the Trustees elect that such deferred pension shall commence before Normal Retiring Date. The amount of the deferred pension shall be reduced by an amount determined by the Trustees. A Member shall not be permitted to elect that his pension shall commence before Normal Retirement Date, if this would operate to reduce the amount of his pension below the amount required by the contracting out requirements.

Relevant extract from the 30 March 2012 Deed of Amendment

8.4. The definition of service shall be amended to read as follows:

"Service means continuous service with one or more Participating Employers PROVIDED THAT:

(i) service which is interrupted only by National Service shall be deemed to be continuous service; and

(ii) the Principle Employer, shall finally determine, in relation to any Eligible, the date of commencement of Service and the number of years to be counted as Service No Eligible Employee will be treated as being in Service in relation to the Plan on any date after 31 March 2012.