

Ombudsman's Determination

Applicant	Mr E
Scheme	Your Tomorrow Pension Scheme (the Scheme)
Respondent	Lloyds Banking Group (LBG)

Complaint summary

1. Mr E's complaint is that LBG has not provided him with a preserved pension following the transfer of his contract of employment to TSB under the Transfer of Undertakings (Protection of Employment) regulations (**TUPE**). He says that he was assured he would receive membership of the Scheme but ultimately his contributions were returned, with the consequence that he has lost his employer contributions for a little under three months.

Summary of the Ombudsman's Determination and reasons

2. I uphold Mr E's complaint and set out below the further actions required by LBG.
3. My reasons for reaching this view are explained in more detail below.

Detailed Determination

Material facts

4. Mr E joined LBG, and became a member of the Scheme, on 6 January 2014.
5. Mr E's transfer to TSB under the TUPE regulations was completed on 1 April 2014.
6. On 15 May 2014, LBG wrote to Mr E to tell him that he would receive a refund of his employee contributions under the Scheme. Mr E received the refund at the next pay run.
7. After receiving the letter, Mr E telephoned LBG to query why he was not entitled to a preserved pension. LBG said it would respond by letter.
8. LBG wrote to Mr E on 27 May 2014. It said that, since Mr E had been a member of the Scheme for less than three months, he was only entitled to a refund of his employee contributions.
9. On 28 August 2014, Mr E wrote a letter of complaint to LBG. He said that he had been due to start work on an earlier date but had agreed to delay his start date to 6 January 2014 at the request of LBG, to enable another new starter to begin on the same day. As a result, he had been a member of the Scheme for less than three months when he transferred to TSB. He explained that, if LBG had mentioned the effect of starting later on his entitlement to a preserved pension, he would not have changed his start date.
10. LBG issued its final response letter on 15 December 2014. It said that, whilst Mr E's contract of employment gave him a contractual right to membership of the Scheme, it had to apply the relevant Scheme rules. LBG said the Scheme rules say that employees with less than three months' membership of the Scheme will only receive a refund of their employee contributions. LBG concluded that Mr E's rights under the Scheme were satisfied by the payment he received.
11. Mr E was dissatisfied with this response and referred the complaint to us. After we forwarded the details of Mr E's complaint to LBG, it offered him a £500 compensation payment. It explained that this offer is in recognition of any distress and inconvenience caused to Mr E by its role in asking him to change his start date.
12. Mr E rejected this offer. He said LBG had not addressed his loss of a preserved pension. He referred to a copy of an update about the forthcoming TUPE exercise which LBG sent him on 4th November 2014, which said that post TUPE, benefit built up in the Scheme relating to previous pensionable service, would be preserved.

Summary of Mr E's position

13. When accepting LBG's job offer, he relied on written assurances from LBG that his pension benefit relating to pensionable service in the Scheme prior to the TUPE would be preserved.

14. He was also assured in writing that there would be no changes to his contract terms after the TUPE transfer.
15. It was originally agreed that he would start on 1 January 2014. He agreed to start on 6 January 2014 instead, because another new employee was starting on that day. However, LBG did not notify him that he would lose his entitlement to a preserved pension under the terms and conditions of the Scheme if he started on 6 January instead of 1 January 2014. If LBG had done this, he would have negotiated to start on 1 January 2014 or earlier, thereby ensuring he retained his entitlement to a preserved pension.

Summary of LBG's position

16. LBG maintains that, under the Scheme rules, Mr E is not entitled to receive any refund of the employer contributions into the Scheme. LBG also says he is not entitled to a preserved pension.
17. LBG did consider whether those, like Mr E, who had less than 3 months' service, should be allowed further rights, such as a transfer. However, LBG decided that this group should only receive a refund of contributions.
18. LBG has offered to pay £500 compensation to Mr E in recognition of distress and inconvenience caused by its role in his decision to change his start date from 1 to 6 January 2014.

Conclusions

19. I have examined the update LBG issued to Mr E on 4 November 2013, noting that it says:

“Once we've transferred to the new business, we will not be able to participate in the Lloyds Banking Group pension. But, an alternative pension scheme will be provided and your pension benefit relating to previous pensionable service with Lloyds Banking Group will be preserved”.
20. This update was issued to employees who were about to join the new TSB business, many of whom were already employed by the Lloyds group; it looked forward to an anticipated transfer date of 31st March, at which point some would have been in the Scheme long enough to acquire a right to preserved pension or cash transfers. Others who had less than three months service (like Mr E if he started after 1 January 2014) would only have rights under rule 7.2 to a refund of contributions and a discretionary decision from LBG as to whether to offer any other entitlement.
21. Mr E had no benefit relating to previous pensionable service with LBG at the point when the update was issued. It was presumably sent to him because he was at this point due to start pensionable service on 16 December 2013 and had an anticipation of accruing benefits. If he had commenced employment on or around this date, he would have been a member of the Scheme for over three months when he

transferred to TSB. As such, he would have been entitled to a transfer rather than a refund of his own contributions.

22. LBG have confirmed that their Head of HR was aware of the power to offer more than statutory minimum pension rights to those employees in the less than 3-month and 3-24 months service categories. She has confirmed that she was engaged in policy discussions about the right approach to take to TSB colleagues, in the period leading up to a meeting on 11 December 2013. Those discussions included consideration of offering vested benefits or transfer options where those rights did not exist. The decision was then taken not to exercise the power. An agenda document was tabled on 11 December 2013 'designed to take the conclusions through the required governance.'
23. This indicates that the decision as to how to treat those in Mr E's group was made on 11 December 2013. On that date, the statement of 4 November 2013 (a continuing representation) became untrue – but it was not corrected.
24. LBG had a duty to correct their representation because they knew it was no longer true and that Mr E would rely on it. He was in negotiations over a contract to join, during which he specifically raised and received replies about his pension rights. This representation did not necessarily induce him to join LBG: in all likelihood he would have done so anyway. However, it induced him to agree the contract start date of 6 January 2014 rather than negotiate a different date which would have allowed him to keep the employer contributions.
25. The suggestion to put back his start date to match that of the new [] appears to have been made in good faith. There is no evidence that LBG compelled Mr E to change his start date or that the start date was put back in order to deprive him of the right to a preserved pension. But equally, it is probable that Mr E would have been able to negotiate a start date of 1 January 2014, or earlier, had he been told of the impact on his pension rights of agreeing to LBG's delay request. I am satisfied from the conduct of the parties that he would have negotiated.
26. Mr E is, therefore, entitled to be put back in the position he would have been in had LBG corrected its misrepresentation. Giving the benefit of any doubt against the misrepresentor, as required by law, I find that Mr E would have negotiated the rights given to the 3-24 month group, that his benefits would have transferred to the alternative scheme run by TSB, and the transfer value which he took from that scheme would have been proportionately higher. I make the direction below in order to put him, as nearly as possible, back in the position he would have been had that occurred. The refund of contributions Mr E received will need to be paid back, a proposal with which he agrees. Mr E has confirmed that the funds which were transferred from the TSB scheme were reinvested in his current scheme on 11 September 2015, since when the rate of return has been 12.18%. In line with LBG's working assumption that reinvestment would ordinarily occur the day after disinvestment, I have assumed 10 September 2015 as the probable disinvestment

date. Mr E has agreed to provide a further request for transfer in to provide certainty about the identity of the scheme to which compensation is to be paid ('the Receiving Scheme').

27. Mr E initially argued that he was contractually entitled to a 13% employer contribution. I do not agree with that argument. I appreciate LBG's email of 5 December 2013 says Mr E's [] benefits were contractually binding. But Mr E's contract of employment says membership of the Scheme is "subject to the terms and conditions of its governing documentation". The Scheme rules say:

"Members who are not entitled to immediate or preserved benefits...

If the Member has not completed at least three months' Qualifying Service (or such shorter period as LTSB agrees), the Member will not receive any benefits under Your Tomorrow, except a refund of the proceeds of his or her own contributions (if any) less tax at such rate as applies from time to time".

28. I find that Mr E's entitlement to [] benefits under his contractual agreement – but subject to the rules of the governing scheme – was adhered to by LBG.

Directions

29. I direct that within 28 days of the date of this Determination Mr E shall repay to the trustee of Your Tomorrow or LBG, (as LBG shall direct), the sum paid to him in 2014 as a refund of his contributions ('**the repaid sum**') and provide the information required to perform the calculations described below.
30. I direct that subject to compliance by Mr E with the requirement above, LBG shall ensure Mr E is returned to the position he would have been in had he qualified for the right to a cash transfer sum on the terms given to TSB transferees with 3-24 months' service which would have applied had he started work on 1 January 2014. For the avoidance of doubt this means make a transfer payment from Your Tomorrow to the Receiving Scheme available to Mr E for a period of three months from the date LBG is in receipt of Mr E's repaid contributions and the investment information set out below, that payment to be calculated as follows:
- the difference between:
 - (i) the transfer value paid in September 2015 to his current employer's scheme from the TSB Pension Scheme in respect of Mr E's service from 1 April 2014; and
 - (ii) the value which would have been paid then, had he had the right to a cash transfer sum from Your Tomorrow, had promptly elected for that transfer to the TSB Pension Scheme and that transfer had taken place on the date when he actually received a refund of his contributions (**refund date**), composed of:

- the employer contributions actually made into Mr E's Your Tomorrow account for the period 6 January 2014 – 31 March 2014 ('the **employer contributions**');
- the investment return that was earned in Mr E's Your Tomorrow account on the employer contributions for the period 6 January 2014 to the day before the refund date;
- the investment return that would have been earned on the employer contributions in the TSB Pension Scheme for the period from the day after the refund date to 10 September 2015 had those employer contributions been invested within the TSB Scheme in the same investment funds and in the same proportions as actually applied to the employer contributions paid to the TSB Pension Scheme by TSB in respect of Mr E. Mr E shall provide to LBG details of the relevant investment funds and proportions to allow this calculation to be undertaken;
- the repaid sum;
- the investment return that was earned in Mr E's Your Tomorrow account on his employee contributions made, to the day before the refund date, plus;

(iii) An amount to represent the investment return he would have received in the Receiving Scheme on the employer contributions from 11 September 2015 to the date of calculation. To calculate that notional investment return LBG shall apply the average rate of return and investment fund selections that applied in the Receiving Scheme to the transfer payment from the TSB Pension Scheme in the period from receipt of the transfer payment to the date of this Determination (and Mr E shall provide the necessary information to calculate that return and complete a transfer form).

31. I further direct that LBG shall pay £500 for the significant distress and inconvenience caused to Mr E.

Karen Johnston

Deputy Pensions Ombudsman
3 February 2017