PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr S Travis
Scheme	Lloyds Bank Offshore Pension Scheme Pension Investment Plan (**PIP**) Section (**the Offshore Scheme**) Your Tomorrow
Respondent(s)	Lloyds Banking Group plc (Employer) (**Lloyds**) Lloyds Bank Offshore Pension Trust Limited (**Trustee**) Equiniti Ltd (Administrators) (**Equiniti**)

Subject

Mr Travis has complained that non-resident employees of Lloyds who were members of the Offshore Scheme have been transferred to an onshore UK registered defined contribution pension scheme (**Your Tomorrow**). He has complained that the tax treatment of non-resident members is not beneficial and that this was not explained during the consultation process.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against Lloyds because the information they provided during consultation was appropriate. The complaint should not be upheld against the Trustee because they would only have been required to provide information about the Offshore Scheme. The complaint should not be upheld against Equiniti because they did not have a direct role in providing information about the scheme changes.

DETAILED DETERMINATION

Material Facts

1. In January 2009, the HBOS Group was acquired by Lloyds. It was decided that terms and conditions of employment across the merged group should be reviewed, with the aim of harmonising them and reducing costs. There were a number of "legacy schemes" in existence at this time, providing a variety of defined benefit (**DB**), defined contribution (**DC**) and underpinned DC benefits. The PIP Section of the Offshore Scheme is a DC scheme contracted-out on the reference scheme basis. There is a DB underpin such that any pension secured from a member's account should not be less than a 1/80th pension payable at age 65 with a 50% spouse's pension (Rule 13, the 'E' Rules). The minimum contribution rate for members was 2% with the option to pay more. Employer contributions were related to age and employee contribution (a minimum of 6.5% between ages 25-30, 8.5% between 30-45 and 10.5% over 45).

2. The primary governing document for the Offshore Scheme is the Supplemental Instrument dated 2 September 2002 (as amended). Clause 4 provides,

> "[Lloyds] may with the approval of the [Trustee] from time to time declare any alteration or modification of or addition to the terms and provisions of the Rules and of this instrument PROVIDED ALWAYS that no such alteration modification or addition shall:-
>
> (a) in the opinion of the Actuary affect prejudicially any pension or allowance which is already being paid or the accrued rights of Members and Preserved Pensioners at the date of such alteration modification or addition taking effect for which the then existing assets of the Scheme are sufficient or
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> (b) authorise or have effect of authorising or permitting the payment of any part of the Fund to any of the Employers … or
>
> (c) prejudicially affect continued Approval."

3. By an instrument dated 27 July 2011, the Offshore Scheme was amended by inserting a new rule into the 'E' Rules which provided that all members in service on 31 July 2011 would be treated as having left the Scheme. The Rules were also amended to provide that no employee was able to join the Offshore Scheme on or after 1 August 2011. The Offshore Scheme ceased to be contracted-out and

the Rules were amended to provide that the minimum pension would be calculated by reference to service ending on 31 July 2011 and average pensionable salary in the three years ending on that date.

4. The Scheme Actuary certified that, in his opinion, the changes did not affect prejudicially the accrued rights of Members as required by Clause 4.

5. Mr Travis joined Lloyds on 1 March 2010 and joined the Offshore Scheme on 1 May 2010.

Consultation

6. Consultation about the proposed changes to the Offshore Scheme (and others) began in December 2009 with the publication of the document "One Bank Our Terms and Conditions". This document was issued to all employees and covered all terms and conditions, including pension arrangements. A dedicated website was also set up. The section covering money purchase pension schemes stated that "new harmonised Money Purchase pension arrangements" would be launched from April 2010. The document then went into detail about changes to employee and employer contributions. It also mentioned that the new arrangements would be "contracted-in". Employees were told that they would receive a letter during December 2009 with more details about how the changes would affect them and their current pension arrangements. They were also told that they would have the opportunity to respond during the consultation period.

7. The separate letter was sent to members of the Offshore Scheme, which stated that the aim was to provide money purchase benefits through one scheme. It went on to say,

> "We aim to move all colleagues in money purchase arrangements across to the new Scheme terms in 2011. If these proposals go ahead, this means that the new terms will apply for all future benefits from the date of transfer … We will write to you with further details nearer the time.
>
> The new default contribution will be 3% … The matching employer contribution will be 7% in 2011 and increasing to 8% in 2012 unless your current employer match is higher in which case it will be 8% from 2011 …
>
> The new Scheme will be contracted in to the State Second Pension benefit … This means that you will receive additional state pension … you and the Group would pay additional National Insurance contributions …

> As you are currently in a contracted out Scheme your pension is subject to an underpin of a minimum level of pension at retirement or for your spouse/civil partner on death. Under the new terms this underpin would no longer apply in respect of future contributions (although it will still apply in respect of your accrued benefits) …"

8. The letter included a basic comparison table which covered the contribution rates, retirement ages, contracted-out status, death in service benefits and ill health retirement. Employees were told that a "pension modeller" was available on the One Bank website. They were also invited to comment via the website or their union representative by 15 February 2010. Lloyds stated that they would consider all feedback and respond by April 2010.

9. A message was posted on Lloyd's intranet (Interchange) in March 2010. Amongst other things, this confirmed that new DC arrangements were being introduced and that contribution rates would change. The message said that more details would be available nearer to the date of transfer, but that there was information on the One Bank website.

10. In May 2011, Lloyds wrote to members of the Offshore Scheme saying (amongst other things) that they would automatically be included in the new scheme (Your Tomorrow) from 1 August 2011. The letter covered contribution rates and said that members could choose their contribution rate. The letter explained that, if members continued to pay the previous default contribution rate of 2%, this would attract an employer contribution of 6% in Your Tomorrow. Alternatively, they could pay higher contributions which would attract higher employer contributions; up to 13% for member contributions over 5%. It also explained that Your Tomorrow was not contracted-out and that this meant members would pay higher National Insurance.

11. Lloyds wrote to members of the Offshore Scheme again in July 2011, confirming that they would switch to Your Tomorrow from 1 August 2011. The letter covered contribution rates and contracting-out. Members were invited to contact Equiniti or consult the pension scheme website if they had any questions. A table of "Special Terms Applying to Members Transferring from the PIP Section … to Your Tomorrow" was provided. This contained a section on "Tax Issues" and covered differences between the UK and other jurisdictions. It

mentioned (amongst other things) that retirement benefits and tax free lump sums may be restricted and that the UK annual and lifetime allowances would apply in addition to any local restrictions. Members were told that they might be able to apply for an easement in respect of the lifetime allowance and that they should contact Equiniti if they thought they were affected. The table confirmed that Your Tomorrow was tax approved in Jersey, Guernsey and the Isle of Man, which meant that it may be subject to restrictions on benefits and contributions to comply with approval requirements.

12. In December 2011, Mr Travis enquired about merging his benefits in Your Tomorrow with those he had accrued in the Offshore Scheme. Equiniti responded that this would not be possible because the minimum pension provision under the Offshore Scheme required the funds to be kept separate. In response to further enquiries by Mr Travis, Equiniti explained that the Trustee did not wish to take on the additional risk of offering internal annuities in respect of the benefits built up under Your Tomorrow. Mr Travis was also told that he could not transfer his Offshore Scheme benefits to Your Tomorrow because the Rules of the Offshore Scheme prohibited transfer after the age of 59. Following further correspondence from Mr Travis, Equiniti informed him that the Trustee had discretion to allow a transfer after age 59 and the Scheme Actuary would be asked to calculate a transfer value

Summary of Mr Travis' Position

13. The key points from Mr Travis' submissions are summarised below:

- The tax treatment of the UK registered scheme Your Tomorrow is not beneficial to members based in Jersey. This was not explained properly during the consultation period.

- He has over 36 years membership of UK DB schemes from service outside Lloyds. The switch to a UK scheme will have a "profound and complex" impact on the UK lifetime allowance, which is avoided by retaining benefits in the Jersey scheme.

- The switch to Your Tomorrow will increase the amount of tax he will have to pay on his pension.

- There has been a reduction in member benefits and there is insufficient time left for him to make this up before retirement.
- The loss of the underpin will reduce his income in retirement. It is clearly more advantageous than an open market option from Your Tomorrow.
- The loss of enhanced age related contributions will reduce the amount being paid into his pension fund from 14.5% of salary to 11% unless he contributes significantly more.
- The consultation process was flawed because insufficient information was given to members. In particular, the process did not explain the impact of the loss of underpin, the impact on spouses/civil partners, the different rules for taking lump sums between Jersey and the UK or the 55% tax in the UK on death after crystallisation in drawdown. Nor did it explain the impact of the UK Lifetime Allowance for members with existing or future UK pension provision.
- No examples were provided to show the difference between the PIP Section pension and annuity or drawdown rates or the impact of the loss of enhanced employer contributions for those aged over 45.
- The true value of the underpin was not made clear to members. Nor was the actual cost of the underpin included in comparisons of contribution rates. He was only a member of the PIP Section for 16 months, but the cost of his underpin is £15,756.
- The online modeller provided was only for Your Tomorrow and not the PIP Section. This did not allow a comparison to be made.
- A line-by-line comparison of the two schemes should have been provided.
- It was not reasonable to expect members to fully understand the implications of the changes and respond to the consultation.
- He did not join the Offshore Scheme until February 2010, after the consultation period, and did not hear about the transfer until May 2011.
- There was a lack of research into the demographics of the membership, the tax issues and the role of member-nominated trustees.

- It was unreasonable for changes to be made to the Offshore Scheme without researching the impact on the members. The nature of employment in the Channel Islands means that the workforce will comprise foreign nationals, UK citizens and natives of the Islands. This should have been taken into account.
- The Trustee should have provided examples to show how the changes affected members.
- None of the trustees were members of the PIP Section at the time of the consultation.
- Under Your Tomorrow, members are required to purchase an annuity. Only one UK provider is currently willing to quote for Jersey residents.
- The PIP Section was a hybrid scheme, but Lloyds chose to treat it wholly as a DC scheme. They did not pursue the alternative option of limiting pensionable pay which was selected for the DB schemes.
- The duty of the Trustee is to act in the best interests of the scheme members. The limitation of its role during the consultation period to confirming whether legal requirements were being met is insufficient to demonstrate that it acted responsibly.
- The fact that he can neither add to nor switch away from the PIP Section because he has reached age 59 is frustrating. It is an unnecessary constraint on his wish to consolidate his benefits into a QROP so that he can have one meaningful income rather than two sources of income taxed on different bases.

14. Mr Travis would like to have the option to transfer back to the Offshore Scheme.

Summary of Lloyds' Position

15. A summary of the submission from Lloyds is provided below:

- Governance within Lloyds requires significant strategic changes to be considered by the Group Executive Committee (**GEC**), which will make recommendation to the main board. The papers presented to the GEC included impact assessments for the various changes. The GEC considered the impact of the changes to contribution structures and the move to contracted-in status. Overall, the proposed structure of the new scheme was expected to require a significant uplift in employer contribution compared with the existing DC arrangements.

- The analysis reviewed by the GEC did not specifically address the tax differences between the UK and the offshore jurisdictions.
- The GEC concluded that to make the new DC arrangement no less favourable for all members would have increased cost and complexity.
- It should have been evident to non-UK residents from the proposal that if there was going to be one scheme it would have to be based in the UK given the small size of the offshore workforce compared with the main UK business. This was not specifically mentioned in the consultation literature.
- Employees were invited to comment on all aspects of the changes to the reward system. The consultation period lasted from December 2009 to February 2010 to comply with UK statutory consultation requirements.
- An online modeller was provided. Pension seminars were held and a special telephone helpline was set up. Guides and comparison documents for Your Tomorrow were provided.
- The guidance provided did address tax differences, but at a high level. At the time, the UK tax regime for pensions had changed significantly and other jurisdictions were considering their responses. Any detailed comparison would have been misleading.
- They have not looked at all the questions asked during the consultation period on a line-by-line basis, but there did not appear to be any relating to tax.
- They also ran focus groups and there were negotiations with the relevant unions.
- Only 12% of the workforce responded. Of those responding on changes to the DC schemes, two-thirds were concerned about the future level of employer contributions and one-third were positive about the increase to employer contributions.

- The switch to Your Tomorrow took place over 2010/2011, during which time Lloyds was in negotiation with the Trustee to merge the liabilities of the PIP Section with another of the schemes to reduce administration costs. The Trustee took independent legal advice from specialists in the offshore jurisdictions. This merger did not take place because of the tax implications for scheme members.
- The Offshore Scheme is closed for future accrual. Mr Travis does not have the option to return to the Scheme for future accrual.
- The Trustee did not have a say in the design of Your Tomorrow; its role ceased "at the door of the Offshore Scheme". All communication about the new scheme was Lloyds' responsibility.
- The Trustee Board does not include members of the PIP Section. Its role in 2009/10 was limited to confirming that the consultation did satisfy legal requirements. Lloyds did provide the Trustee with briefings from time to time.
- They consider that the level of information provided in 2009/10 was sufficient for the purposes of the consultation. Key features of the new DC scheme were shared and DC members were written to in order that the changes were drawn to their attention.
- Members of the PIP Section did benefit from local tax treatment, but there was no contractual entitlement to continuation of that arrangement or to beneficial tax treatment.
- Offshore members of Your Tomorrow continue to be subject to local tax treatment to the extent that this does not conflict with the UK registration status of the scheme.

16. The Trustee and Equiniti are of the view that Mr Travis' complaint is against Lloyds as the employer.

Conclusions

17. Mr Travis argues that the consultation, which took place prior to the changes made to the various pension schemes existing at the time of Lloyds' acquisition of the HBOS Group, was flawed. In particular, he argues that insufficient

information was provided about changes to the DB underpin and employer contributions or about the tax implications of the changes.

18. There is a statutory requirement under UK legislation[1] for an employer to consult before certain "listed changes" are made to an occupational pension scheme. The listed changes include a decision to cease the future accrual of benefits under the scheme. The legislation contains a requirement to provide information to "affected members" and/or their representatives. "Affected members" are defined as active or prospective members of the scheme to whom the listed change relates. Mr Travis was neither an active member nor a prospective member of the Offshore Scheme during the consultation period. He did not join Lloyds until March 2010 and did not join the Offshore Scheme until May 2010. For this reason, it would not be possible to find that Lloyds were required to consult Mr Travis about the proposed changes. On that basis, it could be argued that, regardless of whether or not the consultation met the statutory requirements, there could be no injustice to Mr Travis.

19. The legislation also provides for certain employers and certain situations to be excluded from the consultation requirements. It seems likely that, so far as the Offshore Scheme is concerned, the statutory requirement to consult did not arise. However, I do not need to determine that point because Lloyds chose to consult.

20. Having chosen to consult the affected members of the Offshore Scheme (amongst others), Lloyds were then required to conduct their consultation in a proper manner. A failure to do so might leave them open to a claim that they were in breach of their so-called *Imperial*[2] duty and/or their contractual duty of trust and confidence. This is the approach recently taken in the High Court[3]. The case in question (*IBM*) concerned a proposal to close two DB schemes to future accrual and the employer was found to be in breach of its *Imperial* duty and/or its contractual duty of trust and confidence.

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[1] The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI2006/349) (as amended)
[2] *Imperial Group Pension Trusts Ltd v Imperial Tobacco Limited* [1991] 2 All ER 597
[3] *IBM UK Holdings Ltd and another v Dalgleish and others* [2014] EWHC 980 (Ch)

21. In the *IBM* case the question was whether the employer had provided misleading information during the consultation period such that it had breached the "implied duty of good faith" (the *Imperial* duty) and/or the duty not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (the contractual duty of trust and confidence). In the case of the consultation undertaken by Lloyds, the question would be whether the information provided was so lacking in detail that it became misleading and, if so, whether that led to a breach of the above duties.

22. However, Mr Travis was not, at the relevant time, employed by Lloyds and, therefore, there was no relationship to be destroyed or damaged. It would not be possible to find a breach of any duty to him even if the information provided during the consultation period was found to be misleading.

23. I have, nevertheless, reviewed the information provided during the consultation period and I consider it sufficient to meet the requirements of the Consultation Regulations and Lloyds' *Imperial* duty and/or their contractual duty of trust and confidence.

24. The information consisted of the One Bank document and the December 2009 letter sent to the members of the PIP Section of the Offshore Scheme. The One Bank document covered more than the changes to the pensions arrangements. But it made it clear that the intention was to have a single DC scheme for all Lloyds employees, including those working in Jersey. It provided clear information about the proposed level of contribution from members and employer. The document did not specifically state that employer contributions would no longer be age-related, but I find that the information provided was sufficient to make members aware that this would be the case.

25. The One Bank document mentioned that the new scheme would not be contracted-out and that this would mean paying higher National Insurance contributions and receiving additional state pension. However, it did not state that the DB underpin would no longer apply for future service. As Mr Travis has mentioned, this was potentially a significant change for members of the Offshore Scheme. I am not aware if any of the other DC "legacy schemes" had the same or similar provisions. It is likely that some did and others did not and it may be

that this was the reason why Lloyds used a separate letter to the Offshore Scheme members to raise this point. The December 2009 letter certainly made it clear that the "underpin would no longer apply in respect of future contributions (although it will still apply in respect of … accrued benefits)".

26. The December 2009 letter also explained that the underpin meant that there was "a minimum level of pension at retirement or for your spouse/civil partner on death". Mr Travis points out that no examples were provided to show the difference between the underpin pension and annuity or drawdown rates. He suggests that the true value of the underpin was not made clear and nor was the true cost. The value of the DB underpin will be different for each member of the Offshore Scheme; as will the cost. I do not find that Lloyds were required to provide this level of detail during consultation.

27. Mr Travis is particularly concerned about the impact of the changes on his tax liabilities. He does not consider that the information provided during the consultation period explained the tax implications sufficiently. Mr Travis has pointed out that the tax treatment of a UK registered scheme, such as Your Tomorrow, is not beneficial to members based in Jersey. Lloyds have acknowledged that they did not specifically address the question of tax differences between the UK and Jersey during consultation.

28. The closure of the Offshore Scheme for future accrual did mean that members no longer had access to a scheme based in Jersey. They were being offered access to a UK based scheme which would obviously fall under a different tax regime. It is the case that neither the One Bank document nor the December 2009 letter specifically stated that the new scheme would be UK based. Lloyds have argued that it should have been evident that the new scheme would be UK based because the majority of their staff are UK based. The establishment of the new scheme was not, itself, covered by the Consultation Regulations. However, I do consider that it would have been helpful for Lloyds to have specifically mentioned that the new scheme would be UK based.

29. Having said that, I do not consider that Lloyds needed to have said any more than that. Providing information about the tax implications of joining a UK based occupational pension scheme is going beyond the kind of information an employer can be expected to provide. This is a specialist field and members can

be expected to seek independent financial advice to cover this aspect of their pension provision. I do not consider the failure to specify that the new scheme would be UK based sufficient to find a breach of the *Imperial* duty and/or the contractual duty of trust and confidence.

30. Mr Travis has made the point that, so far as tax is concerned, Your Tomorrow is not as beneficial for Jersey based employees. There is no requirement for Lloyds to structure the pension scheme they offer to their employees in such a way as to optimise its tax efficiency for any particular member or group of members. Mr Travis is also concerned that the employer contributions under Your Tomorrow are no longer age related. He makes that point that, unless he increases his own contributions, Lloyds will pay less into his pension pot in the future. It is true that the structure of employer contributions is different under Your Tomorrow. For someone paying a 3% contribution, Lloyds would have paid 11.5% once the member reached age 45. Under Your Tomorrow, Lloyds will pay 8% unless the member increases their own contribution to 4%; in which case, Lloyds will pay 10%. However, there was no requirement for Lloyds to offer the same level of contribution under Your Tomorrow as they paid under the Offshore Scheme. Nor were they required to offer the same DB underpin. Lloyds might, as Mr Travis has suggested, have chosen to cap pensionable pay, as they did for their DB schemes. There was no requirement for them to do so, however.

31. Whilst it is undoubtedly frustrating for Mr Travis to find that his future pension arrangements do not suit his circumstances quite as well as the Offshore Scheme, I do not find this to be the result of any maladministration on the part of Lloyds.

32. So far as the Trustee is concerned, it is likely that, as a Jersey based company, it does not come within my jurisdiction. Having said that, it was not responsible for the design of Your Tomorrow and , therefore, had no role to play in the decision to offer this scheme to members going forward. It did have a role to play in the amendment to the Offshore Scheme because, under Clause 4, changes must be approved by the Trustee. In view of the fact that Instrument altering the Scheme Rules was signed on behalf of the Trustee, it can be taken that such approval was given.

33. Mr Travis has pointed out that the Trustee must act in the best interests of the Scheme members. This is, indeed, the case. I do not consider, however, that it has been shown that the Trustee failed in this responsibility. Potentially, Lloyds had the power to terminate their liability under the Scheme completely by giving written notice to the Trustee. Had that happened, the Trustee would have been required to wind the Scheme up. In fact, Lloyds proposed to cease future accrual rather than terminate their liability. In accepting this alternative, the Trustee cannot be said to have not acted in the best interests of the members since it preserved an ongoing liability on the part of Lloyds. The decision to offer a single DC pension scheme rather than the many 'legacy schemes' was Lloyds' and one which it was open to them to make.

34. Mr Travis has suggested that the Trustee should have provided examples of how the changes affected members. In fact, the Trustee would only have been responsible for providing information about the Offshore Scheme – that it would close for future accrual. This information had already been provided by Lloyds. Mr Travis, I believe, envisages something rather more than this; perhaps a comparison between the expected benefits provided by the Offshore Scheme and Your Tomorrow. This is more than can be expected from the Trustee. I do not find that there was any maladministration on the part of the Trustee in not supplementing the information already provided by Lloyds. So, even if it was within my jurisdiction, I would not be upholding the complaint against it.

35. Equiniti are the Scheme Administrators. As such, they had no role to play in the decision to close the Offshore Scheme for future accrual or in the information provided. I do not uphold Mr Travis' complaint against them.

Jane Irvine
Deputy Pensions Ombudsman

18 November 2014