

Ombudsman's Determination

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| Applicant | Mr T |
| Scheme | Allied Domecq Pension Fund (the Scheme) |
| Respondents | Allied Domecq First Pension Trust Limited (the Trustee) Allied Domecq Pensions (the Administrator) |

Outcome

1. Mr T's complaint against the Trustee is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, the Trustee should pay Mr T £500 for the significant distress and inconvenience caused to him by the misinformation he received. The complaint against the Administrator is not upheld.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T has complained that he was misinformed about the revaluation method which applied to his deferred pension.

Background information, including submissions from the parties

4. In 1984, Mr T commenced pensionable service. At the time, Allied Domecq Group operated two schemes, the Allied Domecq Pension Fund (**ADPF**) and the Allied Domecq Executive Pension Fund (**ADEPF**). Mr T was a member of the ADEPF.
5. On 30 November 2003, at age 51, Mr T left pensionable service. He subsequently received a Leaving Service Benefit Statement and a Leaving Service Information Sheet.
6. The Leaving Service Information Sheet, under the section, Deferred Pension Increases, said:

“Between your date of leaving and your attaining State Pension Age, your Guaranteed Minimum Pension (GMP) will be increased by 4.5% for each complete tax year.

Your pension in excess of your GMP will be increased from your date of leaving to your Normal Retirement Date, by at least 3% per annum compound and up to the increase in the Retail Prices Index or 5% per annum compound, whichever is the lower.”

7. On 19 March 2004, Mr T telephoned Towers Perrin, who carried out the day to day administration of the Scheme and ADEPF, to query the deferred pension revaluation which applied to him. The note of the call records ‘Should be 7% or RPI if age + service > 70’.

8. On 25 March 2004, Mr T received a written response from Towers Perrin. This said:

“I confirm that, as your pensionable service plus your age at date of leaving was greater than 70, the maximum increase in your deferred benefit will be 7% per annum compound. I attach a “Transferring Out” Information Sheet which details this benefit on page 4.

However, once your pension is in payment, the maximum increase is limited to 5% as detailed on pages 5 and 6 of the, “Transferring Out Information Sheet.”

9. The information sheet attached with this letter (**the Information Sheet**), contained the following key paragraphs:

“Revaluation of Deferred pensions

All deferred pensions under the Scheme are revalued each year, between your date of leaving and the time you take your pension, to combat the effects of inflation. Different parts of the pensions are revalued at different rates, and the way in which your pension is revalued will depend upon the date you left the Scheme.

Increases to the benefit in excess of GMP. Members who left the Scheme after 6 April 1990:

The whole benefit earned in excess of the GMP will be increased by between 3% and up to 5% per annum compound in line with increases in the RPI.

.....

Increases to Pensions in Payment

Once you start to receive a pension it will be increased as at April each year, with increases being paid on 1 May.

.....

The remainder of your benefit will continue to be increased in line with increases in the RPI, subject to a guaranteed minimum of 3% per annum and a maximum of 5% compound per annum.”

10. Mr T says that the above statements led him to conclude that his deferred pension would increase by at least as much as, and possibly more than, it would if he took the early retirement option and his pension was in payment. He also believed that his pension would be revalued each year. Mr T says these points were fundamental in his decision to leave his pension in deferment and not explore the option of early retirement immediately after his 52nd birthday.
11. In 2005, Towers Perrin ceased to be the Scheme's Administrator.
12. In 2009, the ADPF and the ADEPF merged, as a result of which Mr T became a deferred member of the ADPF. No changes were made to the benefits of former ADEPF members, including the revaluation of deferred pensions.
13. In August 2012, in anticipation of reaching his Normal Retirement Date, Mr T says he realised that for the years in which RPI had increased by more than 3%, his pension had been calculated differently to what he had understood from the Information Sheet. He queried this.
14. On 22 August 2012, the Administrator responded, enclosing a copy of the statutory revaluation table for 2012. It said that the rise in the Retail Price Index (**RPI**) or Consumer Price Index (**CPI**) was calculated over the whole period of deferment before being compared to the maximum of 5%. In Mr T's case, the 5% cap was replaced with a 7% cap due to Mr T's age plus length of service being greater than 70 at the date he left service. It explained that the revaluation table gave an increased rate of 1.28% to be compared with 3% p.a. compound. However the rise in RPI/CPI was 5.22% for 2012 and based on the compounding procedure described in the notes as amended by the Fund Rules, this gave an overall revaluation percentage of 1.283, which was still less than 1.295 (3% per annum). It said each year's increase was not calculated individually.
15. On 24 August 2012, Mr T wrote to the Administrator disputing the above calculations and highlighting the annual revaluation method of 3% to 5% stated in the Information Sheet. Considerable communication took place after this and on 12 August 2013, Mr T submitted a complaint under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He said:-
 - The phrase 'per annum compound' did not support the assertion that revaluation should not be calculated each year: 'per annum' means each year and 'compound' means that increases are calculated by reference to accumulated benefits (including past increases) rather than on only the original principal sum.
 - The methodology in the Information Sheet was different from, and provided an enhanced benefit to, the Pension Revaluation Orders (**Revaluation Orders**) established by the Pension Schemes Act 1993.
 - The Information Sheet said that the non-GMP benefits of a deferred pension in payment would continue to be increased in line with increases in the RPI. This was reinforced by a letter sent by the Chairman of the Trustees during the merger. This was contrary to the Revaluation Orders.

- He was entitled to rely on the Information Sheet because it was sent to him personally, and directly referred to his leaving benefit statement. It also stated that it summarised the main information required to make a decision; it did not indicate that the information within it was subservient to the rules of the fund.
- If the rules of the ADEPF in March 2004 did state that revaluation would be in line with the Revaluation Orders, then the creation and distribution of the Information Sheet was misleading and an act of negligence.
- Since leaving the company, he had decided to live off accumulated capital rather than apply to take his pension early. Had he known that his deferred benefits were not increasing in line with the information provided, he would have reconsidered this and possibly looked into transferring out of the Scheme.
- The calculation of his deferred pension by reference to the Information Sheet provided a valuation for Mr T's lump sum and ongoing pension entitlement at about 8% higher than that which was paid to him. His lump sum had been underpaid by approximately £25,686 and his annual pension was underpaid by approximately £3,850 per annum.

16. On 2 December 2013, the Administrator provided a response to Mr T's complaint. It said:-

- Benefits payable under the fund are set out in the trust deed and rules governing the fund. For former members of the ADEPF, the relevant rules include provisions of the Consolidated Trust Deed and Rules (2005 edition) of the ADEPF dated 27 May 2005 (**the Rules**). The governing provisions are set out in 3.12.1 and 3.12.2.
- The Rules state that Mr T's deferred pension is to be increased in line with the Revaluation Orders, subject to a minimum rate of 3% per annum compound and a maximum rate of 7% per annum compound.
- The Revaluation Orders provide for the revaluation increase to be applied as a one-off adjustment having regard to a member's total period of deferment and since 2011, provide for revaluation to be based on CPI rather than RPI.
- Mr T's entitlement, on reaching his normal pension age of 60 in 2012, was to have an amount added to his deferred pension based on CPI, calculated in the manner set out in the explanatory note prepared by DLA Piper.
- The Information Sheet, which Mr T said he relied on, stated that it had been produced as a guide to members with deferred benefits who were considering transferring out of the ADEPF. In being only a guide, the detail in this was limited.
- It was sufficiently clear that the Information Sheet did not override the Rules and it was not intended that Mr T rely upon this document for the purpose which he did.
- In respect of Mr T's claim that because of the information he relied upon, he decided to live off accumulated capital rather than take his pension early, or, that he would have reconsidered transferring out of the scheme; on this basis, it did not appear that Mr T had suffered any specific loss.

17. On 15 April 2014, Mr T submitted his appeal to the stage one decision. He said:-

- He was not disputing the Rules or the method of revaluation within these. Rather, he felt that these had not been properly communicated.
- He asserted that his lump sum and ongoing pension should be calculated in line with the information provided to him in the information sheet.
- In leaving pensionable service in 2003, he perceived he had three options. These were to: continue as a deferred member; transfer his benefits; or, apply for early retirement. He decided to remain in the Scheme with deferred benefits because of the “comparatively generous” terms of the revaluation for a deferred pensions, the fact that he had been able to accumulate a reasonable capital reserve and the 25% reduction in the cash equivalent transfer value.
- To track the presumed increase in his benefits he monitored the annual increase in RPI which regularly exceeded the 3% level and continued to monitor the early retirement option.
- Upon learning in August 2012 that his benefits would be 8% lower than expected because of the application of the statutory Revaluation Order, he sought additional income to maintain his standard of living by working at his son’s business.

18. On 15 July 2014, the Trustee provided a draft of its stage two response under the IDR. This can be summarised as follows:-

- The Trustee considered whether Mr T had a defence of estoppel by misrepresentation. The first consideration was whether the Information Sheet contained a clear and unambiguous representation that revaluation would be calculated annually using the increase in RPI subject to a minimum increase of 3% and a maximum of 5% (7% for the conditions previously outlined) and if so, was it reasonably foreseeable that Mr T would act upon the representation. The Information Sheet did not say how the annual revaluation would be calculated and did not set out the methodology. Mr T had made assumptions on this.
- As the information did not contain sufficient information on how a revaluation calculation was to be performed, it was not reasonable for Mr T to rely on it for such purposes.
- The Information Sheet said: “Although every effort has been made to keep legal and pensions terminology to a minimum, unfortunately some is unavoidable.” This suggested that it was not a definitive statement of Mr T’s legal rights.
- In terms of the second test for estoppel, although it was reasonably foreseeable that a member would act upon the information in the Information Sheet, it was not reasonably foreseeable that it would be used by a member to calculate the revaluation of their deferred pension benefits.
- Further, there was no evidence that Mr T would suffer any detriment if the Trustee was not held to the misrepresentation being claimed.

19. Following this, the committee of the Trustee Board (**the Committee**) invited Mr T and another member with the same complaint to a meeting. Mr T was asked to provide evidence of financial damage suffered as a result of the decision he made based on his understanding of the revaluation of his pension. Mr T then asked the scheme administrator for details of the pension he would have received if he had taken the early retirement option detailed in the letter dated 23 July 2003. He said he knew the likely reductions at ages 59, 55 and 50, but would like firm figures for retirement on his 52 birthday and confirmation that the calculation formula applicable at age 55 was minimum pension at NRD minus 26.545%. He subsequently asked for details of his tax free lump sum under the various scenarios.
20. On 4 September 2014, the meeting took place. Mr T confirmed in that meeting that he had never previously requested an early retirement quote because he was confident in his calculations based on the information received upon leaving. He believed the information sheet provided all the information needed to calculate pension at retirement.
21. On 17 September Mr T clarified that throughout the period of deferment he recorded the September RPI figures but did not actually create the exact method of calculation which accompanied his complaint until 2012.
22. On 31 October 2014, Mr T sent the Administrator a calculation for his claim for compensation.
23. On 5 December 2014, the Committee issued its final stage 2 IDRPs response confirming its position above.
24. After this, considerable correspondence was exchanged between both parties and in June 2015, Mr T submitted a complaint form to this Office.
25. On 22 June 2016, the solicitor acting on behalf of the Trustee provided its formal response. The main points of this have been outlined above and the additional comments are summarised below:-
 - Mr T's estoppel argument failed for the reasons set out in stage two of the IDRPs but even if this was not the case, Mr T had not suffered a loss from his decision not to transfer or retire early, and it would not be unconscionable in all the circumstances for the Trustee to pay Mr T his pension in accordance with the Rules rather than the higher rate which would apply had his interpretation been correct.
 - The Trustee accepted that it had a duty of care in relation to the Information Sheet to provide sufficient information to facilitate decisions on transfers, however this did not extend to ensuring the detail was sufficient to enable Mr T to carry out pension forecast calculations.
 - There was no careless misstatement, the Information Sheet was correct and appropriate. Accordingly, the Trustee's position was that there had been no maladministration.

- The Trustee had gone to considerable lengths to address Mr T's complaint and had given him a fair hearing. There was no additional information which caused the Trustee to change its view.

Adjudicator's Opinion

26. Mr T's complaint was considered by one of our Adjudicators who partly upheld the complaint. The Adjudicator recommended that the Trustee make a non-financial injustice award to Mr T, but concluded that no further action was required by the Administrator. The Adjudicator's findings are summarised briefly below:-

- The main consideration was whether Mr T had a claim for negligent misstatement.
- The Information Sheet said that it contained the "main information" needed to make a decision as important as transferring out, and there was the assertion that it could be relied upon for this purpose by members and financial advisers. Hence, the Information Sheet was presented as comprehensive reference point on a member's position within the Scheme and it was reasonable for a member to rely upon this document when seeking key information about the Scheme.
- The Trustee had said that the Information Sheet could not be relied upon for the purpose which Mr T attached to it, referring to a statement on legal terminology being kept to a minimum. Although the Information Sheet did not have the technical information required for one to carry out a calculation of the benefits payable, it was not unreasonable for Mr T to have made a comparison of the upper and lower revaluation rates when considering whether to take his pension early.
- The Information Sheet provided a breakdown of the revaluation which applied to the GMP and non-GMP element for members who had left the Scheme at various dates. Had the Information Sheet been a general guide, this information could have been omitted.
- Mr T had telephoned the Administrator in March 2004 to query the revaluation rate. The written response he received addressed his individual circumstances, drawing attention to the higher 7% revaluation rate which applied to him, saying this was on a "per annum compound" basis. The Information Sheet was attached and although a standardised document, was offered to specifically address Mr T's query. It was therefore not unreasonable that he relied upon this for his understanding of the revaluation rate.
- It was reasonable for Mr T to interpret the phrases "per annum" and "each year" as meaning that his non-GMP benefit would be revalued each year.
- The information which Mr T was presented with was, at face value, sufficient to make a comparison between remaining a deferred member and receiving an early pension.

- The omission of the word “average”, or, the failure to say that the revaluation rate applied to the term of deferment, rendered the Information Sheet inaccurate.
- In determining what Mr T would have done had he known the correct revaluation rate, the statements made by Mr T on this were equivocal. In his stage one IDRPs complaint, Mr T said he would have reconsidered his decision to leave his pension in deferment and further investigated transferring out. Hence, it is unclear what he would have done instead, and consequently, his financial loss is not quantifiable.
- Had Mr T transferred out of the Scheme in 2004, a 25% reduction would have applied to the transfer value, which may have influenced Mr T’s decision.
- It was not possible to establish financial loss but an award of £750, paid by the Trustee, would be appropriate for the significant distress and inconvenience caused to Mr T by the misstatement.

27. The Trustee and the Administrator accepted the Adjudicator’s Opinion but asserted their right to revert to their formal representations if Mr T did not. Mr T did not accept the Opinion and made the following further comments:-

- The final paragraph of the complaint form submitted to this Office said that had he known the correct revaluation methodology, he would have elected to take an immediate early retirement lump sum and pension.
- He had maintained throughout that he would have reconsidered his decision to remain a deferred member had he known the correct position. He may have investigated transferring out but the 25% reduction would have dissuaded him from doing so. The other option would have been to take early retirement, but it would be wrong to claim that he would have certainly done this before being given details of his entitlement.
- The Trustee is incorrect in saying that the capital value of his pension was equivalent whether he commenced retirement in 2004 or 2012, due to the reduction factor which would apply, as this would require inflation assumptions and reduction factors to be consistently correct.
- The only way to determine financial loss to a member would be to compare the values of net discounted cash flows to be received by the pensioner in each situation, which he had done when preparing his claim.
- The Adjudicator had mentioned the phrase “any additional legal claim” but not made any reference to his claim of estoppel; the Trustee should adhere to the clear commitment made.
- The Trustee could not rely on the Rules because these had never been properly communicated to him as a member of the Fund.

PO-9229

- This case was not a single instance of negligent misstatement but comprised a series of documents, further reinforced by a 2009 commitment on annual increases made by the then Chairman of the Trustee.
 - In a case of negligent misstatement, there was no requirement for certainty. The fact that he would have reconsidered his position within the Scheme is sufficient.
28. The complaint has been passed to me to consider. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr T for completeness.

Ombudsman's decision

29. The method of revaluation required by the rule is not in dispute. Mr T put forward his claim to a higher level of benefit on the alternative bases of estoppel by representation, maladministration and negligent misrepresentation.
30. To succeed in a claim for estoppel by representation Mr T would have to prove on the balance of probabilities that he was given a clear representation or promise, upon which it was reasonably foreseeable he would act, that he in fact relied upon it to make a decision not to take an early retirement, and he will now suffer detriment if the Trustee is not held to the representation. It must be unconscionable to allow the promise not to be honoured.
31. Mr T says he understood the information that his deferred benefit would increase by at least 3% per annum compound to mean that a calculation would be performed every year. I can see why absent any more information about the method required by the rules, Mr T interpreted the information in the way that he did. I conclude the information given was clear about the minimum and maximum thresholds. However it was not clear and unequivocal about the method to be used. It did not specify how the revaluation worked, only the minimum and maximum result it would produce for the benefit. In particular I note that the information was specific about the dates on which a pension in payment would be revalued, but no information about that was given for a deferred pension.
32. I also do not consider it was foreseeable that the transfers information sheet would be relied on to assess whether to take early retirement. It was limited in its stated application. It did not contain any information about the value of early retirement, information which Mr T had to request in 2014 in order to work out whether he would in fact have been better or worse off as an early retiree.
33. Mr T has explained that having clarified the 7% ceiling would apply to his pension in deferment rather than the 5% previously stated, he replicated the projection of deferred benefit at NRD, using his own methodology, unconfirmed by the scheme. He concluded that his pension in deferment would increase at least as fast as a pension in payment and potentially at a greater rate if the RPI increase for any year rose above 5%. From this explanation I am satisfied that he made his decision to remain a

deferred member in 2004 in reliance on his own calculations rather than any information specifically provided by the scheme. Moreover, while he was generally concerned to understand that the benefits would keep pace with inflation, I cannot see any evidence that he made a specific decision whether or not to retire early. I consider that a reasonable decision about whether to retire early would have required consideration of the information in fact requested in 2014.

34. I accept that Mr T does not need to prove with certainty what he would have done. The burden of proof he has to discharge is only on the balance of probabilities. However, I have to consider what he would probably have done presented with the complete deferred benefit revaluation methodology in 2004, without an illustration of his early retirement benefits, and without benefit of hindsight. I do not consider he can demonstrate that he would probably have taken early retirement.
35. Mr T has put forward no evidence that he would be materially disadvantaged if he receives the entitlement provided for by the Rules. I do not consider there is anything unconscionable in that outcome. I conclude it would, instead, be unconscionable if he received a pension in excess of this.
36. Turning to negligent misstatement, the duty which the trustees accepted when answering Mr T's questions and issuing the information sheet did not extend to giving him all the information necessary to calculate his benefits at NRD and earlier age points. He did not say he was considering retiring early and it was not foreseeable that a member would make a decision whether or not to do so based solely on guidance describing the main information relevant to a decision whether to transfer. In that context I cannot conclude that the statements made were carelessly false.
37. The last issue is whether there has been any maladministration causing injustice. I conclude that there was to this extent. The information sheet was detailed and did not accurately reflect the deferred benefit revaluation methodology required by the rules. It was intended as an aid to people trying to work out whether to leave their benefit in deferment and was provided to Mr T in response to a specific inquiry about the revaluation rates which applied to his deferred benefit. Read as a whole the information reasonably caused Mr T, who was unusually well equipped to carry out such a comparison, to believe that he could use it to compare the relative values of benefit paid now and benefit paid in future, albeit there was insufficient information to calculate precisely what the numbers were. That was the comparison Mr T made. The required methodology was explained only at Mr T's NRD, by which time he had been deprived of the opportunity of reconsidering his options. I consider that caused him significant distress and inconvenience, but I have seen no evidence that he was so severely affected as to merit more than the minimum award which I would ordinarily consider making.

PO-9229

Directions

38. I direct that within 21 days of this determination the Trustees shall pay Mr T £500 for the significant and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
18 September 2017