

## Ombudsman's Determination

<b>Applicant</b>	The Estate of the late Mr R ( <b>the Estate</b> )
<b>Scheme</b>	The Simons Group Ltd Pension & Life Assurance Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	The Trustees of the Simons Group Ltd Pension & Life Assurance Scheme ( <b>the Trustees</b> )

### Complaint Summary

This complaint, which the widow of Mr R (**Mrs R**) brings in her capacity as an executor of the Estate, concerns the lack of information provided to Mr R in relation to benefits under the Scheme.

In summary, Mrs R's complaint is that the Administrator, acting on behalf of the Trustees, failed to inform Mr R during his terminal illness that the benefits payable to the Estate, and to her as his widow, would be considerably lower if they were not taken during Mr R's lifetime.

### Summary of the Ombudsman's Determination and reasons

The complaint is upheld against the Trustees because:

- They failed to follow up on the letter to Mr R of 18 April 2016, to ensure that he had received it.
- They failed to take adequate measures to ensure Mr R understood the significance of the options outlined in the letter. In particular, they failed to explain that if Mr R did not access those benefits before his death, the benefits payable to the Estate, and Mrs R, would be significantly lower.

## Detailed Determination

### Material facts

1. In November 2012, Mr R was diagnosed with terminal cancer. At that time, he was a deferred member of the Scheme. On Mrs R's account, she subsequently had discussions with Mr R during which Mr R had discussed his intention to contact the Trustees for advice and information to ensure that Mrs R received the "maximum amount of widow's benefits from the scheme."
2. In April 2016, Mr R contacted Arthur J. Gallagher, the Scheme's administrator at the time (**the Administrator**), to discuss his options under the scheme. During this conversation, he informed the Administrator that he was terminally ill.
3. On 18 April 2016, the Administrator wrote to Mr R (**the letter**) and informed him that he had the following two options:-
  - A cash lump sum of about £19,000, an annual pension of about £12,000 and a widow's pension of about £7,000 a year (**option 1**); or
  - A cash lump sum of about £61,000, a reduced pension of about £9,000 a year and a widow's pension of about £7,000 a year (**option 2**).
4. The Administrator confirmed in the letter that Mr R had informed them that he had terminal cancer. They stated that if his life expectancy was less than 12 months, the benefits on retirement could potentially be paid in full as a tax-free lump sum, however if Mr R wished to pursue this option, the Trustees would require evidence of his life expectancy and he should contact them directly for more information about this option.
5. In August 2016, Mr R sadly passed away.
6. In September 2016, Mrs R received a letter from Spence & Partners Limited, the new administrator of the Scheme (**the new administrator**). It stated she might be entitled to receive a widow's pension of about £5,500. She queried why this was less than the benefits quoted in the letter, and why there was no longer a lump sum.
7. The new administrator explained that the benefits in the letter related to benefits payable during Mr R's lifetime, as a pensioner member of the Scheme. As Mr R did not proceed with retirement, he remained a deferred member, and the widow's benefits would be calculated accordingly, that is, without a lump sum.
8. In November 2016, Mrs R complained to the Trustees on behalf of the Estate. In summary said:-
  - Her widow's pension would be about £5,500, which was considerably less than the benefits in the letter, and no lump sum was available.

- The Trustees failed to make Mr R aware of all his options in the letter. In particular, he was not told that if the benefits were not taken during his lifetime, then Mrs R as his surviving widow, and the Estate, would be “severely disadvantaged”.
  - The Trustees failed to recommend that Mr R seek independent financial advice in relation to the timing of his retirement options.
  - Mr R’s request for information was not a standard one as he had made clear that he was terminally ill.
9. In February 2017, the Trustees responded to Mrs R under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). They said:-
- Based on what Mr R had requested during the telephone call, the Administrator provided the correct information as required under the Occupational Pension Schemes (Disclosure of Information) Regulations 2013 (**the Regulations**). There was no obligation to provide information to anyone other than the member and the information was provided within the relevant timescales.
  - The Trustees did not agree that they had failed to act in Mr R’s best interests as a Scheme beneficiary. The Administrator provided the information to Mr R within the required timescales and also provided Mr R with information about his retirement options if his life expectancy was less than 12 months. However, Mr R did not pursue this option, or take any further action in relation to the retirement options set out in the letter.
  - The requirement to inform members that they needed to obtain advice only applied where they were considering transferring out of the Scheme; whether Mr R might otherwise benefit from advice was not something they were required to point out.
  - The Trustees did not know, and were not informed, at the time of the telephone call, what Mr R’s life expectancy was, and they could not make any assumptions about this.
  - The Trustees did not agree, as Mrs R alleged, that they had acted incorrectly in failing to explain that Mr R could, or should, seek independent financial advice. The Pensions Regulator had introduced the requirement on trustees to check that members had sought “appropriate independent advice” from an adviser authorised by the Financial Conduct Authority. However, this only applied where the member was considering transferring to another scheme; it did not apply in circumstances where the member was merely considering retiring.
10. In June 2017 Mrs R referred the complaint to this Office.

### **Summary of Mrs R’s position, on behalf of the Estate**

11. As part of the preparations for his death Mr R wanted to ensure the Estate, and Mrs R as his widow, received the “best possible level of benefits” from the Scheme. He had described the Scheme as “the big one” in terms of financial support for Mrs R. He had

also discussed with her “in detail” how he would contact the Trustees, to obtain “the necessary advice and information” to ensure she received “the maximum amount of widow’s benefits from the Scheme”.

12. The purpose of Mr R’s call to the Administrator, some days before the letter, was to understand what options were available to him in the context of his terminal illness. This followed discussions with Mrs R in relation to financial planning.
13. The letter failed to mention what would happen if Mr R did not take benefits from the Scheme during his lifetime. As they were not so informed, they proceeded on the basis that options 1 and 2 set out in the letter and the option of a tax free lump sum would continue after Mr R’s death.
14. There was no doubt that if the letter had made clear what would happen if Mr R took no action, they would have applied for Option 2.
15. The letter failed to provide essential information regarding the benefits under the Scheme, in accordance with the Trustees’ obligations under the Regulations.
16. Even if Mr R only framed his request to the Administrator in the context of his early retirement options, which in any case was denied, a “professional pensions administrator, acting reasonably, on learning of [Mr R’s] diagnosis would have surely considered and provided his possible options in full”.
17. Pension trustees were under a common law duty to act in members’ best interests; in this instance, that meant Mr R’s best financial interests. So, the Trustees failed to act in the best interests of Mr R, the Estate and Mrs R.
18. The letter should have mentioned that Mr R might benefit from “seeking specialist financial advice from an independent financial adviser or similar”.
19. The letter should also have made clear that Options 1, 2 and the option of a tax free lump sum would expire on Mr R’s death. Whilst this might be obvious to pension experts, it was not obvious to lay persons like Mr and Mrs R.

### **Summary of the Trustees’ position**

20. Having received the Ombudsman’s Preliminary Decision (**the PD**), the Trustees submitted that: -
21. They were not under any duty to ensure that Mr R understood the significance of the options set out in the letter. The Trustees accepted that Mr R informed the Administrator during the telephone call that he was terminally ill. However, the Administrator responded correctly and promptly to Mr R given the limited nature of Mr R’s request to the Administrator and the Administrator’s limited knowledge of Mr R’s diagnosis. The letter refers to Mr R having called “requesting details of his early retirement options”, which leads the Trustees to conclude that Mr R’s request was not more wide-ranging than a request about his early retirement options. The contents of

any relevant conversation Mr R may have had with Mrs R were not relayed to the Administrator. There was no evidence that Mr R asked how he, or any beneficiaries, could obtain the “maximum possible” benefits from the Scheme. If it were true that Mr R wanted to secure the maximum benefits, he could and should have made further enquiries and obtained financial advice. If there was no urgency in the April 2016 letter, as concluded in the PD, that was because there was no urgency on the part of Mr R, either during the phone call, or following the letter. The Trustees deny they failed to provide information about the benefits payable on death in deferment in breach of their obligations under the Regulations. The Trustees’ obligation was to provide such information covered by those Regulations as Mr R had requested, however Mr R had only requested details about his early retirement options, which was provided. In fact, the Administrator went further than this and proactively informed Mr R about the tax free lump sum alternative that might be available to him if he met the necessary criteria.

22. The Trustees did not know, and were not informed, what Mr R’s condition was at the time of the telephone call. Nor did they know, and they were not informed, what his life expectancy was during the telephone call or after the letter was sent. Nor was it reasonable for them to make assumptions about his condition or his life expectancy at those times. It was the Administrator who first mentioned life expectancy in the letter which suggested Mr R did not provide details of his life expectancy during the telephone call.
23. It was unreasonable and inaccurate to characterise Mr R as being in “imminent danger of death”. The evidence from Mrs R, in her email of December 2017, indicated that Mr R had been diagnosed with terminal cancer back in November 2012 and yet he took no action in respect of his pension until 2016. Mr R gave no indication of the urgency of the matter or that his death was imminent at the time of his call. It is also not accepted that any medical treatment Mr R was undergoing at around the time of the letter, if indeed he was undergoing treatment, prevented him making a decision, or from making further enquiries in relation to the options set out in the letter.
24. Having provided Mr R with correct and timely information, the onus was on Mr R to make a decision or take other further action. He did not do so. Therefore, it is unreasonable to assume that if he had been given more information, he would have acted on it.
25. It was unreasonable for Mr R and Mrs R to assume that the options set out in the letter would apply after Mr R’s death. Option 1 included a pension for life for Mr R, which, by definition, would cease to be available on his death. Option 2 involved Mr R giving up some of his pension and it followed from this that this option would cease to be payable on death. It is unsubstantiated to conclude that Mr R would have applied for option 2 had the Administrator included the information in question. It was also incorrect and misleading to describe the lump sum alternative as option 3 because the lump sum alternative was subject to the submission of medical evidence, and this alternative was not presented to Mr R as an option he qualified for. Whilst the letter

did not state that the options would expire on death, it did not state that the options would be available on Mr R's death. In any case, as the letter clearly stated that the lump sum option depended on Mr R's life expectancy, it was unreasonable for Mr R to assume that this option would be available on his death. Mr R could have asked if he was unsure whether these options would be available on his death.

26. Whilst it may be that the Administrator could have checked that Mr R received the letter, it is denied that a failure to do so amounted to a breach of duty that warrants an award of higher benefits to Mrs R as no loss has been caused.
27. The Trustees deny that they were under any duty to advise Mr R to seek independent financial advice. The reference in the letter to advice in the context of transferring out ought to have alerted Mr R to the fact that seeking advice was an option; and, it ought to have underlined the importance of Mr R's decision. If the Pensions Ombudsman sought to rely on the argument that the Trustees should have told Mr R to seek and obtain advice, then it should establish whether Mr R actually obtained advice.
28. The Trustees also deny that they owed Mr R any duty to act in Mr R's best financial interests or that their duty to act with prudence and with reasonable skill and care extended to making decisions for, or making recommendations to, members. This complaint does not relate to the exercise of Trustees' powers and discretions, which the Courts were concerned with in *Cowan v Scargill* [1985] Ch 270 and *MNRPF v Stena Line* [2015] EWHC 448. The Trustees paid Mrs R death in deferment benefits in accordance with the Scheme rules and they had no discretion in relation to the benefits payable on Mr R's death. It would place an unreasonable and unrealistic burden on pension scheme trustees to be required to bring to members' attention, situations where it might be in their best interests to take a particular course of action.

## Conclusions

29. The Trustees are ultimately responsible for any acts or omissions on the part of the Administrator. There is no suggestion that the new administrator has acted incorrectly as it was not involved until after the events complained of.
30. One of the main arguments running through the Trustees' submissions is the argument that Mr R only requested details about his early retirement options and the Administrator responded adequately to this request. The Trustees reach this conclusion on the basis of the following statement by the Administrator in the letter:-

"I refer to your recent telephone [call] requesting details of the early retirement option available from this scheme."
31. I do not agree with the Trustees that it can be concluded from this statement that Mr R only asked for information about his early retirement options. The letter does not provide any further details of the conversation between Mr R and the Administrator and the statement is the Administrator's summary of an entire telephone conversation. It is very unlikely that there was no further discussion during which Mr

R may have provided further context to his enquiry. In fact, he clearly mentioned that he was terminally ill, so some further context was provided. It seems very unlikely this would have been mentioned unless he considered it was relevant and anticipated that the information he was to be given in return would reflect his overall situation. I do not consider that this letter is an accurate reflection of what was discussed during that telephone call and I cannot conclude from this statement or any other statements in the letter that Mr R only asked about his early retirement options.

32. The Trustees accept that Mr R informed the Administrator during the telephone call that he had terminal cancer. In other words, the Trustees knew or ought to have known that he had an incurable condition that could only be managed, not treated; and, that the condition would result in his death. The Trustees were on notice that Mr R was terminal. Therefore, they had an obligation to take this fact into account when providing information. In particular, by reason of this knowledge, they were required to send a letter stating what his benefits would be during his lifetime, but to also mention that these benefits would be invalid if he died. The Regulations say that the conditions on which benefits are payable is information which must be given on request. The Administrator's failure to mention, either during the telephone call or in the letter, that the benefits were dependent on the member living, when they knew he was terminal, was inadequate and amounts to an administrative error.
33. The Trustees knew that Mr R was terminal and it was reasonable to expect the Trustees to have considered that Mr R would have been preoccupied with his health. The Trustees also knew that the benefits payable to Mrs R, and the Estate, would be considerably lower if no action was taken during Mr R's lifetime. In those circumstances, I find that the Trustees should have satisfied themselves that Mr R had actually received the letter. They should also have satisfied themselves that Mr R understood the significance of the information contained therein, because it was reasonable to expect that a member with no specific pensions knowledge would not fully understand the implications of the options outlined in the letter.
34. The Trustees argue that they are not under a common law duty to act in the best financial interests of members, or to make decisions or recommendations for members as suggested by Mrs R. In my view, this case is not concerned with any duty to act in the best financial interest of members. Nor is it concerned with making decisions for, or making recommendations to, members. This case is concerned with the provision of relevant information. The Trustees had a fiduciary duty to provide Mr R with the relevant information to enable him to make a fully informed decision about his options under the Scheme. The Trustees breached this duty because, given the way the options were presented, I do not consider that it would have been clear to Mr R (a terminally ill member with limited pensions knowledge) or Mrs R (who also had limited pensions knowledge) that options 1 and 2 would not remain available on Mr R's death.
35. In fact, options 1 and 2 referred to a "widow's pension" which, given that Mr R was not dead at the time, could easily have suggested to him and Mrs R that the benefits

would be available on Mr R's death. I do not consider that the implications of a pension for life (option 1) or a reduced pension (option 2) were readily apparent to a lay person from the letter and that, as a result, Mr R and Mrs R ought to have known that options 1 and 2 would not be available on death. In circumstances where benefits are conditional (in this case, conditional on Mr R living) I do not consider that it was sufficient for the Trustees to inform Mr R about those benefits without confirming the condition to which those benefits were subject. It was clear that the lump sum option was conditional because the letter stated, "If your life expectancy is less than 12 months...", however (on Mrs R's evidence, which I accept) Mr R and Mrs R did not intend pursuing the lump sum option. There was no similar condition attached to options 1 and 2 which would have prompted Mr R to act. The letter also stated in the first paragraph "...I summarise the options you have." which is an open-ended statement which, again, did not mention the options to follow were conditional. In these circumstances, I find that it was reasonable for the Trustees to expect that a member with no specific pensions knowledge would not fully understand the implications of the options outlined in the letter.

36. The duty on the Trustees in this case to provide relevant information is not a duty to bring to members' attention, situations where it might be in their best interests to take a particular course of action. The duty in this case is limited in scope to the provision of relevant information as discussed above, and I do not consider that this duty places an unrealistic and unreasonable burden on the Trustees in this case.
37. The Trustees say that Mr R failed to make a decision and his failure to do so was not due to any failure on their part to provide him with relevant information. They say they provided him with the information he requested and also provided other information. I do not agree with the Trustees that they provided Mr R with the relevant information which he required to make an informed decision. As stated above, the letter is not, in my decision, an accurate reflection of the conversation between Mr R and the Administrator and I cannot conclude from that letter that Mr R only asked for details about his early retirement options. Whilst the details of what Mr R requested during the telephone call are in dispute, it is accepted that the Trustees knew Mr R was terminal. The relevant information in this context was, therefore, information that the options set out in the letter were conditional on Mr R living, which the Trustees failed to provide.
38. The Trustees further contend that Mr R should have made further enquiries or sought financial advice if he was unsure about the options set out in the letter, but he chose to take no action. In my view, the letter did not make it clear that Mr R needed to take any action to progress options 1 and 2 within his lifetime. Given that the letter did not mention the death in deferment benefits or suggest sufficiently (or at all) that the benefits were conditional, it was reasonable for Mr R (a terminally ill member with limited pensions knowledge) to assume that options 1 and 2 would be available on his death.

39. Mr R seems to have taken no action in relation to his benefits under the Scheme since he was diagnosed in November 2012 until April 2016. However, I do not accept it follows that he would have taken no action had the Trustees provided further information. The fact that Mr R telephoned the Administrator in April 2016 indicates that he was more than previously concerned to take further action with regard to understanding his pension options. It suggests that there was more reason to resolve his financial affairs at that time. I find that the reason he did not then proceed to take further action, following the letter, was because there was no urgency in the letter or indication to the layman that he was compromising his wife's future benefits by not taking action. Nor was there anything else in the letter that would have made it reasonable for him to act sooner rather than later. Therefore, I find it is more likely than not that he, or someone acting on his behalf, would have taken further action, if the letter had mentioned or given sufficient indication that the benefits were limited to his lifetime.
40. Put simply, there was a significant difference between the benefits set out in the letter and death in deferment benefits, which was information well known to the Trustees, but not Mr R, a terminally ill member with limited pensions knowledge, and Mrs R who also had limited pensions knowledge. It was therefore incumbent on the Trustees to inform Mr R that the options set out in that letter were dependent on him living, which is information the Trustees failed to provide.
41. Finally, whilst a transfer to another scheme might have been an option, and might have been more beneficial to Mrs R and the Estate in the long-run, Mrs R has said that there is no doubt they would have applied for option 2 if the letter had made it clear what would happen if Mr R took no action. I have no reason to reject Mrs R's version of events in these circumstances, and I find it is more likely than not that Mr R would have applied, and been accepted for, Option 2.

## **Directions**

42. I direct that within 28 days of the date of this determination:-

### Financial loss

43. The Trustees shall calculate the amount of lump sum the Estate would have received if Mr R had applied for Option 2 whilst he was still alive and this should be paid to the Estate directly.
44. The Trustees shall then calculate the difference between (a) the amount of spouse's pension Mrs R is currently receiving and (b) the amount of pension she would now be receiving, if Mr R had applied for Option 2 whilst he was still alive, and this amount shall be paid to Mrs R in two parts as follows:-
- (i) A lump sum: this shall consist of all the marginal payments that Mrs R would have received, from the date the widow's pension came into payment, to the date of this Determination; and

- (ii) An income: Mrs R existing spouse's pension shall be increased, ideally by augmenting her current spouse's pension (or, failing that, by setting up a second pension, alongside the first, in the amount of the marginal pension).
- (iii) In the case of the lump sum (but not the income), the Trustees shall pay interest in respect of late payment, with interest being based on the rate quoted by the reference banks at the time, from date of application to date of payment.

Non-financial injustice

45. In respect of the spouse's pension (but not the lump sum), the Trustees shall pay Mrs R £500 in recognition of the significant distress and inconvenience she has suffered. This is payable to Mrs R in her capacity as an Applicant to this Office and a beneficiary under the Scheme.

**Anthony Arter**

Pensions Ombudsman  
29 June 2018