

## Ombudsman's Determination

Applicant	Mrs T
Scheme	Turning Point Scotland Group Personal Pension Plan
Respondents	Turning Point Scotland Kerr Henderson (Financial Services) Limited

## Outcome

1. I do not uphold Mrs T's complaint and no further action is required by Turning Point Scotland or Kerr Henderson (Financial Services) Limited.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. The complaint has been brought on behalf of the late Mr T's estate. The complaint is that Mr T was not warned that taking his pension would reduce the level of life cover payable on his death.

## Background information, including submissions from the parties

### Background

4. Mr T was employed by Turning Point Scotland (**TPS**). He was a deferred member of the Turning Point Pension Scheme (the **Scheme**), which closed to future accrual in 2012. Thereafter, Mr T became a member of the TPS Group Personal Pension Plan (the **Plan**) with Standard Life. Mr T was diagnosed as terminally ill on 4 February 2016. He died on 8 July 2016.
5. Kerr Henderson (Financial Services) Limited (**KH Ltd**) is retained by TPS to provide it with advice and administration in respect of both the Scheme and the Plan. Members of the Plan may approach KH Ltd on an individual basis for advice. The services which KH Ltd provides are set out in a 2011 service agreement (the **Agreement**). Schedule 3 to the Agreement provides that retirement or annuity advice, including a pre-retirement report, will be provided to members on request and at their expense.
6. Mr T contacted KH Ltd, on 8 February 2016, requesting a benefit quotation. KH Ltd subsequently emailed TPS asking if Mr T's life expectancy was less than one year

because this affected the benefits available to him. TPS responded that Mr T was still at work but its HR was “trying to guide him through some processes”, including making sure his pension paper work was in order. TPS said it had asked its HR to ascertain life expectancy and to discuss ill health retirement with Mr T.

7. On 12 February 2016, KH Ltd sent Mr T a serious ill health early retirement quotation, together with an option form to complete to claim the benefits. The quotation related to his deferred benefits in the Scheme. Mr T was quoted three options: an annual pension of £2,497.07; an annual pension of £1,877.45 with a lump sum of £12,516.73; or a serious ill health lump sum of £21,903.58. Under the heading “Death benefits”, the quotation stated that a spouse’s pension of £1,248.54 per annum would be paid regardless of which option was chosen. No information about the amount of lump sum death benefit which might be payable on Mr T’s death was included in the quotation.
8. The covering letter included a recommendation from the Scheme trustees to seek independent financial advice before making a decision. A website address was provided where details of advisers could be obtained. The quotation itself also included a statement that the member should not make any financial decisions based on the figures without seeking financial advice. A telephone number was provided for Mr T to call if he had any questions or required any further information.
9. Mr T signed the enclosed option form on 15 February 2016. He opted for the serious ill health lump sum of £21,903.58.
10. On 24 February 2016, KH Ltd emailed TPS. KH Ltd attached medical evidence from Mr T’s GP and confirmation from an occupational health physician that his life expectancy was less than 12 months. KH Ltd said it had received a signed option form from Mr T confirming he wished to take a serious ill health lump sum. It asked TPS to confirm its consent for the payment of £21,903.58 to Mr T. TPS responded with its agreement. The lump sum was paid on 1 March 2016.
11. Mr T contacted Standard Life, on 24 February 2016, concerning another pension policy he had with it.
12. File notes supplied by KH Ltd record that Mrs T telephoned, on 23 March 2016, stating she had been in touch with TPS and was expecting someone from KH Ltd to call her about Mr T’s Standard Life (Plan) benefits. The note records that Mr T had terminal cancer and wished to take serious ill health benefits. The note records that Mrs T was told that KH Ltd would contact Standard Life for the paperwork or confirmation of the process.

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13. A subsequent file note records that Standard Life contacted KH Ltd, on 5 April 2016, to say it was ready to settle the benefits and wished to check if there would be any further contributions to the Plan. KH Ltd said the March 2016 premium had already been submitted. A lump sum of £11,298.19 was paid on 18 April 2016.
14. In July 2016, KH Ltd submitted a claim to Standard Life (now Aviva) for a lump sum death benefit of six times Mr T's salary (£141,522). Copies of internal email exchanges show that KH Ltd was aware that Mr T was covered for once times salary but hoped that Aviva would look at his case sympathetically. Aviva responded that, because Mr T had taken his pension in April 2016, he was only covered for once times salary.
15. Aviva paid a lump sum death benefit of £23,587 to the trustees' bank account. This was subsequently paid to Mrs T.
16. KH Ltd contacted Standard Life, on a number of occasions in September 2016, seeking information about Mr T's February 2016 call. File notes made by KH Ltd record that Standard Life confirmed that Mr T had provided bank account details in relation to his other plan. The notes also record that Standard Life had said that Mr T had informed it that he did not wish to "settle the benefits under the TPS scheme at that point in time".
17. The Plan Member's Guide states:

"[KH Ltd] is also available to provide you with individual advice in regard to the Plan. You can also use your own financial adviser but you may be required to pay a fee ..."
18. Members are then referred to two websites which provide information about financial advisers, together with a guide published by the Money Advice Service and its contact details.
19. The Guide also states:

"In addition to any lump sum death benefits from the Plan, Turning Point Scotland also meets the cost of providing an additional lump sum life assurance benefit. The benefit is payable in the event of your death whilst you remain an employee of Turning Point Scotland.

The level of benefit is either:

1 times salary for non pension scheme members

OR 3 times salary for new pension scheme members ...

OR 6 times salary for ex-defined benefit scheme members

The cover ceases at age 65."

20. The Plan terms and conditions, dated 2014, state:

“7.9 If we receive evidence from a registered medical practitioner that you’re expected to live for less than one year, you may have the option of taking the proceeds of your pre pension date accounts as a lump sum ... The lump sum must satisfy the conditions set out in the rules. For more information on this please contact your financial adviser.”

And

“8.1 This Section describes the death benefits that are payable from your plan.

After your death, we’ll normally cancel all the remaining units held under your plan before distributing the proceeds to your beneficiaries.

Lump sum death benefit

8.2 We’ll normally pay a lump sum death benefit from your pre pension date accounts. We’ll decide who should receive a lump sum death benefit, and how much, from the list of beneficiaries described in the rules ...

8.3 If you die before your 75<sup>th</sup> birthday, any lump sum death benefit paid from your pre pension date accounts is tested against your remaining lifetime allowance ...”

### **Mrs T’s position**

21. Mrs T submits:-

- KH Ltd should have informed Mr T which death in service or life cover options were available when he contacted them for advice on 8 February 2016.
- Having been diagnosed as terminally ill, on 4 February 2016, Mr T took steps to avoid her having to deal with matters about which they both had little knowledge. This included pensions, will and funeral arrangements. He changed the car insurance and utilities into her name so that she would have little to do after his death. He wished to ensure she had financial security in the future.
- At the time, Mr T was very vulnerable and had little knowledge or experience of financial matters. Their savings were deposit based. He had never previously sought financial advice because his existing pension arrangements were through his employer.
- Mr T was told by TPS that it could not advise on pensions and he should contact KH Ltd.
- At no time did KH Ltd contact Mr T to discuss life cover.

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- KH Ltd has said that Mr T did not ask for financial advice, but this is why he contacted KH Ltd.
- Mr T explained his situation to KH Ltd.
- KH Ltd took Mr T's instructions to encash his pension benefits in full without giving him advice about the advantages or disadvantages of doing so. He was not told that his request was being dealt with on a non-advised basis. He was not told what effect it would have on his death in service benefit.
- KH Ltd states that it acts as administrators for the TPS Scheme and Plan, but it is an independent financial adviser. It should have considered Mr T's circumstances.
- Both she and Mr T understood that TPS would pay out the death in service benefit. At no time were they told that the death in service benefit was connected to the pension scheme.
- If Mr T had been informed of the consequences, he would not have closed his pension schemes.
- KH Ltd did not advise Mr T to have someone present during telephone conversations. Nor was he told to seek advice from any other source; such as the Government pension advice service, Citizens Advice or another financial adviser. The outcome would have been different if these options had been mentioned.
- Both TPS and KH Ltd were aware that Mr T was terminally ill. She feels that she and her husband were advised that they could encash his pension policies in full because of the diagnosis.
- The fact that KH Ltd submitted a claim for the higher lump sum suggests that it did not understand the situation. If that was the case, then Mr and Mrs T could not be expected to understand the implications of Mr T taking his benefits from the Plan.
- Mrs T understands that TPS has changed its processes since Mr T's death. If so, this indicates that it did not have the correct procedures in place previously.

### **TPS' position**

#### **22. TPS submits:-**

- KH Ltd is engaged by TPS to provide advice and administration services in relation to the Scheme and the Plan. KH Ltd has provided guidance to the effect that an employer should not give financial advice or intervention which could be interpreted as advice.

- On 5 April 2017, it was advised by KH Ltd that Mr T would be taking his benefits early from the Plan. It was asked to cease contributions with immediate effect, unless advised to the contrary by Mr T. It received no instruction to the contrary from Mr T and Mrs T had made it known that she wished the instructions to be progressed quickly.
- It was acutely aware of the fact that Mr T was suffering from a terminal illness and the distress this was causing Mrs T. Its focus was on actioning the instruction from KH Ltd as a matter of urgency.
- Mr T continued to work for TPS despite his diagnosis. TPS would have discussed a range of factors with him, including appropriate adjustments. It was also aware of the need to steer Mr T to occupational health for confirmation of his diagnosis. It was in this context that it told KH Ltd that its HR was “trying to guide him through some processes”. This should not have affected the need for KH Ltd to check whether Mr T required financial advice.
- Mr T was provided with a member’s guide to the Plan during the consultation process which led to the closure of the Scheme. This document explains that the level of life cover is dependent upon the employee’s status of membership of the Plan.
- It is not unreasonable to expect a member of the Plan to refer to the member’s guide when making decisions in relation to their membership of the Plan.
- The level of life cover was also set out in a number of other documents issued to members of the Scheme, in 2010 and 2011, as part of the consultation process.
- It did not at any point receive any instruction directly from Mr T or Mrs T. Nor did it receive any request for advice or assistance in relation to Mr T’s benefits in the Plan or his life cover. Any such request would, in any event, have been referred to KH Ltd.
- Its expectation is that, where a significant change is requested by a member, KH Ltd would automatically check if the member has sought or requires financial advice.
- It feels that it makes strong efforts to support its employees with regard to its pension and life assurance arrangements. It keeps its policies and procedures under review. Since 2016, it has increased the number of written references to taking financial advice. This action was taken because it was aware of the dangers of individuals becoming victims of pension scams. It is not aware of any specific changes to its procedures in relation to death benefits.

**KH Ltd's position**

23. KH Ltd submits:-

- It is a financial advisory firm with both private and corporate clients. It provides advice and administration services to TPS. These services are set out in the Agreement. Schedule 3 to the Agreement sets out the nature of its relationship with individual members.
- Three departments have been involved in this case: the Defined Benefits Team dealt with Mr T's benefits under the Scheme; the Corporate Pensions Team deals with the Plan and auto-enrolment; and the Group Risk department deals with life assurance and death-in-service benefits.
- Neither Mr nor Mrs T have, at any stage, been private clients of KH Ltd.
- The Plan Member's Guide is given to all members on joining and was available on the intranet and through HR.
- It was not, at any time, asked by Mr and Mrs T or TPS to advise in relation to Mr T's pension options. Financial advice will only be given to members who expressly engage KH Ltd for this purpose.
- It was contacted by Mrs T, on 23 March 2016, and informed that Mr T wished to take his ill health retirement benefit. The member of staff who spoke to Mrs T has confirmed that the conversation was short and Mrs T did not request advice. He emailed Standard Life on the same day requesting the relevant paperwork. He also emailed TPS informing it that Mr T was taking his benefits and, therefore, effectively opting out of the Plan. He asked TPS to cease contributions unless Mr T advised it to the contrary. This gave TPS the opportunity to speak to Mr T about his options before he left the Plan.
- It was not incumbent upon its administrator to question Mrs T's instructions.
- As an employee and member herself, Mrs T could not have been entirely ignorant of anything to do with pensions and life benefits. She had access to clear information which informed her of the consequences of Mr T's actions. Mr and Mrs T had a responsibility to act on the knowledge and opportunities which were available and seek appropriate advice if they were unsure.
- The information Mr and Mrs T required was contained in the Plan Member's Guide. They could also have requested information about the level of life cover from TPS' HR.

## Adjudicator's Opinion

24. Mrs T's complaint was considered by one of our Adjudicators who concluded that no further action was required by TPS or KH Ltd. The Adjudicator's findings are summarised below:-

- Mrs T found herself in an unfortunate situation. As a result of Mr T's decision to take his benefits under the Plan, he was no longer considered an active member at the time of his death. The lump sum death benefit payable was equal to once times his salary, instead of six times the salary. This was a significant difference; £23,587 instead of £141,522.
- In essence, Mrs T's position was that, had he received appropriate advice prior to his decision, her husband would not have taken his Plan benefits early. She was of the view that either TPS or KH Ltd had a responsibility to advise Mr T of the consequences of taking his Plan benefits when he did. The question for the Ombudsman was whether either or both of those parties had a responsibility to advise Mr T on his actions.
- There is a distinction to be drawn between giving advice and providing information. The Adjudicator acknowledged that there is sometimes a fine line to be drawn between these two activities. The giving of financial advice is strictly regulated under the Financial Services and Markets Act 2000. TPS had made the point that, as Mr T's employer, it could not give him any financial advice. This is true. There is a general prohibition under the above act which prevented anyone other than an authorised (or exempt) person from advising on pension rights.
- The general prohibition on giving advice did not preclude TPS from providing information. Indeed, there are certain statutory requirements to provide information which applies specifically to employers. For example, the Employment Rights Act 1996 requires employers to provide a written statement of an employee's terms and conditions, including any relating to a pension scheme. However, this is quite basic information and does not encompass the kind of discussion which the Adjudicator believed Mrs T envisaged.
- There is also caselaw relating to the extent to which employers can be expected to advise employees. The leading cases are: *University of Nottingham v Eyett* [1999] 1 WLR 594 and *Scally v Southern Health and Social Services Board* [1992] 1 AC 294.
- In *Eyett*, the member would have been better off if he had delayed his retirement by one month because this would have allowed a pay rise to be taken into account. The High Court decided that Mr Eyett had been provided with sufficient information for him to be aware that he would be better off if he delayed his retirement. Mr Eyett had not asked his employer for any advice

about his chosen retirement date and there was no evidence that the employer was aware that he was making his decision on the grounds of a mistaken belief. The Court did not accept an argument that Mr Eyett's employment contract included an implied duty of good faith which encompassed an obligation on the employer to warn him that his decision to retire a month earlier might be financially detrimental.

- In *Sally*, the employees in question had the right to buy additional pension rights on favourable terms if they did so within a certain period. The employees argued that they had not been informed of their rights in time for them to take advantage of the favourable terms. The House of Lords decided that, in the circumstances, it was appropriate to imply a term into the employees' contracts of employment that the employer would take reasonable steps to inform them of their rights.
- From these two cases cited above, it appears that, whilst there is an obligation to provide information about an employee's pension rights, an employer is not obliged (or indeed able) to advise an employee; even when there might be a financial disadvantage resulting from the individual's decision.
- In Mr T's case, he had been provided with the Plan Member's Guide which set out the lump sum death benefit payable in various circumstances. The Adjudicator noted that Mrs T had said that neither she nor Mr T had been told that the death in service benefit was connected to the pension scheme. However, this information was contained within the Guide. The Guide did indicate that the amount payable was dependent upon whether or not the individual was a member of the Plan. An amount of once times salary was payable for non-pension scheme members.
- The Adjudicator accepted that Mr T would have been given the Guide some years prior to his diagnosis and might not have thought to consult it in 2016. She also accepted that the information about death benefits could perhaps have been made slightly clearer by stating explicitly that a member taking benefits would no longer be covered for six times salary. However, it did state that the benefit was payable whilst the individual remained employed by TPS. In her view, the wording was sufficiently clear for TPS to have met its obligations with regard to the provision of information.
- Mr T did not appear to have asked for any more specific information relating to death benefits in 2016. Nor was there any evidence that TPS was aware that either he or Mrs T were still expecting a lump sum of six times his salary to be paid on his death when he opted to take his Plan benefits. TPS was under no obligation to raise the matter of the lump sum death benefit with Mr T in the absence of a specific request for information from him. The fact that it did not raise the matter with him did not amount to maladministration on its part.

- The Adjudicator considered whether it could be argued that, as a matter of good practice, TPS should have checked whether Mr T had sought independent financial advice. She noted that TPS had said that it would have expected KH Ltd to check if Mr T had sought or required advice. The covering letter which accompanied the benefit statement sent to Mr T in February 2016 recommended that he seek advice. It also provided a website address where he could obtain details of appropriate advisers. The Adjudicator did not think that TPS was required to go further than this and actually ask Mr T if he had sought independent financial advice.
- With regard to KH Ltd's role, it was not required to provide financial advice for Mr T unless he specifically engaged it to do so. The 2011 Agreement was between KH Ltd and TPS. It provided for KH Ltd to advise TPS. Schedule 3 to the Agreement allowed for pre-retirement advice to be provided for members "on request and at their expense".
- Mrs T had pointed out that KH Ltd was an independent financial adviser. She was of the view that KH Ltd should have discussed life cover with Mr T when he contacted it in February 2016. Although KH Ltd would have been authorised to provide financial advice for Mr T, it was only required to do so if he had engaged it to do so. There was no evidence that Mr T sought financial advice from KH Ltd.
- In addition, the telephone call he made to KH Ltd on 8 February 2016 was a request for information about his deferred Scheme benefits. At this stage, Mr T did not appear to have made a decision about his Plan benefits. The decision to take his Scheme benefits did not affect Mr T's lump sum death benefit. It was only when he decided to take his Plan benefits early that he ceased to be an active member and the amount of lump sum death benefit was reduced.
- On 23 March 2016, Mrs T contacted KH Ltd. She informed KH Ltd that Mr T wished to take serious ill health benefits under the Plan. The member of staff to whom Mrs T spoke took this as an instruction and contacted Standard Life and TPS to action it. In the circumstances, this was not inappropriate and did not amount to maladministration.
- The Adjudicator understood Mrs T to be suggesting that her husband had been encouraged to take his benefits as a lump sum because of his diagnosis. With regard to his Scheme benefits, Mr T was provided with details of a serious ill health lump sum but there was no evidence that he was encouraged to take this option; he was provided with other options at the same time. In March 2016, KH Ltd was informed that Mr T had decided to take a serious ill health lump sum under the Plan. It was not asked to provide details of other options. In the Adjudicator's view, this did not amount to encouraging Mr T to take the serious ill health lump sum option.

- The Adjudicator acknowledged that it was unfortunate that Mr and Mrs T did not receive independent financial advice before Mr T opted to take his benefits under the Plan. However, in her view, neither TPS nor KH Ltd were in a position to provide such advice.

25. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T and Turning Point Scotland provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs T for completeness.

### **Ombudsman's decision**

26. Essentially, Mrs T is of the view that either TPS or KH Ltd, or possibly both parties, should have been more proactive in alerting her husband to the potential consequences of his decision to take his benefits under the Plan. I can perfectly well understand why Mrs T would take this view; particularly when the consequences of Mr T's decision are so detrimental to her own position.
27. However, TPS and KH Ltd have to operate within the boundaries of what is now a highly regulated financial services environment. The kind of intervention which Mrs T envisages would amount to giving financial advice. The Financial Services and Markets Act 2000 includes a general prohibition which prevents anyone other than an authorised (or exempt) person from advising on pension rights. TPS was not authorised to advise Mr T. KH Ltd is authorised to give financial advice but had not been engaged by Mr T to do so.
28. My Adjudicator considered those circumstances where the courts have been prepared to find that an employer should be proactive in relation to an employee's pension rights. In *Scally*, the House of Lords was prepared to find that there was an implied obligation on the employer to take reasonable steps to bring the particular benefit in question to the employees' attention. Implying such an obligation was considered necessary because, amongst other things, the employees had no other means of knowing about it. However, this decision rested heavily on the particular circumstances of the case.
29. In subsequent cases<sup>1</sup>, the courts have held that there is no general implied duty on an employer to safeguard an employee's economic well-being. It was considered unfair and unreasonable to impose such a duty on employers. If, on the other hand, an employer has assumed a responsibility for giving financial advice then there is a duty to take reasonable care in the giving of such advice.
30. In Mr T's case, there was no duty (implied or otherwise) on TPS to advise him as to the implications of his decision to take his benefits under the Plan. The particular circumstances of the *Scally* case did not arise because Mr T could have known about the terms of the lump sum death benefit from the Guide. Nor do I find that TPS had

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<sup>1</sup> For example, *Crossley v Faithful and Gould Holdings Ltd* [2004] IRLR 377

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assumed a responsibility to advise Mr T. In fact, had he requested financial advice, TPS would have directed him towards KH Ltd or another financial adviser of his choice.

31. Mrs T's representative has referred to the fact that KH Ltd submitted a claim for the higher benefit. He suggests that this shows a lack of understanding of the Plan terms on its part. The internal correspondence indicates that the claim for the higher benefit was made more in hope than expectation. KH Ltd clearly realised that, strictly speaking, Mr T's beneficiaries were not entitled to the higher benefit but hoped that Aviva would look sympathetically on such a claim.
32. Mrs T's representative has also referred to TPS' subsequent changes in policy and/or procedure. He suggests that this amounts to a recognition on its part that its previous procedures were lacking. TPS has explained that it has taken steps to reinforce the message about seeking independent financial advice in the light of the increased concern about pension scams. I do not find that TPS' procedure was lacking at the time of Mr T's retirement. Nor do I find that subsequent changes in procedure should be seen as an acceptance on its part that its procedure was lacking.
33. I agree that it is regrettable that Mr and Mrs T did not receive more financial advice at the time he decided to take his benefits from the Plan and I understand Mrs T's considerable frustration at the outcome. However, I do not find that responsibility for providing such advice lay at either TPS' or KH Ltd's door.
34. Therefore, I do not uphold Mrs T's complaint.

**Anthony Arter**  
Pensions Ombudsman

20 February 2019