

## Ombudsman's Determination

Applicant	Mr D
Scheme	American Express UK Pension Plan ( <b>the Plan</b> )
Respondents	The Trustees of American Express UK Pension Plan ( <b>the Trustees</b> )

## Outcome

1. I do not uphold Mr D's complaint and no further action is required by the Trustees.

## Complaint summary

2. Mr D complained about an error initially made in his Plan leaving service benefit statement in 1994. His deferred pension was overstated as it was calculated incorrectly. The miscalculation was used in subsequent illustrations sent to Mr D. Mr D said he based the timing of his transfer from the Plan, to a Self-Invested Personal Pension (**SIPP**), on the incorrectly calculated benefits.

## Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mr D worked for American Express (**AMEX**) and was a member of the Plan, a defined benefits occupational pension scheme, from 17 September 1990 to 22 April 1994, when he left AMEX's employment and became entitled to a deferred pension.
5. On 30 June 1994, Buck, the Plan's administrators, sent Mr D a deferred benefit statement (**the 1994 DBS**). It said:-
  - The transfer value of Mr D's deferred benefits in the Plan at this date was £18,944.46. This value was guaranteed for two months. The calculation date was 30 June 1994.
  - His annual pension payable from Normal Retirement Date (**NRD**) in April 2024 was a Guaranteed Minimum Pension (**GMP**) of £316.16 plus a pension in excess of GMP of £4,608.96. A total annual pension of £4,925.12.

- The GMP amount would increase by 7.0% a year to State Pension Date (**SPD**).
  - The pension in excess of GMP would increase by 5% compound per annum or in line with the Retail Price Index (whichever is lower) between the date of leaving and NRD.
6. On 1 February 2002, Buck wrote to Mr D. It said the transfer value of Mr D's deferred benefits in the Plan at this date was £42,461.45. This value was guaranteed for three months. It enclosed a copy of the 1994 DBS.
  7. On 2 November 2006, Buck wrote to Mr D. It said the transfer value of Mr D's deferred benefits in the Plan at this date was £69,852.11. This value was guaranteed until 1 February 2007.
  8. On 16 July 2009, Buck sent Mr D another copy of the 1994 DBS.
  9. In May 2014, Buck sent Mr D an illustration of retirement options as shown below based on a retirement date of 1 June 2014 (Mr D was aged 55 at this date):
    - An annual pension of £7,315.67 until the GMP became payable in March 2024, £9,101.87 from March 2024 to SPD and £8,869.92 from SPD, or
    - A pension commencement lump sum of £31,738.79, plus an annual pension of £4,760.82 until March 2024, £6,547.02 from March 2024 to SPD and £6,315.07 from SPD.
  10. On 16 July 2020, Mr D wrote to Buck asking it to provide him with a Cash Equivalent Transfer Value (**CETV**) in the event that he wished to transfer out to a SIPP.
  11. On 20 July 2020, Buck responded to the request for a CETV from Mr D. It said his pension benefits had been wrongly calculated when he left the Plan in 1994 because the HMRC Earnings Cap it had used was for the incorrect tax year. An updated DBS was enclosed which said that Mr D's annual pension at date of leaving, payable from NRD, was a GMP of £316.16 plus a pension in excess of GMP of £4,064.27. A total annual pension of £4,380.43.
  12. Mr D contacted Buck about this error and the implications for his retirement planning. He said:

“Can you please set out urgently the difference between what was previously communicated to me and what has now been recalculated and its impact on my future pay outs including on any potential transfer payments?”.
  13. On 19 August 2020, Buck wrote to Mr D giving more details of the calculation error. It said that as well as the Earnings Cap not being applied correctly, the wrong Final Pensionable Earnings (**FPE**) had also been used. This led to Mr D's FPE being calculated as £84,552. It should have been £75,600 under the Plan Rules and in line with the Earnings Cap for the correct year applied. This inflated his annual pension at date of leaving from £4,380.43 to £4,925.12.

14. On 19 August 2020, Buck also sent Mr D a statement of entitlement. It said the CETV at this date was £235,190.54. This value was guaranteed for three months.
15. Mr D made a complaint to the Trustees under the Plan's Internal Dispute Resolution Procedure (**IDRP**). He said he felt he should be paid his pension in line with the 1994 DBS because he based his retirement calculations on those figures.
16. On 7 November 2020, the Secretary to the Trustees responded to Mr D under stage one of its IDR. She did not uphold his complaint. She said that the most recent incorrect transfer value sent to Mr D was in November 2006 and the value of the plan had increased significantly from this date to August 2020. The Plan was non-contributory so it was unlikely Mr D would have decided not to join the Plan had he been aware of the correct Earnings Cap. Mr D had not explained how the inflated transfer values had impacted any decisions he made regarding his retirement.
17. Mr D responded to the Trustees. He said he knew transfer values can be volatile, so he was not complaining about the shortfall of the transfer value itself. The erroneous transfer values and pension projections, which were based on the incorrectly calculated pension value at the time he left the employment of AMEX in 1994, led to him attaching the wrong value to his retirement savings. He said the financial loss he suffered is the opportunity of not being able to make up the shortfall due to his age and income earning potential. Mr D said the 1994 DBS provided to him when he left the employment of AMEX amounted to a contractual obligation.
18. On 15 January 2021, Buck sent Mr D a statement of entitlement. The accompanying letter confirmed that the CETV would now be lower than in August 2020, but because of the ongoing complaint it would honour the CETV provided in August 2020 which was £235,190.54. This value was guaranteed for three months. It also agreed to waive the fee for a second CETV quote within 12 months.
19. On 5 March 2021, the Trustees responded to Mr D under stage two of the IDR. Mr D was offered £500 in recognition of the disappointment and distress of finding out that statements he had received had been incorrect. The Trustees found it unlikely that Mr D had relied on one transfer value provided to him in 2006 to base his retirement plans on, and that if he did, it was not reasonable to do so. They did not uphold this aspect of his complaint.
20. On 6 May 2021, Buck confirmed that Mr D's CETV of £235,190.54 had been transferred from the Plan to AJ Management Ltd to be applied to his SIPP.

### **Mr D's position**

21. Incorrect pension benefit projections were provided to him on several occasions as a result of an error calculating his FPE when he left the Plan in 1994.
22. The error only came to light in 2020 when he requested a CETV to transfer his benefits in the Plan to a SIPP.

23. He had based his retirement calculations on the incorrect information, so his retirement planning has been impacted. The error has resulted in him wrongly attaching a value to his retirement savings which is no longer valid and the impact of which is too late to change.
24. He anticipated receiving a transfer value based on the 1994 DBS he received on departure from AMEX and uplifted through to retirement. Had he known of the problem before, and that it may lead to a reduction in his pay out, he would not have initiated the transfer at all.
25. The 1994 DBS provided when he left the employment of AMEX is a contract and cannot be reneged upon. His pension benefits should be calculated on the same basis as this calculation.

### **The Trustees' position**

26. Mr D's deferred pension benefits were calculated incorrectly upon leaving the Plan in 1994. An incorrect FPE figure was used and HMRC's annual Earnings Cap was not correctly applied to Mr D's FPE. This led to Mr D's FPE being calculated as £84,552. The correct figure should have been £75,600 under the Plan Rules and in line with the Earnings Cap for the correct year. The result of this miscalculation was to inflate the projected pension on the 1994 DBS and again in future projections until July 2020.
27. The transfer value provided to Mr D in the 1994 DBS should have been approximately £16,000 -17,000, not £18,944.46 as stated. The projected annual pension from NRD should have been £4,380.43, not £4,925.12 as stated.
28. The transfer value provided to Mr D in 2006 should have been approximately £62,571, not £69,852.11 as stated.
29. Mr D suffered a loss of expectation, but it is not clear how he has suffered any actual financial loss.
30. An offer of £500 for the distress and inconvenience caused by the error has been made to Mr D. This is still open to him. The £240 fee for a second CETV quote within 12 months has been waived. By allowing Mr D to use an out-of-date CETV, his CETV was effectively topped up by £591 when transferring out his benefits in May 2021.

### **Adjudicator's Opinion**

31. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised below:
  - The Trustees have agreed that Mr D was sent benefit statements which were calculated on an incorrect basis, including transfer values in June 1994, February

2002 and November 2006. The effect of the initial mis-calculation in 1994 was to falsely inflate Mr D's transfer values and projected pension.

- Mr D has said that he based his retirement calculations on the original transfer value and projection of benefits provided to him in the 1994 DBS and uplifted through the years. He has said that the error and subsequent incorrect projections have impacted his retirement planning.
- The Adjudicator was sympathetic to Mr D's disappointment upon realising the 1994 DBS and subsequent projections and transfer values provided to him were wrong, but said that ,while the provision of incorrect information did amount to maladministration, Mr D has not provided any evidence of actual financial loss.
- The error occurred initially in 1994, and led to incorrect information being sent to Mr D on at least three further occasions. The most recent incorrect transfer value was 15 years before Mr D transferred his benefits out of the Plan to a SIPP. Mr D acknowledges that CETV's can be volatile and has said he did not have a specific amount in mind about the level of CETV he was anticipating. He said he thought that the calculation would be based on the previous amounts provided to him and calculated in the same way. In the Adjudicator's view, this did not suggest that Mr D relied on the 1994 DBS and any subsequent incorrect statements. Nor was it reasonable for Mr D to have attempted to make an accurate prediction that a CETV in May 2021 would be higher than £235,190.54 based on the transfer value of £69,852.11 quoted in November 2006.
- In the Adjudicator's view, it was unlikely that the relatively low difference between the correct and incorrect projected annual pension and transfer values quoted would have been a significant deciding factor in Mr D's retirement planning.
- Mr D was provided with a corrected pension benefit projection and CETV in August 2020 and so was aware of the error by the time he transferred out of the Plan in May 2021. The Adjudicator said Mr D cannot therefore argue that he would not have transferred out of the Plan or retired later had he known the correct figures earlier.
- The Adjudicator disagreed with Mr D's contention that the 1994 DBS is part of a contract which cannot be reneged upon as the necessary elements to form a contract did not exist.
- In the Adjudicator's view, the Trustees offer of a payment of £500 for the distress and inconvenience the error had caused to Mr D, was reasonable.

32. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his further comments which are summarised below:

- The impact on his finances had not been considered.

- He should not have to prove that his employment was connected to his pension when his employment contract specifically included a reference to the pension scheme and the employee and employer contributions.
- The Adjudicator did not look at how others in his situation have been treated.
- There should be financial sanctions imposed as a result of the incorrect information sent to him by Buck over a 30 year period.
- His complaint should be escalated to someone who is not an extension of the pension scheme.

33. I have considered Mr D's comments but they do not change the outcome, I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

34. Mr D contended that the impact of the misinformation on his finances has not been considered. My role is to consider redress if it can be shown that financial loss has arisen directly from the incorrect information given. Mr D said the incorrect transfer values and projections led to a loss of opportunity to make up the shortfall in his projected pension. Given that Mr D has not provided any suggestion of how he would have acted differently had he been aware that his deferred benefits had been overstated or, indeed any evidence of actions subsequently taken to make up the shortfall, I cannot conclude, on the balance of probability, that there has been a financial loss.
35. Mr D said his employment was connected to his pension and that his employment contract specifically included a reference to the pension scheme and the employee and employer contributions. Mr D is reiterating his contention that the erroneous 1994 DBS amounted to a contractual obligation and that his pension benefits should therefore be calculated on this basis.
36. There are five requirements for a contract to exist; an offer, acceptance, consideration, intention to create legal relations and certainty of terms. If all five requirements are not met there is no legally binding contract. In this instance, while there was an offer to pay retirement benefits which Mr D accepted, the remaining elements are not made out.
37. 'Intention to create legal relations' means that all parties must intend to enter into a legally binding arrangement in which the rights and obligations of the agreement are enforceable. It is clear to me that neither Buck nor the Trustees intended to make a binding arrangement to pay the incorrectly calculated figures since they are only permitted to pay the correct benefits that a member of the Plan is entitled to under the Plan rules.

38. 'Certainty of terms' requires the terms and regulations being made in a contract to be stated clearly and understood by all the parties to the contract. If the agreement is not certain, it would no longer be valid. Since Buck used incorrectly calculated figures, the terms have become uncertain and this aspect of the creation of a contract has also not been satisfied.
39. I am satisfied that no promise was made to Mr D such that it would give rise to an entitlement to the higher level of pension that was based on incorrect calculations . In any event, a contract based on a mistake is unlikely to be an effective one.
40. Mr D suggested that how others in his situation have been treated should be taken into account. My position on the provision of incorrect information was set out in the Adjudicator's Opinion and I am satisfied that the investigation into Mr D's complaint has been conducted along those lines. While there is a general approach to these types of complaint each individual complaint is considered on its own merits and the outcome may differ for any number of factors pertaining to the individual complaint.
41. Mr D said that the Trustees and/or Buck should face punishment in terms of financial sanctions due to the erroneous transfer values and projections sent to him.
42. My role is not to punish the people who have been have complained about, nor can I impose a penalty or take sanctions against them. I am not a regulator, I can only consider whether there has been any financial or non-financial injustice caused as a result of maladministration and, if so, make directions to put matters right.
43. Mr D asked that his complaint be escalated to someone who is not linked to his employer's pension scheme. The Pensions Ombudsman (**TPO**) is an impartial service, and to my knowledge there is no conflict of interest between TPO and the parties to this complaint.
44. The Trustees offered Mr D £500 for the distress and inconvenience caused to him by the errors. My awards for non-financial injustice are intended to acknowledge the distress and inconvenience that an applicant has suffered as a result of maladministration. In my view, the offer of £500 from the Trustees is reasonable and I do not consider it appropriate to direct a higher award. Should Mr D wish to accept the offer of £500 he should contact the Trustees directly.
45. I do not uphold Mr D's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman  
25 May 2023