Ombudsman's Determination

Applicant	Mr D
Scheme	Nord/LB Retirement and Death Benefits Plan (**the Plan**)
Respondent	The Trustees of the Nord/LB Retirement and Death Benefits Plan (**the Trustees**)

Outcome

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

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

1. Mr D complains that the Trustees improperly reduced the cash equivalent transfer value (**CETV)** available to him from the Plan by £223,043.51 in November 2016.

Background information, including submissions from the parties

2. Mr D applied for a CETV quotation in September 2016. The Trustees subsequently requested an Insufficiency Report (**the Report**) from the Plan Actuary in order to assist them to decide whether or not they could continue to pay CETVs in full from the Plan.

3. In the Report, the Plan Actuary said that:

   - the funding level of the Plan as at 30 September 2016 calculated using the CETV basis agreed with the Trustees was 84.9%;
   - the maximum reduction that could be applied to a CETV was consequently 15.1% and this was equivalent to a 45% reduction to that part of a CETV in excess of the Pension Protection Fund (**PPF**) levels of compensation;
   - if large CETVs were paid in full, the funding level of the Plan would be significantly reduced for the remaining members; and
   - the Trustees should also bear in mind when making their decision on whether or not to reduce CETVs (a) the recovery plan agreed with Nord/LB to address the funding deficit (b) the strength of the covenant with Nord/LB (c) whether Nord/LB would be prepared to pay additional funds so that unreduced CETVs

could continue to be paid (d) whether there were any contingent assets and (e) whether any savings to the Plan arising from payment of reduced CETVs justified the costs involved

4. The Trustees accepted the Plan Actuary's advice in the Report and decided to apply a 45% reduction to that part of Mr D's CETV in excess of the compensation levels provided by the PPF.

5. In November 2016, they sent Mr D a statement showing that the CETV available to him was £967,934.83 and this figure was guaranteed until 1 March 2017.

6. The statement also showed that:

   - the CETV had been calculated in accordance with the Occupational Pension Schemes (Transfer Values) Regulations 1996 (as amended) (**the Transfer Regulations**) using a basis determined by the Trustees;
   - the CETV quoted was less than the amount it would otherwise have been by £223,043.51 to reflect the long term position of the Plan, as permitted by the Transfer Regulations;
   - the Trustees could not say when full CETVs would be available again in the future but would be reviewing the position on a regular basis; and
   - an unreduced CETV quoted in the future could be less than the amount currently available due to changes in economic conditions or the Trustees' basis for calculating CETVs

7. Mr D was unhappy that the CETV had been severally reduced and appealed the Trustees' decision under the Plan's Internal Dispute Resolution Procedure (**IDRP**). He contended that:

   - it was gross negligence on the Trustees' part to continue paying full CETVs when they were fully aware of falling gilt and bond yields;
   - the 15 year gilt yield as at 30 June 2014, the date of the last actuarial valuation was 3.16% and this had decreased to an all-time pre Brexit low of 1.68% in January 2015;
   - the Trustees should have intervened in January 2015 because at that stage the underfunding had increased to £3.5 million and their lack of action amounted to negligence on their part;
   - the issue of fairness to all members of the Plan should have been addressed at this time;
   - if the Trustees had acted sooner, the reduction to his CETV would not have been necessary or so severe;
   - the Summary Funding Statement for the Plan issued by the Trustees in December 2015 showed that:
     a) the ongoing funding level was 93% as at 30 June 2014;
     b) Nord/LB had agreed to pay £316,000 pa from 1 July 2015 to 30 June 2019 in order to eliminate the shortfall;

   c) the funding position of the Plan had improved between 30 June 2011 and 30 June 2014 mainly due to good returns on the Plan's investments and the additional contributions paid by Nord/LB;
   d) his pension benefits were not directly affected by the state of the financial markets but it was inevitable that movements in investment markets would lead to fluctuations in the Plan's funding position; and
   e) the Trustees and Nord/LB were working together to agree the level of Plan contributions required to meet the cost of the benefits

- the additional contributions which Nord/LB agreed to pay into the Plan of £316,000 pa in order to eliminate the deficit was clearly inadequate;
- it was consequently "misleading and morally wrong" for the Trustees to assure that full benefits would be paid in the Plan and then renege on this promise by "hiding behind the Report" and failing to provide the "exact terms of the CETV calculation";
- it was inconceivable that Nord/LB with assets in excess of £181 billion could not meet its pension obligations to the Plan and it should therefore now increase its contributions to the Plan so that full CETVs could be paid;
- as the Trustees are also beneficiaries of the Plan there is a conflict of interest;
- he had "little choice but to accept the reduced CETV" because:
   a) he was made aware about one year in advance that he would be made redundant in August 2017; and
   b) his benefits from the Plan were inadequate to cover his expenditure because of ongoing financial commitments;
- the Trustees did not inform him that the Rules of the Plan allowed non-statutory transfers of pension rights from the Plan, i.e. members within one year of his/her Normal Retirement Date (**NRD**) could still transfer out; and
- he could therefore have sought a transfer of his pension rights right up until his 60th birthday, 24 November 2017 (but only if bond yields improved to such an extent that full CETVs could be paid again); and
- it is unfair that the Trustees decided to reduce his CETV by around £223,000 instead of seeking additional funding from Nord/LB in order to cover the Plan liabilities

8. The Trustees say:

- they have acted in good faith in line with their fiduciary duty and have followed the Rules of the Plan by taking professional advice before reaching their decision to reduce CETVs;
- they strongly refute Mr D's allegation that they have acted improperly due to any conflicts of interest;
- their decision to reduce CETV was not taken lightly and was made in order to protect the Plan's funding position and the security of the remaining members' benefits;
- current legislation permits them to reduce a CETV to an amount which reflect the Plan's funding level and in a way that is fair to all members of the Plan;

- they were comfortable with the assumptions which they had made for the CETV basis during 2015 so no reductions to CETVs were necessary;
- the level of financial support provided by Nord/LB is communicated to the Pensions Regulator at each triennial valuation;
- the valuation documentation (including the agreed recovery plan) was submitted to the Pensions Regulator in accordance with its requirements;
- the Pensions Regulator has accepted the content and terms of this documentation without comment or amendment;
- the Pensions Regulator has not taken any regulatory action against its management or administration of the Plan;
- Mr D did not have to proceed with the transfer once he became aware that his CETV had been significantly reduced; and
- any queries regarding Nord/LB's stance on its benefit provision for its employees should be referred to Nord/LB directly

Adjudicator's Opinion

9. 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 briefly below:-

- In order to comply with The Occupational Pension Schemes (Transfer Values) Regulations 1996 (**the Transfer Regulations**), the Trustees calculated the CETV of Mr D's benefits with the assistance of the Plan Actuary using a prescribed method and underlying assumptions which are reviewed on a regular basis by them. The CETV represented what the Trustees considered to be a fair value of the benefits Mr D had in the Plan and the calculation would have taken into account many factors including how long Mr D might be expected to live, future inflation and investment returns.
- The Trustees have a duty to act in the interests of all Plan members. When approaching requests to transfer out of the Plan they consequently must balance the interests of both the members wishing to exercise their right to transfer with those that wish to remain in the Plan. They may, therefore, reduce the CETV amounts paid out if there are insufficient funds in the Plan at a particular point in time until full funding is restored. The Trustees would need to tell Mr D if they were applying any reduction to his CETV because of underfunding and they specified this on the CETV quotation which they sent Mr D in November 2016.
- The Transfer Regulations also allows the Trustees to reduce a member's CETV if:
    a) the insufficiency conditions are met; and
    b) they have an insufficiency report prepared by the Plan Actuary in accordance with the detailed requirements of the Transfer Regulations

- The insufficiency conditions are described in the Transfer Regulations and, in order for them to be satisfied, the insufficiency report must show that at the effective date of the report, the Plan's assets were less than its liabilities for all members.
- The Trustees obtained the Report from the Plan Actuary showing that the Plan had a deficit using the CETV basis and a reduction could therefore be applied to CETVs calculated on this basis.
- Because of the guaranteed nature of defined benefit pensions they are often seen as more valuable than defined contribution pensions as the risks of living longer than expected or of investments underperforming are underwritten by the employer rather than the individual themselves.
- The Pensions Regulator believes that it is likely to be in the best financial interests of the majority of members to remain in their defined benefit scheme. It has suggested, however, that trustees should not rely solely on the insufficiency report itself as a reason to reduce CETVs. In addition to this report it recommends that trustees should take other factors into account such as the level of underfunding in the Plan, the strength of the employer covenant, and the length and structure of any recovery plan.
- The Plan Actuary recommended in the Report that the Trustees take these factors into account before deciding whether or not to reduce CETVs. There was no reason to doubt that the Trustees gave serious consideration to the contents of the Report including these recommendations before making their decision.
- The Trustees had to be cautious about deciding not to reduce CETVs because they could be criticised for continuing to pay them in full if subsequently the deficit increased significantly or the Plan had to be wound up. They ultimately decided to reduce CETVs in order to protect the benefits of those members remaining in the Plan because the circumstances of the Plan indicate that this was necessary.
- It is understandable that Mr D has concerns about how the Trustees have invested the Plan's assets and complied with the scheme specific funding introduced under the Pensions Act 2004.
- But it is clear from the available evidence that the Trustees have complied with the responsibilities placed upon them by legislation concerning scheme investment and funding such as:
    a) preparing and maintaining a Statement of Investment Principles;
    b) having a written Statement of Funding Principles setting out their policy for securing the statutory funding objective and recording decisions as to the basis for calculating the technical provisions and the period within which any shortfall is to be remedied;
    c) having a recovery plan in place setting out the steps to be taken (and over what period) to make up the shortfall if an actuarial valuation shows that the statutory funding objective is not met; and

d) having a schedule of contributions in place setting out the rates and due dates of contributions payable to the Plan

- Mr D cannot claim for a loss that he could have mitigated, whether he in fact did so or not. Mr D did not have to proceed with transfer once he was notified that the CETV had been reduced.

10. 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 do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr D for completeness.

Ombudsman's decision

11. It is the Pensions Regulator who is responsible for ensuring that the requirements for scheme funding under the Pensions Act 2004 are complied with by trustees and employers and have powers to intervene when it considers it necessary to do so.

12. The funding and investment issues which Mr R has raised are consequently a matter for the Pensions Regulator and not for me.

13. Although I sympathise with the circumstances which Mr D now finds himself, the evidence is clear that the Trustees have fully complied with the criteria required by the Transfer Regulations in order to reduce CETVs. I do not consequently consider that there has been any maladministration on their part. Therefore, I do not uphold Mr D's complaint.

Karen Johnston

Deputy Pensions Ombudsman
7 February 2018