

Ombudsman's Determination

Applicant	Mr S
Scheme	Mars Associates Retirement Plan (the Plan)
Respondents	Aon Hewitt Ltd (the Administrator), Mars Wrigley Confectionery UK Ltd (the Employer)

Outcome

1. I partly uphold Mr S' complaint in respect of the non-financial injustice which Mr S has suffered. I do not find that Mr S has suffered a financial loss from the negligent misstatement made to him.

Complaint summary

2. Mr S' complaint against the Administrator and the Employer is about a large difference between the estimated pension figures he received for immediate payment in December 2013 and the estimated figures for deferred payment in April 2016.

Background information, including submissions from the parties

3. In April 2002, Mr S started working for The Wrigley Company Ltd, which later merged with the Employer. Sometime after that, he became a member of the Wrigley Pension Plan, which later merged with the Plan.
4. In October 2013, discussions took place within the Employer about making some employees redundant. On 5 December 2013, Mr S received confirmation his position would cease to exist from 1 January 2014. He contacted the Employer to request two sets of figures showing (1) what level of immediate pension he could take and (2) what level of deferred pension he could take at age 62 in April 2016. On 17 December 2013, the Employer wrote to Mr S enclosing pension benefit estimates. It said:

“...The enclosed Illustration of Retirement Benefits explains the different options you have. The actual benefits payable may differ from those quoted... Example illustrations are shown below. Actual benefits payable at retirement may be different. Final figures will be provided once you have confirmed the

option required and all information relevant to the calculation of your benefits has been received...”

5. The first estimate assumed benefits would be paid immediately, in December 2013. Option 1 (Illustration Where Maximum Tax-Free Lump Sum Taken), was for a pension of £36,669 and tax-free cash lump sum, in respect of additional voluntary contributions (**AVCs**) of £247,783. Option 2 (Illustration Where No Lump Sum Taken), was for a pension of £36,669 and a pension, in respect of additional voluntary contributions (**AVCs**) of £15,871.
6. The second estimate assumed benefits would be paid age 62, in April 2016. Option 1 (Illustration Where Maximum Tax-Free Lump Sum Taken), was for a £45,127 lump sum, a pension of £45,432 and a tax-free cash lump sum, in respect of AVCs, of £257,753. Option 2 (Illustration Where No Lump Sum Taken), was for a pension of £48,354 and a pension, in respect of AVCs, of £16,693.
7. Mr S sought financial advice from a representative of Tilney Financial Planning Ltd (**the Adviser**). Being familiar with the Plan, the Adviser said the figures were too high and contacted the Employer to query them. On 19 December 2013, the Adviser told Mr S that, according to the Employer, he was on an “accelerated accruals” (**AA**) program, due to his seniority. So, the figures were higher than expected but nonetheless correct.
8. On 31 December 2013, Mr S was made redundant from the Employer. He decided to delay taking benefits from the Plan until age 62 in April 2016.
9. In February 2016, Mr S contacted the Administrator to initiate the process of taking his benefits. He then received some estimated figures. The first estimate assumed benefits would be paid immediately, in April 2016. Option 1 (Illustration Where Maximum Tax-Free Lump Sum Taken), was for a pension of £27,773 and a tax-free cash lump sum, in respect of AVCs, of £205,502. Option 2 (Illustration Where No Lump Sum Taken), was for a pension of £27,773 and a pension, in respect of AVCs, of £17,262.
10. Unhappy with the reduction in the figures, Mr S contacted the Administrator and Employer to query them. In response, he was told, in summary, that the December 2013 figures were only estimates and not binding. But the Administrator and the Employer admitted making an error, namely that the December 2013 estimates to age 62 wrongly assumed he would remain an active member of the Plan. In addition, Mr S says he was informed that he had not actually been on an AA program.
11. Mr S then had further discussions with the Employer and discovered that the Administrator had also failed to apply a “shadow earnings cap”, which had further distorted the December 2013 estimates. There were some discussions about compensation for the errors but, in the end, no such offer was made.
12. Mr S authorised payment of his benefits, selecting a pension of £27,773 and lump sum of £205,502, ie Option 1.

13. In April 2016, Mr S complained to the Employer, which arranged for his complaint to be considered by the Plan Trustees (**the Trustees**) under the Plan's internal dispute resolution procedure (**IDRP**).
14. In June 2016, the Trustees responded under the IDR. But they rejected the complaint on grounds that: they had a legal duty to pay benefits in accordance with the Plan trust deed and rules (**the Rules**); that duty was being met, as the benefits being paid reflected Mr S' correct entitlement; and the original estimates were only "illustrative" and made clear that the final figures would be calculated at retirement.
15. In August 2016, the Administrator wrote to Mr S and offered him £1,200 to recognise the distress and inconvenience caused by the incorrect estimates. Mr S turned this down but did not pursue the matter further.
16. In January 2019, Mr S discovered someone else had had a similar experience, receiving figures substantially lower than the correct values. He says that person won his case on grounds that the company had a "duty of care" to ensure the figures were a "fair and reasonable" estimate of entitlement. Mr S then referred his complaint to us.
17. In August 2019, the Administrator and Employer responded to the complaint. In summary they said :-
 - The Administrator disagreed with Mr S' assertion that he had lost more than two years' of benefits; in fact, he was receiving the correct benefits in accordance with the Rules and his entitlement.
 - The Employer said Mr S had no entitlement to the benefits in the December 2013 estimates. Nor had he incurred a loss by delaying taking benefits until April 2016, rather than taking them immediately in December 2013, as the latter were materially higher than the former.
 - Although Mr S had not specifically raised a complaint against the Trustees, nonetheless they had reviewed it and had nothing to add.
18. Mr S provided his further comments. The main point was that had he received correct estimates in December 2013 (which he estimated would have been for a pension of about £24,000 a year), he would "almost certainly" have taken his pension then.

Adjudicator's Opinion

19. Mr S' complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Administrator or Employer. His findings are summarised below:-
 - Mr S said the parties had "hidden behind" the fact that the incorrect figures were "only estimates". In his view, they should honour the higher figures or offer a compromise, because he had challenged the higher figures in December 2013 and was assured they were correct. In addition, he received no benefits for more

than two years. In his view, he should receive a back payment in respect of the payments that would have been paid from December 2013 to April 2016.

- The parties had given several reasons for the 2013 estimates being incorrect. First, the Adviser was apparently told, in December 2013, that Mr S was on an AA programme in respect of the Plan, although the Employer has since denied this. In Mr S' view, because he was so informed by the Adviser, after the Adviser checked with the Employer, it was reasonable for him (Mr S) to think that was correct. Second, the December 2013 estimates for immediate and delayed payment wrongly assumed Mr S would remain an active Plan member until retirement. But the Administrator should have known he had been made redundant in December 2013. Third, the Administrator did not use an accurate figure for Mr S' final salary, namely it failed to take into account an earnings cap.
- There was no further evidence to support Mr S' being on an AA program. But this was not crucial to the assessment because the Employer did not dispute that the Administrator wrongly assumed Mr S would remain an active Plan member until retirement. Nor did it dispute that the Administrator used an incorrect figure for Mr S' final pensionable salary. In short, all parties agreed that the 2013 estimates were incorrect.
- In response to our enquiries, Mr S said that had the 2013 estimates been correct, there is no reason he would not have taken benefits immediately; he only changed his mind because the estimated benefits for delayed payment were so much higher than for immediate payment. He said he had missed out on two years' benefits and, in any case, was denied the chance to make an informed decision about when to take benefits.
- As part of our enquiries, the Employer had provided corrected figures as at December 2013 for immediate and delayed payment. The correct figures, assuming no lump sum, would have been £24,908 for immediate payment in December 2013 and £28,862 for delayed payment from April 2016. That is, had correct figures been provided Mr S would have faced a choice between (a) receiving a pension of £24,908 a year straight away or (b) receiving a pension of £28,862 in about two years' time.
- Without the benefit of hindsight, it was difficult to say what Mr S might have done. But he had received a large redundancy payment and also had existing personal savings. The fact he received no other income between 2014 and 2016 suggested he could afford to wait until April 2016; he was not in need of immediate income in January 2014. And although he said it was only the significantly higher delayed pension that caused him to change his mind about taking benefits immediately, there was no sign that he had made a decision to take benefits in January 2014.
- Had correct estimates been provided, the benefit of delaying for two years would have been lower. The difference in yearly pension would have been about £3,954 (ie, £28,862 less £24,908), rather than £11,685 (ie, £48,354 less £36,669).

Nonetheless, there would still have been a material increase from waiting. In circumstances where Mr S did not need to take Plan benefits immediately, and where he was prepared to wait for about two years to receive higher benefits, it was more likely than not he would always have delayed taking benefits.

- Even if Mr S would have taken benefits immediately, it was unclear that he had suffered a loss from deferring. The Employer had confirmed that there should be no material difference between a reduced pension paid from age 59 and an unreduced pension from age 62; over Mr S' expected lifetime, the benefits should be actuarially equivalent. So, even if Mr S did change his position (ie, by delaying his benefits) in reliance on the incorrect estimates, there was insufficient evidence that he was or would be worse off as a result.
 - As (a) the reduced benefits from January 2014 and (b) the unreduced benefits from April 2016 were actuarially equivalent, there was no identifiable loss to remedy. But the estimates had caused Mr S a loss of expectation (ie, from receiving benefits that were substantially lower than expected) and a loss of opportunity (ie, being denied the chance to make an informed decision about how and when to take benefits). Accordingly, Mr S should be awarded redress in respect of "non-financial injustice".
 - If incorrect information is "clear and unambiguous", the party providing it can potentially be "estopped" (ie, prevented) from arguing that the recipient cannot receive benefits in line with the information. But that did not apply in Mr S' case, the estimates making clear that they were not guaranteed and would be re-calculated at retirement. So, there was no scenario where Mr S could receive the delayed April 2016 figures from December 2013.
 - The Ombudsman publishes guidance on "redress for non-financial injustice", which is available on our website. This says an award of £1,000 is appropriate where there has been: a serious level of distress/inconvenience that has materially affected the applicant; this lasted on several occasions; there was a lasting effect over a long period; and the respondent was slow to put things right. In the Adjudicator's view, one or more of these factors applied in Mr S' case. And, as he and the Adviser questioned the figures in December 2013, and were told they were correct, the Employer missed at least two chances to review the figures to ensure that they were accurate. So, the higher award of £1,000 (rather than the starting point of £500) was justified.
 - The Administrator on behalf of the Trustees had already offered Mr S £1,200 and, in the Adjudicator's view, the Ombudsman would not recommend a higher award.
20. The Administrator and Employer accepted the Adjudicator's Opinion and provided no further comments. Mr S did not accept the Adjudicator's Opinion and provided further comments, they are summarised below:-

- He was disappointed because although he understood that the Plan could only pay the correct benefits, he was denied the correct information in December 2013 to allow him to make an informed decision on when to take benefits.
- He was surprised that the Adjudicator had concluded that it made no real difference in the long run. In his view, he had lost more than 27 months', or about £58,000, benefits. Had he started receiving a reduced pension at age 59, he would now stand to be better off over his lifetime.
- By his estimate, he would need to live until 76/ 77 before "breaking even". However, it was uncertain that he would reach this age (or, indeed, his normal life expectancy of age 78/79) as he had suffered from cancer in the past.
- Finally, the Opinion was based on input from the Adjudicator, the Administrator and the Employer, but not from him.
- He disagreed that he had not incurred a loss and asked the Ombudsman to make a Final Determination on his complaint.

21. Mr S provided his further comments on which I will respond. I agree with the Adjudicator's Opinion in respect of financial loss but not in respect of non-financial loss.

Ombudsman's decision

22. The December 2013 estimates were incorrect, so, Mr S was denied the opportunity to make an informed decision about when to take Plan benefits. As the Adjudicator said, Mr S is not entitled to receive the misquoted benefits, which must be paid in accordance with the Scheme rules. The estimates provided did not amount to a contractual promise nor give rise to an estoppel.
23. The estimates did specify that they were illustrations and that the actual benefits paid on retirement might differ. Ordinarily if, when payment is actually taken some time later, the figures differ then some latitude may be appropriate to recognise specific factors which might in the intervening period affect the calculations. Innocent mistakes in the calculation or letter can also occur, without liability necessarily attaching. However, in this instance, the calculations were undermined from the outset by being made using incorrect information (I expand upon further below in paragraph 31) which was either known or should have been known to the Administrator. In addition, Mr S (through his advisor) suspected there might be an error and went to the trouble of challenging the figures, only to be assured they were correct and the error was repeated and reinforced.
24. I find these failures to be so serious as to constitute a breach of the duty of care owed by the Administrator to Mr S. The actions fall well below those expected of a reasonably competent administrator. The estimates and the assurance were negligent misstatements. As he was being made redundant, it was clear Mr S would

rely on the figures and advice provided. In the circumstances, Mr S is entitled to be put back in the position he would have been (if different) had he been given the correct information in December 2013. However, I agree with the Adjudicator that, on the balance of probabilities, had Mr S received correct benefit estimates he would still have delayed his pension until age 62 in April 2016.

25. By January 2014, Mr S had received a redundancy payment and also had pre-existing personal savings. He has confirmed, as part of our enquiries, that these were sufficient to provide him with a reasonable income; he was not in need of immediate further income at that time. If he had he found himself, for whatever reason in need of additional income between January 2014 and April 2016, it would have been open to him to contact the Administrator and request an up to date estimate.
26. In any case, as explained at paragraph 19 above, had the December 2013 estimates been correct, the marginal yearly pension from delaying for two years would have been about £3,954, rather than about £11,685. These are based on the particular benefit options, which Mr S has seen and had the chance to comment on.
27. Clearly, the correct increase was a lot lower than Mr S was initially told. However, in circumstances where Mr S: (i) had received a redundancy payment; (ii) had pre-existing personal savings, which he has confirmed were sufficient to provide for his living expenses; and (iii) was prepared to wait in order to receive a higher pension (albeit the actual increase was lower than he was told), I find it is more likely than not he would always have delayed taking his pension. Accordingly, I find that Mr S has not incurred a financial loss as he is currently receiving the correct benefits in accordance with his entitlement and the Rules.
28. Also, I agree with the Adjudicator that even had Mr S taken reduced benefits at age 59, it is unclear that he will suffer an overall (ie, lifetime) loss. Although, I have not reviewed the Rules, none of the parties to the complaint dispute that they allow for a reduction for early payment. In its response of August 2019, the Employer explained that (a) an immediate, reduced pension from age 59 and (b) a delayed, unreduced pension from age 62 would be of equal actuarial value. Based on the available evidence, I find that this is correct.
29. To calculate the level of pension payable from both ages, the Administrator on behalf of the Trustees, will have used factors provided by the Plan Actuary. Because it was (and is) impossible to know with certainty how long Plan members will live, the Actuary had to make assumptions. There is no sign that the Actuary made any errors in this regard.
30. In his response to the Adjudicator's Opinion, Mr S has mentioned a diagnosis of cancer. I have considered this. I have great sympathy with Mr S for any health problems he has suffered and is suffering from. However, there is no sign that this was a factor back in December 2013 (or, if it was, that it was raised with the parties). Provided he met the relevant criteria under the Rules, and the Trustees and Employer

consented, Mr S could have applied for an ill-health early retirement pension. However, there is no sign that he did so.

31. The Administrator, on behalf of the Trustees, has previously offered Mr S £1,200 in recognition of the distress and inconvenience caused by issuing incorrect estimates. However, two serious mistakes were made in December 2013, in calculating Mr S' pension estimates. They were even queried by Mr S' financial adviser, who was reassured that they were based on correct assumptions: that Mr S was on an "accelerated accruals" (**AA**) program, due to his seniority. Also, the estimates were based upon Mr S retiring from active status, when the Administrator should have been aware that Mr S was being made redundant. These needless mistakes resulted in a considerably different pension benefit being quoted than the one to which Mr S was entitled. When Mr S' IFA queried the estimates they should have been reviewed properly but they were not. In my view the non-financial injustice is extreme and Mr S has been materially affected in receiving a considerable reduction to the pension that he was initially told that he could expect. Although, the quotes were only estimates, they should have been based upon the correct information otherwise they are completely valueless. It has had a lasting effect over a long period, but I have also taken into account that the respondent was slow to put things right.
32. I uphold Mr S' complaint in respect of the extreme non-financial injustice which he has suffered.

Directions

33. Within 21 days of the date of this Determination the Administrator shall pay Mr S £3,000 in respect of the extreme distress and inconvenience which he has suffered.

Anthony Arter

Pensions Ombudsman
18 December 2019