

Ombudsman's Determination

Applicant	Mr William Beveridge
Scheme	DHL Voyager Pension Scheme
Respondent(s)	Williams Lea Limited (Williams Lea)

Complaint Summary

1. Mr Beveridge complains that following a TUPE transfer on 1 August 2010, Williams Lea have not made a 5% pension contribution into the Plan on his behalf. He understood that contributions from Williams Lea would be paid into the Plan, in addition to a 15% pension allowance which was paid to him as a salary enhancement.
2. Mr Beveridge also complains that in order to meet auto-enrolment requirements Williams Lea are taking the 1% mandatory employer contribution from the 15% pension allowance and adding it to the Plan.

Summary of the Ombudsman's Determination and reasons

3. The complaint should be upheld against Williams Lea because they were not entitled to simply take the 1% mandatory employer contribution from money they had agreed to pay in cash to Mr Beveridge, following only a standard form auto-enrolment notice. Their approach failed to recognise the unique prevailing circumstances of the unusual contractual pension arrangement already in existence. .
4. Williams Lea should have acknowledged this arrangement, properly explained the effect of the auto-enrolment legislation on the unusual contract made with Mr Beveridge and outline his options. He should then have been given a free choice as to whether he preferred to retain the 15% as cash and opt out, or remain auto-enrolled but receive 14% as cash.
5. I do not uphold the complaint regarding 5% employer contributions to the Plan. There is no evidence that this was agreed by Williams Lea, or by his previous employer pre-TUPE, and Mr Beveridge should have been aware from the transfer remuneration schedule he received (dated 1 August 2010) that he would receive a 15% pension

allowance in lieu of any contributions directly into the Plan. His pension statements would then have confirmed the position.

Detailed Determination

Material facts

6. Mr Beveridge worked for the Royal Bank of Scotland Group and was a member of the Royal Bank of Scotland Group Retirement Savings Plan.
7. Royal Bank of Scotland closed its final salary pension scheme to new recruits in October 2006, before Mr Beveridge joined. Existing employees were given the option of remaining in the final salary scheme or leaving it in return for a 15% monthly payment. There appears to have been considerable variation in the press commentary and amongst staff as to how the latter option was termed.
8. New recruits were given a basic salary plus an additional pot of money, called a "Value Account", to spend on a range of benefits.
9. Mr Beveridge has provided a contract of employment from June 2007, which shows a Value Account of £13,864 per annum, comprised of a salary element of £12,056 and benefit funding. After deducting his flexible benefit choices, the balance of the Value Account was to be paid to him (called 'residual cash').
10. The terms and conditions go on to say that he is eligible to join the Retirement Savings Plan and, if so, contributions would be deducted from the Value Account.
11. A further contract from February 2010 shows the Value Account now at £17,801, comprised of a salary element of £14,241 and benefit funding.
12. In March 2010, Mr Beveridge was advised that a TUPE transfer was going to take place on 1 August 2010, and his new employer would be Williams Lea.
13. Mr Beveridge had one to one meetings on 6 May 2010 and 24 May 2010, with a Williams Lea representative to give him the opportunity to raise questions about the transfer including remuneration queries.
14. He was asked to sign his new contract, which he did on 25 May 2010. This also included a transfer remuneration schedule, as follows:

	Current Terms	Williams Lea proposed terms
Weekly contracted hours	35	35
Annual salary	£14,954.00	£14,954.00
Pension allowance	£2,243.10	£2,243.10
Benefit allowance	£1495.40	£1495.40
Shift allowance	£4000.00	£4000.00
First aid allowance	£0.00	£0.00
Location allowance	£0.00	£0.00
Total annual reward	£22,692.50	£22,692.50

15. On 24 September 2013, Mr Beveridge received a letter from Williams Lea saying that due to auto-enrolment they needed, as a requirement by law, to pay a 1% mandatory employer contribution into the Plan. They explained that as he already received an extra 15% pension allowance as a salary enhancement they would take the mandatory 1% employer contribution from the 15% pension allowance.
16. On 25 October 2013, Mr Beveridge wrote to DHL Trustees Ltd and queried the 1% that would be added to the Plan but taken from his pension allowance. They advised that he should speak to his HR representative.
17. He contacted Ms Gaynor Westwell, his HR representative, by email and queried the lack of employer contributions into the Plan. He said he understood he would be receiving a 5% employer contribution into the Plan. Ms Westwell explained to him that he did not receive pension contributions directly into the Plan because he received a 15% pension allowance as a salary enhancement which was paid directly to him via payroll. She said her understanding was that he asked for 2.5% of this to be paid as contributions into the Plan. She also said that when a person is eligible to join the company pension scheme but does not receive a pension allowance then the company would provide a 5% employer contribution. She said he did not fall under this category as he received the 15% pension allowance.
18. On 14 November 2013, Mr Beveridge took his complaint to the Pensions Advisory Service. He said when the TUPE transfer took place he was under the impression that he paid a 2.5% employee contribution and that Williams Lea paid a 5% employer contribution into the Plan. On 11 December 2013, Mr Beveridge brought his complaint to the Pensions Ombudsman Service.

Summary of Mr Beveridge's position

19. There is considerable uncertainty over the classification of the 15% payment and a legal ruling is needed. He has provided press cuttings commenting on the issue.
20. The fact that the 15% could be taken as salary, or any mix of salary and benefit, makes it clear beyond any doubt that it was not solely or exclusively for the purpose of pension benefit.
21. He accepts that he signed a transfer schedule which indicated a monetary figure as a "pension allowance" but, by then, the distinction of this, if indeed there ever was any, had been lost.
22. Mr Beveridge considers Williams Lea were acting in good faith but were unaware of how Royal Bank of Scotland employees actually regarded this allowance. A number of people in a similar situation have signed a letter to that effect.
23. Nevertheless, Williams Lea failed to communicated clearly with employees regarding the contributions they would, or would not, receive.
24. He understood that Williams Lea were contributing 5% to his pension and he was contributing 2.5%. If he had known that Williams Lea were not contributing directly to his pension, he would have taken financial advice on the option of taking out a personal pension plan that could have been individually tailored to his requirements.
25. Mr Beveridge also seeks a ruling on whether Williams Lea would be entitled to treat 1% as their contribution, where an employee was already paying the 15% towards their own pension provision. However, that is not his position.

Summary of Williams Lea's position

26. They have a range of benefit schedules with different employer contribution rates depending on legacy issues. The Scheme Rules permit this.
27. They believe the information provided to employees transferring from Royal Bank of Scotland was clearly explained.
28. Mr Beveridge was given two options:
 - i) Join the Defined Contribution Section on the terms applicable to Williams Lea employees in the same category of employment as him, with the difference between the 15% allowance and the amount paid in contributions being paid to him in cash or used for additional pension contributions as he wished; or
 - ii) Take a pension allowance in cash, some or all of which could then be used for pension contributions as he wished.

29. Mr Beveridge chose the second option. He also chose to sacrifice 2.5% of his salary towards his pension, benefiting from reduced national insurance contributions. His payslips from the time thus show receipt of the 15%, from which a deduction of 2.5% was made and converted into a 2.5% contribution to the pension plan. This option did not include any 5% employer contribution and he would have been well aware of that.
30. As a result of auto enrolment, Williams Lea were obliged to auto-enrol Mr Beveridge, without consent, and pay a 1% employer contribution into the pension plan. It would not be equitable or just for him to have a windfall gain due to electing to take 15% as cash and receive an employer contribution in addition under auto enrolment.
31. They were entitled to take Mr Beveridge's contributions as they did for over 20,000 auto-enrolled members. There is no difference between taking this from money they had agreed to pay in cash to Mr Beveridge, and taking any auto-enrolment contribution from any member's pay.
32. Mr Beveridge was given an opportunity to opt out by Williams Lea's letter dated 24 September 2013. There is no obligation in law to consult further with employees and Williams Lea do not believe they dealt with the requirement to auto-enrol Mr Beveridge inappropriately,

Conclusions

33. This complaint is not against Royal Bank of Scotland and I have limited paperwork from the period in which Mr Beveridge was employed there. It may be that new recruits after October 2006, like him, understood less about the connection between the 15% payment and the closure of the final salary scheme to new entrants.
34. However, his terms and conditions of employment from 2007 do indicate that he would receive a salary and a 'residual cash' amount, the latter reflecting any sum left over after the deduction of payments towards the flexible benefits he chose. He was eligible to join the Retirement Benefits Scheme and, if he did, contributions would be deducted from the Value Account. So, I am unable to accept that Mr Beveridge could have expected Royal Bank of Scotland to pay extra contributions towards a pension if he took the full cash amount, had auto-enrolment been introduced then.
35. Williams Lea chose to operate the system in a different way. They could have instituted a mirror image flexible benefits scheme. If they had done this, their contributions could have been clearly designated into an account, and only those not proactively selected for attribution to specific benefits would then be returned to employees as cash.
36. They did classify the 15% as a pension allowance in his transfer remuneration schedule, so it should have been clear to Mr Beveridge that, regardless of the view he might have come to form about the nature of the 15% payment before, under Royal Bank of Scotland, this was clearly the position now under his contractual agreement with Williams Lea. However, since Williams Lea did not operate it through

a Value Account or Flexible Benefit plan, transferred employees were told they could take any amount between 0-15% as cash which was paid alongside their salary. If they chose the latter it created a problem for Williams Lea contractually under auto enrolment, albeit an unforeseeable one at the time.

37. I do not consider that Williams Lea should be asked to pay additional sums towards Mr Beveridge's pension when they had already contractually agreed with him to pay him a 15% pension allowance direct, subject to any part of this he wished to have paid to the pension. Neither Williams Lea nor Royal Bank of Scotland agreed to pay more than this. And Mr Beveridge is not entitled to expect more.
38. I do not uphold Mr Beveridge's complaint regarding 5% regular employer contributions. That was not promised to him or accepted by him under the terms through which he transferred to Williams Lea and joined their pension scheme.
39. However, it was also not right for Williams Lea to treat Mr Beveridge as any other employee to be auto-enrolled. His contractual agreement, which incorporated his choice to take all of the 15% as cash, meant that his circumstances were individual and different. Williams Lea should have formally explained to him that they were being effectively required by legislation to alter that contractual arrangement, and discussed with him whether he wished to be/remain auto-enrolled and how this would affect the position.
40. The process requires employees to be auto-enrolled into the scheme at or above the relevant minimum contribution level. Employees can then choose to opt out. The employer has a right to take 1% from a member if the employer pays 1%. But in this case, the employer's pension contribution was being used in another way. It was this that needed to be properly explained. The standard letter together with the confusing way employer and employee contributions have been referred to in payslips and pension statements mean that the communication of such an important change to Mr Beveridge's contractual agreement, and his financial position, was insufficient in this case.
41. It may be that once Mr Beveridge understands how Williams Lea propose to proceed, and all his options, that he would prefer to opt out and continue to receive the 15% cash. Alternatively, he may wish to remain auto-enrolled and, if so, Williams Lea would be entitled to deduct the 1% from the pension allowance they give him. However, what they cannot do is rely on a standardised auto-enrolment notice, a week before staging date, as a sufficient basis to alter their individual contractual agreement with Mr Beveridge without giving him the opportunity to fully understand and consider his options and make a free, informed choice.
42. I do not know which option Mr Beveridge will choose but so far he has not been given the opportunity to make a fully informed choice. To put this matter right, Williams Lea will need to consult with him and, if he chooses to opt out, reimburse him the

additional 1% payments he would have received had he been allowed to do this originally.

43. I am satisfied that putting these options to Mr Beveridge does not constitute undue coercion not to be auto-enrolled, which is precluded under the Regulations. This is a matter of re-categorising pension contributions which were already contractually agreed and made and allowing Mr Beveridge to decide how he wishes to allocate monies to a pension, if at all.
44. Although I have some sympathy with Williams Lea in that they could not have foreseen the auto-enrolment changes and the problem this would cause, nevertheless they failed to deal with it appropriately in Mr Beveridge's case, prioritising the regulations and ignoring the agreement they had with him which permitted him to choose a 15% payment each month if he so wished, instead of providing for a pension. This was a set of circumstances which auto-enrolment did not envisage. So, communication was all the more important. Although changes to pensions legislation meant that this agreement could not continue as it was, its renegotiation should have been a two-way process. Williams Lea's actions constitute maladministration.

Directions

45. Williams Lea are to contact Mr Beveridge within 28 days, ensure he is fully apprised of his options, and establish whether he wishes to remain auto-enrolled into the Scheme. If so, contributions will not need to be amended. However, if he elects to opt out, then Williams Lea must reimburse Mr Beveridge with the 1% payments they have taken from his 15% pension allowance, in accordance with his wish to receive the full amount as cash and not be auto-enrolled.
46. Such reimbursement would need to be paid with interest, at the base rate quoted by the reference banks from time to time.
47. Irrespective of Mr Beveridge's election, within 28 days, Williams Lea are to pay him £500 to reflect the significant distress and inconvenience caused to him by their maladministration.

Anthony Arter

Pensions Ombudsman
16 February 2016