

## Ombudsman's Determination

Applicant	Mr R
Scheme	KPMG Staff Pension Fund ( <b>the Fund</b> )
Respondents	Aon Trust Corporation LTD ( <b>Aon</b> ) KPMG LLP ( <b>KPMG</b> ) KPMG Pension Trustee Company Ltd ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Mr R's complaint and no further action is required by Aon, KPMG or the Trustee (**the Respondents**)
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr R has complained that he is unable to receive enhanced pension benefits from the Fund despite his ill health. Mr R has claimed that this is discrimination on the grounds of age and disability, is indicative of the improper exercise of discretion and is evidence of a breach of the duty of good faith.

## Background information, including submissions from the parties

### Background

4. Mr R was a member of the 'Pre-2000' section of the Fund from 1 November 1993, until 29 September 1996, when he left KPMG and became a deferred member.
5. The original Trust Deed and Rules was established in 1949 and has been subject to several variations. The operative rules are the rules dated 24 April 1996, as amended by a Deed of Variation dated 13 August 2008 (**the Rules**). Relevant extracts from the Rules are set out in Appendix 1.
6. KPMG is the principal employer to the Fund. Aon was the Trustee of the Fund from 31 December 2002, until 29 September 2014, at which point it resigned and was replaced by the Trustee. Aon was also Director of The Trustee until 31 December 2014, when it resigned as Director and was replaced by Pitmans Trustees Limited (**PTL**).

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7. In September 2012, Mr R had a serious road accident. He was left with permanent musculoskeletal injuries and post-traumatic stress disorder. As a result of his injuries Mr R was unable to return to work.
8. In September 2013, Mr R enquired about his eligibility to retire on ill health grounds, including any enhancement he would receive. The Fund replied, explaining that the Rules do not provide for an ill health enhancement and that if Mr R took benefits his pension would be subject to an actuarial reduction of around 69.2% to account for benefits being paid before his normal retirement date.
9. Mr R's responded saying, if he was "offered medical ill-health incapacity retirement, with appropriate enhancements, [the Fund] would be able to recover IN FULL the whole cost of any enhancement or retirement package from [Mr R's] personal injury claim" (original emphasis).

### **Mr R's position**

10. Mr R has made detailed and comprehensive submissions and has raised a number of points about the Respondents.

### **Complaint about KPMG**

- KPMG has not explained how it reached its decision not to award an enhancement, or what decision making policy has been applied. It has refused the augmentation on the basis that it may result in an unfunded liability but has provided no evidence of this.
- The decision to decline Mr R's request for augmentation is discriminatory – KPMG has agreed to augment the pensions of non-disabled people, but has refused his request.
- KPMG's Pensions Manager has incorrectly said that the Trustees do not have any discretion to augment member's benefits.
- On the one hand, KPMG said it does not have a policy relating to ad-hoc requests for augmentation, but on the other hand, it has said such requests are declined. Further, there is evidence that KPMG has exercised its discretion to augment the benefits for certain classes of member. This created the expectation that ad-hoc augmentation may be approved.

### **Complaint about Aon**

- Aon returned Mr R's stage two internal dispute resolution (**IDR**) appeal, stating it was unable to trace the Fund. This resulted in Mr R having to spend more time, effort and expense in submitting the appeal again – yet his request for compensation in relation to this was denied.
- Mr R is unhappy with the way a discretionary augmentation was administered by Aon in 2006.

- At no stage did Aon notify Mr R that there had been a change in the Trustee Director.

### **Complaint about the Trustee**

- Mr R considers that his musculoskeletal injuries and post-traumatic stress disorder meet the definition of a disability, which is a protected characteristic under the Equality Act 2010. Mr R has said, “he has been less favourably treated than other members because [KPMG] did not ‘properly’ consider his interests and similarly augment his pension on a one-off voluntary basis as it had done previously for many other members.”
- Mr R has said, “In the sense that [Mr R] has not benefitted from the exercise of the discretion, whereas older members were able to benefit, the decision was discriminatory, was unfair and should be regarded as maladministration.”
- Mr R disputes that he has received a stage two IDR response from the Trustee saying, “no correspondence in regard to IDR stage two has ever been received ... on letter headed paper from KPMG Pension Trust Company Limited.”
- PTL’s letter dated 27 January 2015, makes reference to “our decision under Stage Two of the Scheme’s IDR”, this, Mr R says, indicates there is more than one Trustee which is contrary to what he has previously been told.
- Mr R considers that the author of PTL’s letter “has failed to provide a persuasive argument to substantiate his decision and is even unaware of the correct timescale for competing an IDR stage one Decision.”
- The email sent enclosing the stage two decision was not encrypted or password protected. Mr R considers this to be, “a flagrant breach of Data Protection” and shows “a total lack of consideration for [his] personal information or the protection of confidentiality.”
- Mr R maintains that the Stage One IDR Adjudicator being an employee of KPMG is a “blatant conflict of interest” and that “competing interests make it difficult for the Stage 1 Adjudicator to complete his duties with fairness, neutrality and impartiality.”
- Mr R also disagrees that the Adjudicator commenting, on behalf of KPMG, about the reasons for declining a discretionary enhancement was helpful. He said: “How is it helpful to state the reasons for an augmentation decline decision? What would have been helpful was for the Stage 1 adjudicator to state the reasons and in what circumstances [KPMG] would augment ... pension benefits.” (Original emphasis).

### **The Respondents’ position**

#### **KPMG’s position**

- KPMG recognises that the wording “unable to agree to any discretionary augmentation”, contained within KPMG’s initial response declining Mr R’s request for augmentation, could be misinterpreted. Clause 10 of the Rules permits KPMG to grant enhanced benefits, but this is exercisable at the discretion of KPMG.
- Any exercise of discretion is a gift from KPMG – it is reliant on KPMG paying into the Fund a cash amount equivalent to the benefit as determined by an Actuary. The money comes from KPMG and not from the assets of the Fund.
- KPMG’s discretion is not a fiduciary power and the Rules do not specify how or when discretion should be considered, or that it should be considered at all. Further the Rules do not require any reasons for a decision to be given in relation to how, or if, KPMG’s discretion has been exercised.
- KPMG does not have a standard decision making policy which deals with requests for augmentation, since any requests are ad-hoc and tend to be rare. However, if such a policy were to exist, this would simply confirm that KPMG does not agree to requests to augment benefits.
- KPMG declined Mr R’ request for a discretionary augmentation on the basis that it would involve additional cost to KPMG which the firm is not willing to meet. Further, it could establish a precedent creating a false expectations amongst members of the Fund.
- When providing the stage one IDR response, KPMG’s Pensions Manager also responded to Mr R’s request for an enhanced pension. It was entirely appropriate for the Pensions Manager to respond to a request of this nature.

**Aon’s position**

- The enquiry desk which Mr R contacted, deals exclusively with Aon’s administration clients. Consequently it did not recognise the name of the Fund, which is dealt with by a separate part of Aon.
- Aon accepted that this resulted in a delay addressing Mr R’s enquiry.

**The Trustee’s position**

- Clause 10 of the Rules sets out the requirements in relation to a discretionary augmentation of benefits. In terms of the Trustee, the power of augmentation only arises after a request from the employer and then the ‘agreement’ of the Trustee relates only to the agreement as to the funding. Essentially the Trustees will only permit the augmentation on the condition that KPMG agrees to meet the cost of providing the additional benefits. In this regard the Trustee has no power to instigate an augmentation.
- The Trustee does not agree that there was a conflict of interest as a result of the stage one IDR response being provided by a KPMG employee. It was appropriate

for PTL to provide the stage two IDR response in its capacity as Director of the Trustee.

- Contrary to Mr R's position, the Trustee considers that the IDR procedure requires a stage two response to be sent within four and not two months.
- It was not unreasonable to email Mr R a copy of the stage two IDR letter – this had not been received by Mr R when it was issued by post, therefore it was prudent to treat the matter as urgent. Further, the letter did not include any personal or sensitive information.

## **Adjudicator's Opinion**

11. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Respondents. The Adjudicator's findings are summarised briefly below:-

### **Ill health early retirement**

- The Rules say that any request to provide augmentation must be made to the Trustee from KPMG as the Employer. So any decision to enhance Mr R's pension benefits is matter for KPMG's discretion.

### **Findings in relation to KPMG**

- The discretionary augmentations KPMG applied to some members in 2006 and 2008 were made to a defined group of members with specific circumstances, with the intention of protecting the position of pensioners with long periods of service. There are no similarities between the augmentation exercises in 2006 and 2008 and Mr R's request for an enhanced ill health pension. On this basis it cannot be said that KPMG has exercised its discretion arbitrarily, or that it has created the expectation that Mr R would receive an augmentation in the future.
- KPMG has a duty to act in good faith, but this does not override KPMG's ability to act in its own commercial best interests. To say KPMG has breached its obligations it would need to be demonstrated that it; acted irrationally and perversely, and that the act was sufficiently serious so as to destroy or damage the relationship between it and the members of the Fund.
- KPMG is unwilling to augment Mr R's pension benefits as this could lead to a potential unfunded liability. It has also said, it is not clear how the subrogated rights Mr R has from his personal injury claim would be substituted in practice.
- KPMG has provided valid financial reasons why it has refused Mr R's request and its decision was not irrational or perverse.

- KPMG does not have a formal written policy for dealing with ad-hoc requests for augmentation. Instead it has established a policy approach through the convention of declining such requests.

#### **Findings in relation to Aon**

- Aon has accepted that Mr R's stage two internal dispute resolution (**IDR**) appeal was not dealt with appropriately. Aon has apologised for its error which provides appropriate redress. Compensation for non-financial injustice is not warranted.
- It has been evidenced that Aon notified Mr R of the change of Trustee Director. Although the notices were sent after the changes had taken effect, this is not a decision which the members of the Fund have influence over, so there was no requirement for members to have been informed beforehand.

#### **Findings in relation to the Trustee**

- Mr R has suggested that, when offering augmentations in 2006 and 2008, the Trustee was preferring one class of member over another. However, there is no evidence that, in applying the Rules, the Trustee has preferred non-disabled members to disabled members. The Trustee did not, for example, offer to augment a member's pension as a direct or indirect consequence of them not being disabled. It is not possible to say that by refusing to augment Mr R's pension the Trustee is treating Mr R differently in light of his disability.
- PTL assumed responsibility for the IDR process when it was appointed as Director of the Trustee on 31 December 2014. Consequently PTL's letter dated 27 January 2015, sent on behalf of the Trustee, represented the stage two IDR decision.
- The Trustee was incorrect in respect of the timescales it quoted for providing the stage one IDR response. The Trustee's response, based on an out-of-date factsheet, indicated that a stage one response will be provided within four months. However, Mr R provided a more recent factsheet, which says the IDR response will be provided within two months. Although this amounts to maladministration, the distress caused by this discrepancy was not sufficient to warrant compensation.
- The Trustee did send a copy of the IDR decision letter in an unencrypted email, however this was after Mr R had already established the convention of corresponding about his dispute using unencrypted email. It is not unreasonable to expect Mr R to have set up a secure email exchange, or corresponded by some other method, if he was concerned about unencrypted email. The Trustee has not acted inappropriately by responding to an email exchange instigated by Mr R.
- Section 50 of the Pension Schemes Act 1995 (as amended), requires pension schemes to operate an IDR procedure, but there is no requirement that the 'specified person' should be independent of the employer.

- It is common for the IDR decision maker to be an employee of the principal employer, as they are usually best placed to deal with initial disputes about the operation of the pension. Although KPMG's Pensions Manager, as the IDR procedure's 'specified person', also passed comment on the position of KPMG when responding to the stage one complaint, this was likely to be a genuine attempt to assist Mr R by preventing the need for him to make a separate enquiry to KPMG.
  - The stage one decision maker did not have a conflict of interest, and was not unfair or biased when dealing with the stage one appeal.
12. Mr R did not accept the Adjudicator's Opinion and requested an oral hearing. In support of his request, Mr R said:-
- The Adjudicator's opinion contains a number of factual errors as well as a number of errors in law. The Pensions Ombudsman has a duty to act in a procedurally fair manner – Mr R's case cannot be fairly determined on the current papers on file.
  - An oral hearing would afford Mr R the opportunity to express himself without any misunderstandings which may arise from his disabilities or writing style.
  - Mr R has a disability – which is a protected characteristic under the Equality Act 2010 – holding a hearing would be considered a reasonable adjustment and is a right Mr R is entitled to under Article 6 of the European Convention on Human Rights.
13. As Mr R disagreed with the Adjudicator's Opinion, the complaint was passed to me to consider. Mr R provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr R for completeness.

### **Request for an oral hearing**

14. Mr R submitted a request for me to hold an oral hearing. The purpose of an oral hearing is to assist me in reaching my determination. Circumstances in which a hearing may be appropriate include where there are differing accounts of a particular material event and the credibility of witnesses needs to be tested; where the honesty and integrity of a party has been questioned and the party concerned has requested a hearing; or where there are disputed material and primary facts which cannot be properly determined from the papers.
15. I do not consider that any of these circumstances apply here so I do not consider it necessary to hold an oral hearing in this case.
16. Mr R's initial submissions and his response to the Adjudicator's Opinion are detailed and clearly set out Mr R's position. I do not consider that Mr R's style of writing will

give rise to any misunderstanding and there are no facts that have been disputed which cannot be properly determined from the file papers.

17. The application form Mr R completed asked if he had any accessibility requirements. He indicated that he did have communication preferences and this Office has corresponded with Mr R in line with his request. I have not seen any evidence to suggest that Mr R has been unable to present his full and comprehensive submission in writing or by email.
18. I consider that I can properly determine the case on the basis of the detailed written representations and the documentation which has already been submitted by the parties.

### **Ombudsman's decision**

19. Section 17 of the Rules of the Fund permit members to take benefits earlier than their normal retirement date, where ill health prevents them from following their normal employment. However the rules also specify that an actuarial reduction will apply to reflect that benefits have been taken early.
20. Clause 10.1 of the Rules of the Fund makes it clear that the decision to augment a members pension benefits, to provide an enhanced amount, is a decision for KPMG.
21. KPMG's power to provide an augmentation is entirely discretionary, and is not fiduciary, so this does not prevent KPMG from acting in its own commercial best interests when exercising its discretion. The only requirement is that KPMG must not make a perverse decision, that is to say, a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
22. KPMG refused Mr R's request for his benefits to be augmented on the basis that this would result in an additional cost to KPMG which it is not prepared to meet. Mr R disagrees, saying that KPMG has not provided any evidence to support the claim that this could lead to a potential unfunded liability.
23. The cost of funding enhanced benefits is calculated using assumptions about future economic variables. It therefore follows that if the underlying assumptions, used by the Actuary to estimate of the cost of providing an augmentation, differ to what actually happens in the future, there is a risk that the cost of the augmentation could result in a deficit to the Fund.
24. KPMG has provided valid reasons why it declined Mr R's request for a discretionary augmentation. I cannot find that KPMG's decision is irrational or perverse.
25. Mr R has suggested that by failing to assess the cost of the augmentation he requested, the Trustee has failed in its duty to "obtain an estimate of the increase in the value of the liabilities of the Scheme [for] the funding of such increase," as required by the Rules of the Fund. But I do not agree with this, the requirement on the Trustee to estimate the cost of enhanced benefits is dependent upon such a



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request being made by KPMG as the employer. In this case KPMG has not asked the Trustee to grant additional benefits so there is no requirement for the Trustee to make an estimation of the costs.

26. It is not disputed that KPMG has, in 2006 and 2008, augmented the benefits for some members of the Fund. This was as a result of court action and applied to a distinct group of members with particular circumstances – specifically those with long periods of service.
27. The circumstances of the 2006 and 2008 augmentations are entirely different to Mr R's request and there is no evidence that KPMG, when exercising its discretion, or the Trustee in carrying out KPMG's request, has preferred non-disabled members to disabled members. Consequently I am unable to find that KPMG or the Trustee is treating Mr R differently as a result of his disability.
28. Finally, for the sake of completeness, if Mr R is concerned that, in sending a copy of the IDR decision letter in an unencrypted email, the Trustee has breached his rights under the Data Protection Act 1998, then this is a matter he can take up with the Information Commissioner's Office.
29. The Respondents have not acted in maladministration in declining Mr R's request for enhanced ill health retirement benefits. Therefore, I do not uphold Mr R's complaint.

**Anthony Arter**

Pensions Ombudsman  
28 February 2017

## Appendix 1

### Extracts from the Rules of the Fund

#### Extract from Schedule 1

##### 10 Augmentation: Additional and New Benefits

###### Request from Employer to Trustees

10.1 Any Employer may request the Trustees to grant additional or new benefits under the Scheme for or in respect of any of its employees or former employees whether or not the employee or former employee concerned is or is not already a member.

###### Estimate of cost of benefits

10.2 Before granting any benefits to which an Employee's request pursuant to sub-Clause 10.1 relates, the Trustees shall obtain an estimate of the increase in the value of the liabilities of the Scheme which will result from doing so together with advice as to the funding of such increase.

###### Grant of additional and/or new benefits

10.3 The Trustees shall grant any benefits to which a request made pursuant to sub-Clause 10.1 relates, subject to the following conditions:-

10.3.1 the benefits do not exceed Revenue Limits;

10.3.2 the Employer which makes the request makes such additional contributions to the General Fund, or enters into such other arrangements (if any) with the Trustees, as the Trustees may require in order to fund the increase in value of the liabilities of the Scheme resulting from the grant of the benefits.

#### Extract from Schedule 2

##### 17: Early Leaver entitled to Preserved Benefits

###### Commencement of preserved pension before Normal Pension Date

17.4 A Deferred Member may elect that his pension shall commence from a date before his Normal Pension Date if the following conditions are satisfied:-

(1) (a) the Deferred Member has attained the age of 50; or

(b) in the Trustees' opinion after taking medical advice he has become incapable of following his normal employment by reason of ill-health or other incapacity.

17.5 The initial amount of a Deferred Member's pension under sub-Rule 17.4 shall be determined by taking the pension to which he would be entitled in accordance with Rule 7 on retiring at Normal Pension Date and reducing it by such amount as the Trustees on the advice of the Actuary consider appropriate in order to take account of the early commencement of such pension but so as to comply with the Trustees' obligation under regulation 8(4) of the Preservation Regulations to be reasonably satisfied that the total value of the benefits to be provided on the Member's early retirement is at least equal to the amount described in regulation 11 of the Preservation Regulations. For the avoidance of doubt, the discretion conferred on the Trustees by this sub-Clause is exercisable so as to enable the Trustees to pay before Normal Pension Date a preserved pension which in the opinion of the Trustees having taken advice from the Actuary is equivalent to the pension that would have been payable to the Member at Normal Pension Date and is not exercisable so as to enable the Trustees to augment any Member's benefits.