Final Pensions Ombudsman Determination – Mr T v British Regional Airlines Group Pension Scheme (BRAL)

Summary of Complaint and Findings

Mr T has complained that, as a result of his reliance on an inaccurate leaving service statement issued in 2008 and an overstated Guaranteed Cash Equivalent Transfer Value quote issued in 2017, he has sustained legal loss. Mr T considers that BRAL Trustee should honour the Guaranteed CETV quote or otherwise compensate him for the shortfall in the transfer value. The BRAL Trustee has already accepted that there has been maladministration in issuing Mr T with an inaccurate leaving service statement and overstated Guaranteed CETV, has apologised and has offered to pay Mr T £1500 to compensate him for the non-financial injustice (distress and inconvenience and loss of expectation) sustained as a result.

I am not satisfied that:

(1) any legal loss has been sustained by Mr T on grounds of negligent misstatement; or
(2) an estoppel arises against the Trustee to honour the inaccurate Guaranteed CETV,

so I do not uphold these elements of Mr T's complaint.

I am satisfied that, as already accepted by the BRAL Trustee, there has been maladministration. I also recognise that Mr T has sustained significant distress, inconvenience and disappointment as a result in the significant reduction in his expected CETV transfer value. This has resulted in him having to delay his retirement and continue working. However, the £1500 already offered by BRAL Trustee to compensate Mr T for the non-financial injustice is in my view sufficient to address the injustice he has sustained. I therefore do not uphold this element of Mr T's complaint. It is still open to Mr T to accept the offer of £1500 from the BRAL Trustee if he wishes to do so.

In relation to Mr T's additional complaint that he has sustained injustice as a consequence of BRAL Trustee advising Mr T that he should refer the complaint to the UK Pensions Ombudsman, both the UK and IoM Pensions Ombudsman have overlapping jurisdiction to investigate and determine the complaint. I am not satisfied that Mr T has sustained any injustice as a consequence of not being told that both the IoM and UK Pensions Ombudsman could investigate the complaint. I do not uphold this element of Mr T's complaint.

The Pensions Ombudsman's powers

The statutory provisions governing the IoM Pensions Ombudsman's can be found in Part X of the Pension Schemes Act 1993 (as applied to the Isle of Man). These provisions are virtually identical to the equivalent provisions governing the UK Pensions Ombudsman's jurisdiction under Part X of the Pension Schemes Act 1993 in the UK. Indeed until May 2015 the same person performed the role of Pensions Ombudsman in the UK and in the IOM albeit they were separate offices under separate statutes.

The IoM Pensions Ombudsman core jurisdiction (like the UK Ombudsman), is to investigate and determine:

(1) complaints brought by an actual or potential beneficiary that he or she has sustained injustice as a consequence of maladministration in relation to an act or omission of a person responsible for the management of an occupational or personal pension scheme (Section 146(1)(a) Pension Schemes Act 1993); and
(2) disputes of fact or law between an actual or potential beneficiary and a person responsible for the management of an occupational or personal pension scheme (section 146(1)(c) Pension Schemes Act 1993).

There is a very extensive body of case law relating to the UK Pensions Ombudsman's powers and jurisdiction. The UK case law is not binding on me but, I do have regard to it when determining a complaint or a dispute. If a complaint or dispute was appealed on a point of law to the Isle of Man High Court, to the extent that there is not direct IOM authority on an issue, the High Court can have regard to UK authorities in relation to the UK Ombudsman's jurisdiction as persuasive authority when determining how the Isle of Man Pensions Ombudsman's jurisdiction should be exercised. Generally I will take the same approach as the UK Ombudsman having regard to the same authorities unless there are particular IoM related reasons for taking a different approach or there are differences in the applicable law between the IoM and the UK.

Broadly in relation to the UK Pensions Ombudsman' jurisdiction it has been held that:

(1) the Pensions Ombudsman must decide complaints that a member has sustained injustice as a consequence of maladministration (comprising an infringement of legal rights) and disputes of law in accordance with established legal principles rather than by reference to what the Pensions Ombudsman considers fair and reasonable[1]; and

(2) the Pensions Ombudsman has power to direct the payment of reasonable compensation for non-financial injustice (distress and inconvenience) sustained as a consequence of maladministration. Any injustice must be sustained in consequence of maladministration.[2] Recent UK cases (to which I can have regard) indicate that higher levels of compensation may now be appropriate than were initially indicated as appropriate by the UK courts).[3]

It follows that the IoM Pensions Ombudsman (like the UK Pensions Ombudsman) is generally (other than in relation to complaints of non-financial injustice arising as a consequence of maladministration) required to determine a complaint in accordance with established legal principles. In the current case, however, I am satisfied that the legal principles applicable to this complaint are the same both under the Isle of Man and the UK despite the fact that BRAL contains UK and IoM members.

The British Regional Airlines Group Pension Scheme (BRAL)

[1] See Henderson v Stephenson Harwood [2005] PLR 209 (at 12); Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862, 899; Wakelin v Read [2000] PLR 319; Edge v Pensions Ombudsman [1998] Ch 512, 520; and Arjo Wiggins v Ralph [2009] 079 PBLR at paragraphs 13 to 14.
[2] NHS v Business Services v Leeks [2014] 056 PBLR at paragraph 20
[3] Westminster CC v Haywood (No 1) [1998] Ch 377 and City of County of Swansea v Johnson [1998] Ch 189 and Baugniet v Capita Employee Benefits (Teachers' Pensions) [2017] 059 PBLR (019) and Smith v Sheffield Teaching Hospitals [2018] 004 PBLR);

Mr T was a member of BRAL at the time of the events which are the subject of the complaint. BRAL is a defined benefit pension scheme set up under trust in the Isle of Man and currently governed by a trust deed and rules dated 27th April 2012 (as subsequently amended). The principal employer of the scheme is currently Flybe Limited (now in administration) and the trustee of BRAL is BRAL Trustee Limited. The administrator is currently Mercers. However, at the time the 2008 leaving service statement was issued the administrator was Aon.

BRAL has both Isle of Man members and UK members. BRAL is a regulated by the Financial Services Authority in the Isle of Man under the Retirement Benefits Schemes Act 2000 (an IoM statute). BRAL is also subject to regulation by the UK Regulator under the Pensions Act 2004 (a UK statute). BRAL is a registered pension scheme for Finance Act 2004 purposes in the UK in relation to its UK members and has exempt approved status for tax purposes in the Isle of Man in relation to its Isle of Man members. Effectively the scheme has dual registration and dual tax approval. BRAL, however, is not an eligible scheme for PPF entry purposes in the UK as, I understand, it has its main place of administration in the IoM not the UK.

Whilst Boal & Co (Pensions) Limited is registered as an administrator with the Isle of Man Financial Services Authority it is Mercer who undertake the day to day administration of BRAL. In the UK it is not necessary for an administrator of an occupational pension scheme to be regulated by the Pensions Regulator or Financial Conduct Authority in relation to the function of acting as an administrator of an occupational pension scheme.

The Trust Deed states that the law governing BRAL and its administration is Isle of Man law. However, the Trust Deed is drafted on the basis that in relation to many of the provisions in the trust deed and rules the legislation applicable to IoM members is Isle of Man legislation and the legislation applicable to UK members is UK legislation although there is nothing specifically relating to dispute resolution procedures or the Ombudsman in the deed. The interpretation provisions in the BRAL rules states that references to UK legislation are interpreted as including the corresponding IoM legislation in relation to IoM members. The BRAL rules also refer to IoM Members and UK Members.

This does not mesh together perfectly. The Trust Deed could have said that the governing law applicable to Isle of Man members is IoM law and the governing law applicable to UK members, such as Mr T, is UK law. There is also nothing in the Trust Deed stating that UK common law applies to the UK members and IoM common law (which is similar but not always identical) applies to IoM members. There is also no exclusive jurisdiction clause under which the Trustees submit the exclusive jurisdiction of the IoM in relation to IoM members or to the UK Courts in relation to UK members or say that both the IoM and UK Courts have jurisdiction.

However, nothing turns on this issue as I am satisfied in in relation to this complaint/dispute that the law applicable to this complaint in the IoM and the UK is all material purposes the same and I do have jurisdiction as BRAL falls within the definition of "occupational pension scheme" under section 1 of the Pension Schemes Act 1993 (as applied by Tynwald to the Isle of Man). This is an IoM trust with an IoM trustee and there is a sufficient connection with the Isle of Man for me to determine the dispute. The definition of occupational pension scheme used in the UK Pension Schemes Act 1993 is also wide enough to cover an Isle of Man occupational pension scheme.

It follows that there is potential overlap between the UK and Isle of Man Pensions Ombudsman's jurisdiction in relation to BRAL and it would have been possible for either the UK Ombudsman or the IoM Ombudsman to have determined the complaint. Both the UK and IoM ombudsman have a general discretion in any event to decide whether or not to accept a complaint or dispute for investigation and determination as under section 146 of the IoM Pension Schemes Act 1993 and the UK Pension Schemes Act 1993 the Ombudsman "may investigate and determine" a complaint or dispute.

Background to the complaint

Broadly, the background to the complaint is as follows:

(1) an inaccurate leaving service deferred benefit statement was issued to Mr T about his pension entitlement on 28 April 2008 which said his deferred pension as at 31 October 2007 was £16,002.94 a year and overstated his deferred pension entitlement;

(2) an inaccurate transfer quote received in 2017 which overstated the amount of the transfer value by almost £200,000 (£667,847 instead of £476,160);

(3) the error was notified to Mr T in March 2018 and Mr T accepted the reduced transfer quote which was paid on 3 July 2018; and

(4) the statement was corrected before the transfer took place and Mr T has subsequently transferred his benefits out of the pension scheme.

The inaccurate transfer value quote arose as a result of the fact that there had been a transfer of Mr T's benefits to BRAL and Mr T was granted a transfer credit of about £3569. The transfer credit was double counted in BRAL's records of Mr T's entitlement which resulted in the overstated leaving service figures being given in 2008 and also the overstated transfer value in 2017 as Mercer used the records inherited from Aon.

The complaint has been through both a first and second stage internal dispute resolution process in BRAL. It was accepted at first stage IDRP that there had been maladministration for which a distress and inconvenience award of £500 was appropriate but it was not accepted by the trustees that Mr T had sustained any "legal loss" as a result of the inaccurate deferred benefit statement in 2008 and the overstated transfer in September 2017. The trustee concluded that Mr T had not demonstrated that he had relied on the overstated benefits and that no legal loss flowed from the misstated leaving service information.

Mr T disputed this at IDRP 2 (see below) and also argued that a higher distress and inconvenience payment should be made and the Trustee should honour the inaccurate quote. The Trustee however rejected these arguments on the basis again that no legal loss had been sustained as a consequence of the overstatement of the transfer value. The Trustees however did increase the level of a distress and inconvenience payment from £500 to £1500 recognising that Mr T had suffered a significant disappointment, loss of expectation and distress as a result of the inaccurate quotation.

The detailed submissions of Mr T and the Trustee are summarised below.

Mr T's submissions

Mr T has submitted, among other things, that:

(1) ***The information given to him in 2008 and 2017 was incorrect*** and the failure to provide the correct information amounts to maladministration and breach of law;
(2) ***The scheme was to blame for the error*** – a letter from Mercer dated 22 March 2018 confirms that the electronic data transferred by Aon (the previous administrator) was incorrect. The Trustees, through the delegated administration to Aon and Mercer were to blame for the error;
(3) ***It was reasonable for Mr T to have relied on the inaccurate information*** and not to have checked with the administrator that what he was told was correct. Mr T had been issued with benefit statements since 1 April 2000 showing the projected pension he would receive at NRD. The projected pensions in these statements were as follows:

Benefit Statement Date	Estimated Pension at NRD*	Included Transferred In pension at NRD*
1 April 2000	£21,343.81	
1 April 2001	£22,342.69	
1 April 2002	£22,679.84	
1 April 2003	£23,337.10	£26,906.51
1 April 2004	£27,227.96	£30,797.37
1 April 2005	£28,148.39	£31,717.80
1 April 2006	£28,851.38	£32,420.79
1 April 2007	£21,839.84	£25,409.20

* if remaining in service to NRD
[*Ombudsman note - I would observe that Mr T was quoted a leaving service pension as at 20/7/2006 of £11,169 per annum (including a transferred in pension of £3569.41) in July 2006 when he asked for a CETV and the CETV at the time was £44595*)]. Mr T subsequently received a leaving service statement of £16,002.94 on 28 April 2008 calculated as at 31 October 2007 (his date of cessation of pensionable service) and it was reasonable for him to rely on that statement when making his future pension plans. Given the figures issued to him in the period from 2001 to 2007 Mr T submits that the figure quoted was not so extraordinary to put him on notice that there had been a mistake;
(4) ***Financial loss has been sustained as a result of the inaccurate information*** – there was a difference of £191,687 between the CETV quote of £667,847 in the letter of September 2017 guaranteed up to 3 December 2017 and the revised quote of £476,160 given on 22 March 2018. The reduction was a substantial one and one which materially affected his decision making process in the period from 2008 onwards [*Ombudsman Note I would observe that the overstated CETV* quote in 2017 *cannot have made any difference in relation to any decisions made up to 2017 – it is only the inaccurate 2008 deferred benefit quote which is relevant until then*)
(5) ***Financial decisions or commitments were made in reliance on the incorrect information***. In particular the following commitments were made:
    a. Mr T's decision to contribute at a minimum 4% in the new Flybe scheme because he was content with the level of pension expected on the basis of his leaving service statement in 2008;
    b. Mr T considered his financial position was secure enough to buy a flat;

c. Mr T's decision in 2015 to reduce his working hours to 56% or normal hours was taken on medical advice and also on the basis it was affordable for him;
d. His decision to retire early in 2018 or 2019 was based on the inaccurate information;

(6) ***Mr T took reasonable steps to mitigate the loss*** – Mr T took reasonable steps to mitigate his loss. Since the error came to light in March 2018 he continued to work to mitigate the loss of the monies including on a self-employed basis on his days off and has deferred his planned retirement.

In support of Mr T's submission that he had planned to retire in 2017/2018 Mr T enclosed a copy of extracts of paperwork completed during discussions with his IFA which contained contemporaneous evidence that he intended to retire in 2017/2018 and his discussions about the intended retirement.

Mr T has also submitted that:

(1) The leaving service statement and the guaranteed CETV were clear representations made to him about the level of benefits payable to him;
(2) It was reasonably foreseeable that he would act on the leaving service statement in 2008 when considering his future financial affairs, particularly when considering the level of contributions to a defined contribution scheme. The corporate transaction which led to him leaving the scheme was known to the Trustees at the time;
(3) It was reasonably foreseeable that future financial decisions (such as the flat purchase and reduction in hours in 2015) would have relied on his leaving service statement;
(4) It was reasonably foreseeable that he would act on the guaranteed CETV that was issued to him after it was requested in 2017;
(5) If the scheme does not stand by the representation made in his leaving service statement and the guaranteed CETV issued to him he will need to work longer to pay off his mortgage and achieve the level of income he was led to believe he was entitled.

Mr T further submitted at IDRP 2 stage, effectively in support of an argument that the trustees should be estopped from going back on the CETV quote, that as with Steria v Hutchinson, the representations made were a significant factor in making his breach of retirement plans and acting as he did and it is unconscionable to allow the Trustees to go back on their representations made to him with regard to the level of his pension benefits.

Mr T also submitted at the Stage 2 IDRP that the failures to identify the error demonstrated that there had been inadequate internal controls and also that the lack of any meaningful update from the Trustees or Mercers (chasing them 13 times and sending 5 emails to Mercer) and meant that a higher distress and inconvenience award was appropriate than the £500 proposed at the time. Mr T has also submitted that he has suffered depression as a result of the inaccurate information and IDRP process which is relevant to the level of distress and inconvenience award which may be appropriate.

Mr T has also submitted that the Trustee is guilty of maladministration in advising him that he should refer the matter to the UK Ombudsman (and not the IoM Ombudsman) and he has sustained injustice as a consequence of the delay this has caused.

The Trustee's response

The Trustee's response is set out in a letter dated 28 January 2021 from the Trustee's lawyers. Broadly the response is as follows:

(1) ***General*** – the Trustee accepts that the issue of the inaccurate statement of entitlement in 2008 and inaccurate transfer quotation in September 2018 amounts to maladministration. The Trustee has apologised and offered Mr T £1500 to compensate for distress and inconvenience and disappointment for the error. However Mr T is not entitled to a higher transfer value by reason of the error as he has not reasonably relied on it nor suffered any financial detriment as a result of any reliance on the error and the trustee's increased offer of £1500 is a fair and reasonable amount to compensate for Mr T's non-financial injustice;

(2) ***Legal entitlement to the higher transfer value*** – the Trustee can only pay what he is due under the Scheme rules and the law. The starting point is that Mr T does not have an entitlement to the correct transfer value. Regulation 9(5) of the Occupational Pension Schemes (Transfer Values) Regulations 1996 make it clear that if an error has been made and the figure is overstated in the Guaranteed Statement of Entitlement given to a member, it will be reduced to the correct one. Therefore the Trustee is not required by legislation to honour the much higher figure given it was wrong;

(3) ***Entitlement to the higher transfer value due to detrimental reliance*** – the Trustee noted that Mr T had argued that he should still be provided with the higher transfer value as he reasonably relied on the statement and this resulted in some detrimental reliance on his part. The Trustee then went on to submit:

   a. ***Reasonable reliance*** – there is evidence to show that the excessively high benefit was identified in 2008. Mr T spoke to the Member Nominated Trustee about the level of the pension that had been quoted. It was noted at the time that the statement of entitlement was to be reissued but accepts it is not clear whether this was done. The Trustee submits, on various grounds, that it should have been obvious that the statement of entitlement of £16,002.94 was wrong and most pilots would have had a good idea of the rate at which the pension accrued and a feel for the type of transfer their co-pilots were receiving. On the balance of probabilities Mr T was aware of the error;

   b. ***Acting in reliance on the misquotation to Mr T's detriment***- Mr T has not demonstrated that he relied on the 2008 statement to make a decision not to pay higher contributions. Mr T has said he would "probably would have made other arrangements to increase his pension in other ways". From which the Trustee takes it to mean he would have paid higher employee contributions. It is difficult to see how he has acted to his detriment. In relation to the other decisions Mr T alleges made on the basis of the inaccurate statement the Trustee's position is as follows:

      i. ***Decision to buy a flat*** – Mr T has not shown financial detriment in this regard. Mr T still owns the property and therefore still has an asset which will have marketable value. The Trustee cannot see how the financial position has worsened;

      ii. ***Decision to reduce working hours to 56% of his normal hours*** – Mr T has suggested that the misquotation was taken into account in the decision to reduce his working hours but also says that reduction in working hours was on the basis of discussions with his doctor;

iii. ***The plan to retire early in 2018*** – Mr T had not retired prior to taking his transfer out. While his plans may have been disrupted, in this regard, he has not acted by retiring. If he has been disappointed by the change of plan the issue is covered under the award for distress, inconvenience and disappointment below.

c. **Distress and inconvenience and disappointment** – in relation to the level of award for distress and inconvenience the Trustee noted the approach the UK Ombudsman takes to distress and inconvenience awards and the fact that the classification of an appropriate level of awards depends on guidelines derived from applicable case law. The Trustee considered the complaint fell within the serious category and not the severe category for which an award of £2000 may be appropriate;

d. **Depression** – in relation to the arguments advanced by Mr T that he has sustained significant distress that would justify a higher award the Trustee notes Mr T has a pre-existing condition with regards to depression and the Trustee assumes that the claim relates to the fact that the correction of the inaccurate quote made the depression worse. The trustee notes that the IDRP application form did not mention the depression or distress allegedly suffered and the focus on his claims at IDRP 1 and 2 are firmly on the reasonableness of his reliance and the financial detriment suffered (not the level of distress he was suffering or the effect it was having on his depression);

e. **Referral to UK Ombudsman** – the Trustee does not consider that there was maladministration notifying Mr T that he could refer the matter to the UK Pensions Ombudsman after the completion of the stage 2 IDRP complaint as the UK Ombudsman did have jurisdiction to consider the complaint in relation to a pension scheme established under Isle of Man trusts

General Approach taken by Ombudsman where inaccurate information has been provided in relation to be benefit entitlement

Complaints and disputes about inaccurate statements of benefit entitlement or transfer quotes often arise.

In order to determine a complaint of this type it is generally necessary to consider if:

(1) the inaccurate information provided has caused any financial loss (or legal loss) under the legal principle of negligent misstatement/misrepresentation;
(2) the inaccurate information can give rise to an estoppel in law which prevents the trustees or administrator going back on the inaccurate statement of entitlement;
(3) the member has sustained non financial injustice as a consequence of any maladministration identified in relation to the provision of the inaccurate information.

Mr T has effectively submitted in his IDRP 2 submission both that there has been a negligent misstatement issued by the administrator on behalf of the Trustee and also that the Trustee should be estopped from going back on the overstated benefits. It is important to separate out these principles in relation to this complaint.

Negligent misstatement/Equitable Duty of Care

Broadly, for a negligent misstatement or negligent misrepresentation claim to succeed in law (in either the UK or the IoM), it is necessary to show that:

(1) the Trustees and/or the administrators acting as their agents owed Mr T a duty of care in relation to the accuracy of the leaving service benefit statement and the guaranteed cash equivalent transfer value quote;
(2) there was a breach of the duty of care i.e. the representations were false and could not be made by someone exercising reasonable care;
(3) it was reasonable for Mr T to have relied on the representation;
(4) it was reasonably foreseeable that Mr T would have suffered loss of the type of loss he has in fact sustained as a result of reliance on the representation. This principle is also sometimes expressed at it being necessary for the loss to be of a kind falling within the scope of the duty of care – or that it is necessary to show the loss is not too remote; and
(5) Mr T must have taken action he would not otherwise have done had he been given the correct information. This is sometimes called the "but for" test of causality.

If the requirements for negligent misstatement are established, the remedy would be to put the applicant back financially in the position they would have been if the inaccurate statement had not been made. An inaccurate statement does not give an entitlement to the inaccurately stated benefit and will generally only entitle the applicant to compensation for financial loss if the member can show that they relied on the statement to their detriment and sustained legal loss as a result in accordance with the above legal principles.

In assessing any legal loss flowing from a negligent misstatement the member will also have an obligation to take reasonable steps to mitigate the loss. So, for example, if a member gave up his job on the basis of a negligent misstatement he would need to take reasonable steps to find a similar job to mitigate the loss. If he fails to do so the amount of recoverable loss is reduced.

To the extent that the Trustees exercise any functions in relation to BRAL they also owe an equitable duty of care to exercise those functions with due skill and care. While strictly this duty is derived from principles of equity (and not negligence) the principles used for calculating any breach of the equitable duty of care are essentially the same as those used when calculating any loss flowing from breach of a duty of care in negligence.[4]

Estoppel

In some cases where inaccurate information has been provided the applicant may argue that the trustees or administrator of the scheme is "estopped" (or legally prevented) from going back on the inaccurate statement on grounds that it would be inequitable to do so. If an estoppel argument succeeds (which generally fails in most claims where it is argued it gives an entitlement to future pension benefits) the estoppel may prevent the trustees arguing that the member is not entitled to the higher benefit on the grounds it is inequitable to do so.

[4] Bristol & West Building Society v Mothew [1998] Ch 1.

There are different types of estoppel but the one which is most frequently relied on by an applicant in cases like Mr T is estoppel by representation or promissory estoppel. The essential requirements to give rise to an estoppel by representation were helpfully summarised in the case of Steria v Hutchinson[5] which was referred to in Mr T's submissions. Broadly it is necessary to show that that it would be unconscionable for the defendant to go back on the representation. To demonstrate an estoppel by representation the following essential requirements generally need to be satisfied:

(1) there is a clear representation or promise made by the defendant on which it is reasonably foreseeable that the claimant will act;
(2) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and
(3) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise.

In order to succeed in a claim based on estoppel it has been confirmed that it probably not necessary for a claimant to satisfy the "but for" test as would be the case in a negligent misstatement claim. The applicant has to show that the representation was a significant factor which he took into account before taking the action taken.

More generally as estoppel is an equitable remedy the applicant can also only rely on an estoppel if they act in good faith.

In practice the courts have been very reluctant to find an estoppel giving entitlement to a future pension (as opposed to barring an overpayment). Often the claim fails in a pensions context by virtue of the fact there is no unequivocal representation. This is why most complaints are brought on grounds of negligent misstatement where the focus is more on whether the applicant reasonably relied on the misstatement.

Awards for non-financial injustice as a consequence of maladministration

If inaccurate information is provided, there is no financial loss under established legal principles but I am satisfied that the applicant has sustained non-financial injustice (distress and inconvenience) as a consequence of the maladministration I can still however make a non-financial injustice award in appropriate circumstances under my powers under section 146(1)(a) PSA 93. The level of the award will generally depend on the extent of distress and inconvenience sustained.

The UK Ombudsman has issued guidance on the level of awards he may make for non-financial injustice following recent case law developments (Redress for Non-Financial Injustice Factsheet – September 2018). I am not bound by this guidance but consider it a helpful starting point for looking at the appropriate level of award for non-financial injustice.

The levels of awards the UK Ombudsman considers appropriate vary depending on how the award is classified.

[5] Steria v Hutchinson [2006] Pens LR 291

nominal	significant	serious	severe	exceptional
No award	£500	£1000	£2000	More than £2000

The classification in turn depends on a number of different factors set out in the guidelines derived from the applicable case law. I am not required to have regard to the above guidelines but I generally will do so and the case law on the extent of my powers to make awards for non-financial injustice is persuasive authority which the IoM High Court could have regard to if any of my decisions was appealed to the High Court on a point of law under section 151(4) of the Pension Schemes Act 1993 (as applied to the IoM).

Burden of proof

When determining a complaint or dispute (involving a breach of law or alleged infringement of a legal right) I generally have to determine the complaint or dispute on the civil standard of the balance of probabilities having regard to the evidence submitted by both parties. In cases relating to events occurring many years ago when there is very little evidence I have to sometimes resort to the burden of proof and it would generally be for the applicant to discharge the burden of proof that they would have acted as they did or suffered the loss they allege they suffered.

Application of the law to the facts of the case

In order to determine the complaint it is necessary to consider how the above legal principles apply in relation to both:

(1) the inaccurate leaving service statement made in 2008 giving an overstated statement of Mr T's deferred pension entitlement; and
(2) the inaccurate guaranteed Cash Equivalent Transfer Quote given in 2017.

It is also necessary to consider the additional issues about whether:

(1) having issued the guaranteed Cash Equivalent Transfer value to Mr T the Trustee was entitled to reduce the CETV value when the mistake was discovered; and
(2) whether advising Mr T that he should contact the UK Pensions Ombudsman instead of the IoM Pensions Ombudsman amounted to maladministration

Inaccurate Deferred Pension quote in 2008 – Negligent Misstatement/Breach of Equitable duty of care

In relation to the issue of the alleged negligent misstatement I am satisfied that the Trustees owed Mr T a duty of care to ensure the accuracy of the leaving service statement and the CETV quote provided to Mr T on their behalf by Aon.

The Trustees have a duty to pay the correct benefits under BRAL and to take reasonable care to ensure that Mr T was issued with an accurate leaving service statement in respect of this entitlement by their appointed administrator. The relationship between the Trustees and member is sufficiently proximate for a duty of care to arise in negligence. The Trustees are also subject to an equitable duty of care to take due skill and care in the performance of the Trustee's functions. In practice it has been confirmed by the courts that in assessing any

breach of a duty of care whether in negligence or equity similar principles apply in relation to foreseeability and remoteness of loss and the duty to mitigate loss.

I am also satisfied that there was a breach of the duty of care. The original letter from Aon dated 28 April 2008 states incorrectly that

> "The current value of your pension is £16,002.94"

In relation to whether it was reasonable for Mr T to rely on the statement I would note that Mr T's pension was £16,002.94 is unequivocal taken in isolation but the letter then goes onto say that:

> "Aon Consulting is not authorised to bind either the Trustees or your employer to provide benefits in excess of your entitlements under the Scheme"

The statement that Aon were not authorised to bind the Trustees does not in my view detract from the fact Mr T was told by Aon (acting as agent on behalf of the trustees) that Mr T was entitled to a pension of £16,002.94 at this point in time. I also consider it was reasonable for Mr T to have relied on the statement, at least in relation to future pension planning, and for him to assume that it did accurately reflect Mr T's entitlement. As Mr T has noted persuasively in one of his submissions the statement does not say anywhere "*Please do not rely on this figure as it is probably inaccurate and overestimated*".

The Trustee has argued that the difference between the earlier figure for his pension entitlement (which did not double count his transferred in benefit) and the previous annual benefit statements between 2001 and 2007, the correct leaving service quote given in 2006 of £11169 (including the £3569 transfer credit) and the leaving service figure in 2008 of £16002.94 pa (which did double count the transferred benefit) was sufficiently large to put Mr T on notice that there was an error which he should have queried with the Trustee so he should not have relied on the statement. The Trustee indicate that Mr T may have queried the accuracy of the statement at the time and submits that on the balance of probabilities he was aware it overstated his preserved pension. Mr T maintains that in the context of the earlier much higher pension projections from 2001 to 2007 the difference in the figures was not so extraordinary to put him on notice that there was a mistake. The difference between the figure of £16002.94 in 2008 and £11169 in 2006 is quite high and I accept that Mr T would have had some idea of the rate at which the pension accrued. I also recognise however that most ordinary individuals are not pension professionals do not always check their current statement against earlier ones. Given the past higher projections and the multiple sets of figures provided I accept Mr T's submissions that he was not aware of the overstatement and it was "*not obvious to him"* and at the time given the risk to his job "*he had more important things to worry about*".

I also consider that it was reasonably foreseeable that Mr T might rely on a deferred pension statement in his overall pension planning (including in particular the decision about the initial level of contributions to the new replacement defined contribution scheme immediately following the date he became a deferred member) and it was reasonably foreseeable this could result in financial loss if Mr T made different pension planning decisions as a result. I am not however convinced that Mr T has suffered any loss as a result of the reliance (see below). I am also not convinced that the other decisions Mr T alleges he took in reliance on

the 2008 deferred pension statement are within the scope of the duty of care the Trustee owed to Mr T in negligence in relation to the preparation of the statement.

I also have to consider whether if Mr T had been aware that his leaving service pension was £3569 less this would have on the balance of probabilities made any difference to the level of contributions he selected to the new defined contribution scheme. Is there a causal link between the inaccurate statement and the alleged loss? In other words "would Mr T have made a higher employee contribution to the defined contribution scheme? Mr T was only in his mid 40s at the time which is quite a long time from his projected retirement date. Also my understanding is that the employer contribution was fixed and did not vary depending on the level of employee contributions so if Mr T had decided to pay a higher employee contribution it would not have resulted in a higher employer contribution.

I have no evidence that Mr T obtained detailed projections at the time about his target pension at 60 and he considered having regard to the deferred benefit statement what level of defined contributions would be needed to achieve this once he was no longer able to accrue benefit in a defined benefit scheme. I need to be satisfied that if the correct information had been provided Mr T would have paid a higher employee pension contribution and be granted a higher matched employer contribution. I accept that it is possible that the deferred pension quote could have impacted on the decision only to pay 4% contributions. However, it is equally possible that it may have made no difference. In my view in this case, the burden of proof has not been discharged and there is not in any event sufficient evidence to demonstrate on the balance of probabilities that higher employer contributions would have been made.

Mr T also submits that his later decision to reduce his working hours was as a result of reliance on the 2008 deferred pension statement. My view is that any loss flowing from the original 2008 negligent misstatement is too remote to give rise to liability under principles of negligent misstatement. I am also not satisfied on the balance of probabilities that if Mr T had not been issued the 2008 deferred pension statement Mr T would not have made the same decision to reduce his working hours. Mr T says his decision was for a number of reasons including his state of health. I would also have expected Mr T to have checked with the Trustee what his current deferred pension entitlement was if, as he submits, he was relying on the 2008 statement which would have broken the chain of causation between the statement and the alleged loss.

I am also not satisfied that the scope of the duty of care in relation to the deferred benefit statement extended to any loss arising from a future decision to purchase a flat. The loss is again too remote. Also if I had come to a different conclusion on the question of remoteness Mr T would also have to show on the balance of probabilities that "but for" the issue of the 2008 deferred benefit statement he would not have bought the flat. There are many reasons why Mr T may have wanted to buy a flat. Mr T had not provided any evidence that he was intending to pay off a mortgage with the lump sum from his pension which would support his argument that he would not have bought the flat if he had known his deferred pension was less than he was told in 2008.

I also agree with the Trustee that there is not necessarily any loss flowing from the inaccurate statement as Mr T has purchased a potentially valuable asset and has been living in the flat.

I would note that Aon are not party to the complaint and I make no finding with regard to the negligence (or otherwise) of Aon in issuing the statement.

Inaccurate 2008 Deferred Benefit Statement - Estoppel

In relation to the issue of whether an estoppel could arise against the Trustee, Mr T was issued with a leaving service statement stating his pension was £16,009.94. The letter however stated that Aon Consulting were not authorised to bind either the Trustees or Mr T's employer to provide benefits in excess of his entitlements under the Scheme. In my view this statement (while not sufficient to prevent a potential claim in negligence in relation to any loss falling within the duty of care) is sufficient to prevent an estoppel arising against the Trustee. This may seem a surprising conclusion to have reached given my conclusion that it was reasonable to rely on the statement for negligence misstatement purposes but I consider this is the correct position in law

If I had concluded that an estoppel could arise against the Trustee on the basis of the statement from Aon it would not have been necessary to satisfy the "but for" causality test but only if the representation was a significant factor which Mr T took into account before taking the action was taken. Again Mr T would need to show this on the balance of probabilities or if there was limited evidence discharge the burden of proof. There was still a 16% combined employee and employer contribution so it does not follow that if Mr T had known the deferred pension was lower he would have increased the level of the employee contribution.

Given the lack of any contemporaneous supporting evidence I am not satisfied that on the balance of probabilities that it was a "significant factor" in the decision only to make 4% employee contributions (on top of the 12% employer contribution), purchase the flat or in his decision to reduce his working hours.

In relation to the purchase of the flat I also do not see how any detriment can have been sustained as he still has a capital asset and Mr T had the benefit of living in the flat since the date of purchase.

On a number of grounds therefore I am not satisfied that an estoppel can arise in relation to the 2008 deferred benefit statement.

Inaccurate Transfer Quote in 2017 – Negligent Misstatement/Breach of duty of care

In relation to the 2017 Guaranteed CETV statement I am satisfied again that there was a sufficiently proximate relationship for a duty of care to arise in relation to the preparation of the transfer quote. I am also satisfied that there was a breach of the duty of care by the Trustee is failing to ensure that an accurate statement was prepared (it overstated the transfer value). It was reasonably foreseeable that Mr T would rely on the statement in relation to any decision to transfer out or retire on the basis of the statement. For the reasons previously discussed I do not consider that Mr T was aware that there was an error in the 2017 statement on the basis of the earlier discrepancies between the 2006 and 2008 statements.

Mr T however has not demonstrated any detrimental reliance on the inaccurate CETV transfer statement as he was notified of the error before he transferred and did not take any irrevocable steps such as giving up his job as a consequence of the inaccurate statement. The negligent misstatement claim/breach of duty of care to ensure an accurate benefit statement is provided fails on this basis as he has not relied to his detriment on the inaccurate statement.

Mr T has undoubtedly suffered significant distress and disappointment at not being able to retire when he expected and having to work longer. However, while this may give rise to a claim for non-financial injustice as a consequence of the maladministration in preparing the statement, it does not give rise to any legal loss.

I make no finding as to whether there was (or was not) a breach of a duty of care in negligence by Mercer as they are not party to the complaint.

Inaccurate Transfer Quote 2017 Estoppel

In relation to the inaccurate transfer quote I am not satisfied Mr T detrimentally relied (in a legal sense) on the Guarantee Statement as he was told that the transfer was incorrect before the transfer occurred and did not retire from his job. An estoppel therefore cannot, in my view, arise as a matter of law as there is no detrimental reliance. I agree with the Trustee's conclusion on this issue at IDRP stage 1 and IDRP stage 2.

This does not however mean that Mr T has not suffered significant distress and disappointment at not being able to retire and working longer than he had originally been intending (see below). The correct legal analysis is that, as acknowledged by the BRAL Trustee, Mr T is entitled to be compensated for non-financial injustice as a consequence of the maladministration.

Is the Trustee able to scale down the Guaranteed CETV?

I am satisfied that the Trustee is correct and the Trustee is able to scale down the CETV after the Guaranteed CETV quote was issued. Regulation 9(5) of the Occupational Pension Schemes (Transfer Values) Regulations 1996 which in my view is the applicable legislation here given Mr T is a UK member, provides that

> "If a member's cash equivalent shown in the statement of entitlement falls short of or exceeds the amount which it would have been had it been calculated in accordance with Chapter I of Part 4ZA of the 1993 Act and these regulations then it shall be increased or reduced to that amount"

There is also an equivalent provision in the Occupational Pension Schemes (Transfer Values) Regulations 1996 (as applied to the Isle of Man) which provides for the scaling down of a Guarantee quote in the same circumstances.

On my previous analysis however it is the UK regulations which will govern Mr T's right to a transfer.

Award for Non-financial Injustice

It has been accepted by the Trustee that there was maladministration in relation to the issue of the inaccurate 2008 deferred benefit statement and 2017 transfer statement. The Trustee has apologised and increased the offer of a distress and inconvenience award from £500 to £1500 at IDRP2.

As noted earlier in the determination, in relation to injustice not involving an infringement of a legal right my powers to make non financial injustice (distress and inconvenience or loss of expectation) awards are relatively limited. Until a few years ago the UK courts had indicated that the UK Ombudsman could make an award for distress and inconvenience but generally awards of above £1000 should not be made other than in exceptional circumstances. More recent cases have established that the UK Ombudsman has greater flexibility than this and the UK Ombudsman revised his practice on the level of awards in 2017/2018 and issued revised guidance on this in September 2018 called "Redress for non-financial injustice"

The levels of awards the UK Ombudsman considers appropriate vary depending on how the award is classified.

nominal	significant	serious	severe	exceptional
No award	£500	£1000	£2000	More than £2000

The guidance goes on to classify Significant, Serious and Severe as follows:

Nominal	• Minimal or no distress and/or inconvenience established • Very limited distress and inconvenience • Single occasion • An apology would be adequate redress	No Award
Significant	• Starting point – where some significant inconvenience has been caused to the applicant • One or more occasions • Effect was short term • Respondent took reasonable steps to put matters right	£500
Serious	• A serious level of distress and/or inconvenience that has materially affected the applicant • Several occasions • Lasting effect over a prolonged period • Respondent was slow to put the matter right	£1000
Severe	• A severe and adverse, but not quite exceptional, level of distress and/or	£2000

	inconvenience caused to the applicant; • Chronic situations • Numerous and/or repeated or compounded errors over a prolonged period and opportunities to notice and remedy those mistakes were missed (more so if ease of true position could have been ascertained) • Lasting effect over prolonged period • Applicant's wellbeing affected, for example, serious detriment to health; • Applicant prevented from making informed life decisions at critical times for example a decision to retire early or resigning from employment that might not otherwise have been taken • Respondent failed to respond to the applicant • Respondent failed to take steps to put the matter right • Respondent failed to understand the applicant's distress and inconvenience	

I am not bound by these guidelines (nor for that matter is the UK Ombudsman) but they do provide quite a helpful framework for looking at the appropriate size of a distress and inconvenience award.

Mr T undoubtedly suffered considerable distress, inconvenience and loss of expectation as a result of the provision of the inaccurate transfer quote in 2017. Mr T has been unable to retire as he had hoped and I recognise he was really disappointed when he was notified of the mistake. It must have been very upsetting to have his retirement plans dashed in those circumstances.

The initial proposed payment of £500 was not sufficient in my view to compensate Mr T for the non-financial injustice. This is not a case where the non-financial injustice was only "significant" under the above categorisation. However, the offer was increased to £1500 (between serious and severe) at the second stage of the internal disputes procedure and the Trustee has apologised. It could be argued that a £2000 award might be appropriate – this is definitely not an exceptional case. On balance I consider, however, that where the Trustee has ended up is about right and an award of £1500 (between a serious and severe award) is

appropriate for the undoubted disappointment, distress and inconvenience sustained by Mr T as a result of the inaccurate quotation.

Did it amount to maladministration by the Trustees to advise Mr T that he could refer his complaint to the UK Pensions Ombudsman?

For the reasons already discussed the UK and Isle of Man Ombudsman both have overlapping jurisdiction to determine Mr T's complaint even though he is resident in the UK and a UK taxpayer. There is nothing in the scheme documentation to the effect that any reference to the ombudsman should be to the UK Ombudsman in relation to UK complaints and disputes and the IoM Ombudsman in relation to IoM disputes and complaints or that all disputes and complaints relating to UK members should be determined by the UK courts or ombudsman and all IoM disputes and complaints should be determined by the IoM Pensions Ombudsman. Up until 2015 this did not, in any event, make any difference as the offices of the UK and IoM Pensions Ombudsman were held by the same person.

If Mr T had been given correct information he should arguably have been told that both the IoM and UK Ombudsman potentially had jurisdiction to investigate and determine his dispute and both have discretion to accept the complaint or dispute for investigation and determination. It is arguable that failure to do so might amount to maladministration.

The jurisdictions of the IoM Ombudsman and UK Ombudsman are however virtually identical and Mr T's complaint would have been determined in the same way whichever Ombudsman it had been referred to. To the extent that the process may have been extended by initially referring the matter to the UK Ombudsman (who in theory would have been able to determine the complaint as well) I am not satisfied that any injustice has been sustained for which it would be appropriate to direct an additional award of compensation under section 146(1)(a) PSA 1993.

Conclusions

The offer of £1500 by the Trustee is in my view sufficient to address the non-financial injustice sustained by the Mr T in relation to the inaccurate 2008 deferred benefit quotation and the inaccurate 2017 Guaranteed Cash Equivalent Transfer Value. The Trustee has also already apologised to Mr T for the undoubted distress and disappointment Mr T has sustained in relation to the inaccurate quotations. The inaccurate statement clearly has in Mr T having to continue working when he had been planning his retirement on the quotation.

I do not consider that any further distress and inconvenience award is appropriate in the circumstances as the injustice sustained has already been addressed. If Mr T wishes to he should contact the Trustee to accept the £1500 distress and inconvenience award.

Ian Greenstreet

Pensions Ombudsman for the Isle of Man

8 March 2021