

Ombudsman's Determination

Applicant	Mrs Jane Flynn
Scheme	Marks and Spencer Pension Scheme (the Scheme)
Respondent(s)	Marks & Spencer Pension Trust Ltd (the Trustee)

Complaint summary

Mrs Flynn has complained that the Trustee provided incorrect information about the application of the state pension deduction (the **Deduction**) to her pension entitlement.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Trustee because there has been no maladministration. The Trustee has dealt with Mrs Flynn's pension in accordance with the Scheme rules, which states that her state pension age (**SPA**) is her 60th birthday. In addition, the Trustee did not provide her with inaccurate or misleading information.

DETAILED DETERMINATION

Material Facts

1. Mrs Flynn's date of birth is 15 February 1955. She was employed by Marks and Spencer (the **Company**), but left their employment in 15 September 1990. During this time she was a member of the Scheme. Once Mrs Flynn left employment, she became a deferred member of the Scheme.
2. The Scheme rules (the **Rules**) have been revised on a number of occasions over the years. At the time when Mrs Flynn left employment in 1990, the Rules then in force were set out in a Trust Deed and Rules dated 7 August 1984 (**the 1984 Rules**).
3. Rule 5(a) of the 1984 Rules said that on retirement at or after normal Retirement Date, a member would be paid a pension equal to 1/45 of their final pensionable salary for each year of service "less the State Pension Deduction".
4. The State Pension Deduction was defined as
"an amount equal to 1/40th of the full yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person who fully satisfies the relevant contribution conditions."
5. Rule 5(a) also said that the total amount to be deducted
"... shall not exceed the yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person... and provided further that the reduction in the amount of the yearly pension due to the State Pension Deduction shall be ignored until the Member reaches pensionable age."
6. Under Rule 15, a deferred member with more than five years' service was entitled to a deferred pension when they reached Normal Retirement Date or pensionable age, whichever was earlier. This would be calculated in the same way as if Rule 5

applied, but with reference to their final pensionable salary at the date of leaving employment (though with a deduction for early payment).

7. The Normal Retirement Date under the Scheme was age 65 for men and age 60 for women.
8. The effect of the Rules was that where a member received their pension under the Scheme before reaching state pension age (**SPA**) they would receive their pension in full, but once the member started to receive their state old age pension, the amount of state old age pension received by them would be deducted from the pension paid to them under the Scheme.
9. The 1984 Rules were amended by a Supplemental Deed date 25 November 1988 (**the 1988 Rules**), but those amendments did not affect Rule 5 or the definitions set out above.
10. The Social Security Act 1975 defined “pensionable age” as “in the case of a man, 65; in the case of a woman, 60.”
11. Mrs Flynn was sent a certificate by the Trustee when she left the service of the Company in 1990 which sets out her entitlement under the Scheme. The certificate stated that her normal retirement date was 28 February 2015 and her state retirement date was 15 February 2015. The certificate informed her that when she reached normal retirement date she would be entitled to a pension of £5,180, which “takes into account the deduction to be made when you reach state retirement age”.
12. On 7 January 2009 the Trustee wrote to Mrs Flynn saying that she may be aware from recent news reports or contact with the Company’s employees that changes were being made to the Scheme. It said that the changes would not affect her deferred benefits. It added that the only change that may affect her was a government change to early retirement in the UK – from 6 April 2010, 55 would replace 50 as the earliest age she could take her pension.
13. A letter from the Trustee dated 1 July 2010 to Mrs Flynn giving her an estimate of the pension payable to her from her 60th birthday states that the estimated figure will be reduced by a Deduction when she reaches SPA. The letter did not define what her SPA was.

14. On 26 August 2011 the Trustee wrote to Mrs Flynn saying that she may have received a retirement quotation advising that if she drew her pension early, it would reduce from 6 January 2020. It explained that as a result of the government's proposals to change the SPA, it had reviewed how the Deduction is to be applied to her pension. The review revealed that part of the Deduction should be applied when she reaches age 60 and not 6 January 2020. It said that this was not a change to the Scheme as both it and the Company are committed to paying benefits in accordance with the Rules. It apologised for providing her with incorrect information regarding the timing of the Deduction.
15. Mrs Flynn complained to the Trustee about the date on when the Deduction is to be applied to her pension. The Trustee dealt with her complaint under the Scheme's internal dispute resolution procedures. It confirmed that she was receiving her correct entitlement under the Rules. With regard to her point on discrimination, it took legal advice as to whether the basis on which the Scheme was being administered amounted to unlawful discrimination on grounds of sex and is satisfied that this was not the case. It could see how she felt that she relied on the information given to her even though it was incorrect. However for her complaint to be upheld, she needed to demonstrate that she had suffered an actual financial loss. Taking all the information she gave into account, it did not feel that she had demonstrated either reliance or actual financial loss.
16. Mrs Flynn started to take her pension from the Scheme in 2013. On 7 November 2013 the Trustee wrote to her setting out the benefits payable to her as from 1 December 2013. The letter stated that the first part of the Deduction of £2,155 would be made in the first payment due after 15 February 2015 and a further deduction of £18 will be made on the first payment due after 6 January 2020.

Summary of Mrs Flynn's position

17. Although at the time she left the Scheme, in September 1990, her SPA was 60 and it was expected that the Deduction would be made as from age 60, the Rules were amended by a Deed dated 6 May 1998.
18. Under the 1998 Rules the definition of SPA was amended and this together with the provisions of rules 16.2 and 16.5 meant that the Deduction would not be applied

until she reached her revised SPA, ie 65, as originally envisaged by the Pensions Act 1995.

19. This was consistent with the Scheme explanatory booklet dated April 1997 which, although by that date she had left the Company, applies equally to her as it was stated to be a guide to permanent staff engaged up to and including 31 December 1995. The booklet informed members that if they retired before SPA, there would be a gap between the start of their pension from the Scheme and start of their state basic pension. Members were advised that "*The Scheme will bridge this gap by paying you your M&S pension without any reduction for the Basic State Pension until you reached State Pension Age*".
20. The booklet also advised members that the SPA would eventually be age 65 for everyone and suggested women born after 6 April 1950 should check with the local DSS to find out what their revised SPA would be.
21. In the letter dated 7 January 2009 she was advised that changes to the Scheme were being considered at that time and would not affect her entitlement.
22. Her case is different from Mrs Thew in that the latter was in two different schemes - one from 1972 to 1981 and another from 1982 to 2010.
23. The Trustee was still communicating with her up to August 2011 stating that the Deduction would be made in January 2020.
24. The letter of 1 July 2010 from the Trustee states that the Deduction would be made from January 2020.
25. She did think that the Trustee was treating men and women differently, as men were not being penalised when they reached 60 by a reduction in their pension.
26. As a result of an industrial accident she had in 2010, she now has a part-time job.
27. With regard to the letter of 26 August 2011 it is clear that prior to the review referred to in that letter, the Trustee believed the Deduction would only apply from her revised SPA.

28. Since the 1998 Rules there have been several deeds completed but the only deed which specifically affects the date from which the Deduction would be applied is the deed dated 20 September 2011. This deed introduced by way of clarification a new definition of “Pension Age” which if applied to her would mean the Deduction would be applied in part from age 60, and in part from May 2018. She believes that the terms of the 1998 Rules gave her a subsisting right for the Deduction not to be applied until her revised SPA of 30 November 2020, and to do so would be in contravention of clause 4 of the 2011 Deed and would breach her subsisting right.

Summary of the Trustee’s position

29. Mrs Flynn left service on 15 September 1990 and her entitlement to benefits is governed by the Rules in force at the date when she left service – ie the 1984 Rules. The 1988 Rules also apply, but did not make any changes in her particular case. These provide that the Deduction should be applied at “State Pension Age”. In respect of pension attributable to pensionable service before 17 May 1990, this is age 60. In respect of pension attributable to pensionable service on or after this date, this is 64 and 11 months.
30. The Rules have since been amended at various times. In general, subsequent versions of the Rules are stated to have no effect on the calculation of benefits in respect of previous leavers.
31. In 2011, in light of government changes to the state pension age, the Trustee and the Company undertook a review of the effect of those changes to state pension age on the Scheme’s state pension age, and took legal advice on this. It concluded that the correct position was as follows:
- (a) where the Rules define the Scheme’s state pension age by reference to statutory provisions, they should be construed by reference to legislation in force as at their date, unless the Rules specifically provide otherwise;
 - (b) in some cases the Rules specifically refer to a designated age as the Scheme’s state pension age;

- (c) the Trustee must, however, ensure that all benefits attributable to service from 17 May 1990 comply with the equalisation requirements imposed by the Barber judgment.
32. The Trustee and the Company entered into a Deed confirming this position in 2011.
33. As stated above, Mrs Flynn's benefits are governed by the 1984 and 1988 Rules. These Rules provide that the Deduction should be applied at "State Pension Age", which is defined as age 60 for women. There is no statutory reference included in the definition of "State Pension Age".
34. Part of Mrs Flynn's pension is attributable to pensionable service on or after 17 May 1990 and therefore that part of her pension must be considered against the background of the equalisation requirements in the Pensions Act 1995. The Deduction in respect of that period of pensionable service is applied at the date which will be applied at her state pensionable age under that Act, which was age 64 and 11 months.
35. It acknowledges that Mrs Flynn had been provided with correspondence which stated that the Deduction would be applied from her SPA. However, the provision of incorrect, incomplete or misleading information does not give rise to an entitlement. A member is only entitled to the pension due to them in accordance with the Rules; it has no power to confer benefits in excess of those under the Rules. The documents were all summary documents and could not reasonably be expected to confer any entitlement.
36. The Company did have power to confer benefits in excess of the Rules, via discretionary benefits/augmentation provisions. However, there is no evidence that the Company has used such power in her case. Therefore, it does not agree that the provision of incorrect information on retirement amounts to a contractual obligation which it is obliged to honour.
37. It acknowledges that in some cases, a member may be able to demonstrate that he or she acted upon information provided, that it was reasonable for the member to do so and that the member has suffered actual financial loss in respect of which it may be liable to compensate the member. This does not, however, amount to a

requirement for it to honour the information given. However, Mrs Flynn has provided no evidence that she has actually relied on this information.

38. Mrs Flynn has mentioned that she has changed roles at a state school nursery and is now earning a reduced salary. This role change appears to have occurred due to factors other than her pension expectations and she has neither suggested nor provided any evidence showing that this role change was made in reliance on the information provided by the Scheme. Indeed, she states that the role change was beyond her control.
39. Mrs Flynn refers to a workplace accident which she claims has caused her a “loss of function”. She says that she is now trying to decide when to retire. However, she has provided no evidence to show that she has made any final decisions in this regard or that any steps were taken in reliance on the information provided by the Scheme.

Conclusions

40. This is one of a number of complaints brought by female members of the Scheme about the date when the Deduction will be made.
41. Although not referred to as a bridging pension in the Rules, the way pensions are paid under the Scheme is in effect a form of bridging pension – an additional amount is paid to members who retire and start receiving a pension from the Scheme before reaching SPA. When they become entitled to their state pension an amount equivalent to the basic state pension is then deducted from their Scheme pension, so that they continue to receive the same amount of pension overall.
42. The position under the Scheme is that a deduction is made from the member’s Scheme pension when they reach SPA (as defined in the Scheme Rules), which is referred to as the “State Pension Deduction”. For members who left service before 17 May 1990, this happens at age 60 for women and 65 for men. That is because those were the respective SPAs in force at that time and it was then permissible to have different pension ages for men and women.

43. As a result of the decision in the Barber case, from 17 May 1990 it was unlawful to have different retirement ages for men and women. All pension schemes were required to equalise the retirement age for male and female members. But they did not have to do this immediately – schemes were allowed a period of time (known as the ‘Barber window’) to equalise the retirement ages for men and women.
44. For members who left service before 17 May 1990, the Scheme applies the Deduction at age 60 for women and 65 for men.
45. What was not foreseen at the time was that there would be further changes to SPA; the government has made – and is continuing to make – changes to the state retirement age, which will continue to increase (indeed it has recently announced that SPA will increase to 67 on a date between 2026 and 2028 and it will continually review the retirement age in light of the increase in people's life expectancy).
46. The outcome of these changes is that the definition of SPA for the purposes of the Rules has not kept pace with changes in the statutory SPA. So Mrs Flynn now has a SPA of 66 and will receive her basic state pension in February 2021. The result of this is that the bulk of the Deduction will be made in 2015 when she reaches age 60. So there will be a gap of just about six years when her Scheme pension will be reduced but she will not yet be receiving her basic state pension.
47. Mrs Flynn says that the Trustee has treated male and female members differently. I have received a number of complaints from members of the Scheme about the Deduction, each raising different but related issues. During the course of the investigations into these complaints a number of issues arose, including the question of whether there was unlawful discrimination between men and women. I considered that point in another case, where my determination was issued on 10 October 2013 (PO-304 Thew). My conclusions are set out in detail in that published determination and there is no need for me to go through them again in detail.
48. It follows from my conclusion in Mrs Thew’s complaint that Mrs Flynn’s has not suffered unlawful sex discrimination, but there remains the question of whether her pension has been dealt with in accordance with the Rules.

49. This question turns on the definition of SPA and, thus, the date at which the Deduction should be applied. Mrs Flynn understandably says she took this to mean the age at which she would actually receive her state pension. However, the starting point for determining a member's benefits is always the Rules, so the definition must be that set out in the Rules.
50. In the 1998 Rules, it is clear that the Deduction only comes into effect when the member reaches the age at which they become entitled to their state pension.
51. There was clearly an intention to smooth pension income – the purpose of the Rule is to ensure that the amount of pension received stays the same regardless of whether any state pension is being paid; no deduction is to be made that is greater than the actual state pension. Although amended by subsequent Deeds, there is nothing in the later Deeds that specifically overrides this. Indeed, the 2009 Rules again say that for members in Mrs Flynn's situation, the Deduction is not to be taken until the Member reaches SPA.
52. That leads to the next question, which is what her SPA is.
53. The Trustee says that the reference should be interpreted as being to the state pension arrangements in force at the time of the 1984 Deed – in other words, age 60. The Trustee relies on Rule 5(a) of the 1984 Rules, which refers to a member reaching pensionable age. "Pensionable age" is defined in accordance with the Social Security Act 1975 as, for a woman, age 60.
54. That ignores the clear intention of the Rules to ensure that the Deduction only applies to money payable through the state pension. The clear intention is to maintain a level pension both before and after the state pension comes into payment. Otherwise, there would be no point having this Rule at all. The language of this Rule itself does therefore suggest a contrary intention – it says the Deduction should be ignored until the member is entitled to their state pension and should then be deducted to reflect the amount of pension they will receive. Looked at in this way, the language of the Rules is clear in saying the Deduction is specifically designed to reflect the state pension a member receives. Accordingly, it should only be deducted when they receive their state pension.

55. However, Mrs Flynn left service in September 1990. She then became a deferred member and her benefits crystallised then. She was entitled to a deferred pension under Rule 15, which would be paid to her when she reaches Normal Retirement Date or pensionable age, whichever was earlier. At that point, her pensionable age was defined in Rule 5 of the 1984 Rules – in other words the pension payable from pensionable age under the Social Security Act 1975. That Act defined pensionable age for a woman as age 60.
56. So, the 1984 Rules make it clear that her pensionable age is 60 as defined by the Social Security Act 1975. It follows that at the point Mrs Flynn left and became a deferred member in 1990 her pensionable age – both for the state pension and for the purposes of this Scheme – was 60. It was not, at that point, discriminatory to have different pension ages for men and women.
57. The effect of all of this is that, although there was an intention to ‘smooth’ pensions, this was designed to take effect from the date at which members became entitled to their state pension. Mrs Flynn became entitled to this at age 60. Accordingly, the Trustee is correct to say that is the relevant age.
58. Mrs Flynn says that 1998 Rules gave her existing right for the Deduction not to be applied until January 2020, and to apply part of the Deduction before that date would be in contravention of clause 4 of the 2011 Rules and would breach her subsisting right.
59. The 2011 Rules say that the relevant meaning is as originally enacted in the Pensions Act 1995. On that basis, Mrs Flynn’s SPA would again be 60. However, those Rules were to be for clarification only and to have effect only so far as they do not adversely affect any subsisting rights. So what were her existing rights?
60. Mrs Flynn’s existing right under the 1984 Rules was to have the state pension deduction made when she would become entitled to her state pension; which at that point would be when she reached age 60.
61. The fact that the state retirement age has subsequently changed does not mean that the Rules are no longer valid. The legislation changing SPAs does not automatically extend to all references in the Scheme documents; the Deduction is

not written in terms that require it automatically to track any later changes in the state pension.

62. There has been no change to her entitlement under the Rules. The position is that her SPA for the purposes of the Scheme is, and always has been, age 60. The 2011 Rules did not change this; they merely clarified what her entitlement was. The only thing that has changed is the information that has been provided to her.
63. I therefore find that the Trustee has dealt with Mrs Flynn's pension in accordance with the Scheme Rules; her pension should be reduced from the date when she would reach SPA, as defined in the various Rules. This is the clear intention of the Rules.
64. The explanatory booklet to the Scheme refers to the Deduction taking effect from the date the member reaches SPA. It states that SPA is 60 for females and 65 for males.
65. The Trustee is correct that misleading or inaccurate information does not in itself create a legal entitlement; a member is only entitled to the pension due to them in accordance with the rules of their scheme. But the provision of inaccurate or misleading information is maladministration.
66. The statement sent to Mrs Flynn when she left the service of the Company in 1990 said that the Deduction would be made from 15 February 2015. The letter of 1 July 2010 states that the Deduction will be made when she reaches SPA, but does not define this date. In fact, I can see no correspondence or other communications from the Trustee which states that the Deduction will be made in January 2020. On balance, I am unable to find that she was given misleading information and therefore there is no maladministration.
67. Even if Mrs Flynn was provided with incorrect information, which she was not, she would need to show that she relied on the information to her detriment and pursue a claim in respect of any loss she has suffered as a result. The Trustee considered the evidence provided by her but concluded that she had not demonstrated either reliance or actual financial loss.

68. In my judgment Mrs Flynn has not demonstrated that she has been provided with incorrect information or that she has suffered financial loss as a result. As I am therefore unable to find maladministration on the part of the Trustee, I do not uphold Mrs Flynn's complaint.

Jane Irvine

Deputy Pensions Ombudsman

19 February 2015