Ombudsman's Determination

Applicants	Mr D and Mr R (the **Applicants**)
Scheme	HSBC Bank (UK) Pension Scheme (the **Scheme**)
Respondents	HSBC UK Bank plc (the **Bank**)
	HSBC Bank Pension Trust (UK) Limited (the **Trustee**)

Outcome

1. The Applicants' complaint is not upheld.

Complaint summary

2. The Applicants' complaint concerns pension and severance options they have been offered by the Bank upon redundancy.

3. The Applicants are of the opinion that, as members of the Scheme, they are entitled under:

   (i) Appendix 2, Part 2 of Section 10 (former James Capel Staff Scheme members) of the Scheme (the **Appendix**), to a Tier 2 'enhanced'[1] early retirement pension, with no reduction to their severance payment; alternatively

   (ii) the Bank's 'Security of Employment Policy' (the **SEP**)[2], to a full 'unreduced' early retirement pension, and a reduced severance payment.

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[1] 'Enhanced' that is in respect of the reduction factors applied to any pension.

[2] The Applicants' severance is an employment matter, which is outside the jurisdiction of The Pensions Ombudsman. Reference to the SEP is limited to the Applicants' pension issues.

Background information, including submissions from the parties

4. The Applicants are represented by Mr Lamble (the **Applicants' representative**) of Genesys Administration Ltd[3].

5. The James Capel & Co Pension and Life Assurance Scheme (1965) (the **JC Staff Scheme**) and other James Capel schemes, merged with the Scheme in January 2000 and the Applicants became 'hybrid' members of the Scheme.

6. A deed of variation dated 3 September 2007 (effective from 2000) adopted the rules for the different schemes, including the JC Staff Scheme. Schedule 1 of the Scheme created a new 'Section 10 (former James Capel Staff Scheme members)', which detailed provisions concerning the JC Staff Scheme (the **JC Staff Section**).

7. Other sections were created, for example, in respect of the James Capel & Co Directors and Senior Executives Pension and Life Assurance Scheme, referred to as 'Section 11 (former James Capel D & SE Scheme members)'.

8. Relevant extracts from the documents provided during this investigation are as follows:

   (i) Rule 3 of the JC Staff Section (of the Scheme) and the Appendix are referred below in Appendix 1 to this Determination;

   (ii) the Bank's SEP is referred to below in Appendix 2 to this Determination; and

   (iii) clause 3(d)(i) of a transfer agreement between the Bank and the trustees of the JC Staff Scheme (the **Transfer Agreement**) is referred to below in Appendix 3 to this Determination.

9. In early 2017, the Applicants were each issued with a notice of redundancy. Their employment ended on 30 November 2017. Both were age 52. Mr D had completed 23 years' service. Mr R had completed 31 years' service. The Bank offered each a choice of one of the following options:

   - a full severance payment and an 'unreduced' pension deferred to age 65; or
   - a full severance payment and a Tier 1 early retirement pension from age 55; or
   - a reduced severance payment and a Tier 2 'enhanced' early retirement pension from age 55.

[3] Mr Lamble was formerly the Pensions Manager for the JC Staff Scheme. He was commissioned by the Bank to redesign the JC Staff Scheme's early retirement procedures in the early 1990's and was involved in drafting the Scheme rules for the sections of the JC Staff Scheme and the original administration handover notes immediately following the merger of the JC Staff Scheme with the Scheme in January 2000.

The Applicants' position

10. The Applicants' representative explains that the Applicants' complaint has two separate but related parts:-

    Part 1

    - Based on the early retirement program (the **Program**), described in the Appendix to the JC Staff Section, the Applicants' consider that they are entitled to a Tier 2 'enhanced' early retirement pension as, upon redundancy, they are qualifying Scheme members. The Applicants consider that there are no additional cost considerations as the benefit is pre-funded (the assets transferred from the JC Staff Scheme contained reserves established to provide these benefits) and that there are no grounds on which the Bank should seek to reduce their redundancy settlement.

    Part 2

    - The Applicants further consider that they are entitled to either:

      (i) a Tier 2 pension plus a full severance payment on redundancy; or

      (ii) a full 'unreduced' early retirement pension subject to a reduced severance payment.

11. In respect of Part 1, the Applicants' representative asserts:-

    - The Bank and the trustees of the JC Staff Scheme implemented the Program in 1992.
    - The Program was fully disclosed to and understood and accepted by the Bank and the Trustee at the time of the merger in January 2000.
    - Further to a Transfer Agreement merging the JC Staff Scheme with the Scheme in December 1999 the Bank and the Trustee undertook to operate the JC Staff Scheme rules and discretionary practices on a no less favourable basis.
    - The Bank and the Trustee confirmed that it intended to continue operating the benefits of the Program as previously. Both approved the wording of a merger/transfer announcement issued to members of the JC Staff Scheme and the Bank established the Pensions Advisory Committee (the **PAC**) to monitor compliance with the terms of the Transfer Agreement.
    - Throughout the seven-year term of the PAC, the Bank and the Trustee continued to operate the Program in accordance with the terms set out in the Appendix. Consent to the provision of Tier 2 'enhanced' retirement benefits was automatic for qualifying members and without additional cost.
    - Following the end of the PAC's tenure, the Bank assumed the PAC's responsibilities, including the continued operation of the Program.

- Sometime after mid-2007 the operation of the Program changed. But neither the Bank nor the Trustee have advised the members of the JC Staff Section. The terms of the Appendix and the Scheme handbook remain unchanged.

12. In respect of Part 2, the Applicants' representative asserts:-

- The issue of entitlement to an 'unreduced' pension was introduced via the Bank's SEP.
- There is nothing contained in the rules of the JC Staff Section of the Scheme that would bar the Applicants from being provided with a full 'unreduced' pension at age 55, subject to their acceptance of a reduced severance package.
- The Applicants brought to the Trustee's attention that their options on early retirement did not include a full 'unreduced' pension as stated in the Bank's SEP.
- The Trustee has a responsibility to the Applicants to establish the reason for the variance between the Bank's SEP and the terms of the Scheme. To date the Trustee has failed to do this.

13. Commenting on the respective positions of the Bank (paragraph 14) and the Trustee (paragraph 15) , the Applicants' representative further asserts:-

On Part 1 of the Applicants' complaint

- The Bank and the Trustee have misinterpreted the operation of the Program.
- The Applicants' representative was the original architect of the Program in 1992. His proposals were discussed between the Bank and the trustees of the JC Staff Scheme. The Bank determined a series of criteria by which members could determine how they would be treated at early retirement. Namely:-
    - Tier 1 early retirement benefits would be granted by prior consent of the Bank and the trustees of the JC Staff Scheme and paid automatically if a member's application for early retirement did not meet qualifying criteria for Tier 2 early retirement benefits.
    - Tier 2 'enhanced' early retirement benefits would be granted by prior consent of the Bank and the trustees of JC Staff Scheme and paid automatically if a member's application for early retirement met the qualifying criteria.
    - If a member's circumstances did not entirely meet the qualification criteria, Tier 2 'enhanced' early retirement benefits would be granted and paid at the discretion of the Bank.
- The Appendix served a number of purposes:-
    - It recognised the existence of the Program that had previously been agreed between the Bank and the trustees of the JC Staff Scheme.

  - It recognised the details of the Program.
  - It was an acknowledgement by the Bank and the Trustee that the detail of the Program had been disclosed to them.
  - It did not create any new rights. It confirmed the intention to operate the Program on an ongoing basis. The rights contained within the Program already existed.
  - It gave the JC Staff Section members of the Scheme the opportunity to make contingency plans for their retirement.

- The provision of early retirement benefits is discretionary and was so under the JC Staff Scheme prior to the merger. But the Appendix established the entitlement to receive a Tier 2 early retirement pension without additional funding. Paragraph 2 (2) of the Appendix refers to “the automatic application of the Tier 2 factors in the case of a **member** who fulfilled” the qualifying criteria. There is no discretion in this matter and both the Bank, and the Trustee have confirmed that the Applicants meet the criteria.

- While the Appendix is a statement of intent, the Bank is wrong to say it is non-binding.

- The Applicants’ representative disagrees with the Bank’s comment that the Appendix simply acts to record the discretionary practices that related to the payment of early retirement pensions under the JC Staff Section of the Scheme.

- The Applicants’ representative disagrees with the Bank’s view that reference to the Appendix may occur after a decision to exercise discretion is made, in accordance with the Scheme rules, but not before. There is no discretion in the application of Tier 2 ‘enhanced’ early retirement benefits for members who fulfil the qualifying criteria. Further the determination of whether a member fulfils the criteria is made at the point of leaving service and not at the point of retirement if this is later.

- The Applicants’ representative disagrees with the Bank’s statement that the Appendix does not direct that the discretion must be exercised if the criteria it applies are met. The discretion is not a simple matter of whether to provide a Tier 2 ‘enhanced’ early retirement benefit. The discretionary element relates to the discretion retained by the Bank to provide Tier 2 ‘enhanced’ early retirement benefits to members who do not quite fulfil the criteria, together with the actual determination of the criteria, which establishes the group of members who automatically receive Tier 2.

- At the time of the merger/transfer it was agreed that the Program would continue unless changed. The Bank and the Trustee acknowledged and continued to operate the Program on the basis set out in the Appendix and it became an established practice.

- At some time after the dissolution of the PAC, there have been major changes in the practical implementation of the Program and very major changes in the underlying policy of the Program:-
    - The Bank and the Trustee have ignored their respective commitments to the automatic provision of Tier 2 ‘enhanced’ early retirement benefits for qualifying members. The Trustee has made it conditional on the Bank making an augmentation payment, while the Bank has made it conditional on members’ accepting reduced severance on redundancy.
    - The calculation of the augmentation payment does not consider the assets received from the JC Staff Scheme included reserves to provide the funding for these benefits. The calculation applies a costing factor based on an approximation to open market annuity rates which does not relate to the value of the benefits granted by reference to actuarial assumptions adopted by the Trustee. This overstates the augmentation payment and further distorts the operation of the Program by producing an actuarial profit within the Scheme and fetters the ability of the Bank to provide its consent.
- While changes to benefit provisions may be made, neither the Bank nor the Trustee can rely on the wording of the Scheme’s statement of funding principles to represent the notification of change.

On Part 2 of the Applicants’ complaint

- The Applicants’ representative fails to see how both the Bank and the Trustee can argue that the terms of the SEP do not apply to the Applicants.
- The Bank’s SEP provides for a contractual benefit of an ‘unreduced’ pension, not a reduced Tier 2 pension, agreed between the Bank and a Scheme member. It is for the Bank to arrange payment of this benefit via the Scheme; and its funding is in part provided by the Applicants’ agreement to the reduction of their severance pay on agreed terms contained within the SEP.
- The SEP does not mention anywhere that the term ‘unreduced pension’ should be interpreted in any different way for members of different sections of the Scheme.
- There is nothing within the rules of the JC Staff Section (of the Scheme) that would disallow the provision by the Bank, on a discretionary basis, of an unreduced pension at the point of redundancy, or age 55 if later. Indeed, the Bank and the Trustee have been unable to deny that they have used the JC Staff Section (of the Scheme) as the vehicle to provide an unreduced pension to other members of the Scheme in exactly that way.
- The Applicants’ representative disagrees with the Trustee’s position that it cannot comment on any changes the Bank has made to its redundancy policies

and that the Trustee has no right to receive information from the Bank about intended changes to redundancy terms.

- One of the Trustee's fiduciary duties is to establish a close working relationship with the Bank, to keep itself informed of the Bank's plans and to uphold the interests of the members of the Scheme. The Bank was also obliged to notify members of changes to the Scheme rules and proposed changes to members' benefits.

The Bank's position

14. The Bank submits:-

- There is no legal basis on which the Applicants are entitled to the benefits claimed in a way that is consistent with the Scheme rules, their contract of employment or through the operation of the law.

- The Applicants' complaint is based on the view that the Appendix creates a legal entitlement to the enhanced Tier 2 factors and/or an unreduced pension. This is presumed on the basis that the Applicants meet the criteria set out in the Appendix. However, the Appendix is deliberately set apart from the Scheme rules and does not create any entitlements. It is a guide if the Bank did wish to exercise its discretion to use enhanced early retirement factors. It simply acts to "record the discretionary practices that related to the payment of early retirement pensions under the James Capel Staff Scheme".

- The Scheme rules provide the discretionary power relevant to early retirement and not the Appendix, which is a non-binding statement of intent. Reference to the Appendix may occur after a decision to exercise discretion is made in accordance with the Scheme rules, but not before. The Appendix does not direct that the discretion must be exercised if the criteria it applies are met.

- If it had been the intention to allow early retirement to operate in the manner presented by the Applicants' representative, then it would have been introduced by means of a Deed of Amendment and not by way of an Appendix.

- The funding details that the Appendix contains are a matter between the Bank and the Trustee and have no relevance to the Applicants or the entitlements they can claim, which are governed by the Scheme rules and not the Appendix.

- The Applicants' representative continued reference to the funding or pre-funding of what are acknowledged as discretionary benefits does not establish an absolute right to those benefits. Discretionary or contingent benefits rely in the first instance on either the discretion being exercised or the contingency occurring.

- The relevance of the funding details in the Appendix should also be seen in the broader context. The Appendix was prepared more than 20 years ago. Since then, the whole funding basis of the Scheme has been "radically superseded by legislation and actuarial practice". Funding arrangements are now based on the statutory funding objective, which requires the Bank and the Trustee to agree a statement of funding principles as part of the Scheme's valuation.

- There is no interaction between the SEP and the operation of the Scheme rules. Under the terms of the SEP all pension benefits are stated to be subject always to the overriding terms of the Scheme rules. The SEP does not create rights under the Scheme which are not already provided for. The SEP cannot convert a discretionary benefit into an absolute right.

- How the Bank manages the financing of redundancy costs in respect of early retirement pensions and severance payments is a separate matter.

The Trustee's position

15. The Trustee's representative submits:-

- The Applicants fulfil the criteria in the discretionary practice, as described in the Appendix, to be offered Tier 2 'enhanced' early retirement benefits.

- The Scheme rules do not provide a guaranteed right to a Tier 2 'enhanced' early retirement pension. Nor do the Scheme rules (or any other document) restrict the Trustee from seeking additional funding from the Bank if certain discretionary benefits are offered, such as Tier 2 benefits.

- Accordingly, while the Trustee has regard to the Appendix, the Appendix is only a non-binding statement of the Trustee's intention 20 years ago. The Scheme's funding, its maturity, and the benefits it provides have all changed since then.

- The Trustee has a statutory duty to monitor and secure the funding of the Scheme. Paragraph 5.19 of the current statement of funding principles provides that:

  > "Under many of the Scheme's benefits sections a member may retire before normal retirement age with the consent of the Trustee or, in certain circumstances [the Bank]. The terms on which this is allowed are not always neutral as far as the expected cost to this Section of the Scheme is concerned. No allowance is included in the technical provisions for any additional costs that might arise in such circumstances, particularly in cases of redundancy. However, the Trustee will monitor the additional strains arising and request any additional funding required from the employer as and when such benefits are awarded."

- The Trustee has no control or influence over how the Bank finances its obligations to the Scheme. If a member chooses Tier 2, the Trustee has no role in agreeing if the Bank applies a reduction to the severance payment offered to the member. The Trustee's only concern in this matter is to ensure appropriate funding is requested, and paid by, the Bank.

- The Trustee is not required to inform members when it decides to seek additional funding from the Bank.

- There have been no changes to the benefits provided by the Scheme.

- The Bank's redundancy policies are issues for the Bank and the Trustee cannot comment on the Applicants' allegations regarding them. The Trustee has no legal or other right to be informed by the Bank of its intended changes to redundancy terms, so there is no basis for asserting that the Trustee owes any duties to advise members about the same.

- While the Trustee appreciates that the Applicants are disappointed, there is no basis for upholding their complaint against it.

Adjudicator's Opinion

16. The Applicants' complaint was considered by an Adjudicator in the Pensions Ombudsman's Office. He did not consider the complaint should be upheld. Below, I have set out the Adjudicator's opinion:-

- The Applicants' view was that the options the Bank had offered were less favourable than what they considered to be their entitlement.

- Referring to the Scheme rules, it was clear from Rule 3 of the JC Section, that while the Applicants satisfied (1)(a), the election of the pension benefit they could respectively choose was subject to the agreement of the Bank and the Trustee. Similarly, at Rule 3(2), the benefits might be reduced by reason of their early commencement by such amount as the Trustee and the Bank (having consulted the actuary) decided. This provided a discretion for the Bank and the Trustee.

- The Applicants raised the effect of the Appendix and the SEP and sought to rely on these. The Applicants' view was that Tier 2 'enhanced' early retirement benefits were granted by prior consent of the Bank and the Trustee and would be paid automatically if a member's application for early retirement met the qualifying criteria, which they asserted aligned with their situations.

- However, crucially, while both the Appendix and the SEP appeared to grant the automatic application of the Tier 2 factors to the Applicants, the formal Scheme rules were clear that early retirement factors were subject to the discretion of the Bank and the Trustee. It was also notable that at Part 1 of the Appendix it stated:

"The purpose of this part 1 of Appendix 2 is to record the discretionary practices that related to the payment of early retirement pensions under the **[JC Staff Scheme]** and to confirm that, in accordance with Clause 3(d)(i) of the **transfer agreement**, when exercising discretionary powers in relation to Tier 1 and Tier 2 early retirement factors, the **trustee** and the **bank** shall have regard to the manner in which these powers were exercised in the **[JC Staff Scheme]**…In addition the **trustee** and the **bank** confirm their intention to exercise the powers referred to below on a no less favourable basis than set out in the "Transferring Scheme Guidelines" attached to the **transfer agreement** and that <u>this is a statement of intent and not intended to create rights or entitlements</u> [Adjudicator's underlining]."

- Similarly, at Appendix 1, 'Redundancy terms of the Bank's SEP', it stated:

  "Any arrangements as they may apply to the treatment of benefits <u>will be subject to the rules</u> [Adjudicator's emphasis], as they may apply from time to time, that may be attached to the provision of such benefits."

  and:

  "6.2 Pension
  It should be noted that any reference to pension payments within this appendix refer to pensions calculated <u>within and subject to the terms of the HSBC Bank (UK) Pension Scheme Rules</u> [Adjudicator's emphasis] as they may apply from time to time, and subject to any Pension Trustee approval that may be required."

  Therefore, despite the statements in the Appendix and the SEP regarding pension benefits that the Applicants relied on, there were clear assertions that the calculation of benefits would be made subject to the Scheme rules which provided a discretion to the Bank and the Trustee.

- The salient issue was the status of the Appendix and the SEP in relation to the formal Scheme rules. The Bank and the Trustee both asserted that the Appendix and the SEP were not binding and therefore the Applicants were not absolutely entitled to the benefits in the manner that they believed.

- On the facts, the Appendix was deliberately not incorporated into the formal Scheme rules by a Deed of Amendment or resolution. Therefore, it would not form part of the Scheme rules and would not create binding entitlements thereunder.

- The Adjudicator agreed with the Bank's and the Trustee's submissions that:-

  - The Scheme rules provided the discretionary power relevant to the provision of early retirement benefits and not the Appendix. The Appendix was a statement of intent, it was non-binding, and reference to it might occur after the discretionary power was exercised. The Appendix did not direct that the discretion must be exercised if the criteria it applied were met.

- The funding details the Appendix contained were a matter between the Bank and the Trustee and were not relevant to the Applicants' pension entitlements, which were governed by the Scheme rules.

- The Appendix was prepared more than 20 years ago and since then the funding basis of the Scheme had radically changed with funding arrangements now based on the statutory funding objective.

- Although the Applicants fulfilled the criteria in the discretionary practice, as described in the Appendix, to be offered Tier 2 'enhanced' early retirement benefits, the Scheme rules did not provide a guaranteed right to Tier 2 benefits. Neither did the Scheme rules, nor any other document, including the SEP, constrain the Trustee from seeking additional funding from the Bank if Tier 2 benefits were offered. So, while the Trustee had regard to the Appendix, it was a non-binding statement of intent. The Scheme's funding, its maturity, and the benefits it provided had all changed since then.

- The Adjudicator concluded that it appeared that there was never any intention, or action taken, by the Bank or the Trustee to exercise the Scheme's amendment power or pass a resolution to make the Appendix or the SEP a formal part of the Scheme rules with binding intent. There was also no reference to the Appendix or the SEP in the formal Scheme rules' interpretation section. Instead, the Appendix and the SEP created a statement of intent to be applied as and when appropriate at the discretion of the Bank and the Trustee.

Comments received post the Adjudicator's Opinion

17. The Applicants' representative did not accept the Adjudicator's Opinion and their complaint was passed to me to consider. The Applicants' representative provided further comments and asserts:-

On Part 1 of the Applicants' complaint

- The Applicants dispute that the Appendix does not direct that the discretion must be exercised if the criteria are met. The Appendix directs that, under paragraph 2(2)(a), the prior consents of the Bank and the Trustee have been granted for the automatic provision of Tier 2 benefits for qualifying members.

- It was the provision of early retirement benefits that were the subject of discretion, "in the wider sense of the meaning of "discretion"". Once the discretion to provide an early retirement benefit is granted, the actual level of the benefits provided is not discretionary while those "prior consents" prevail.

- The Adjudicator noted within the summary of the complaint the Trustee's statement that "There had been no changes to the benefits provided by the Scheme". It should be noted that discretionary benefits were considered to be benefits under the terms of the Transfer Agreement and were described as such. The Adjudicator also summarised the Applicants' representative statements that significant changes were made to the operation of the Program. These are contradictory statements, and regardless of the Adjudicator's findings, the Opinion should have included a reference to which statements are correct and, if practices of the JC Staff Section have changed, when such a change occurred.

- The Adjudicator commented that "the funding details are a matter for the Bank and the Trustee". While this is understood, the Opinion should have recognised that the Bank and the Trustee accepted a transfer of reserves from the JC Trustees to fund these benefits and evidence has been provided that they were aware of, and had taken regard to, the funding issues thereafter.

- The Applicants remain concerned that the Trustee's decision to require additional funding from the Bank has fettered any decision by the Bank to exercise its discretion to provide Tier 2 benefits.

- The JC Staff Section was issued in September 2007, not 20 years ago as stated in the Adjudicator's findings, and evidences the intention, at that time, to continue to implement the Program as described in the Appendix. The Applicants disagree with the Adjudicator's statement relating to the passage of time. This is irrelevant as there has been no notification of change.

- The undertaking to continue to implement the Program was an ongoing commitment; made at the time of the merger, published in the Appendix (2007), and referenced within the scheme handbook (2009). Over what period would it be expected the undertakings made by the Bank and the Trustee to prevail, without notification of the change? What are the circumstances the Bank and Trustee have cited under which it was acceptable to change the application of discretions without notification?

- It is disputed that the statement of funding principles is a document that can be cited to advise members of a change of benefit levels even where those benefits are deemed discretionary.

- The Adjudicator's opinion failed to address the Trustee's fiduciary duties towards the Scheme members. When considering whether to exercise a discretionary power the Trustee should follow any procedures set out in the Scheme documents. The Appendix represents a formal notification of a discretionary practice applied by the Trustee and advised to the Scheme membership. The Appendix has meaning within the context of the JC Staff Section rules and cannot be discounted. The Trustee has not sought to amend that "discretionary practice" or advise the members that it has changed.

- The Applicants believe:-
  - The change in practice emanated from an overlay (drift) of practices that were adopted for non-JC Staff Sections of the Scheme.
  - The Trustee overlooked the nuances of the JC Staff Section practices and that the actual changes were implemented in error.
  - Some of these practices were "lost" in the handover of administration from HSBC Actuaries and Consultants Ltd (**HACL**) to Towers Watson in or around 2009/10 after the dissolution of the PAC.
- As further evidence of the lack of understanding by the Bank and the Trustee regarding the provisions of the JC Staff Section (of the Scheme), in or around 2010/11 both announced the intention to increase the normal retirement age (**NRA**) of the various sections of the Scheme from 60 to 65. However, members of the JC Staff Section were excluded from the consultation exercise. The Bank and the Trustee neglected to consider that the Program was an integral part of the JC equalisation policy, which provided the remaining active members of the JC Staff Section with the opportunity to retire with unreduced pensions from age 60 (the Tier 2 basis was purposely designed to achieve exactly this).

  As a result of the consultation the Scheme's NRA was increased to 65 but members were given the opportunity to maintain an NRA of 60 subject to making a 3% contribution to the Scheme. This offer was not made available to the members of the JC Staff Section.

  At the time, the Applicants queried (i) whether the early retirement provisions of the Program, as described in the Appendix, would still prevail and (ii) if the provisions were being withdrawn, would the offer to make a contribution to the Scheme to secure Tier 2 early retirement benefits apply to active JC Staff Section members. The Bank replied that the terms of the Program for the automatic provision of Tier 2 benefits were not being withdrawn and that members of the JC Staff Section were not to be offered the option to make a contribution to secure a guaranteed actuarially unreduced retirement age of 60.

  The changes to the administration of the Program appear to have been made soon afterwards. Due to a misunderstanding of the JC Staff Section practices, the members of that section were denied the opportunity of securing a protected NRA of 60.

  While he has no documentary proof of this, Mr R has advised that he made an application to secure a "Protected NRA" but was denied this opportunity.

18. In respect of the last bullet point, the Applicants' representative has submitted a 10 February 2010 'Pension Update' to members of the ex-JC Staff Section who had incorrectly elected the Retirement Savings option 'Current Accrual with Current Age for Unreduced Pension' on the My Reward website. This states:

> "As a member of the [JC Staff Section], the minimum age at which you can draw an unreduced pension within your Scheme has always been 65 and therefore as this matches the [NRA], there was no requirement for you to elect to pay the additional 3% to retain your Current Age. This was communicated to all impacted [JC Staff Section] members by e-mail on 20 December 2009."

It goes on to say:

> "…therefore we will be centrally correcting your My Reward website to show 'Current Accrual with NRA 65' with effect from 1 May 2010."

19. The Applicants' representative has also submitted two statements by Mr Latham, who was the Chairman of the trustees of the JC Staff Scheme at the time of the merger and the Chairman of the PAC for a period thereafter. In the first statement Mr Latham says:-

- When the merger was being considered, the trustees of JC Staff Scheme were formally advised by its solicitor and the JC Scheme actuary that it could not agree to a transfer of the JC Staff Scheme assets unless the Scheme guaranteed to continue the Tier 2 discretion in accordance with the Program.

- That guarantee was given by the Bank and the Trustee under clause 3, Benefits, sub-clause (d)(i) of the Transfer Agreement. It was clearly understood that, although drafted as an intention, the continuation of the discretionary practices, including the Program, was to be an ongoing intention for existing members.

- The details of the Program were contained in the Appendix for clarity and because they included an element of discretion for members who did not automatically qualify for Tier 2. Their importance in no way is diminished by their inclusion in the Appendix. They are and have always been an integral part of the JC Staff Section of the Scheme rules.

- The importance of the undertaking was highlighted in an announcement to members:

  > "the [Trustee] is aware of certain discretionary practices adopted by the [trustees of the JC Staff Scheme] and has confirmed that when exercising relevant discretions in the future it intends to maintain those practices."

- The JC Staff Scheme had been closed to new members since 1997. The Program was well-known by the members of the JC Staff Scheme at the time of the merger and its continued operation was hugely important to all the members in pensionable service. As no document has been issued by either the Bank or the Trustee repealing or amending the Program the members assume it is still in operation.

- The announcement also introduced the PAC. The PAC, comprising former trustees of the merged schemes, educated the Bank's Pensions Executive and the Scheme administrators in the understanding and application of the merged schemes discretionary practices, some of which like the Program were complex. The Program continued throughout the PAC's minimum seven-year term. The JC Staff Section members were aware of this.

- The final PAC meeting was on 14 March 2007. In attendance were two members of the Bank's Pension Executive, a senior executive of HACL and the Chief Operating Officer of the Bank's Corporate, Investment Banking and Markets Division HR Department. The minutes in relation to the JC Staff Section:-

    - Recognised that there were issues with poor administration, particularly with the understanding and application of Tier 1/Tier 2 early retirement factors both within the Bank's HR department and HACL. Further training was recommended by the Chief Operating Officer.

    - Recognised that a member's eligibility for Tier 1/Tier 2 was determined at the point of leaving service.

    - Evidenced an example of a Tier 1 pension being queried by the PAC and subsequently amended to Tier 2, as well as examples of new Tier 2 early retirement pensions.

    - Considered that some 90% of future early retirements were likely to qualify for Tier 2 benefits.

    - Concluded with the Chief Operating Officer stating that the "original purpose and responsibilities of the PAC had not been discharged" and confirming that "the Bank would take over all the responsibilities of the PAC", which included the continued monitoring of the Program.

- There has never been any suggestion that the undertaking was time limited.

- The Applicants are still entitled to rely on it and should be granted automatic Tier 2 benefits without making any contributions, in accordance with the provisions set out in paragraph 2(2) of the Appendix.

20. In his second statement, Mr Latham provides an account of the Bank's merger of its UK pension schemes. Mr Latham says:-

    - Around the time the merger was proposed (of the Midland Bank Pension Scheme with some 15 different UK pension schemes within the HSBC Group) he perceived difficulties with regard to the JC Staff Scheme's (and other schemes) benefit structures because there were a number of "well established 'discretionary practices' which had to be protected".

- The lawyers for the Trustee and for the JC Staff Scheme together with the Applicants' representative spent "many hours drafting to ensure that the established practices were carried forward accurately and their continuation assured as promised".

- While the whole merger proposal was good, the Bank's implementation was protracted and the choice of internal administrators, HACL, was poor. HACL was too inexperienced to cope with the Scheme "with its different benefit structures all with their individual oddities". Around 2009 HACL was replaced by Towers Watson. The handover was poor and experience built-up in HACL was lost. This was compounded by the departure of senior staff within the Bank's HR Departments and the HSBC Pensions Executive in the years post-merger.

21. The Applicants' representative assertions:-

On Part 2 of the Applicants' complaint

- The SEP forms an integral part of the Applicants' contract of employment. It binds the Bank to provide the Applicants with an 'unreduced' early retirement pension by agreeing to waive a portion of his redundancy settlement. The enhanced benefit promise can only be provided on a discretionary basis, subject to the Bank's approval and the member's acceptance of a reduced redundancy payment. The Bank has offered the Applicants a reduced redundancy payment but will not provide the promised 'unreduced' early retirement pension. What are the legal grounds by which the Bank can seek to reduce the Applicants' redundancy payment?

- The Adjudicator added emphasis to two general statements made by the Bank relating to references in the Scheme rules. However, the Adjudicator did not explain which specific rule(s) within the JC Staff Section of the Scheme disenfranchise members from an unreduced pension on redundancy.

- The rules of all sections of the Scheme permit the use of the Bank's discretion to provide benefits up to the "Relevant Maximum".

- The Bank has recently used this route to provide unreduced pension benefits to JC Staff Section members in the same circumstances as Mr R.

- The JC Scheme was regularly used to provide discretionary benefit enhancements up to the same definition of "Relevant Maxima" as currently defined by the Scheme.

22. The Bank submits:-

- It can identify no basis for questioning any of the arguments and reasoning that it or the Trustee has previously presented.

- The Applicant's representative refers to "the wider sense of the meaning of discretion". The accepted legal position, in relation to occupational pension schemes constituted under trust, is that a benefit either is or is not discretionary in nature as defined by the rules which dictate how the benefit may be provided. It cannot be an absolute entitlement. Very clearly the benefit in question is discretionary under the Scheme rules and the Appendix.

- There is a fundamental flaw in the Applicants' representative's reasoning in the presumed sequence of events under which the discretionary benefit may be provided. In ordinary or conventional circumstances, the Bank will firstly exercise its discretionary power, having done so it will then have reference to the form of benefit applicable based on past practice detailed in the Appendix. The Applicants' representative's contention is that this process is essentially reversed. If that occurred, the benefit would cease to be discretionary and become an absolute entitlement. This is completely contrary to the express nature of the discretionary power provided by the Scheme rules and the intention of the Appendix.

- The substance of the Applicants' representative's argument and the subsequent issues he refers to are largely predicated on the above misconceptions, which the Bank rejects for reasons previously provided.

- The Bank will continue to operate the Scheme rules correctly and consistently for relevant Scheme members and not in the way the Applicants' representative is seeking to promote.

- There is nothing in Mr Latham's comments that progresses the Applicants' representative's arguments.

- Details relating to whether the Scheme was poorly administered do not assist directly in reaching the correct conclusion as to the nature of the benefit in question, although it does explain some of the rationale for making a record in the form of the Appendix to the Scheme rules.

- It seems contradictory to refer to the efforts to maintain pre-existing discretionary practices culminating in their recording in the Appendix and then suggest that only those directly party to that effort could properly understand what it was intended to achieve.

- As to the adequacy of that record and its intention, Mr Latham refers to the fact that the trustees to the JC Staff Scheme and the Scheme were provided with independent legal advice. These advisers with the Applicants' representative "spent many hours drafting to ensure that the established practices were carried forward accurately". In these circumstances it must be taken that the inclusion of the words in Part 1 of the Appendix to the rules of the JC Staff Section "this is a statement of intent and not intended to create rights or entitlements", with all of the legal significance this entails, was a deliberately informed decision to make the position clear: the benefits in question would continue to be discretionary, no absolute entitlement was to be created, thus putting this matter beyond dispute.

23. The Trustee's representative submits:-

- The Trustee's position is unchanged.

- On several occasions the Applicants' representative refers to the lack of notification of the 'change'. The Scheme rules do not provide a guaranteed right to receive a pension on a Tier 2 basis and do not restrict the Trustee's ability to seek additional funding if discretionary benefits are granted. As such there has been no 'change' about which the Trustee is required to communicate. The fact that the documentation has always framed this as an intention rather than a commitment demonstrates the point clearly.

- The nature of a pension scheme merger is that assets are paid across to the receiving scheme and the receiving scheme also takes on liabilities in line with the terms of the transfer agreement. As such, the fact that the Scheme received funds as part of the transfer process does not mean that anybody should look behind the terms of the transfer in seeking to understand the way in which benefits should be paid.

- Mr Latham refers to an "undertaking" that formed part of the transfer agreement. While Mr Latham was involved in the discussions at the relevant time, and his conviction on this point is not doubted, the only way to consider the Applicants' complaint is by reference to the terms of the agreements made and the documentation available. This makes clear that there was no contractual undertaking and no binding commitment from the Trustee.

Deputy Pensions Ombudsman decision

24. The background to this complaint arises from the Bank acquiring, over a period of time, a number of companies with different individual pension schemes. These schemes were amalgamated, comprising the Scheme (as amended) by a deed of variation executed in 2007, stating to have effect from 17 January 2000.

25. The Applicants' representative explains that, leading up to the merger of the JC Staff Scheme with the Scheme, it was agreed that discretionary practices relating to the provision of early retirement benefits under the JC Staff Scheme would be published as an appendix to the Scheme. He submits, in effect, that these discretionary practices represented an integrated early retirement and redundancy program that was agreed would continue to be given effect by the Bank and the Trustee.

26. The Applicants' representative asserts (see paragraph 10 above (Part 1)), that the Applicants are entitled to a Tier 2 'enhanced' early retirement pension under the Scheme and that no reduction to the cash severance (inclusive of statutory redundancy) paid under the SEP (the **Severance Payment**) should apply. More particularly, the Applicants' representative argues that the right to a Tier 2

‘enhanced’ pension under the Scheme is paid automatically (without additional cost) if a member’s application for early retirement meets certain qualifying criteria, which it is not disputed by the parties, did so apply to the Applicants. I will consider this in Part 1 below.

27. Alternatively, the Applicants consider (see paragraph 10 above (Part 2)) that the SEP entitles them to: (i) a full ‘unreduced’ early retirement pension, which allows the Bank to reduce their Severance Payment; or (ii) a Tier 2 ‘enhanced’ pension together with a full Severance Payment. I will consider this in Part 2 below.

28. The difference between a Tier 2 pension (i.e. where the actuarial factors that normally would apply for early retirement are enhanced) available to the Applicants under the JC Staff Section, and an ‘unreduced’ or more precisely an ‘immediate non-reduced pension’ as referred to in the SEP is, by the Applicants’ representative calculations in monetary terms, a few thousand pounds for each Applicant.

29. The Applicants’ representative (the JC Staff Scheme’s former pensions manager) has raised an array of issues and points straddling various areas of law. But the crux of the Applicants’ complaint, and the narrow complaint before me that I am addressing, concerns whether the Applicants are entitled as a matter of right to the options above at paragraph 26 and 27 pursuant to the JC Staff Section and the SEP.

Part 1

30. Turning to Part 1 of the Applicants’ complaint.

31. Under the Transfer Agreement, the JC Staff Scheme merged with the Scheme.

32. Clause 3(d)(i) of the Transfer Agreement, provides, in summary, that the Bank and the Trustee undertake that regard would be had to the manner in which discretionary practices had been exercised in the past under the JC Staff Section, and that the intent was that the powers referred to in guidelines would be exercised on a no less favourable basis than set out in the guidelines.

33. Clause 3 (d)(i) went on to record that the intention concerning the guidelines was:

“…a statement of intent and is not intended to create rights or entitlements.”

34. Those guidelines (in so far as they are relevant to this complaint) subsequently formed the Appendix (that is of the JC Staff Section of the Scheme).

35. The scheme handbook, which is clearly stated to be a guide and not to confer rights, refers to the clause 3(d)(i) undertaking in brief terms.

36. The JC Staff Scheme has two parts to the Appendix in the JC Staff Section. Part 2 of the Appendix concerns discretionary dependants’ pensions. Relevant to this complaint, Part 1 of the Appendix (headed, Early Retirement Factors) concerns the early retirement factors of (Tier 1 and) Tier 2 pensions. The Appendix explains its purpose is to record the discretionary practices that related to the payment of early

retirement pensions under the JC Staff Scheme; and confirms that, in accordance with clause 3(d)(i) of the Transfer Agreement, when exercising discretionary powers in relation to (Tier 1 and) Tier 2 retirement factors, the Trustee and Bank shall have regard to the manner in which those powers were exercised in the JC Staff Scheme. Additionally, the Appendix records the Trustee and Bank's intention to exercise the powers on a no less favourable basis than set out in the guidelines to the Transfer Agreement and that "is a statement of intent and not intended to create rights or entitlements". Paragraph 2(2)(a) of the Appendix sets out the criteria for those members qualifying for benefits using the Tier 2 early retirement factors.

37. Rule 3 of the JC Staff Section provides that, with the agreement of the Bank and the Trustee, a member may elect to receive an early retirement pension; and further that the amount of any reduction that might be applied to that pension shall be such amount as the Bank and Trustee (having regard to the actuary) decide (subject to a proviso that is not relevant for the purposes of this complaint).

38. In my view, as the Transfer Agreement clause 3(d)(i) undertaking, and the Appendix, (including the scheme handbook), are mere statements of intention, they must be read in the context of and are supplemental to, Rule 3 of the JC Staff Section.

39. Rule 3(1) of JC Staff Section provides that a member who ceases to be in service on or after reaching age 50 and before normal retirement age may elect, subject to the agreement of the Bank and the Trustee, to receive an immediate pension. So, under Rule 3(1), both the Trustee and the Bank must, in the first instance, agree that the Applicants can receive an early retirement pension.

40. Following that agreement by the Bank and the Trustee that the Applicants may retire early under the Scheme; Rule 3(2) provides that the Trustee and the Bank can determine (as they decide) the amount that any early retirement pension is reduced by, having consulted with the actuary.

41. Rule 3(2) is punctuated by a footnote, which references the Transfer Agreement in connection with the discretionary practice to provide early retirement factors, the detail of which was set out in the Appendix. The Appendix, as I have highlighted at paragraph 36 above, reiterated the terms of the Transfer Agreement clause 3(d)(i) undertaking.

42. The wording of both clause 3(d)(i) of the Transfer Agreement and the Appendix, drafted in consultation with solicitors for both the Bank and the trustees of the JC Staff Scheme, is at pains to carefully document that what is under consideration is a discretionary practice that was intended would continue to be applied.

43. It does not follow, in my view, that any discretion under Rule 3 entails that the Appendix (paragraph 2(2)(a)) must be applied to the Applicants' benefits as of right (as opposed to there being a right that consideration is given under Rule 3 whether to apply the Appendix).

44. Moreover, a statement of intent to act in a particular way reflects an acknowledgement of uncertainty. That is, for any given period in the future, change is anticipated and so it might follow that the weight given to any existing factor may change or new considerations may arise.

45. Historically, funding considerations concerning the JC Staff Scheme had already been in issue. For example, I note that the guidelines in the Transfer Agreement explain the original early retirement factors were considered too generous and could affect the JC Staff Scheme funding so new factors (those in the Appendix) were being introduced.

46. In addition, the Appendix notes when establishing the Tier 2 factors, that it was assumed by the employer and trustees of the JC Staff Scheme, that the JC Staff Scheme was 100% funded and no adjustment would have to be made to reflect the fluctuating funding level of the JC Staff Scheme. However, because of complications in equalising benefits under the JC Staff Scheme, it was agreed that Tier 2 factors would be applied as if the members' normal retirement age was 60.

47. The Scheme's funding (which includes the JC Staff Section) over a prolonged period, will likely be a relevant consideration for the Trustee and the Bank. There is no document that fetters the Trustee's and the Bank's decision-making powers as regards funding decisions and underlying assumptions that may be applied to calculate benefits, including Tier 2 benefits. The underlying basis and assumptions are a matter for the Trustee and the Bank in consultation with the actuary.

48. Changes to funding is not a matter that needs to be communicated to members individually. As noted by the Trustee's representative, the Scheme's statement of funding principles (introduced by legislation in 2004, which must be reviewed after each full valuation, and which must be published) at paragraph 5.19 reflects that:

> "Under many of the Scheme's benefits sections a member may retire before [NRA] with the consent of the Trustee or, in certain circumstances [the Bank]. The terms on which this allowed are not always neutral as far as the expected cost to this Section of the Scheme is concerned. No allowance is included in the technical provisions for any additional costs that might arise in such circumstances, particularly in cases of redundancy. However, the Trustee will monitor the additional strains arising and request any additional funding required from the employer as and when such benefits are awarded."

49. In the pension scheme merger documents that I have seen, nothing indicates for example, that any monies were specifically ringfenced to pay Tier 2 pensions. In addition, statements made in the Appendix concerning funding (for example, that the JC Staff Scheme was funded to take account of Tier 2 early retirement benefits or that the trustees of the JC Staff Section would not require an employer to make any augmentation when an early retirement pension was granted) not only relate to the funding position from as long ago as 2000, but cannot in my view properly be interpreted as creating an entitlement.

50. The Applicants' representative places much importance to the following wording in paragraph 2(2)(a) of the Appendix:

> "The prior consent of **the trustees of the [JC Staff Scheme**] …and the **employer** was granted for the automatic application of the Tier 2 factors in the case of a **member** who fulfilled the … criteria…".

51. In my view, the relevance of this wording means that, if the Trustee and the Bank decide to apply paragraph 2(2)(a) of the Appendix, then (in the Applicants' case) the Tier 2 factors would indeed apply automatically.

52. But, this is subject to paragraph 3 of the Appendix which states:

> "… the factors shown … *are by way of illustration only* [my italics]. The specific factors are not fixed and are not intended to operate as an underpin to any retirement discount factors that may be applied by the [**Trustee**] in the future".

So, the factors applying automatically, are the ones that are applied by the Trustee from time to time.

53. However, and in any event, as I said at paragraphs 38 - 40 above, in my view, the Appendix is supplemental to the discretionary decisions under Rule 3 of the JC Staff Section. This is because under Rule 3(1), both the Trustee and the Bank must first agree that the Applicants can receive an early retirement pension. Following that agreement, under Rule 3(2), the Trustee, and the Bank (consulting the actuary) can determine the amount of reduction for the early retirement pension.

54. If, pursuant to the footnote of Rule 3(2), the Trustee and the Bank had regard to the manner early retirements factors had been granted previously in the JC Staff Scheme, but decide not to apply paragraph 2(2)(a) of the Appendix (the Tier 2 pension for certain members) then the Appendix does not bite: that is, the Tier 2 pension does not apply automatically (to the Applicants).

55. I consider that, for an automatic right to arise in the manner argued by the Applicants' representative, Rule 3 would have had to contain, for example, an exception that a Tier 2 pension automatically applies as of right in the case of a member meeting certain criteria.

56. In summary, I do not find there is created an (automatic) right or entitlement to a Tier 2 pension because the Applicants met certain qualifying criteria in the Appendix, or because there was in the Appendix, statements made in the past concerning the funding of Tier 2 benefits.

57. I have noted the additional documentational evidence provided by the Applicants' representative which goes to the parties intentions leading up to the merger. But I do not find this evidence material because I do not find there to be any ambiguity arising in the meaning of Rule 3 and the application of the Appendix.

58. I have not seen evidence of other members, in the same circumstances as the Applicants, who applied for and received the benefits the Applicants are claiming. I cannot accept evidence in confidence, and of course any discretionary decision properly made, is by reference to the facts and circumstances pertaining at the time to that individual.

59. There may be, as the Applicants' representative asserts, a widely held perception by members that they would be able to retire early on favourable terms. However, a perception (which even if reasonably held because of a stated intention to exercise discretionary powers on a no less favourable basis) is not something which gives rise to an (automatic) entitlement to the benefits that the Applicants' claim.

60. As regards the reduction to the Severance Payment, the Applicants do not consider that the early retirement pension provisions and the amount of a Severance Payment are mutually exclusive. That is, if a Tier 2 pension is granted to them, any Severance Payment they are entitled to should not be reduced.

61. I note that the Appendix makes no reference to past practice as regards the Severance Payments. Under Rule 3(1) of the JC Staff Section, there is no express prohibition on what factors the Bank may take into account in agreeing to early retirement under the Scheme.

62. Moreover, I note that Rule 3(1) is also punctuated by a footnote that provides that:

> "Decisions relating to the payment of early retirement benefits will be taken by the **employer** following discussions with the division; the division may also make representations to the **employer** if it feels that any particular issues need to be brought to the **employer's** attention."

63. Therefore, other considerations are flagged under the Scheme as potentially being relevant for employers to consider. Notwithstanding, employers may take their own commercial interests into account when exercising a discretionary power under a pension scheme (and indeed, trustees may take into account employers' interests if that means properly taking account of members' interests).

64. Accordingly, I find that the Tier 2 pension that can be provided under the Scheme is not an (automatic) right or entitlement. As regards the right to or amount of any Severance Payment, this is not a matter within my jurisdiction (see paragraph 66 below). But in terms of exercising discretion under the Scheme, any Severance Payment that might be paid to a member applying for an early retirement pension, is a factor that the Bank may have regard to.

Part 2

65. Turning now to the SEP, I note that Mr R submits that the SEP forms an integral part of his contract of employment. Whereas Mr D has explained that the SEP was referred to throughout his redundancy and similar terms were referred to in an announcement in 2015.

66. Contractual employment matters between the Bank and the Applicants are not within the scope of my jurisdiction. Accordingly, I have not considered the SEP agreement (or any reiteration) in so far as it provides for separate employment rights to a Severance Payment.

67. In my view the documentation before me does not demonstrate there was a combined early retirement and redundancy policy, which entails that the payment of the benefits cannot be decoupled. The Severance Payment is not a pension benefit arising under the Scheme. The Scheme does not incorporate the Severance Payment under the SEP.

68. The Bank has submitted that it is quite separately a matter for the Bank as to how it manages the financing of redundancy costs in respect of both early retirement pensions and Severance Payments; that there is no arrangement that governs the interaction of these obligations or how they are financed by the Bank. On the evidence before me, I agree.

69. The SEP is a document from the Bank, and it is not binding on the Trustee. The SEP is not a document relating to or arising from the Scheme. The calculation of a Severance Payment under the SEP is by reference to years of service and weeks' pay, not a member's normal retirement age under the Scheme. By contrast the Tier 2 early retirement factors in the Appendix are calculated by reference to enhanced actuarial factors and a member's retirement age.

70. As has been highlighted (see paragraph 16 above), the SEP states that arrangements as they may apply to the treatment of pension benefits will be subject to the Scheme rules, as they may apply from time to time and are subject to the Trustee approval that may be required.

71. The SEP refers under the heading 'Employees aged 50 and over…', to the possibility of an 'immediate non-reduced' pension. But this is not defined so it is not clear what exactly this means, and in any event, it is payable subject to the Scheme rules and the Trustee approval. There are several sections to the Scheme, so an immediate non-reduced pension might mean different things to different members.

72. In the Appendix, for Tier 2 pensions, the early retirement factors, are not reduced from age 60. So had the Applicants been aged 60 or more, they might have been offered an 'immediate non-reduced' Tier 2 pension (together with a reduced Severance Payment or alternatively with a full Severance Payment). But for the reasons I have explained in Part 1 and 2 above, this is not a right or entitlement under the Scheme.

73. To conclude, it does not appear that benefits provided by the Scheme have changed. By this I mean, the options provided to the Applicants on leaving service under the Appendix included: an (enhanced) Tier 1 and (further enhanced) Tier 2 early retirement pension from age 55; and a (non-reduced) Tier 1 pension from age 65.

74. As regards the Applicants' representative's assertion that the Scheme was poorly administered, whilst this may be correct, it is not the subject of the complaint before me and more particularly, it is not relevant in determining whether a right or an entitlement arises to the benefits that the Applicants' claim.

75. My decision should be read with regard to the Respondents' submissions and the Adjudicator's Opinion.

76. I do not uphold the Applicants' complaint.

Claire Ryan

Deputy Pensions Ombudsman
23 March 2021

Appendix 1

JC Staff Section

77. Rule 3:

"**EARLY RETIREMENT**

(1) A member who

(a) ceases to be in service on or after reaching age 50 and before **normal retirement age**; and

(b) does not receive an incapacity pension under rule 4 of this part 2:

may elect subject to the agreement of the **employer**[6] and the **trustee** to receive a pension beginning on the day he ceases to be in **service** (or the date the election is made, if later) and continuing for life.

(2) The yearly amount of the **member's** pension under this rule shall (subject to rule 7 of this part 2) be –

one sixtieth (1/60) of the **member's final pensionable salary** multiplied by the **member's pensionable service**

REDUCED by reason of its early commencement by such amount as the **trustee** and the **employer** (having consulted the **actuary**) decide provided that the **trustee** must be reasonably satisfied that the reduced pension's capital value is at least equal to what the unreduced pension's capital value would have been had the latter started at **normal retirement age**[7]

PROVIDED THAT if the **member** is aged 60 or over or has completed more than 40 years **service** the pension will not be reduced for early payment if the **employer**[8] so determines.[9]"

"[6] Decisions relating to the payment of early retirement benefits will be taken by the employer following discussions with the division; the division may also make representations of the employer if it feels that any particular issues need to be brought to the employer's attention."

[7] The transfer agreement recorded that under the [JC Staff Scheme] there was a discretionary practice to provide an early retirement pension using factors calculated in accordance with agreed principles resulting in either a standard (Tier 1) or an enhanced (Tier 2) early retirement pension for members who fulfilled certain criteria, details of which are set out in part 1 of [the Appendix] to this section 10."

[8] Decisions relating to the payment of early retirement benefits will be taken by the employer following discussions with the division; the division may also make representations of the employer if it feels that any particular issues need to be brought to the employer's attention."

[9] The discretionary practice referred to in footnote 7 included the waiver of an early retirement discount factor in the case of any member who has achieved 40 years of pensionable service as set out in part 1 of [the Appendix] in the section 10."

78. Extracts of the Appendix of the JC Staff Section:

PART 1 – EARLY RETIREMENT FACTORS:

The purpose of this part 1 of [the Appendix] is to record the discretionary practices that related to the payment of early retirement pensions under the [**JC Staff Scheme**] and to confirm that, in accordance with Clause 3(d)(i) of the **transfer agreement**, when exercising discretionary powers in relation to Tier 1 and Tier 2 early retirement factors, the **trustee** and the **bank** shall have regard to the manner in which these powers were exercised in the [**JC Staff Scheme**] …In addition the **trustee** and the **bank** confirm their intention to exercise the powers referred to below on a no less favourable basis than set out in the "Transferring Scheme Guidelines" attached to the **transfer agreement** and that this is a statement of intent and not intended to create rights or entitlements.

The terms on which early retirement pensions were payable under the [**JC Staff Scheme**] …were explained in a Guidance Note set out in Schedule 3 to the **transfer agreement**.

The early retirement policy consisted of a two tier system based on principles that were agreed between the trustees of the [**JC Staff Scheme**] and the **employer**. These principles applied to the qualification criteria for each tier, and the establishment of the early retirement factors for each tier.

…

The principles regarding how the early retirement factors were intended to apply are set out in more detail below. In summary, the intention was that –

Tier 1 factors would be applied on a basis which was broadly cost neutral to the [**JC Staff Scheme**]; and

Tier 2 factors would be applied on a basis which was consistent with the principles adopted for Tier 1 but assuming that the **member's normal retirement age** is 60 rather than 65. (In practice, this was achieved by using the relevant Tier 1 factor for a member 5 years older.)

…

2. Tier 2 – Enhanced early retirement factors

(1) Principles relating to the calculation of the Tier 2 early retirement factors

…

(2) Members qualifying for benefits using the Tier 2 early retirement factors

(a) The prior consent of the trustees of the [**JC Staff Scheme**] and the **employer** was granted for the automatic application of the Tier 2 factors in the case of a **member** who fulfilled the following criteria –

- He was aged 50 or over at the date of leaving service; and
- He was leaving **service** at the request of the **employer** (possibly redundancy or voluntary redundancy but not dismissal), or with the agreement of the **employer**; and
- Except in the case of redundancy (including voluntary redundancy), he was retiring from the City rather than leaving to take up full-time employment with a competitor company.

(b) …

…

In specifying the above guidelines in (a) and (b) …it should be noted that it was agreed in relation to the exercise of this discretionary benefit that the trustees of [**JC Staff Scheme**] would not require the **employer** to make any augmentation payment to the [**JC Staff Scheme**] when an early retirement pension was granted on a Tier 2 basis (including those marginal cases where the **employer** had arbitrated in favour of a **member** receiving Tier 2 benefits), the [**JC Staff Scheme**] being funded to take account of Tier 2 early retirement benefits.

3. Specimen Early Retirement Factors

… the factors shown …are included by way of illustration only. The specific factors themselves are not fixed and are not intended to operate as an underpin to any early retirement discount factors which may be applied by the **trustee** in the future. …"

Appendix 2

The Bank's SEP (extracts)

79. 'Appendix 1 – Redundancy terms':

"Any arrangements as they may apply to the treatment of benefits will be subject to the rules, as they may apply from time to time, that may be attached to the provision of such benefits.

…

6.2 Pension

It should be noted that any reference to pension payments within this appendix refer to pensions calculated within and subject to the terms of the [Scheme] Rules as they may apply from time to time, and subject to any Pension Trustee approval that may be required.

…

Employees aged 50 and over in the [Defined Benefit Section] (hybrid active members), and 55 in the [Defined Contribution Section]

Employees who are active hybrid members of the DBS will receive a 'Full' Severance Payment (see Appendix 2) and (subject to Pension Scheme rules and Pension Trustee approval), an immediate actuarially reduced DBS pension.

However, alternatively, employees can elect to receive payments in accordance with Appendix 2, as follows:

A 'Reduced' Severance Payment* and an immediate non-reduced DBS pension – (calculated within the terms of the Pension Scheme [sic]; including their DCS savings or

A 'Full' Severance Payment and a deferred benefit – (calculated within the terms of the Pension Scheme, and paid at normal retirement age, you will be known as a deferred hybrid member).

…"

80. 'Appendix 2 – Cash payments – full and reduced payments'

"The cash payment... will be made in accordance with the following scale:

Length of Service	Full Severance Payment	Reduced Severance Payment	…
Over 1 years' service	6 weeks' pay	2 weeks' pay	

…

Over 23 years' service	80.5 weeks' pay	40 weeks' pay
…		
Over 30 years' service	104 week's pay	40 weeks' pay"

Appendix 3

Transfer Agreement

81. Clause 3(d)(i) states that the Bank and the Trustee undertake:

> "…when exercising or considering the exercise of discretionary powers under the [Scheme] relating to benefits for or in respect of [some members of the JC Staff Scheme] that they each shall have regard to the manner in which comparable powers have (so far as disclosed to or as may have come to the knowledge of the [Trustee] or [the Bank]) in the past been exercised under the [JC Staff Scheme]. Without prejudice to the generality of the foregoing [the Bank] and the [Trustee] confirm that they each intend to exercise the powers referred to in the [JC Staff Scheme] Guidelines (attached as Schedule 3 to this deed) on a no less favourable basis than set out in the guidelines. For the avoidance of doubt the parties to this deed acknowledge that the intention regarding the [JC Staff Scheme] Guidelines is a statement of intent and is not intended to create rights or entitlements in respect of the [some members of the JC Staff Scheme]."

Guidelines referred to in the Transfer Agreement

> "…..However, it was felt that the exiting retirement factors were slightly too generous and that their continued use could affect the future funding of levels of the [JC Staff Scheme]….."