

Ombudsman's Determination

Applicant	Mr E
Scheme	Nissan Pension Plan (the Plan)
Respondents	Trustees of the Nissan Pension Plan (The Trustee)

Outcome

1. I do not uphold Mr E's complaint and no further action is required by the Trustee.

Complaint summary

2. Mr E's complaint is that, when commuting some of his pension in order to receive a pension commencement lump sum (**PCLS**), the Trustee commuted his post 1997 and post 2005 accrued benefits before commuting any of his pre 1997 accrued benefits. Mr E is unhappy with this approach because the portion of his pension in payment resulting from his pre 1997 accrued benefits only receives discretionary increases, and the Trustee has not increased pension benefits on this tranche of benefits for any pensioner members since 2000.
3. Mr E says he was not informed in 2011 that the Trustee had changed the basis of calculating the PCLS to what, he believes, is a less favourable basis.

Background information, including submissions from the parties

4. Mr E was an employee of Nissan (**the Employer**) and joined the Plan in 1985.
5. The Plan is a defined benefit occupational pension arrangement to which both the Employer and the Plan members contribute. Benefits accrued under the Plan are subject to different rates of pension increase after retirement, depending on when they were accrued as follows:-
 - Pension arising from pre 1997 benefit accrual: discretionary increase only.
 - Pension arising from post 1997 benefit accrual: up to 5% or Consumer Price Index (**CPI**).
 - Pension arising from post 2005 benefit accrual: up to 2.5% or CPI.

6. Following the Government's decision to change the basis for the calculation of pension increases in payment, the Trustee announced, in the Trustees' Report for the year ending 31 March 2012, that it had made changes to some of the Plan's retirement factors, as well as amending the PCLS commutation basis.
7. The change in the PCLS commutation basis altered which tranche of a member's benefits would first be used to secure a PCLS. This change meant that the greater part of the PCLS would be taken from post 1997 accrued benefits before using up benefits from pre 1997 accrued benefits.
8. In 2014, Mr E was considering taking early retirement. He was provided with an illustration on 29 October 2014 which set out three retirement options as follows:-
 - Option One:

Full pension of £40,690.68 per annum plus

 - An annuity purchased with AVC fund of £20,020.50 or
 - A pension purchased within the Plan of £637.44 per annum.
 - Option Two:

Full pension of £40,690.68 per annum plus

 - A PCLS of £20,020.50
 - Option Three:

A reduced pension of £30,074.52 per annum plus

 - A PCLS estimated at £200,496.07 (including 100% of the AVC fund).
9. The illustration also provided the following information regarding the effect each option would have on Mr E's accrued benefits:
 - Splits for pension increase purposes:
 - Options One and Two: Pre 1997 pension: £16,763.47
 Post 1997 pension: £11,412.95
 Post 2005 pension: £12,514.20
 - Option Three: Pre 1997 pension: £16,763.47
 Post 1997 pension: £796.74
 Post 2005 pension: £12,514.20
10. Mr E took early retirement in 2016, approximately four months after his 55th birthday. At retirement he chose Option Three and received the maximum PCLS which, since the date of the illustration in 2014, had grown to £215,647.54, together with an annual pension of £30,074.52 per annum. The pension came into payment on Mr E's chosen retirement date of 2 January 2016.

11. In the following years, Mr E became concerned at the low level of annual increases applied to his pension in payment. Having discussed the matter with other pensioner members, Mr E discovered that the Rules governing the Plan had been changed some years before his retirement and that the PCLS was taken first from the part of the pension which receives guaranteed annual increases. This resulted in a significant portion of the pension in payment receiving no guaranteed increases as the majority of his retirement benefits, post commutation, were accrued pre 1997 and were subject to discretionary increases only.
12. Mr E says that he had not been informed of this change when it took place.
13. On 15 May 2018, following a telephone conversation with Capita, who were administering the Plan at the time, Mr E sent an email asking Capita for details regarding annual increases to his pension. Mr E also asked Capita specifically to confirm what information was being included regarding annual increases to the pre 1997 tranche of benefits in the upcoming Plan review.
14. On 12 July 2018, the Trustee responded to Mr E's query, stating that:-
 - The Board of Trustees meet annually to consider pension increases for all pensioner members.
 - Both legal and actuarial advice was sought when considering any such increases.
 - The Plan's liabilities continued to grow, and far outweighed the Plan's assets. As a result, the Plan continued to have a considerable deficit.
 - The Trustee has a duty to manage the interests of all Plan members equally.
 - In order to preserve future benefits which would arise, the Trustee had, for a number of years, decided not to make any discretionary increases, including the 2018 pension increases.
 - The Board of Trustees would continue to review both statutory and discretionary increases annually in future.
 - The Trustee acknowledged Mr E's view that an increase was justifiable but explained that an increase to all pensioners of just 1% would cost in the region of £2 million for the 2018 year alone. Given the extent of the deficit, the Trustee could not make such an increase.
15. Mr E was unhappy with this response and contacted the Trustee again on 9 August 2018, saying the letter of 12 July 2018 had not answered his two specific points, which were:-
 - What consideration was being given, during the current Plan review, to ensure loyal ex-employees would start to see an annual increase for this large part of their pension (the pre 1997 tranche of benefits).

- If the current lack of increases were not to be corrected, would the Trustee explain why.
16. On 3 September 2018, the Trustee responded to Mr E and confirmed that the Employer had undertaken consultation with its active Plan members regarding their future service benefits. There was no consultation with pensioner members as the consultation was led by the Employer and not by the Trustee. It confirmed that legislation protects pensioner increases and the Plan Rules follow legislation. The Trustee reviews pension increases annually, following legal and actuarial advice before awarding any discretionary increases.
 17. Having consulted with other retired members about how the PCLS commutation basis had changed, Mr E wrote to the Trustee again on 5 September 2018 asking for the documentation that had permitted the change to the PCLS commutation basis and confirmation of the date the change had taken place. He also wanted to know when there might be a discretionary increase.
 18. On 19 September 2018, the Trustee responded to confirm the following:-
 - Benefits for pensioner members were fixed, with the exception of annual increases which are reviewed every year.
 - A link was provided to information on the relevant legislation provided by the Pensions Advisory Service.
 - An extract of the minutes of the Trustee's meeting of 23 August 2011 was provided which stated that "after discussion, the Trustees decided to offer commutation on the basis that members commuted the 1997 to 2005 pension first, followed by post 2005 pension, and then pre 1997 pension".
 - The scope for making a discretionary increase was reviewed annually.
 19. On 17 October 2018, Mr E wrote to the Trustee asking when the decision to change the commutation basis had been communicated to Plan members.
 20. The Trustee responded on 14 November 2018 to confirm that the information regarding the change to the commutation basis had been communicated to the Plan membership in the report and accounts for the 2011/2012 year.
 21. Mr E sought a copy of the report, which was provided to him by email on 10 December 2018. In the covering email, the Trustee also confirmed that there was no legal duty for the Trustee to advise members of changes to the commutation methodology.
 22. Some further communication took place regarding the discretionary increases but the matter remained unresolved and the Trustee recommended Mr E use the Internal Dispute Resolution Process to progress the matter.

23. Mr E raised his complaint under Stage 1 of the Internal Dispute Resolution Procedure (**IDRP**) on 12 February 2019, making the following points:-

- He thought the Trustee had acted in an “underhand way” in not explaining that the PCLS would be taken primarily from the parts of his “pension pot” which received a guaranteed annual cost of living increase.
- This meant his expectation of an annual increase was now incorrect.
- He felt the pension provider was “hiding” information from members to the financial advantage of the Plan, rather than looking after the membership, who had paid into the Plan for decades.
- He noted that nothing had been done to correct the situation during the 2018 Plan review.
- He sought either a retrospective amendment so that the lump sum payment was first taken from the pre 1997 part of his pension or for the Trustee to pay the same annual cost of living increases to the pre 1997 part of his pension as was being paid to the post 1997 part of his pension.

24. The Trustee provided its Stage 1 IDRP response on 4 April 2019. The Trustee did not uphold the complaint, saying:-

- The Trustee is obliged to administer the Plan and pay members’ benefits in accordance with the Plan’s Rules.
- Under the Rules, the Trustee has the discretion to set the basis on which PCLS commutation is offered to members.
- The Trustee consulted with its advisers before changing the basis on which PCLS commutation was offered to members. This change was noted in the 2011/12 report.
- The Trustee had therefore acted properly and in accordance with the Rules when it decided to change the commutation basis.
- The Trustee considers whether, or not, to award a discretionary increase on the relevant portion of the pension on an annual basis, in accordance with the Rules.
- As the Trustee had acted properly and according to the Rules, there was no basis for awarding Mr E a greater level of increase to his pension in payment.

25. Mr E did not accept the Trustee’s response and appealed under Stage 2 of the IDRP on 8 April 2019, reiterating his previous points of complaint. He also asked:-

- What was the basis for the Trustee’s discretion and what direction was given to the Trustees regarding their discretion?

- What constituted a proper decision-making process, who was involved, what was the aim of the process, why was it necessary, who agreed the final outcome and who from Nissan “bought off the result”?
- The Trustee resolved to change the basis on which PCLS commutation was offered to members and Mr E asked, why was it changed, what was changed, why were the members not informed of the change at the time it was made, why were members not informed of the change on receipt of their pension offers, and had the Trustee done anything since his retirement in 2016 to inform members of this change?
- Why had the recent Plan changes not included any consideration for pensioners who had retired but were not told about the changes?
- Would the Trustee implement any actions necessary to remedy the situation which had been caused by the changes made by the Trustee?
- He wanted the Trustee to consider potential remedial action including retrospectively amending the source of the PCLS or giving cost of living increases to the pre 1997 tranche of benefits in line with those made on the post 1997 tranche.

26. The Trustee issued its Stage 2 IDRPs response on 24 May 2019 saying:-

- The Plan’s Trust Deed and Rules allowed members to elect to receive a cash lump sum in lieu of part of their annual pension. The basis for providing this lump sum, known as commutation, was set out in the Rules.
- There was a provision in the Rules for the Trustee to vary the commutation basis from time to time, if certified as reasonable by the Plan’s Actuary.
- The Trustee undertook an actuarial review in 2011 and adopted a new PCLS commutation basis which changed from commuting pre 1997 pension first to commuting post 1997 pension first.
- This new basis and amended commutation factors gave members “a greater lump sum and pension at retirement than they would receive if pre 1997 pension continued to be commuted first”.
- As the Plan’s Actuary had certified that this change was reasonable, the Trustee had implemented it following the 2011 review.
- Mr E was in receipt of the correct benefits to which he was entitled under the Plan’s Trust Deed and Rules.
- The Trustee was not obliged to notify members of changes to the PCLS commutation basis. However, it noted that, before retirement, Mr E had been supplied with a benefit illustration showing the three options available to him if he

took early retirement. This illustration had demonstrated the impact each option had on the split of his pension for pension increase purposes.

- It noted that in June 2015 Mr E had a conversation with the Pensions Manager during which he had indicated his unhappiness that the increasing part of his pension would be commuted for a PCLS before the non-increasing part of his pension. He was therefore aware before he elected to take the maximum PCLS that it would be commuted first from his post 1997 pension.
- It provided a response to the questions Mr E raised as set out in paragraph 25, as follows:-
 - The basis for the Trustee's discretion is the Plan's Trust Deed and Rules.
 - The Trustee takes account of all relevant factors and seeks expert advice when required before making decisions. All decisions are made by majority vote.
 - The Plan's Actuary advised undertaking a review of the Plan's actuarial factors in line with good practice. After the review, the Plan's Actuary advised that the previous commutation factors were no longer appropriate and a new PCLS commutation basis was adopted following a proper decision-making process, including obtaining expert advice from the Plan's Actuary.

27. Mr E's complaint was not upheld.

Adjudicator's Opinion

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

- The Plan Rules conferred power on the Trustee to amend the PCLS commutation basis. The Trustee had subsequently changed the PCLS commutation basis, which resulted in the greater part of the PCLS being taken from post 1997 accrued benefits. The Trustee had informed the membership of this change in a timely manner
- The Adjudicator concluded that the Plan changes were permissible and that suitable communication had been provided by the Trustee.
- Some months prior to his retirement, Mr E was given an illustration showing three options for his retirement, together with information on the pension splits for pension increase purposes. He also had a face to face meeting with the Pensions Manager before he finalised his retirement choice, during which the effect on his pension in payment of taking the maximum PCLS was discussed.

- The Adjudicator concluded Mr E had been sufficiently informed about the change in the PCLS commutation basis before he made his retirement choice, so he was able to make an informed decision on which option he wanted to take.
- The Trustee had confirmed that the change in the PCLS commutation basis meant Mr E received a substantially higher PCLS than would otherwise have been the case.
- Mr E was only entitled to the benefits he was already receiving, including the statutory annual increases and any discretionary annual increases that might be paid.

29. The Trustee confirmed it accepted the Adjudicator's findings, but Mr E did not, so the complaint was passed to me to consider. Mr E provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr E.

30. A summary of Mr E's further comments are as follows:-

- There was no suitable communication given to members about the change in PCLS commutation basis and how this would impact them.
- He considered the change to the PCLS commutation basis was of material significance. Nissan or the Trustee had a duty to consult members, so a formal consultation period of not less than 60 days' duration should have been instituted.
- Similarly, he believed the duty to ensure the proper funding of the Plan was not conducted appropriately since he believes there was no evidence of a consideration of the requirement to support current pensioners, who would be affected by such a significant change.
- He had not sought a discretionary increase but was complaining about the fact that such a significant change as the PCLS commutation basis had not been communicated to members.
- The subsequent removal of discretionary increases was carried out in an unfair and "underhand method".
- Such increases would not need to be required for all pensioner members but rather would be necessary only for long-serving members who were employed prior to 1997.
- Prior to making his choice of PCLS and pension, he had sought advice from retired colleagues and had felt reassured by the information these pensioner members had supplied regarding the choice of which option to take for his pension benefits.

- He believed the Adjudicator's point about being offered choices was flawed, as he would have required professional help to interpret these choices, which he did not seek as he was unaware of the change to the PCLS commutation basis.

31. The Adjudicator responded to Mr E's further points as follows:-

- She disagreed that the Trustee had a duty to offer a formal consultation period regarding the decision to change the PCLS. Matters such as discretionary increases, the commutation basis and funding the Plan were considered routinely each year after consultation between the Trustee and the Plan's Actuary. The Trustee had discharged its duties by making an announcement about changes to the PCLS commutation basis in the 2011/2012 Trustee's Annual Report.
- Mr E contended that, for fairness, discretionary increases could be given to only the small group of long serving pensioner members with pre 1997 benefits. The Adjudicator concluded that it would be unlikely that the Trustee would selectively pay discretionary increases. It would be more likely that a pension scheme trustee would choose to pay all pensioner members such increases rather than only some pensioner members.
- She had considered the evidence and concluded that Mr E was sufficiently informed about the effects of taking the maximum PCLS before he made his decision on the arrangement of his benefits at retirement, even if he did not fully appreciate the implications. This included the face to face meeting with the Pensions Manager, where Mr E had the opportunity to discuss his pension options before making any decisions.
- Mr E could only receive the overall benefit that his length of service and Plan membership entitled him to receive. The Adjudicator also pointed out that Mr E could have chosen an alternative retirement option if he had concerns about the pension increases in payment or regarding the effect of taking maximum PCLS. She confirmed that receiving the maximum PCLS meant Mr E would receive less pension in payment.
- She noted Mr E's point about being in poor health, but concluded that, even had he fully understood the implications of the new PCLS commutation basis, he would still likely have opted to take the maximum PCLS available at retirement. She conceded, however, that there was no way to know now with certainty what he would have done in 2016.
- She confirmed that her Opinion remained that the matter could not be upheld.

Ombudsman's decision

32. Broadly speaking, after a member reaches their State Pension Age, a scheme must increase the member's pension at different rates, depending on when the benefits were accrued. Increases to the following benefit tranches are required by legislation:

- GMP built up from 6 April 1988 to 5 April 1997 (**Post 99 GMP**).
 - Any pension built up after 6 April 1997.
 - Any pension built up after 6 April 2005.
33. A scheme does not have to increase any benefits accrued before 6 April 1997, except for the relevant GMP element. Any increases above these levels are generally set out in a scheme's rules or paid on a discretionary basis. Where such payments are discretionary, a scheme has no obligation to continue to make or apply these increases.
34. Mr E joined the Plan in 1985, so his pension accrued over 12 years under the pre 6 April 1997 regime. This means that almost half of his pension in payment is subject to discretionary increases only, and no such increase has been paid since Mr E's retirement in 2016.
35. I understand that Mr E feels it was unfair of the Trustee to change the PCLS commutation basis so that the post 1997 benefits were commuted first. However, the Trustee has stated that this change was implemented after consultation with the Plan's Actuary and it offered the opportunity to take a larger PCLS. The Trustee's Report also noted that notification had been made which could reasonably be considered to have informed members of the position.
36. The Plan is governed by the Nissan Pension Plan.
- Schedule 1, Rule 19, Amendment of Rules, provides:-
 - "The Trustees and the Principal Company may from time to time amend all or any of the provisions of the Rules in the manner provided by the Definitive Trust Deed."
 - The Definitive Trust Deed states under Operative Clauses, Number 2, Trustee Powers:-
 - "The Trustees shall hold the Fund upon the trusts and with and subject to the powers in this Deed and the Rules and may do all such other acts and things as may seem to them expedient or necessary for the support and maintenance of the Plan and the benefit of the Members." And
 - Alteration of Deed and Rules, Number 12 provides:-
 - "The Principal Company and the Trustees may from time to time without the concurrence of the Members alter or add to the terms and provisions of the Rules and the trusts, powers and provisions of the Deed whether retrospectively or otherwise. The Principal Company and the Trustees shall forthwith declare such alteration or addition in writing under their hands or (in the case of an alteration or addition to this Deed) by further deed and the Deed and/or Rules shall stand amended accordingly..."

37. Having considered the Trust Deed and Rules, I find that the Trustee has the right to make amendments to the PCLS commutation basis without the need for prior consultation with the membership.
38. I consider the Trustee has the power to implement Plan changes and that the Trustee communicated the fact that changes were being made to the membership in good time.
39. I am also mindful of the responsibility Nissan and the Trustee have to ensure the viability of the Plan now and in the future, in order to be able to provide the guaranteed benefits to current and future pensioner members. If the Trustee, having consulted with the Plan Actuary, concludes that a discretionary payment is unaffordable, then there is no obligation to make such a payment.
40. An illustration of future benefits and options in retirement was sent to Mr E on 29 October 2014, more than a year before he retired. Mr E was provided with this information and he also had a discussion with the Pensions Manager regarding the PCLS commutation basis, I consider that Mr E knew, or could reasonably have known, at the outset, what proportion of his pension in payment was going to come from each tranche of pension. It is reasonable to conclude, on the balance of probability, that Mr E was informed about what increase, if any, would accrue for each tranche before he made his retirement choices.
41. Accordingly, I find that sufficient information was provided for Mr E to have ascertained exactly what was on offer before he made his retirement choice. He also had the opportunity of consulting with the Pensions Manager before he made his choice.
42. Mr E has received a substantial PCLS, which had increased as a result of the change to the PCLS commutation basis. Almost half of the residual pension in payment will receive a statutory increase each year. While the balance will only receive a periodic discretionary increase, Mr E was made aware of this prior to retiring.
43. I do not uphold Mr E's complaint.

Anthony Arter

Pensions Ombudsman
25 February 2021