

Ombudsman's Determination

Applicant	Mrs E
Scheme	Avis UK Pension Plan (the Plan)
Respondents	Avis Budget Group (the Employer)
	XPS Administration (the Administrator)
	Avis Pension Trustee Limited (the Trustee)

Outcome

1. I do not uphold Mrs E's complaint and no further action is required by the Employer, the Administrator, or the Trustee.

Complaint summary

2. Mrs E's complaint is that her Plan benefits have been actuarially reduced for early payment. She believes that, after the Barber Judgment¹, the Trustee has incorrectly increased the normal retirement date (**NRD**) for her pre-Barber benefits.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. From 18 August 1986, Mrs E was in the service of the Employer. By virtue of Mrs E's employment, she was a member of the final salary section of the Plan, an occupational defined benefit arrangement, with an NRD of 60 for women, and 65 for men. This was in line with the state pension ages for both men and women at the time.
5. The Plan is administered in accordance with the Avis UK Pension Plan Trust Deed and Rules (**the Rules**). The Rules currently state that a member of the Plan's NRD is:

¹ Barber v Guardian Royal Exchange (European Court of Justice) – 17 May 1990 - Sackers

“...the 65th birthday of the Member or such other date as the Principal Company, in consultation with the Trustee may agree with the Member”.

6. Rule 8.1 states:

“The Trustees may, with the consent of the Principal Employer, at any time by deed, alter, extend or modify all of any of the trust's powers of provisions of this Definitive Trust Deed or the Rules. Any such alteration or modification may have retrospective effect.”

7. Rule 8.2 provides:

“8.2 This Definitive Trust Deed and Rules shall not be altered or modified in any way which would:

8.2.1 or might adversely affect any subsisting right of any Member or any survivor of a Member within the terms of section 67 of the PA 1995 (as amended) unless the requirements prescribed by that Section are met;

...

8.2.4 in the opinion of the Actuary, operate substantially to prejudice the pension payable to any Member or other person who is at the effective date of such alteration or modification entitled to a pension under the Plan...”

8. See appendix 1 for relevant extracts of the Pensions Acts 1995 (as amended) (**the 1995 Act**).

9. On 17 May 1990, the European Court of Justice (**ECJ**) delivered its decision in regard to Barber v Guardian Royal Exchange. The ECJ held that the concept of "equal pay for equal work" was enshrined in the Treaty of Rome under Article 119. This applied to benefits derived from an occupational pension scheme. Briefly, the decision prohibited any discrimination relating to the payment of pension benefits whereby age conditions differed between men and women from a contracted-out arrangement.

10. From 17 May 1990, pension schemes were required to equalise the benefits of men and women going forward (**the Barber Window**). In most cases, the Barber Window could only be closed after amendments were made to a scheme's applicable rules/regulations. In Coloroll Pension Trustees Ltd v Russell [1994], it was held that during the Barber Window, the less favoured class must be given benefits awarded to the favoured class. Where a scheme has an NRD of 65 for men and 60 for women, during the Barber Window:

- the NRD is equalised to 60 for both men and women, a process known as levelling up; and
- thereafter, the NRD is equalised to 65, known as levelling down.

11. On 15 November 1990, the Trustee wrote to the Plan members and explained:-

- From 1 January 1991, amendments would be made to the Plan, in particular the NRD for men and women would be equalised to age 65. This provided both women and men the opportunity to accrue additional pension benefits up until their NRD.
- After 1 January 1991, men or women who wished to retire between the age of 50 and 60, could do so with the Employer's consent. Thereafter their benefits would be calculated up until the equalised NRD of age 65, using pensionable service, final pensionable salary, and state adjustment applicable at the date of retirement. An actuarial reduction of 3% would then be applied for each year the benefits were taken before age 60.
- For men and women who took early retirement between ages 60 to 65, with the Employer's consent, their benefits would be calculated the same way as a normal retirement pension, but without a reduction.
- By implementing these changes, the Plan benefits, at retirement, would be calculated in the same way for men and women.
- Included within the letter were copies of planned amendments that were due to be made to the Plan booklet. Members were encouraged to keep copies of these amendments in their current booklets until a new Plan booklet was published.

12. The amendments to the booklet said:

"The Normal Pension Age when Plan benefits become payable is 65 for male and female members. However, with the [Employer's] consent you may retire at any time after your 50th birthday. If you retire at or over age 50 and before age 60 your pension will be actuarially adjusted to take account of this.

...

Both men and women must retire at age 65 (or earlier see 11.4) unless the Company agrees otherwise. If you do retire after age 65 your Avis pension will be calculated as at Normal Pension Age and will then be actuarially increased to take account of late payment. Payment will commence when you do retire."

13. On 23 November 1992, the Rules were updated to equalise the NRD for men and women to age 65. Subsequently, from this date, the Barber Window was closed for the Plan.
14. On 21 December 1992, the Employer made Mrs E redundant and her benefits in the Plan were deferred. On the same day, the Plan's former administrator sent Mrs E a deferred benefit statement which said that when she reached her NRD, in October 2020, at age 65, she would be entitled to a yearly pension which was currently worth £3,143.49.
15. In April 1993, the Trustee sent the Plan members an updated copy of the Plan booklet which included the amendments outlined in the 15 November 1990 update.

16. On 1 January 1996, the 1995 Act incorporated Article 19, of the Treaty of Rome, into UK law. Regulation 62 of the 1995 Act stated that all occupational pension scheme rules must contain an equal treatment rule if they did not already. From that point onwards, the Barber Window for all UK pensions schemes was closed, unless schemes had already implemented amended rules to equalise the NRD/benefits between men and women at an earlier date.
17. On 8 July 2009, the Court of Appeal delivered its decision in *Foster Wheeler v Hamley*. Subsequently, the Trustee obtained advice from its legal counsel on the potential ramifications of this judgment. Brief details of the *Foster Wheeler v Hamley* case is set out below:-
 - the Trustees of the Foster Wheeler Plan closed the Barber Window on 16 August 1993, prior to that date men and women held different NRDs. Thereafter, the Trustees continued allowing early retirement, without applying any reduction for benefits taken between ages 60 and 65 for active members of that Plan.
 - In 2003, a deficit was identified, and the Foster Wheeler Trustees revised their early retirement rules to allow a reduction to be applied for benefits taken between ages 60 and 65.
 - Initially, the High Court said that the Foster Wheeler Trustees should pay members their full benefits on retirement from age 60 onwards. However, the Foster Wheeler Trustees argued that this would result in a windfall for those with mixed NRD's as they would receive benefits to which they were not entitled.
 - The Trustees appealed to the Court of Appeal, who decided that the Foster Wheeler Trustees should pay member benefits on retirement, but if members with an NRD of age 65 claimed their benefits earlier, a reduction would be applied. This meant members with mixed NRDs were included under the deferred early retirement provisions of the scheme, and any non-Barber Window benefits could be reduced for early payment.
18. Between 2009 and 2012, the Trustee continued to obtain advice from its legal counsel and the Plan Actuary on the equalisation practices of the Plan.
19. In early 2019, Mrs E contacted the administrator to request a retirement illustration for October 2019, when she would reach age 64. She also queried the effects of the Barber Judgment on her benefits and what her NRD should be.
20. On 5 February 2019, the Administrator wrote to Mrs E and explained that the Barber Judgment meant that the NRD for men and women needed to be equalised. This was achieved on 23 November 1992 when the Barber Window was closed. It provided her with a copy of the deferred leavers statement which made clear that her NRD was age 65. For female members with benefits in the Barber Window, a calculation was carried out, at the point of retirement, to apply an uplift (**the Underpin**). This was to ensure their benefits were not negatively affected during the Barber Window.

21. On 12 March 2019, the Administrator sent Mrs E a retirement illustration for October 2019 (**the Illustration**). It explained that, as a result of equalisation, her retirement benefits as of October 2019, had been uplifted by £268.40. She could elect to claim a full yearly pension of £5,854.08, or she could take a tax-free lump sum of £26,801.85, with a reduced annual pension of £4,020.36.
22. On 25 March 2019, Mrs E submitted a complaint under stage one of the Plan's Internal Dispute Resolution Procedure (**IDRP**). She explained that:-
- The Rules were not amended to equalise the NRD for men and women until 23 November 1992. She believed that her pensionable service, from 18 August 1986 to 22 November 1992, should have had an NRD of age 60. Thereafter, her NRD would have been age 65 for the remainder of her pensionable service.
 - She was 60 in October 2015; however, she wished to claim her Plan benefits from October 2019, when she turned age 64. Consequently, she believed that she was entitled to a late retirement uplift, of four years, on the portion of her benefits with an NRD of age 60.
 - Based on the Illustration, it appeared that she was only being offered an uplift of £268.40 per year in recognition of her equalised NRD. She had taken independent financial advice and she believed that an uplift of 20% should have been applied to her annual pension.
23. On 21 May 2019, the Trustee provided its response under stage one of the Plan's IDRP and did not uphold Mrs E's complaint. The Trustee said that:
- extensive legal advice was obtained in order to equalise the NRD for men and women's benefits post 17 May 1990;
 - a check was carried out for members who had pensionable service in the Barber Window;
 - this was to ensure that "the amount of pension provided to the member at the point of crystallisation is at least as great as that required by equalisation"; and
 - this check was correctly applied to the Illustration she received as the Underpin had been applied uplifting the pension by £268.40.
24. On 26 September 2019, Mrs E asked for her complaint to be considered under stage two of the Plan's IDRP. She said that, in her view, the correct way to calculate her Plan benefits was to revalue her deferred pension up until the current date. Thereafter an actuarial late retirement uplift should be applied to all of her pre-23 November 1992 benefits to account for the fact that it had been four years since she had reached age 60, in October 2015. She believed an appropriate late retirement uplift of 1.2 should have been applied to her revalued deferred pension "£5,960.03 x 1.2 = £7,152.07".

25. On 18 February 2020, the Trustee responded to Mrs E under stage two of the IDRPs and said that it did not accept her complaint, as her benefits were correctly calculated in accordance with the Rules. The Trustee said:-

- Extensive legal and actuarial advice was obtained before the Rules were amended to accommodate the Barber Judgment.
- As a result, a generous equalisation practice was adopted which, in many cases, resulted in members being paid in excess of the minimum requirements for equalisation.
- On 23 November 1992, the Rules were amended to equalise the Plan's NRD to age 65 for men and women.
- When calculating a retirement/transfer quotation, a check was undertaken to ensure that the benefits payable were no less than what was required under the minimum equalisation criteria. This check was correctly applied to her retirement Illustration by implementing the Underpin.
- The early and late retirement factors were set and regularly reviewed by the Trustee, in accordance with advice obtained from the Plan Actuary. These factors were applied equally across the membership, and they were not negotiable.

Mrs E's position

26. Following the complaint being referred to The Pensions Ombudsman, Mrs E made further submissions that have been summarised in paragraphs 27 to 31 below.
27. During the course of her complaint with the Trustee, she was never provided with a breakdown of how the Illustration was calculated when taking into account the Barber Judgment.
28. She accepted that her NRD was age 65 for any benefits that she accrued after the Barber Window was closed. This amounted to about 20 days of pensionable service from 23 November 1992 to 21 December 1992. So, it was correct that this period of service should attract an early retirement reduction if she took her Plan benefits in October 2019, when she turned age 64.
29. In the Court of Appeal decision, *Foster Wheeler v Hanley* [2009], Lord Justice Lloyd said:

"Thus, a member who has NRD60 rights is entitled, as it seems to me, to retire at or after 60 (even though before 65) as of right, as regards the NRD60 part of his or her pensionable service. The fact that, after equalisation, the member's rights appear to be based on a normal retirement age of 65 obscures the fact that for some of the past service the NRD was 60, and the right to take the pension attributable to that service at or after 60 cannot be overridden by any rule of the scheme. . . After 17 May 1990 female employees have both rights which do not depend on Barber and additional rights by virtue

of Barber; after equalisation they still have the same rights, as regards service before Barber and during the Barber window, and they are entitled to exercise those rights without qualification. If a female member who reaches the age of 60 after equalisation wishes to retire at that age, she is entitled to do so as of right, for all her service before equalisation. Only as regards later service would any question of early retirement arise.”

30. In *Safeway v Newton* [2020], the Court of Appeal held that “even when the rules of a pension scheme confer a power, as a matter of domestic law, permitting adverse changes to be made to members’ benefits retrospectively”.
31. Based on previous case law, she did not agree that amending the Rules on 23 November 1992, allowed the Trustee to retrospectively increase her NRD to age 65 for pre-17 May 1990 service. Section 67 of the 1995 Act, required that the Trustee obtain the member’s consent before implementing any amendments that might affect their subsisting rights in the Plan, which the Trustee did not.

Adjudicator’s Opinion

32. Mrs E’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Employer, the Administrator, or the Trustee. The Adjudicator’s findings are summarised below:-
 - The Trustee had obtained advice from its Legal Counsel and from the Plan Actuary before any amendments were made to the Rules and subsequently to the members’ NRD. Thereafter, the Underpin was implemented for all female members of the Plan with benefits in the Barber Window. Based on the information available, the Underpin on Mrs E’s benefits, if taken in October 2019, resulted in an uplift of £268.40 to her annual pension.
 - It was understandable that there was confusion in regard to what elements of Mrs E’s benefits attracted an NRD of age 60 or age 65. The Barber Judgment did not impose any requirements on how benefits earned prior to 17 May 1990 had to be treated, nor how equalisation had to be achieved to end the levelling up period from 17 May 1990 onwards. The levelling up period being within the Barber Window while it was open.
 - The Rules were amended on 23 November 1992, subsequently closing the Barber Window for the Plan. Between 17 May 1990 and 23 November 1992, Mrs E’s benefits had an NRD of age 60, with an Underpin. Any benefits Mrs E accrued outside of the Barber Window held an NRD of age 65. The increase to the Plan’s members’ benefits, pre-17 May 1990, was in order for the Plan to achieve equalisation.
 - The Adjudicator was satisfied that the approach taken by the Trustee was consistent with the requirements of equalisation. That was, to achieve equalisation, the Trustee levelled down the members’ pre-17 May 1990 benefits

by amending the NRD to age 65. During the Barber Window, the members' benefits were levelled up, thereafter the Rules were amended on 23 November 1992, and the members' benefits were again levelled down by implementing an NRD of age 65 for men and women.

- There was nothing to suggest that the Illustration did not correctly outline Mrs E's entitlement for retirement in October 2019. It was correct that an actuarial reduction needed to be applied to the accrued benefits outside of the Barber Window to account for Mrs E retiring before her NRD of age 65.
- In *Foster Wheeler v Hanley* [2010], the Court of Appeal considered the process of paying benefits when active members held a mix of NRD's of age 60 and age 65 due to the Barber Window. The circumstances behind that Judgment differ slightly to that of Mrs E's. That is, the Foster Wheeler Plan offered early retirement, without a reduction, for active members affected by the Barber Judgment retiring between the ages of 60 and 65. This was until a deficit was identified making the practice unmanageable. The ramifications of that case were that actuarial reductions could be applied to the non-Barber element of a members' benefits if they retired between ages 60 and 65.
- In *Safeway v Newton* [2020], the scheme issued a notice on 1 December 1991, announcing to the members a single NRD of age 65. The scheme rules were amended to reflect this on 2 May 1996. The Court of Appeal decided that the Safeway pension scheme's Barber Window was closed as of 1 January 1996, the date on which section 62 of the 1995 Act, implemented the equal treatment rule. This was despite the scheme rules only being amended on 2 May 1996. This was due to the rules containing a power of amendment allowing for a retrospective amendment.
- Consequently, the Adjudicator did not agree with Mrs E's belief that *Foster Wheeler v Hanley*, nor *Safeway v Newton*, prevented the Trustee from amending the Rules in order to change the NRD to age 65 for pre-17 May 1990 benefits.
- Mrs E's references to section 67 of the 1995 Act, is not applicable as that rule was only introduced on 6 April 1997. By that time, the Trustee had already amended the Rules and closed the Barber Window, effective from 23 November 1992. Section 67 of the 1995 Act could not be applied retrospectively in the way that Mrs E had suggested it could.

33. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mrs E, which are:-

- She believed that her Plan benefits, for retirement in October 2019, were incorrectly calculated in regard to the equalisation of pension benefits between

men and women. That is, the subsisting rights contained within all applicable UK and EU case law.

- As a result of the increase of her NRD from age 60 to age 65, for the benefits she had accrued pre-17 May 1990, she would likely suffer a loss of pension income of £15,287.59. See appendix 2 for a summary of how Mrs E calculated this figure.
- She did not agree that she was entitled to the same level of benefits, albeit with a later NRD. This was demonstrated by the 10% reduction (see appendix 2), that she would suffer, as the lifetime value of her pension would reduce. This was because she may not receive it for as long as she could have if her NRD remained age 60, for the pre-17 May 1990 benefits.
- If the Barber Judgment did not provide for how the pre-17 May 1990 benefits should be treated, then the Trustee's decision to increase the NRD to age 65, for benefits accrued prior to the Barber Widow, was an intentional action. It would be reasonable to infer that the Trustee had disadvantaged the Plan's female members (which she believed amounted to 70% of its members) with this amendment, and thereby was not acting in accordance with its fiduciary duties.

Ombudsman's decision

34. As I understand it, Mrs E's contention is in respect of the decision to increase the Plan's NRD from age 60 to age 65 for all pre-17 May 1990 benefits, following the Barber Judgment. A change that has only affected female members of the Plan.
35. Mrs E has submitted that section 67 of the 1995 Act, should prevent the Trustee from making any changes that affect the members' subsisting rights under the Plan, without seeking their consent to do so.
36. I will not repeat the process which the Trustee undertook in equalising the Plan's NRD between men and women. I am satisfied that the Adjudicator has accurately outlined how equalisation was achieved, within the Plan, and that it was in line with the requirements of the Barber Judgment. I will, however, consider whether Mrs E's subsisting rights were affected by the retrospective changes the Trustee made to the benefits she accrued prior to 17 May 1990.
37. Rule 8.1, of the Rules, provided the Trustee with the necessary power, with the consent of the Employer, to amend the Rules as and when required. Rule 8.1 also states: "Any such alteration or modification may have retrospective effect". So, the Trustee was also provided with the power to retrospectively implement any changes made to the Rules. In this case, the Trustee retrospectively equalised the members' pre-17 May 1990 NRD to age 65. Otherwise known as levelling down. So, I am satisfied that the Trustee, at the time, acted within the scope of the powers provided by the Rules.

38. That being said, despite the powers provided to the Trustee by the Rules, the Trustee is still required to act in accordance with wider UK pensions legislation, which in all cases takes precedence over the Rules.
39. As Mrs E has correctly said, Section 67 of the 1995 Act limits the extent to which the Trustee can make amendments in regard to a member's "subsisting rights". In general terms, "subsisting rights" provisions under section 67 of the 1995 Act limits any power of amendment that would adversely affect the entitlement or accrued rights of any member of an occupational pension scheme, other than a public service pension scheme.
40. Subsection 3 of section 67 of the 1995 Act provides that, before the Trustee can implement any amendments that affect a members subsisting rights, they must satisfy themselves of the "certification requirements", or that the "requirements for consent", were met in respect of the members.
41. Based upon the criteria outlined in section 67, the Trustee would have been required to receive the consent of the members before it could apply any retrospective changes to the pre-17 May 1990 benefits. However, in respect of changes made prior to section 67 of the 1995 Act, the legislation does not require Mrs E, or the other members' consent to implement the NRD changes.
42. Section 67 of the 1995 Act was not brought in until 6 April 1997. It is not retrospective and can only be applied from 6 April 1997 onwards. So, as the Adjudicator has correctly said, section 67 of the 1995 Act is not relevant to Mrs E's case. I am satisfied that the steps taken by the Trustee are not in breach of statute law. Consequently, the Trustee, up until 6 April 1997, had the necessary power in the Rules to retrospectively amend the Plan's pre-17 May 1990 service's NRD to age 65.
43. I appreciate the lengths Mrs E has gone to in demonstrating the financial consequences she believes she will suffer due to the increased NRD to age 65, for the pre-17 May 1990 benefits she had accrued. However, I am unable to consider any financial loss when there is no identifiable evidence of maladministration, nor a breach of any overriding legislation. Consequently, Mrs E's perceived loss is notional and amounts to a loss of expectation.
44. I appreciate that this will not have been the outcome that Mrs E was hoping for. However, the Trustee has acted in accordance with the Rules, and is not in breach of section 67 of the 1995 Act. If Mrs E wishes to claim her pension from the Plan, she should contact the Administrator. As she is over the age of 65, she will not be subject to any form of actuarial reduction.
45. I do not uphold Mrs E's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman

29 April 2024

Appendix 1

46. Relevant extracts of the Pension Act 1995 (as amended)

Section 67 of the 1995 Act, restriction on powers to alter schemes, provides:

“(1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.

(2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.

(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—

(a) the trustees have satisfied themselves that—

(i) the certification requirements, or

(ii) the requirements for consent,

are met in respect of that member, and

(b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.

(4) In subsection (3)—

(a) “the certification requirements” means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before the power is exercised, and

(b) “the consent requirements” means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies.

(5) Subsection (2) does not apply to the exercise of a power in a prescribed manner.

(6) Where a power to which this section applies may not (apart from this section) be exercised without the consent of any person, regulations may make provision for treating such consent as given in prescribed circumstances.”

Appendix 2

47. Mrs E's formula for how she had been negatively affected by an increase to her NRD:

"MEMBER A - who leaves Avis on 21 November 1992, with NRA of 60

MEMBER B - who leaves Avis (as I did) on 21 December 1992, with NRA of 65

"MEMBER A"

Leaving service on 21 November 1992. NRA of 60

Member A, a female with date of birth 19 October 1955, starts pensionable service with Avis on 18 August 1986, with an NRA of 60. Avis Pension Plan rules were changed to equalise male/female NRAs to 65 on 22 November 1992. The day before this happens, *Member A* has completed 75 months service, and has a forecast pension of approximately* £3,102.00 (plus statutory revaluation index (RPI/CPI) to 19 October 2015 when she reaches her NRA of 60.

From the revaluation index numbers provided by Dee Bretnall (Sec. To Avis Trustees - 20 June 2019) the annual value of this deferred pension at age 60 in 2015 projected to £5,519.95.

Based on the Office of National Statistics calculator, at age 60, *Member A* has an average expectancy of living till age 87, meaning that in 27 years of retirement she would receive total pension benefits of £5,519.95 x 27 = **£149,038.76** (ignoring payment indexation)

*Note: Avis Trustees did not provide a deferred pension forecast for 21 November 1992. But exactly one month later, on 21 December 1992, after 76 months' service they provided a valuation of £3,143.47. The theoretical value of *Member A*'s pension at 21 November 1992 must therefore be approximately $75/76 \times £3,143.47 = £3,102.11$

"MEMBER B"

Leaving service on 21 December 1992. NRA of 65

Avis provided at statement of pension at actual date of *Member B*'s leaving service, payable at NRA of 65 of £3,143.47

From the revaluation index numbers provided by Dee Bretnall (Sec. To Avis Trustees - 20 June 2019) the annual value of this deferred pension at age 65 in 2020 projected to £6079.60.

Based on the Office of National Statistics calculator, at age 65, *Member B* also has an average expectancy of living till age 87, meaning that in 22 years of

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retirement she would receive total pension benefits of £6079.60 x 22 =
£133,751.17 (ignoring payment indexation)."