

## Ombudsman's Determination

Applicant	Mr N
Scheme	Airdrie Savings Bank Pension Scheme ( <b>the Scheme</b> )
Respondents	Phoenix Life Ltd ( <b>Phoenix</b> ) Dalriada Trustees Limited ( <b>the Trustee</b> )

## Outcome

1. Mr N's complaint against the Trustee is partly upheld. To put matters right, the Trustee shall pay Mr N £500 for the significant distress and inconvenience he has experienced.
2. No further action is required by Phoenix.

## Complaint summary

3. Mr N complains that: -
  - Phoenix and the Trustee provided him with poor customer service in their interactions with him. He asserts that this caused him to suffer anxiety, which was instrumental in his decision to transfer from the Scheme, as he believed his benefits in the Scheme were at risk. He would like to be reimbursed for the fees he paid to his financial adviser (**IFA**), in relation to the transfer of his benefits.
  - The cash equivalent transfer value (**CETV**) of his benefits was incorrectly calculated, and he has incurred a financial loss as a result.

## Background information, including submissions from the parties

4. Mr N became an active member of the Scheme from 21 April 1980, and his normal retirement age (**NRA**) was 65. He was made redundant on 14 March 2018 and became a deferred member of the Scheme from that date. Airdrie Savings Bank (**the Bank**) was Mr N's employer and was the only employer in the Scheme.
5. On 26 March 2018, the Scheme's administrator at the time sent Mr N a preserved benefit statement (**the Statement**) informing him of the estimated benefits he could receive at his NRA. Under the heading: **Early Retirement** (original emphasis), in the Statement notes it said:

“You may currently apply to receive your benefits at any age on or after your 55<sup>th</sup> birthday.

If you wish to receive the benefits before your [NRA]/60<sup>th</sup> birthday, Trustee agreement may be required before any benefits can be paid. The pension will be reduced for early payment...”

6. On 8 August 2018, Mr N requested a CETV quotation (**the initial quotation**) of his benefits.
7. Between 7 September 2018 and 25 March 2019, there were exchanges between Mr N, Phoenix, the IFA and the Trustee, concerning Mr N being sent CETV and early retirement quotations, and the IFA being sent information.
8. On 12 September 2018, the Bank gave the Trustee notice that it no longer wanted to participate in the Scheme. The Scheme entered wind up with effect from the same date.
9. On 10 October 2018, the Trustee sent an announcement<sup>1</sup> concerning the Scheme (**the Announcement**) to the members of the Scheme. This informed members of a change to the Trustee Board and that the Scheme had entered wind up.
10. On 27 March 2019, Mr N complained to Phoenix and the Trustee. He provided a timeline of the events that had occurred<sup>2</sup> and in summary said:-
  - Their business processes were not aligned with best practices, nor the requirements of general data protection regulation (**GDPR**). It was not clear from any of the documentation which party he should have been dealing with in relation to the matters detailed in the timeline.
  - Their failure to reply to his requests had caused him needless stress and anxiety that his funds were “not in safe hands”. The fact that when pressed they could produce figures within a 30-day time frame did not remove his fear that something was wrong, and that his benefits may have been at risk.
  - Had the 30-day time limit been adhered to, the three months to accept the initial quotation would not have expired.
  - He also noted that the pension figure quoted on his early retirement quotation was approximately £2,000 per annum less than previously shown in his final employee benefit statement. It had always been the case that employees could retire at age 60 with full benefits, as detailed in the Scheme booklet<sup>3</sup>.
  - To resolve his complaint he requested:

---

<sup>1</sup> A summary of the Announcement is in Appendix 1

<sup>2</sup> This timeline is detailed in Appendix 2

<sup>3</sup> Relevant extracts of the Scheme booklet are in Appendix 3

- confirmation that the CETV on the initial quotation had been calculated on the basis that he was entitled to his benefits unreduced at age 60;
  - confirmation that the CETV of his benefits had not been reduced because the guarantee period of the initial quotation had expired;
  - assurance that they would respond to his advisers quickly and complete his transfer request without delay;
- and
- payment of compensation to cover his time and effort in dealing with this matter, together with the stress and anxiety he had experienced.

11. On 16 April 2019, Phoenix replied to Mr N's complaint. In summary it said:-

- Neither it nor the Trustee appeared to have received a formal Subject Access Request (**SAR**) from Mr N or his IFA. While Article 15 of the GDPR did not state that Mr N needed to specifically use the phrase "subject access request", he did need to make a clear request for a copy of all the data relating to him, held on file. It had been unable to locate anything relating to such a request.
- Pension law stipulates that a member is entitled to one CETV quotation every 12 months, which schemes have three months to provide. With reference to Mr N's request for the initial quotation, it noted that he had requested this on 8 August 2018.
- It had sent this CETV quotation to the Trustee on 10 September 2018, for it to be sent to him. On the same date, it received Mr N's 7 September 2018 letter; it subsequently tried to contact him by telephone and left a message.
- The Trustee had sent Mr N the initial quotation on 17 October 2018. So, this quotation was sent to him within the permitted three month deadline.
- It had then received a request for a further CETV quotation on 25 February 2019. Although Mr N's IFA had provided a cover letter with Mr N's details, the IFA had enclosed a letter of authority (**LOA**) for someone else. After informing the IFA of this oversight, it had received the correct LOA on 13 March 2019.
- Although the Scheme was only required to provide one CETV quotation in any 12 month period, the Trustee had authorised an additional quotation. This calculation was internally requested on 14 March 2019 and sent to Mr N by post on 29 March 2019. This was significantly before the statutory deadline of 13 June 2019, and before Mr N's letter of complaint was received.
- The Trustee had confirmed that it would be writing to Mr N directly, with details of the calculation basis used to produce his CETV.

- As it and the Trustee had adhered to the timelines prescribed in pension law, it would not offer a compensation payment. It apologised for any inconvenience Mr N had experienced.

12. On 17 April 2019, the Trustee responded to Mr N's complaint. In summary it said:-

- Phoenix was the administrator of the Scheme so it would respond to the majority of the points Mr N had raised. As Trustee, it was its responsibility to respond to Mr N's request for confirmation that his CETV had been calculated on a basis that full benefits were payable from age 60, without reduction for early payment.
- The benefits payable from the Scheme were in accordance with the governing Trust Deed and Rules as amended from time to time (**the Rules**). Historically and in common with many UK pension schemes, the Scheme had a different NRA for male and female members. Following a European Court Judgment on 17 May 1990 (**the Judgment**), it was necessary for all UK pension schemes to "equalise" retirement ages for male and female members.
- The NRA for the Scheme was amended with effect from 17 March 1998. However, because there was a gap between the date of the Judgment and the date the NRA was effectively changed, the Trustees had to ensure that, for that period, male members were not treated less favourably than female members. This meant treating the pension earned by both male and female members during that interim period as if it had a notional NRA of 60.
- Therefore, a male member's benefits were treated as follows:-
  - Pension in respect of pensionable service prior to 17 May 1990 – NRA of 65.
  - Pension in respect of pensionable service between 17 May 1990 and 17 March 1998 - NRA of 60 (**the Barber Window**).
  - Pension in respect of pensionable service on or after 17 March 1998 – NRA of 65.
- A deferred member of the Scheme could have elected to draw their benefits at age 60. For a male member any pension in respect of pensionable service outside the Barber Window, taken at age 60, would be reduced to reflect the fact that this was being paid five years early.
- There was provision in the Rules for unreduced benefits to be paid from the Scheme with the agreement of the Bank. The Bank was in the final stages of winding down and would at some point cease to exist. It was not agreeing to the payment of unreduced benefits.
- So, Mr N's benefits had been calculated in accordance with the Rules and the CETV was calculated in accordance with those benefits.



13. On 1 July 2019, Mr N complained to the Trustee through the Scheme's internal dispute resolution procedure (**IDRP**). A summary of his comments are detailed below in paragraphs 14 to 23.
14. Following his request for basic information concerning his benefits, Phoenix and the Trustee had conducted their interactions with him in a manner that caused him to believe his benefits were at risk. It also led to a complete breakdown of the relationship between him and them.
15. He felt his only option was to transfer his benefits out of the Scheme to "a place of safety." The long established practice of full benefits being paid at age 60 seemed to have been arbitrarily withdrawn, without notice or notification.
16. It took five attempts, between 8 August 2018 and 17 October 2018, to receive the initial quotation. When the response was received, it was dated 10 September 2018. There was no explanation for the delay. The initial quotation had a time limit of three months from the date of the letter, but more than a month had elapsed before he had received it.
17. There were inaccuracies in Phoenix's response to his complaint. He could not find any record of any attempt by Phoenix to contact him via his mobile or land line or that any message was left. Phoenix said the second CETV quotation was posted on 29 March 2019, which was before his complaint was received. However, Royal Mail tracking showed his complaint had been received by Phoenix on 28 March 2019.
18. He found Phoenix's comments on GDPR odd. It seemed to be saying that he could have all his data in 30 days, but if he only wanted part of his data, he could not get it.
19. Most seriously, letters referring to valuations of the fund including the Statement and CETV quotations contained no trading disclosure as required by the Companies Act. They also did not include any statutory status, as required by the Financial Conduct Authority (**FCA**). This was extremely concerning as either the funds were held outside UK jurisdiction or Phoenix had a complete disregard for UK laws and regulations.
20. Phoenix failed to comply with its own complaints procedure. His complaint letter of 27 March 2019 was not acknowledged, contrary to Phoenix's policy of acknowledging all complaints within five working days. He had to request details of the IDRP as Phoenix's response to his complaint did not include this information.
21. Phoenix delayed sending him letters. Two letters from Phoenix dated 5 April 2019, were post marked 29 April 2019. There were too many instances of administrative issues to be dismissed as rare clerical errors. Multiple instances of communications being ignored, delaying mail and apparent failure to comply with UK law and regulations were serious failings. This caused him worry and concern that his benefits were at risk. Had the administration been conducted in a professional manner and his benefits calculated without reduction, it is likely that he would not have decided to transfer his benefits from the Scheme.

22. It had been long established practice that members of the Scheme could retire with full benefits at age 60. Many members had in fact been encouraged to do so. During the Bank's winding down period, members were given verbal assurances that this would remain the case. The Statement also confirmed this. As he requested his benefits from age 60, neither the permission of the Trustee nor a benefit reduction was applicable in his case.
23. To resolve his complaint he thought it would be fair and reasonable for the Trustee to:-
- Recalculate his CETV on the basis that his benefits should not have been reduced, and he should be paid the difference.
  - Reimburse him his IFA fees of £10,460.70.
  - Compensate him for the stress and anxiety this situation had caused him.
24. On 8 August 2019, the Trustee replied to Mr N's complaint. It reiterated details of the Announcement and the chronology of events as detailed in Phoenix's letter dated 16 April 2019. It also reiterated the points Phoenix and the Trustee had made in their respective letters of 16 and 17 April 2019. The Trustee also made some additional comments, and these are detailed below in paragraphs 25 to 32.
25. Mr N's complaint appeared to be two-fold. These were:-
- (i) Administrative delays undermined his confidence in the Scheme to such an extent that he felt compelled to transfer his benefits from the Scheme.
  - (ii) His benefits should have been calculated by reference to his NRA being 60, so no reduction should have applied for early payment.
26. Although the initial quotation was sent to Mr N within the three month deadline of the relevant legislation, it accepted there was a delay in him receiving this quotation. However, it noted that Mr N did not base his decision to transfer on that quotation.
27. In May 2019, Phoenix received confirmation that Mr N wished to transfer his benefits from the Scheme. The document requesting settlement of the CETV asked what prompted the transfer, and the answer Mr N gave was "IFA". Mr N's CETV transfer was completed on 7 June 2019.
28. It is a legal requirement, when taking a transfer from a defined benefit (**DB**) scheme to a defined contribution arrangement, such as a personal pension, and the transfer value exceeds £30,000, that members take independent financial advice. It had not seen the advice Mr N's IFA had given him, but it was not aware that his IFA had asked any specific questions about the security of Mr N's benefits. Had the IFA requested a copy of the most recent triennial valuation of the Scheme, it would have established that the Scheme was in surplus on an ongoing funding basis at the valuation date.

29. It assumed Mr N would have provided a copy of the Announcement to his IFA, which informed members that their benefits would be secured in full, with an insurance company. Given the range of information made available to Mr N and his IFA over the period Mr N was considering the options available to him from the Scheme, it could not see how his confidence was undermined to such an extent that he felt compelled to transfer his benefits from the Scheme. So, it did not uphold this element of Mr N's complaint.
30. There is provision in the Rules for unreduced benefits to be paid from the Scheme with the agreement of the Bank. As the Bank was in its final stages of winding down and would have ceased to exist at some point, it had not, since the wind down process had begun, been agreeing to the payment of unreduced benefits.
31. The Trustee could not unilaterally increase the benefits payable from the Scheme, and the reality was that there was no employer who would fund increased benefits once the final wind up of the Bank was completed. That was the reason the Scheme was being wound up and the members' benefits being secured with an annuity provider.
32. Mr N's benefits and CETV had been calculated in accordance with the Rules. So, it did not uphold this element of Mr N's complaint.

### **Summary of Mr N's position**

33. Mr N said:-
  - Phoenix and the Trustee dealt with him in an unprofessional manner and failed to deal with "business as usual" enquiries. This caused him to believe that his benefits were at risk. This caused him needless anxiety and was instrumental in his decision to transfer his benefits from the Scheme.
  - He did not receive a suitability report from the IFA and the IFA had gone into receivership. He was a victim of mis-selling and was awarded compensation from the Financial Services Compensation Scheme (**FSCS**).
  - He did not believe the IFA had contacted Phoenix or the Trustee regarding his benefits. Given the short period of time between the transfer of his benefits and the IFA going into receivership, he suspected that the IFA was not working in his best interest. Instead, the IFA was working to achieve the maximum commission for himself.
  - The Trustee's assertion that the Scheme was in surplus and benefits would be placed with Phoenix was of little comfort, given the issues he had experienced. He had completely lost faith in their competence.
  - The way Phoenix and the Trustee had conducted themselves made him more receptive to the transfer proposal. They should be responsible for the difference between the compensation payment he received from the FSCS and his actual financial loss.

- His CETV was undervalued. It was always the case that members of the Scheme could retire at age 60 without their benefits being reduced. The Trustee is now claiming that this is not possible, despite issuing information that states otherwise.
- Since receipt of the Trustee's IDRP decision, he had spoken to the former member nominated trustees (**MNTs**) who were present at the meetings regarding the wind up. They confirmed that it was the Bank's stated position that no member should suffer a loss as a result of wind up, including the right to retire at age 60 with full benefits. The Bank had more than sufficient assets to ensure this.
- Subsequent to the wind up, he had not received any notification that this was no longer the case. Had the Scheme not been in wind up, he would have been able to claim his full benefits at age 60, without any issues, as this had always been the case.
- Neither the Deed of amendment dated 2014 (**the 2014 Deed**)<sup>4</sup>, nor the Trustee's legal advice mentioned the clause in the Scheme booklet. Given this change or removal of this Rule would have been severely detrimental to Scheme members, it was surprising that this was not mentioned in the legal advice the Scheme had received.
- He can only assume there had been negligence on the part of the Trustee for failing to properly protect members' benefits. The Trustee ought to have been aware of the existence of this Rule. It should have taken the necessary action, on becoming aware that the Bank was closing, to remove the requirement of the Bank's consent.

### Summary of the Trustee's position

34. The Trustee confirmed that its position on the points previously raised by Mr N remained unchanged but added:-

- Equalisation of the Scheme's NRA was revisited in the 2014 Deed, when it was identified that there was a deficiency in the approach the Scheme had adopted to equalisation, prior to that date.
- The 2014 Deed addressed the equalisation issue. This deed shows that the NRA for members was amended to 65, unless otherwise agreed with the Bank and the Trustee, and notified by the Trustee to the member in writing. The Statement clearly showed Mr N's NRA as 65.
- Mr N appears to have spoken to the previous MNTs, who were signatories to the 2014 Deed addressing equalisation. At the point that the Bank indicated it was going to wind up its business, there was discussion around the NRA for the Scheme. One of the MNT's indicated an understanding that the benefits would be payable at age 60, unreduced, in all circumstances.

---

<sup>4</sup> Relevant sections of the 2014 Deed are in Appendix 3

- Several steps were taken at that time to investigate the NRA of the Scheme and member's entitlements under the Rules. The Trustee sought legal advice in this regard, and it was confirmed that early retirement from deferred status did not require consent, but benefits would be reduced for early payment, subject to the Barber Window applying.
- The MNTs received a copy of the legal advice, and the consequences of the legal advice were discussed with them. One of the MNTs had indicated that he had spoken to a former senior executive member of the Bank's staff. The MNT said that the former senior executive had confirmed that the Bank had agreed that there would be no reduction for benefits paid to members between the ages of 60 and 65. The MNT believed this would be detailed in the Bank's board minutes between 1997 and 1999.
- The Trustee raised this issue with the then CEO of the Bank, but no minutes were produced that would have supported this claim.
- It accepted that the MNTs may have held a view at one point that members could retire at age 60 without a reduction, based on a misunderstanding of the position and retirement from active membership. However, it was difficult to accept that this was the MNTs' views once they had reviewed the documentation, including the legal advice.
- The Scheme's actuarial valuations were prepared on a basis consistent with the Rules, with both NRA and treatment of benefits on early retirement being confirmed in the final actuarial reports.
- Every quotation obtained from Phoenix to secure members' benefits during the wind up was on the basis that the Scheme's NRA is 65 and that the Barber Window of the Scheme operated as set out in the 2014 Deed.
- The Bank ceased carrying out business in 2018 and consequently had finite resources available to it. It would have been impossible for the Bank's position as stated by Mr N to be accurate. This is because the information was not available to the Bank, or anyone else, to support such a statement.

### **Summary of Phoenix's position**

35. After reading the materials provided in relation to the complaint, the substance of the dispute seemed to be about Mr N's membership of the Scheme. As Phoenix believes that this dispute is solely between Mr N and the Trustee, it did not believe it was in a position to opine on a dispute to which it should not be a party.

### **Adjudicator's Opinion**

36. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustee. The Adjudicator was of the view that there

were two parts to Mr N's complaint. She gave her findings on each part in turn, and these are summarised below in paragraphs 37 to 52.

### **Poor customer service**

37. Prior to transferring his benefits from the Scheme, Mr N sought the advice of an IFA. In the Adjudicator's view, it would have been reasonable for Mr N or his IFA to have made enquiries with the Trustee or Phoenix about the status of his benefits in the Scheme, or the Scheme's funding position in general, before Mr N decided to transfer, particularly if Mr N had concerns that his benefits were at risk. The Adjudicator had not seen any evidence that, prior to Mr N deciding to transfer his benefits from the Scheme, he or his IFA made such enquiries with the Trustee and Phoenix, or that the Trustee or Phoenix failed to respond to them in this regard.
38. The Announcement informed members of the Scheme of the action the Trustee intended to take following the Bank's notification of its intention to leave the Scheme. In the Adjudicator's view, Mr N assumed that his benefits in the Scheme were at risk, and took action based on this assumption. The Trustee and Phoenix cannot be held responsible for any decisions Mr N made, based on his assumption that the Scheme and/or his benefits were at risk.
39. Further, it appeared that Mr N was considering the option of transferring his benefits from the Scheme prior to the Announcement and any subsequent exchanges between himself, the Trustee or Phoenix. The Adjudicator was of this view because Mr N had initially requested a CETV quotation in August 2018. It was Mr N's decision to appoint an IFA to assist him with his transfer, and he would have agreed to pay the IFA the fees he was charged. So, it was the Adjudicator's view that none of the respondents were responsible for the fees Mr N paid in this regard.
40. Notwithstanding this, after considering Mr N's timeline as set out in Appendix 2, the Adjudicator was of the view that Phoenix's failure to respond to Mr N's request for a CETV quotation between 8 August 2018 and 28 September 2018, amounted to maladministration. This was because, taking over a month to respond to Mr N's request would have been outside of Phoenix's service standard to respond to such requests. In addition, Phoenix did not provide Mr N with an explanation for the delay.
41. It was also the Adjudicator's view, that the Trustee in taking longer than a month to send the initial quotation to Mr N, once it had received the quotation from Phoenix, also amounted to maladministration. This was because CETV quotations have a guarantee period of three months. In the Adjudicator's opinion, it was not reasonable for the Trustee to have taken over a month, from the date the CETV quotation was valid, to send it to Mr N. This delay reduced the time that Mr N had to review the quotation, discuss it with his IFA, and make an informed decision of whether or not to transfer.
42. The Adjudicator noted that Mr N did not decide to transfer his benefits based on that CETV quotation. However, it was her view that Mr N's actions in this regard did not excuse the Trustee's maladministration.

43. It was the Adjudicator's opinion that Mr N did not suffer a financial loss as a result of Phoenix and the Trustee's maladministration. Instead, he suffered non-financial injustice, in the form of distress and inconvenience.
44. I have published guidance on redress for non-financial injustice. Based on my guidance<sup>5</sup>, it was the Adjudicator's view that Mr N had suffered significant distress and inconvenience for which he should receive an award.
45. It was the Adjudicator's opinion that this part of Mr N's complaint should be partly upheld.

### **Calculation of benefits**

46. The Rules determine how benefits should be calculated. The NRA of the Scheme was 65 but, there was an option in the Rules, prior to the Bank and Scheme entering wind up, for members who retired at age 60, to receive their benefits unreduced. This was a discretionary benefit and was subject to the Bank's consent.
47. When Mr N applied to transfer his benefits, a reduction was applied as he was transferring his benefits before his NRA. Mr N does not accept that a reduction should have been applied to his benefits. The Trustee had confirmed that as the Bank was winding down, it did not allow members to claim their benefits at age 60 without a reduction.
48. The Adjudicator understood Mr N's disappointment in this regard, but it was her view that the Trustee could not be held responsible for the Bank's decision not to award this discretionary benefit once it commenced wind up.
49. Mr N argues that, had the Scheme not been in wind up, he would have been able to retire and draw his benefits, in full, at age 60 without an issue. However, the Scheme entering wind up was not because of any maladministration by the Trustee. The Scheme entered wind up because the Bank decided that it no longer wanted to participate in the Scheme. As the Bank was the only employer in the Scheme, it was not feasible for the Trustee to keep the Scheme open without the Bank's support as employer.
50. Mr N asserts that the Trustee should have removed the requirement for the Bank's permission to allow members to retire at age 60 from the Rules. In the Adjudicator's view, the Trustee's failure to do so, did not amount to maladministration. As the Scheme was entering wind up and it was a DB Scheme, the Trustee had a responsibility, first and foremost, to all members, to ensure their benefits, as defined in the Rules, were secured. Further, the option for members to retire at age 60 without a reduction being applied to their benefits, was a discretionary benefit funded by the Bank and not one that Mr N was automatically entitled to. It was not a rule which the Trustee could unilaterally amend.

---

<sup>5</sup> This guidance is published on The Pensions Ombudsman website.

51. The Adjudicator appreciated that the Statement was ambiguous and appears to contradict the Rules in relation to the retirement age (see paragraph 5 above). However, where there was a contradiction, it is the wording of the Rules that is overriding.
52. The Adjudicator understood Mr N's disappointment that his benefits were reduced as he transferred them from the Scheme prior to his NRA. But it was the Adjudicator's view that the reduction did not result from any maladministration by the Trustee, and his benefits were correctly calculated in accordance with the Rules.
53. It was the Adjudicator's opinion that this part of Mr N's complaint should not be upheld.
54. Mr N did not accept the Adjudicator's Opinion. His response to the Opinion is summarised below in paragraphs 55 to 67.
55. There is no dispute that the government equalised retirement dates in 1997, and consequently the Scheme had to be brought into line. It is also accepted that the Bank had within its powers to make ad hoc enhanced payments to members at its discretion, which was used frequently at times of restructuring, as part of a "Golden Goodbye" package for Managers & Executives who were leaving the Bank's employ.
56. This discretionary power is not disclosed anywhere in the Scheme booklet. However, the Bank added what was referred to in an accompanying memo as a "special arrangement". This was to allow existing female members to continue to receive their pension at age 60, and due to equalisation, it was extended to men as well. As this benefit is mentioned in the Scheme booklet, it is clearly a benefit the Bank wanted the eligible members to be aware of, and benefit from, and no member was refused this option.
57. It would appear that the right to obtain a full pension at age 60 was not formally added to the Rules. So, it can only be assumed that the Bank was content to implement the benefit using its existing powers.
58. Although enabled through a discretionary power, the granting of this benefit was never carried out in a discretionary manner, as no member had been refused. If the Bank had chosen to pay it to some members and not others, it would have left itself exposed to allegations of discrimination.
59. Reference to the benefit also appears in the Statement (see paragraph 5 above), which the Adjudicator had said, is ambiguous. However, statements can only be ambiguous if they are capable of being interpreted in an alternate manner. He has not been provided with an alternate explanation of the wording offered. Indeed, the information that the FSCS requested from Mercer evidenced that it too interpreted the information in the same way.



60. He submits that there is sufficient evidence to conclude that the Bank was indeed intent on honouring the early retirement benefit, and that the wording in the Statement was as intended. He questioned why he was being refused this benefit.
61. It is assumed that both the Bank and the Trustee would have produced projections on the financial status of the Bank at wind down, and the amount required by the pension scheme to transfer it to Phoenix. "Clearly", with what they were telling members, they were confident they would have sufficient funds. The last available summary funding statement showed the Bank had assets in excess of what was required to provide benefits.
62. Any references made to the Bank after 14 March 2018, do not refer to the Bank as such, but to the appointed Judicial Factor from Johnson Carmichael LLP (**the Judicial Factor**). It appears to be the case then, that agreement on the wind up of the Scheme had not been finalised at the time the MNTs, Bank Executive and Board of Trustees had been stood down, leaving the pension arrangements in the hands of the Trustee and the Judicial Factor.
63. Therefore, it would be those two parties who decided on the terms of the wind up, and it seems at this point, that a benefit that had been in place for 21 years, with no member ever having been denied it, had simply ceased to exist. No mention of it being removed was intimated to members in the Announcement.
64. The Adjudicator said that where there is a contradiction, it is the wording of the Rules that is overriding. He cannot accept that this is the case. Members are not provided with the Rules, so they are totally reliant on the information given to them by the Trustee. He does not think it is unreasonable for members to expect that the information provided by the Trustee is accurate and reliable and is in accordance with the Rules and legislation. Where that is not the case, members must be able to hold the Trustee to account and seek redress where they have suffered a loss.
65. The Trustee's administrative failures, its apparent admission that no planning, analysis or projections had been undertaken, the issuance of Statements which have been deemed to contradict the Rules, raises questions about its competence in winding up the Scheme. It should not be the case the members of the Scheme lose benefits as a result of the Trustee's actions.
66. In the Scheme booklet dated 1985, prior to 1997, members were able to retire from age 50 for reasons of ill health or other justifiable reason, on a reduced pension basis. This is quite different from the 1997 version of the Scheme booklet, so it is "abundantly clear" that the Bank wanted staff, who were in the Scheme prior to 1997, to draw their pensions in full at age 60. He queried if this was not the case, why would it have been mentioned.
67. Without wishing to be critical of the Trustee, it seemed to be adopting a defence of confusion, conflation and misdirection. It is not reasonable to assume that an ordinary member of the Scheme would understand this refers to the "three tranche approach" and then state it is only theoretical. Only women had the legal right to retire at age 60.

He questioned if "NRD/60th Birthday" did not refer to the early retirement benefit referred to in the Scheme booklet, why did it even appear in the Statement.

68. A summary of the Trustee's additional comments is detailed below, in paragraphs 69 to 88.
69. A fundamental point which it believes needs highlighting in relation to Mr N's response is that he correctly recognises that the exercise of the discretionary power to allow retirement on unreduced benefits was exercised by the Bank and not the Trustee.
70. In his submissions to The Pensions Ombudsman, Mr N recognises that the Bank used its discretionary power to address specific circumstances for a specific subset of members. This is at odds with his later claims that this discretionary power was used universally by the Bank.
71. Mr N states that this power is not disclosed in the Scheme booklet. However, the Scheme booklet clearly states "*In respect of members who joined the scheme before 6 April 1997, no penalty will be applied if you retire, subject to employer consent on your 60th birthday or later...*" (original emphasis).
72. Mr N claims, without any supporting evidence that the Bank effectively equalised retirement ages for male and female members at age 60 and that this was the Bank's intention. He claims that this was mentioned in a memo that accompanied the 1997 Scheme booklet.
73. The memo refers to special arrangements for members who joined the Scheme prior to 6 April 1997 and are set out on page five of the Scheme booklet. Page five of the Scheme booklet sets out the three tranche approach that was adopted to achieve equalisation, noting a normal retirement date of the member's 65<sup>th</sup> birthday for benefits post the Scheme's equalisation date, which was later revised. It is clear that the special arrangements referred to in the memo are the provisions of the three tranche approach.
74. The three tranche approach was set out clearly and in some detail in the Scheme booklet dated September 1997, and which Mr N refers to in several of his additional comments. A legal review of how the Scheme had implemented equalisation was carried out for the Trustees in late 2011/early 2012. This identified that, notwithstanding the fact that the Scheme had been administered on the basis that retirement ages had been equalised at the 1995 date, the NRA of the Scheme had not in fact been equalised until the adoption of the Third Rules of the Scheme on 17 March 1998.
75. The Third Rules documented equalisation of the Scheme's NRA as the member's 65<sup>th</sup> birthday for both males and females with effect from 18 September 1995. In order to reflect the advice received in 2012, the Trustees, including the MNTs Mr N referred to, and the Bank entered into a deed of amendment last dated 13 May 2014.

76. It is inconceivable, given that the Trustee and the Bank had entered into formal deeds to give effect to equalisation on retirement ages at 65, that the Bank's intention was to do something completely different and give members the right to retire at age 60 on full benefits and without a reduction of benefits that had accrued by reference to an NRA of the member's 65<sup>th</sup> birthday. Had that been the Bank's intention, it would be contrary to the Rules and the Scheme booklet, both of which clearly note the need for the Bank's consent if benefits are to be paid without such reduction.
77. Furthermore, the amendment to the Scheme's NRA also provided that, in respect of a member who joined after 16 March 1998, their NRA was their 65<sup>th</sup> birthday or such other date as has been agreed with the Bank and the Trustee and notified by the Trustee to the member in writing.
78. It was aware of four members, three males and one female who were specifically granted an NRA of 60 as of right by the Bank under this part of the Rule. It is again inconceivable that the Bank would have felt the need to specifically grant these members an NRA of 60 if its intention had been that all such members would have an NRA of 60 as of right. As previously stated, such a "blanket" practice would be inconsistent with the Rules and Scheme booklet.
79. Mr N said the right to obtain a full pension at age 60 was not formally added to the Rules. The wording in the Scheme booklet does not give a right to obtain a full pension. From the preceding paragraphs, it is clear that the Rules as currently constructed, properly reflect the intentions of both the Trustee and the Bank.
80. It does not accept that the Statement issued to Mr N when he left service in March 2018, was ambiguous when considered in its entirety and in context. The Statement consisted of three pages. Mr N's NRA was clearly and unambiguously stated on page one to be 65. Mr N did not query or challenge his NRA when he received the Statement.
81. The wording on the Statement (see paragraph 5 above) was a reflection of the generally accepted legal principle that where, as in Mr N's case, a three tranche approach is adopted to deal with equalisation, then members have a right to access any element of their benefit treated as having an NRA of age 60, at that date. Accessing benefits treated as being due from the Scheme's NRA, which was in this case age 65, may in theory, depending on the rules, require Trustee's consent if these benefits are also able to be drawn, albeit reduced for early retirement, at age 60. In practice, schemes will allow both elements to be drawn at the same time and reduced or increased accordingly.
82. The CETV issued to Mr N in April 2019 also clearly and unambiguously stated Mr N's NRA was age 65. Neither Mr N nor his IFA queried or challenged his NRA after receipt of the CETV. No reduction was applied to Mr N's benefits as a result of him transferring before his NRA. The CETV represented the unreduced actuarial present value of Mr N's benefits in the Scheme based on the correct interpretation of the Rules.

83. Mr N claims that it was the Trustee and the Judicial Factor who decided on the terms of the wind up, and that a benefit that had been in place for 21 years had ceased to exist. This is incorrect and shows a lack of understanding about what a Trustee can and cannot do.
84. Contrary to what appears to be Mr N's understanding, in Scots Law, the Judicial Factor, is in effect the Bank and the Bank has not yet wound up its affairs. The fundamental point is that it is the Bank and not the Trustee that exercises the discretionary power in question. Mr N understands this fundamental point. His complaint to the Trustee about the calculation of his benefits is misdirected.
85. Mr N makes a point that at no time during the wind up process was a quotation obtained by the Trustee for the cost of securing benefits which would allow all members to receive all their benefits unreduced from age 60. The question of the basis of equalisation was looked at in detail between 2012 and 2014. The advice received confirmed the Scheme's NRA had been equalised to age 65 for both males and females.
86. Buyout quotations were therefore obtained on the basis of the benefits due to members as set out in the Rules. There was no need or requirement to obtain quotations on any other hypothetical basis. It rejects Mr N's characterisation of this as somehow a lack of planning or analysis on the part of the Trustee. The Trustee carefully analysed the position regarding equalisation under the Scheme, took appropriate advice and proceeded on the basis of that advice.
87. The Trustee cannot pay benefits on a basis that is not provided for in the Rules any more than it can choose not to pay benefits on a basis that is provided for. It sought to secure members' benefits in accordance with their entitlement under the Rules and took appropriate advice as to what those benefits and entitlements are throughout the wind up process.
88. All the documentary evidence demonstrates that the Trustee and the Bank intended the Scheme to be administered in accordance with the Rules as currently constructed. Mr N has not provided any documentary evidence to contradict this.
89. As Mr N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr N and the Trustee provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr N and the Trustee.

### **Ombudsman's decision**

90. Mr N's main contention appears to be that he is unable to receive his benefits unreduced at age 60.
91. It is important to note that the agreement for members to receive their full benefits unreduced at age 60, was a discretionary benefit offered by the Bank and not one that Mr N was automatically entitled to under the Rules.

92. Mr N argues that there was no discretion in relation to the award of this benefit as the Bank, prior to entering wind up, had always awarded this benefit to members who retired and claimed their benefits at age 60. The decision to award this discretionary benefit rested with the Bank. The Bank's decision to always award this benefit in the past did not remove the discretionary element of this benefit, as prescribed by the Rules<sup>6</sup>. Furthermore, the discretion to award this benefit did not automatically transfer to the Trustee when the Bank ceased trading and the Scheme entered into wind up. The Rules did not give the Trustee the power or discretion to grant members this benefit.
93. Mr N has not provided any documentary evidence to prove that it was the Bank's intention, subsequent to wind up, for it to continue to award this discretionary benefit. The Trustee has a legal duty to pay benefits in accordance with the Rules. There is no provision in the Rules for members to receive their full benefits at age 60, unreduced without the Bank's consent. The Rules take precedence over what is said in the Scheme booklet, memo or verbally to Mr N.
94. The Trustee has confirmed that Mr N's CETV was not reduced as a result of him transferring his benefits from the Scheme before his NRA. The CETV represented the unreduced actuarial present value of Mr N's benefits in the Scheme based on the correct interpretation of the Rules.
95. I find that Mr N has not suffered a financial loss but has suffered a loss of expectation. There has been no maladministration by the Trustee in the way Mr N's CETV was calculated.
96. As the discretionary benefit was awarded by the Bank, any complaints Mr N has in relation to this benefit should have been raised directly with the Bank and not the Trustee. The Trustee cannot be held responsible for the Bank's decision not to award this discretionary benefit to Mr N.
97. Notwithstanding this, I find that the poor customer service Mr N received from Phoenix and the Trustee, as detailed in paragraphs 40 and 41 above, would have caused Mr N significant distress and inconvenience, for which he should receive an award.
98. I uphold this complaint in part.

---

<sup>6</sup> An extract of the relevant Rule is in Appendix 4

## **Directions**

99. Within 28 days of the date of this Determination, the Trustee shall pay Mr N £500 for the significant distress and inconvenience he has experienced as a result of the poor customer service he received from Phoenix and the Trustee.

**Anthony Arter**

Pensions Ombudsman  
29 September 2022

## **Appendix 1**

### **1. Summary of the Announcement dated 10 October 2018**

In summary the Announcement explained:-

- Why there were changes to the Trustee Board and why Dalriada became the sole Trustee of the Scheme.
- On 12 September 2018, the Bank wrote to the Trustee and gave it notice of its decision to terminate its participation in the Scheme. This resulted in the Scheme entering wind up with effect from the same date.
- Members were not required to take any immediate action and there were still a number of activities that needed to be completed by the Trustee before the wind up was completed.
- The next step in the wind up process was for the Trustee to secure every member's benefit entitlement in full with an insurance company, as it believed that this would improve the long term financial security of members' benefits. Once the members' benefits were secured, the insurance company would issue them with an individual policy document confirming that it is responsible for payment of their Scheme benefits in the future.
- The Trustee intended to secure members' benefit entitlement from the Scheme with Phoenix. The Trustee and its advisers intended to continue to carry out the necessary work in order to finalise members' benefit entitlement and secure this with Phoenix. Once all of the necessary actions had been carried out by the Trustee, the Scheme would then be formally wound up.
- The Trustee assured members that it would aim to complete the process with minimal disruption to them.

## Appendix 2

### 1. Mr N's timeline of events

8 August 2018	Mr N wrote to Phoenix requesting a CETV quotation of his benefits. The letter was sent by first class post.
7 September 2018	Mr N sent a copy of the above letter to Phoenix by signed for post.
24 September 2018	Mr N sent an enquiry to Phoenix using its online enquiry system.
28 September 2018	Phoenix replied to Mr N, enclosing a form for further information. Phoenix did not provide a return address.
14 October 2018	Mr N received the Announcement.
15 October 2018	Mr N emailed the Trustee for assistance with his CETV quotation request.
17 October 2018	Mr N received an email from the Trustee, attaching the CETV quotation. He received the paper copy of this quotation in the post the following day. The CETV quotation was dated 10 September 2018.
5 December 2018	Mr N emailed the Trustee asking it for a quotation of the pension he would get if he claimed his benefits at age 60.
22 January 2019	Mr N wrote to the Trustee as he had not received a response to his email above.
25 January 2019	The Trustee replied to Mr N and apologised for the delay.
1 February 2019	The Trustee emailed Mr N and informed him that he would receive the quotation on 15 February 2019.
15 February 2019	The Trustee emailed Mr N confirming that the quotation had been sent. Mr N received the quotation the next day.
21 February 2019	Mr N signed the LOA for his IFA to obtain necessary information from the Scheme,



	with a view to transfer from another pension scheme.
25 March 2019	Mr N's IFA informed him that it had not received a response from Phoenix.

## Appendix 3

### 1. Relevant sections of the Scheme booklet

“ ...

#### **BENEFITS ON EARLY RETIREMENT**

##### **(a) for reasons other than ill-health:**

If you are over age 50, you may, with the agreement of your employer, be able to draw an early retirement pension. The amount of the early retirement pension will be calculated as shown on page 5. The pension will then be reduced by an amount for each month by which your retirement is advanced. In respect of members who joined the scheme before 6 April 1997, no penalty will be applied if you retire, subject to employer consent, on your 60th birthday, or later....”

### 2. Relevant sections of the Deed of Amendment 2014 between the Bank and the Trustees

#### **1. AMENDMENT OF THE SCHEME**

Pursuant to the said Rule 22, the Trustees hereby make the following amendment to the Rules:

##### **1.1 In Rule 1 *Introduction and Definitions*, the definition of “Normal Retiring Date is deleted and the following definition is inserted in its place:**

**“Normal Retiring Date” means:**

- (a) in respect of a Member who joined the Scheme before 17<sup>th</sup> March 1998, the 65th birthday calculated on the following basis:
  - (i) in respect of Pensionable Service from the Commencement Date to 16<sup>th</sup> May 1990, the Member’s 65th birthday for men and the Member’s 60th birthday for women, then
  - (ii) in respect of Pensionable Service from 17<sup>th</sup> May 1990 to 16<sup>th</sup> March 1998 (inclusive), the Member’s 60th birthday for both men and women, then
  - (iii) in respect of Pensionable Service on or after 17<sup>th</sup> March 1998, the Member’s 65th birthday for both men and women; or...”

## **Appendix 4**

### **Relevant sections of Trust Deed and Rules dated 16 September 2008**

“ ...

#### **8 IMMEDIATE PENSION BEFORE THE NORMAL RETIREMENT DATE**

A Member may elect to receive the benefits, described in Rule 5.1, before his Normal Retirement Date, with the consent of the Employer:

- (a) at or after age 50, or
- (b) on account of incapacity due to permanent ill-health.

If the Member so elects, the Trustees shall, at the request in writing of the Member, make arrangements to provide pension for him and his Widow, Widower or Surviving Civil Partner of reduced amounts, as certified as reasonable by the Actuary to be equivalent to the value of the pensions provided under the Scheme in terms of Rules 12.3, 12.4 and 12.5 and Rule 6.1.2 of Appendix 1. Such reduction shall not, however, be applied if a Member, who joined the Scheme before 6<sup>th</sup> April 1997, retires, with the agreement of the Employer, on or after his 60<sup>th</sup> birthday...”