

## Ombudsman's Determination

Applicant	Mr Y
Scheme	Chapelthorpe Plc Pension Fund ( <b>the Scheme</b> )
Respondent	Trustees of the Chapelthorpe Plc Pension Fund ( <b>the Trustees</b> )

## Outcome

1. Mr Y's complaint against the Trustees is partly upheld. To put matters right, the Trustees shall pay £500 to Mr Y in recognition of the significant distress and inconvenience caused to him by their error.

## Complaint summary

2. Mr Y has complained that the Trustees are now claiming that he was not permitted to retire early without a reduction to his pension and that he has been overpaid. The Trustees are seeking to reclaim the purportedly overpaid funds.

## Background information, including submissions from the parties

3. Mr Y is a member of the Scheme in receipt of pension benefits.
4. Mr Y ceased active membership in 2009 and became a deferred member of the Scheme.
5. On 7 May 2013, Buck Consultants (**Buck**), the Scheme's administrator at the time, provided Mr Y with a retirement illustration (**the 2013 illustration**). The covering letter for this said:

"I refer to your request for details of your early retirement benefits as at ... your 62<sup>nd</sup> birthday. Your Normal Retirement Date (NRD) is age 65. However, as you are a member of the Executive Section of the CPF, you can take your benefits from age 62 unreduced. Please find enclosed details of your benefits. These figures cannot be guaranteed."
6. On 31 May 2013, Buck confirmed to Mr Y that his pension payments would commence with effect from May 2013.

7. On 30 August 2019, the Trustees wrote to Mr Y saying his pension had been overpaid. This letter, in summary, said:-

- It was necessary to reduce his future pension payments to their correct level and recover overpayments that had already been paid. They had consulted with International Fibres Group (Holdings) Limited as the Principal Employer of the Scheme (**the Principal Employer**) and it had agreed with the course of action they were proposing.
- In respect of why they were making a reduction, when his pension commenced, he had left pensionable service and was below age 65, the Fund's Normal Retirement Age (**NRA**).
- The Scheme's Rules (**the Scheme Rules**) stated that for deferred members retiring early, their pension must be reduced to take account of early payment unless the Trustees' consent is given. There was no evidence that this consent was given.
- Specifically, Rule 13.6 stated that on the early retirement of a deferred pensioner, "the immediate pension shall be of an appropriately reduced amount determined by the Trustees on a basis certified as reasonable by the Actuary or in the event that the Deferred Pensioner has attained the age of 60 the pension may be paid without reduction if the Trustees consent thereto." This was different to the Rule applying to members who had remained in pensionable service (active members), whereby such members were entitled to an unreduced pension on early retirement from age 62 (without any consent being required).
- Previously, the Trustees had received legal advice that the Scheme was required by legislation to pay the same pension to deferred members as active members. Acting on this advice, the Trustees did not reduce Mr Y's pension when he retired at age 62.
- After another sponsoring employer of the fund became insolvent in March 2018, the part of the Scheme relating to its employees became segregated into a separate section, known as the "SCD Section." The rest of the Scheme, known as "the Main Section", continued and Mr Y was a pensioner and former deferred pensioner (executive member) of the Main Section.
- The SCD Section was assessed to determine whether it was eligible to enter into the Pension Protection Fund (**PPF**). As part of this process, the PPF panel legal advisers for the Trustees reviewed the Scheme Rules. They advised that, on retirement before age 65, there was no legislative requirement to treat deferred members the same as active members. The Scheme Rules therefore applied to determine Mr Y's pension as a former deferred pensioner. Mr Y's pension should have been reduced on early payment.
- The Trustees had taken further legal advice from different legal advisers which agreed with the PPF panel legal advisers' opinion.

- In respect to Mr Y's pension specifically, this would be reduced from £584.37 per month to its correct level of £473.92 per month from 25 November 2019, with any overpaid pension recouped from future pension payments.
  - The total overpayment was an amount of £16,328.73. The four options available in respect of recovery were: reduction of pension payments from November 2019 to March 2026, repayment by a single lump sum, an adjusted reduction of pension payments through an extended repayment plan (or a shorter repayment period if preferred) or, the Trustees may agree not to recover the overpayment if it would be unreasonable or detrimental to correct the payments made. The last two options only applied in certain circumstances and required the Trustees' consent.
8. On 5 September 2019, the Trustees wrote to Mr Y informing him that the Scheme's administrator had sent his name and pension details to the wrong address.
9. In October 2019, Mr Y submitted a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He said:-
- The Trustees had not provided any calculations showing how it had arrived at the figures proposed.
  - They had also said there was no evidence that the Trustees had given consent to pay his pension without reduction. He had received the 2013 illustration stating that, as he was a member of the Executive Scheme, he could take his full pension at 62, which the Trustees would have been aware of. When he signed the illustrative quote, he and the Trustees entered into a binding legal contract which could not be changed now.
  - A letter sent to him on 6 May 2008 concerning 'Proposed Cessation of Accrual' made no reference to any change of date for when an Executive Scheme member could take their benefits, nor did it state that a full pension could not be taken at age 62. The current plans for penalising and punishing pensioners was made through desperation and retrospection.
  - A letter sent to him on 11 April 2001, regarding the Executive Scheme included a "full content insert for a pension binder." Point 5 on early retirement stated: "Should you retire at any time after age 60, but before 62, an unreduced pension will be paid if the Trustees consent. If retirement takes place after attainment of age 62, but before 65, the consent of the Trustees will not be required."
  - The Trustees were being retrospectively creative using Rule 13 from the Deed of Amendment & Consolidation. This was completely unfair and unreasonable and he wished for the Trustees to rescind their letter of 30 August 2019. If it was believed that there was a mistake with his pension, then the funds should be claimed from those who made the mistake rather than punishing an innocent pensioner.

10. On 24 October 2019, the Trustees responded to Mr Y's complaint. The main points were:-

- As retirement at age 62 was classed as "standard" early retirement, his pension on early retirement as a pensioner must be determined in accordance with Rule 13.6 of the Scheme's Rules as set out in the Second Schedule to the Deed of Amendment and Consolidation dated 3 September 1998 (the Rules). Rule 13.6 provided that the early retirement pension "shall be of an appropriately reduced amount determined by the Trustees on a basis certified as reasonable by the Actuary."
- The equivalent early retirement rule for an executive member retiring from the employment of the Company was Rule 11. Rule 11.3.3 provided that when an active executive member retired between the ages of 62 and 65, the pension would not be reduced to take account of early payment. Consequently, if the Trustees had been required to provide the same pension on such early retirement to deferred executive members as on the early retirement of active executive members, deferred executive members' pensions would be unreduced.
- Mr Y had argued that he had received an illustrative quotation from Buck stating that he could receive his full pension at age 62, which he accepted. The Trustees were aware that Mr Y had received this, however, this was based on legal advice that the Trustees had received. This said that overriding legislation required the Trustees to provide the same early retirement benefits to him as a deferred pensioner as if he had been retiring from the employment of the company.
- The reference in its previous letter to there being no evidence that the Trustees had given their consent was a reference to consent for the purposes of Rule 13.6. Rule 13.6 stated that, "in the event that the deferred pensioner has attained the age of 60 the immediate pension may be without reduction if the Trustees consent thereto." The Trustees did not consent to the payment of an unreduced pension for the purposes of Rule 13.6 but instead paid an unreduced pension because they were advised that they were required to do so.
- For these reasons, the Trustees did not accept that they had overlooked the quotation or consented to an unreduced early retirement pension under Rule 13.6.
- Mr Y had claimed that when he signed the 2013 illustration, a binding contract had been entered into. There was no intention by the Trustees or Buck to make a contractual offer capable of acceptance by him and therefore no such contract existed.
- Mr Y had also referred to a letter of 11 April 2001 and Point 5. Point 5 described early retirement benefits payable to active members. The early retirement benefits payable to deferred members was set out in paragraph 7 of the booklet and stated: "if the Trustees consent your deferred pension will be payable from age 60

without actuarial reduction.” There was no evidence that the Trustees consented to an unreduced early retirement pension.

- The Trustees would consider whether they had any claims for loss against their advisers or former advisers. The Trustees did not expect that any such claims would affect the benefits which they must pay to Mr Y under the Scheme. If any such claim was successful, they would receive compensation which would improve the general funding of the Scheme, but they would still be required to pay Mr Y the benefits specified in the Scheme Rules.

11. Mr Y’s position:

- The Trustees are penalising innocent pensioners with retrospective legislation due to their own mismanagement, and were hiding behind their advisers.
- Further, the Trustees had broken General Data Protection Regulation (**GDPR**) rules when it sent out its initial letter.
- The Trustees’ letter of 30 August 2019 should be rescinded.
- The role of the Trustees was to communicate to members the impact of the rules of the Trust Deed when fundamental changes were made. His case demonstrates that this communication had been inadequate.
- The Trustees are relying on Rule 13.6 to reduce his pension. This clause was included in the Trust Deed to cover members who became deferred pensioners because they had left employment with Chapelthorpe. The clause was not for employees who had lost pension benefits from the cessation of accrual that had remained employed by Chapelthorpe, otherwise this would have been covered in the Q&A document which accompanied the 6 May 2008 letter.
- The Trustees had acknowledged two fundamental mistakes, the first by Buck and the second by their previous legal advisers. It was neither fair nor equitable for the Trustees to try and correct their mistakes after all this time had elapsed. If the Trustees had made a mistake, they should suffer the consequences and not “recover their errors” from him.

12. The Trustees’ position:

- The current Scheme Rules are set out in the Second Schedule of the Deed of Amendment and Consolidation of 3 September 1998 (as amended). The relevant provisions are subject to a Deed of Amendment dated 26 March 2008.
- The early retirement pension payable to a deferred pensioner under the Scheme Rules is set out in Rule 13.6. Rule 13.6 enables the Trustees in their discretion to offer deferred pensioners the early payment of their pensions and separately, where the deferred pensioner has attained the age of 60, to consent to the payment of the pension without reduction in respect of its early payment. The

Trustees may offer early retirement from age 60 without consenting to payment on an unreduced basis.

- The advice provided by their previous solicitors was that the preservation requirements of the Pension Schemes Act 1993 required that the Scheme Rules should not discriminate between short-service and long-service members. This meant that deferred executive members should have the same right to take an unreduced pension at age 62 as the executive members retiring from active service. They also advised that the preservation requirements did not override the Scheme Rules and so these should have been amended to include this right. A Deed of Amendment was drafted, but not executed, to amend the Scheme Rules to include this right.
- They had consulted with the Principal Employer; it was not willing to expose employers to the cost of providing additional benefits it was not required to make, unless the member had a legally enforceable change of position or estoppel defence. Mr Y had not indicated that he relied on the incorrect information to his detriment or changed his position.
- Their administrators had posted a version of the 30 August 2019 letter to the wrong address. The recipient of the misaddressed letter had been written to; this letter was then returned to a Trustee and destroyed. This breach of data protection legislation was reported to the Information Commissioner's Office (**ICO**) and it had confirmed that no further action was necessary.
- Mr Y had said that the Trustees were penalising pensioners because of their mismanagement of the fund. The Trustees had endeavoured to address the error as soon as reasonably possible after discovering it. The error was as a result of legal advice. This meant some pensions had already been paid before the error was discovered so there would inevitably be a retrospective effect. There was no intention to penalise pensioners.

13. As part of the Adjudicator's investigation, she asked Mr Y how he had spent or saved the overpaid funds. He said:

“Although one cannot predict the future with certainty, in 2008 any future retirement plans that I had for my Chapelthorpe pension were severely constrained when the pension fund closed for future accrual and I became a deferred member after 13 years' service, consequently not able to accrue at least what I hoped was another five years of contributions and growth.

...

The Chapelthorpe plc pension that I drew from 2013 onwards including the purported overpayments allowed me to recover from some of the earlier costs assisting my children's education under a decreased income. It also bolstered my part-time earnings post redundancy/contract termination helping towards

living costs and also helped build up my savings for my future retirement when able to do so to counter the 'lost pension years' as mentioned above."

14. The Adjudicator also asked the Trustees for some further clarity on the Deed of Amendment that was drafted to amend the Scheme Rules but not executed (**the Unexecuted Deed**). In addition, she asked whether the Trustees were relying on the current (inadvertently unchanged) Scheme Rules. They said:-
  - They had been unable to ascertain why the Deed was not executed and could only assume that the administrators at the time had believed it had been executed, thereby treating deferred executive members as having the same right to take an unreduced pension at age 62 as the executive members retiring from active service. The administrators were aware of the legal advice to the Trustees which advised that the Trustees were required to pay unreduced benefits to deferred executive members.
  - The Trustees were relying on the current rules of the Scheme, the Deed of Amendment and Consolidation of 3 September 1998 (as amended) and the relevant provisions which were subject to the alterations made by the Deed of Amendment dated 26th March 2008. Specifically, they were relying on Rule 13.6 and the fact that unreduced benefits were not due to Mr Y (as a deferred executive member) at the age of 62 as the Trustees did not consent to the payment of an unreduced pension for the purposes of Rule 13.6.
15. In response to a further query, the Trustees confirmed that the PPF legal advice which initially identified the error was received in February 2019.

## **Adjudicator's Opinion**

16. Mr Y's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustees. The Adjudicator's findings are summarised below:-
  - There was no dispute that all of the paperwork Mr Y was sent set out that he could take unreduced benefits at age 62. The Trustees said they believed this to be the correct position until more recent legal advice, due to which it was now apparent that they did not need to offer deferred members the same right to unreduced benefits as active members.
  - Mr Y had questioned the Trustees' application of the rules governing the Scheme, and their approach generally. The Scheme was governed by the Scheme Rules. Rule 13.6 stated that on the early retirement of a deferred pensioner between the ages of 50 and their Normal Retirement Date (Mr Y's 65<sup>th</sup> birthday), their pension "shall be of an appropriately reduced amount determined by the trustees on a basis certified as reasonable by the actuary." It further set out that an "immediate pension may be paid without reduction if the Trustees consent thereto." In the Adjudicator's view, the Scheme Rules did not provide Mr Y with the pension he

was paid in the circumstances, this being an unreduced pension at age 62 without consent. Although, this was through no fault of Mr Y's and it was regrettable that he was having to address the consequences of this error.

- Mr Y believed the Trustees were being “retrospectively creative” in using this rule to claim an overpayment. Rule 13.6 was never changed, so the Trustees could (and must) proceed according to the requirements of the Scheme Rules. It was clear that the fact that the Unexecuted Deed was not implemented appeared to help the Trustees in the current situation. This was fortuitous for them but it did not mean that there had been maladministration in this specific respect, nor did it provide Mr Y with a loophole or remedy for the Scheme Rules to not apply. Overall, there was no power under the Scheme Rules for Mr Y to have been paid unreduced benefits from age 62 without consent.
- Mr Y also said that Rule 13.6 did not apply to “employees who had lost pension benefits from the cessation of accrual that had remained employed by Chapelthorpe,” and that had it applied, it would have been covered in the Q&A document which accompanied the 6 May 2008 letter. However, in the Adjudicator's view, Rule 13.6 made no such distinction between deferred members.
- As the Adjudicator was satisfied that Mr Y had been overpaid his pension, she would assess whether he had any defences to the recovery of these funds. The Trustees had broadly set out that Mr Y's main repayment options were: to repay the full sum in one lump sum (“the repayment option”); or pay by a reduction in pension payments going forward (“the recoupment option”).
- If the repayment option was chosen, the Limitation Act 1980 (**the Limitation Act**), which provides timescales by which an action must have commenced where a breach of the law has occurred, was relevant. Ordinary breaches of contract were actionable for six years after the cause of action accrued.
- However, section 32(1) of the Limitation Act, entitled “Postponement of limitation period in case of fraud, concealment or mistake” provided that, in certain circumstances, the six year limitation period did not begin to run until the claimant (this being the Trustees) had discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it. The question which followed was, at what point could the Trustees, with reasonable diligence, have discovered the mistake?
- The Trustees initially relied upon the advice provided by their previous legal advisers. It then came to light that this was incorrect following a series of circumstances which meant that different legal advice was offered, in February 2019, through the PPF. In the Adjudicator's view, this was the point at which the Trustees, with reasonable diligence, could have discovered the error by making the appropriate enquires. It was understood that the Trustees did this by seeking



further advice, this essentially being a third opinion to address the two previous differing opinions.

- In respect of the Adjudicator's view that February 2019 was the earliest point at which the Trustees could have discovered the error, her basis for this was that in her view, the Trustees were entitled to rely on legal advice. It was not the case that the Trustees constructed the misinterpretation themselves or sought advice from an inappropriate source. In her opinion, the notion of reasonable diligence did not extend to questioning legal advice, unless there was a reason to doubt it. This doubt came about following the PPF's legal advice. Hence, the limitation period did not begin to run until February 2019.
- The Trustees had six years from this date to seek recovery of the overpayment, meaning that the limitation period expired in February 2025. The Trustees made their claim for recovery of the overpayment on 17 January 2020, which is when The Pension Ombudsman's Office (**TPO's Office**) received their formal response to Mr Y's complaint. This followed the approach taken in *Webber v Department for Education* [2016] EWHC 2519 (Ch), where the High Court held that the applicable cut-off date for Limitation Act purposes was the date when Teachers' Pensions brought its claim during the course of TPO's Office's complaints procedure. That date was identified as being the receipt by TPO's Office of Teachers' Pensions' response to Mr Webber's complaint.
- The Trustees had made their claim for recovery within the applicable limitation period so a limitation defence did not apply in the circumstances.
- Should the recoupment option be agreed instead, the Limitation Act was not a relevant consideration. In the recent case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch) Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future, meaning that this defence would not apply.
- The most common defence against the recovery of an overpayment was referred to as "change of position;" that is, the applicant had changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part. This defence applied irrespective of the repayment method agreed. To make out a change of position defence, certain conditions must be satisfied. Broadly, the applicant must on the balance of probabilities show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. The Ombudsman could direct that some or all of the overpayment may be kept by the applicant if these elements were satisfied.

- Mr Y explained that his retirement plans were “severely constrained” when the Scheme closed to future accrual. He said that the pension he received from 2013 allowed him to “recover from some of the earlier costs assisting [his] children’s education under a decreased income.” Further, he said it “bolstered” his part-time earnings post redundancy, helping towards living costs. He also said the pension helped build up his savings for his future retirement to counter his “lost pension years.”
  - In the Adjudicator’s view, payments towards living costs could not be considered exceptional expenditure, as these were expenses he would have incurred in the course of ordinary spending. Similarly, the funds which Mr Y spent towards assisting in his children’s education could not be construed as exceptional spending, as this was a necessary expense, so would have been incurred anyway. Lastly, savings could not be counted as a detrimental change of position, as these were not funds which had been irrevocably spent but rather, had been put aside for a later date. In conclusion, Mr Y did not have a change of position defence available to him.
  - In respect of the defence of contract, Mr Y had suggested that a contract was formed between him and the Trustees when he signed the 2013 illustration. Broadly, in order for a valid contract to exist, the elements of offer, acceptance, consideration and the intention to enter into legal relations, must be present. In the Adjudicator’s opinion, although it was questionable whether the other elements were present, the Trustees did not have an intention to enter into legal relations, in addition to those which already existed due to Mr Y’s membership of the Scheme. The 2013 illustration set out what the Trustees understood Mr Y was entitled to, rather than having created additional rights and obligations.
  - Mr Y had also complained about the data breach which took place. This was not within the remit of TPO and would be a matter for the ICO.
  - In the Adjudicator’s opinion, Mr Y’s finding out that he had been overpaid his pension several years into his retirement, and for quite unusual reasons (which he could not possibly have been aware of) would have been highly distressing. Mr Y was now faced with the prospect of this matter affecting him for several years. Although the Trustees had said that the overpayment was not caused by an error of their own making and was due to incorrect advice they received, this was not Mr Y’s fault either. Irrespective of the reasons for this, Mr Y has suffered significant distress and inconvenience because of the actions of the Trustees.
  - The Adjudicator’s recommendation was that the Trustees pay Mr Y an award of £500 in recognition of this, so the complaint was partly upheld. She also suggested that should Mr Y opt for the recoupment option, he and the Trustees should enter into discussions on a mutually acceptable recoupment plan.
17. The Trustees accepted the Adjudicator’s Opinion. Mr Y did not accept the Adjudicator’s Opinion and made the following further comments:-

- The Trustees' offer of £500 was an insult and did not even partly compensate for the distress caused to him and his family by the retrospective actions of the Trustees.
- He was led to believe that another Scheme member's Chapelthorpe pension, which was being dealt with by the PPF, had been treated differently whereby the PPF had agreed to not collect the 'overpayment.' He should be subject to the same treatment.
- When he had been asked to supply information on the uses of the 'overpayment', he had overlooked to convey another factor. His wife was denied her State Pension at age 60 due to the 'State Pension Act 1995.' She had been treated unfairly and now must wait until age 66, thereby denying them income for a period of six years.
- When the Trust Deed was written in 1998, the possibility of a cessation in pension accrual would not have been considered. The clause in the Trust Deed that the Trustees were now relying on was drafted to cover members who left the service of the company. It was not designed to cover members who continued in employment after the fund had ceased accrual.
- The scheme ceased accrual in 2008 and all the active members became deferred members/pensioners. The Trustees had a responsibility to advise Executive Members that their pension age would be increased from 62 to 65. They failed to do this. If Executive members had been correctly advised, at that time, there would have been an action which would have resulted in a change in the Trust Deed for deferred Executive Members' retirement age.
- The detailed rules of pension schemes are not generally available to members but trustees have a duty to ensure members are advised of all the main factors affecting the calculation of their pension, including the date when pensions can be taken (without deduction) and changes to scheme rules. The Trustees failed to do this.
- It was neither fair nor equitable for the pension fund to gain from mistakes made in the calculation of pensions from several years ago.
- When the Scheme ceased accrual in 2008, the company did not want members to suffer. Members were given the option of either, a pay rise, or the opportunity to join a money purchase pension scheme. The clause delaying Executive Members' pensions from age 62 to 65 was not intended to be used to further penalise members for the loss of accrual. Rather, this clause was being used by a lawyer ten years later for a purpose which it was not intended.
- The Trustees obviously approved the payment of his pension from age 62 through the payment of his full pension for six years. The Trustees were attempting to change his pension after the six-year time limit for claims by the court process.

- Trustees have duties to act impartially, responsibly and honestly in the best interests of the scheme beneficiaries. The Trustees had failed to do this.
- Had TPO's Office seen the conflicting legal advice? If not, why not and why did everyone now think the initial advice was wrong? He believed the initial advice was correct.
- It was the responsibility of TPO's Office to protect scheme members from catastrophic mistakes made by trustees.

18. The Adjudicator replied to these comments and in summary, said:-

- Mr Y had said that another member was being treated differently and not been asked to repay overpaid monies. She was only able to consider Mr Y's particular case and the specific facts in respect of this. Nonetheless, she was aware of another member that had been treated in the same way as Mr Y, so it did not appear that the Trustees were treating Mr Y's case uniquely.
- Mr Y had said his wife had been denied her state pension at age 60. Hence, it could be assumed that understandably, some of the overpaid pension might have been used to supplement this gap in income. However, she could not find that this was an exceptional use of money that would warrant a successful change of position, although she did understand that the money was used for necessary means.
- She took into account Mr Y's point about the clause in question and the intention behind it not being punitive, however, in her view, it remained the case that the Trustees had acted in accordance with the Scheme Rules.
- She had not seen the conflicting legal advice. This would not be a proportionate approach in her view and the Trustees had already explained that following the PPF panel legal advisers' opinion, they sought further legal advice, which confirmed their (the PPF panel legal advisers') opinion). She was satisfied that this was a sensible approach.

19. Mr Y then provided the following further comments:-

- With regard to the other member that had not been asked to pay back the supposed overpayment, he felt that he was still being discriminated against by the Trustees (even if there was another member in his position). This was no excuse for the way the Trustees had penalised an innocent pensioner.
- He could not understand why the Adjudicator had not examined the conflicting legal advice, or why she agreed with the Trustees' opinion on this matter.
- He still felt that substantive points he had put forward had not been addressed.

20. The Adjudicator responded to Mr Y's further comments:

- Mr Y had said that, when the Trust Deed was written in 1998, the clause now being relied upon was drafted to cover members who left the service of the company. Mr Y had also made comments on the Scheme being closed to accrual in 2008 and options that were given to members so that they were not disadvantaged. However, she had seen no evidence that Mr Y's stance was the correct position.
- The Trustees had confirmed that they were relying on the current rules of the Scheme. She had considered the changes to the Trust Deed and the background to this.
- Rule 13.6, as per the 1998 deed, allowed deferred members who had reached age 60 an immediate pension without reduction, should the Trustees consent. The Scheme closed to accrual in 2008, and it had been explained that the Trustees had intended to allow deferred members the same rights as active members (in this particular regard) as this was what the legal advice set out.
- Mr Y had said that the Trustees had a responsibility to advise Executive Members that their pension age would be increased from 62 to 65. However, at that point, the Trustees considered they would treat deferred and active members in the same way, so it was not the case that, at the time, they intended to "increase the pension age." Conversely, they tried to align this by a deed which was not properly implemented.
- It had transpired that the solicitors' original advice was incorrect and the Trustees were now seeking to rely on a deed which, by mistake, was never changed. It was fortuitous for the Trustees that this was the case. However, in respect of Mr Y's statement that the 1998 deed was written when the scheme was not closed to accrual, and Rule 13.6 was not designed to cover members who continued in employment, if this was the case, she would have expected the Trustees to amend the relevant Rules in the 2008 deed, or any other deed, around this time. There was no clear evidence that the Trustees in 2008 or earlier had meant for Rule 13.6 not to apply/ had intended for it to be applied differently.
- Mr Y had questioned why he should be "penalised" for mistakes by the Trustees' initial legal advisors. However, it was established in law that negligence or carelessness by trustees or administrators in making an overpayment did not necessarily prevent its recovery.
- In regard to the conflicting legal advice, the Trustees had received the same advice from two sources: the PPF panel legal advisers and the subsequent solicitors' firm. The fact that the PPF panel legal advisers and the subsequent solicitors both agreed that the original advice was incorrect, stood as strong evidence that this was the case. These were two independent opinions reaching the same view and she had no reason to further question this.

21. The complaint has been passed to me to consider and I have noted Mr Y's additional comments, however, I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

22. There are two elements to Mr Y's complaint. The first being whether the Trustees have now applied the Scheme Rules correctly and, should this be the case, whether Mr Y is required to repay the overpayment which has resulted from the Trustee's amended application of these.
23. In respect of the application of the Scheme Rules, two separate legal advisors have confirmed that the Trustees were not required to pay an unreduced pension at age 62 in the circumstances. Mr Y has questioned this advice and believes the original advice was correct. However, I am satisfied that the revised position, where a third legal adviser has corroborated the revised view, can be relied upon as the correct approach.
24. Mr Y has referred to the Trust Deed when it was written in 1998 and it not having been intended for Rule 13.6 to cover members whose benefits had ceased accrual, that had continued in employment. He has also made reference to what he understands of his employer's intentions in 2008. However, I am not persuaded by the points which Mr Y has put forward, which have not been supported by relevant evidence.
25. Mr Y also questions the fact that the Trustees are using Rule 13.6 to reinforce their position that an unreduced pension was not payable to Mr Y at age 62. It had been intended for this Rule to be amended to reflect legal advice that had previously been given, but for reasons not quite clear, this did not happen. In any case, Rule 13.6 stands as it does. Although this, through an unplanned anomaly, unexpectedly supports the position which the Trustees are now taking, I do not consider that relying on this provision amounts to maladministration on the Trustees' part. The Trustees are applying the Rules which govern the Scheme.
26. Turning now to the overpayment matter and whether Mr Y has any defences, I do not find that that the circumstances which Mr Y has outlined provide him with a change of position defence. Although I am sympathetic to Mr Y's situation and how, in part, the overpaid funds have helped address an unexpected shortfall in his income elsewhere, this does not constitute exceptional spending. I make the same finding for the living costs and funds spent assisting his children's education that Mr Y has explained. Mr Y has not demonstrated that he has spent funds which he otherwise would not have done had the overpayment not arisen.
27. Mr Y has commented on another member that he believes was not asked to pay back the purported overpayment. I am limited to considering the circumstances in Mr Y's case and I cannot comment on the situation of this other member. Although Mr Y considers he has been treated unfairly and that the Trustees are seeking to gain from mistakes made several years ago, essentially Mr Y has been paid monies which were

not in accordance with his correct entitlement. It is appropriate for the Trustees to seek to remedy this error and I am satisfied that it has made its claim in time to do so.

28. In conclusion, although Mr Y has doubts as to whether the Trustees are administering the Scheme correctly, the evidence he has put forward to cast doubt on this is purely circumstantial. The Scheme Rules do not support Mr Y's position and I am not persuaded by the arguments he has put forward to discredit these.
29. However, I agree that the Trustees must be accountable for the distress and inconvenience caused to Mr Y because of the error and that they should make an award in recognition of this. I partly uphold Mr Y's complaint.

## **Directions**

30. Within 21 days of the date of this Determination, the Trustees shall pay £500 to Mr Y in recognition of the significant distress and inconvenience caused to him by the error in question. He shall be offered the option to have this paid to him directly or offset against the overpayment owed.
31. If Mr Y opts for the recoupment option for recovery of the overpaid funds, I suggest that he and the Trustees enter into discussions on a mutually acceptable recoupment plan.

**Anthony Arter**

Pensions Ombudsman  
20 May 2021