

## Ombudsman's Determination

Applicant	Mr Y
Scheme	CEMEX UK Executives' Pension Fund ( <b>the Fund</b> )
Respondent	CEMEX UK Executives' Pension Trust Limited ( <b>the Trustee</b> )

## Outcome

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

## Complaint summary

2. Mr Y's complaint concerns the index that is being used to increase his deferred pension in excess of his Guaranteed Minimum Pension (**GMP**). He is unhappy that his pension in excess of his GMP (**the Excess**) is being increased in line with the Consumer Price Index (**CPI**) and not in line with the Retail Price Index (**RPI**), as he was previously told it would be. He also understands that pensions in payment are being increased by CPI and believes this to be wrong.

## Background information, including submissions from the parties

3. Mr Y became a deferred member of the Fund in December 2005. His normal retirement age (**NRA**) is 62. On 8 February 2006, the Fund administrator sent Mr Y a letter informing him of his benefit entitlement from the Fund (the **2006 Letter**). The letter said:

"The Excess Pension element will be increased for each complete year from leaving to retirement by the RMC Pension Fund by the increase in the [RPI] subject to a maximum of 5% per year..."

4. In October 2011, the Trustee sent Mr Y a summary funding statement (**the Statement**). The covering letter with the Statement said:

"There has been a recent change to the way in which deferred pensions should be [increased] in deferment. This applies to you if you used to be in the Fund but have since left and have yet to retire. The rules of the Pension Fund state that deferred pensions should be [increased] in line with statutory

regulations. This means that [increases] will be linked to the CPI and not the RPI...”

5. The address on the Statement had an incorrect postcode.
6. In 2012, the Trustee sent members a newsletter. Page 4 of this newsletter reconfirmed that deferred benefits would be increased in line with CPI. The address this newsletter was sent to was Mr Y's correct address at the time.
7. In December 2018, Mr Y says he became aware that the Excess was being increased in line with CPI and not RPI. Subsequently, there were exchanges between Mr Y and the Trustee concerning the index used to increase the Excess. This resulted in Mr Y making a complaint through the Scheme's Internal Dispute Resolution Procedure (**IDRP**), in August 2019. In summary he said:-
  - He had not received the correspondence it claimed to have sent him informing him of the index change.
  - When he left the company and the Scheme in 2005, he received the 2006 Letter that informed him that the Excess would be increased in line with RPI up to a maximum of 5% per annum.
  - He expected the Trustee to honour this commitment and requested confirmation that the excess would be increased by RPI from the date of leaving until his NRA.
8. On 2 December 2019, the Trustee responded to Mr Y's IDRP complaint. It did not uphold his complaint and in summary said:-
  - From April 2011, the government switched the index used to calculate statutory pension increases in deferment from RPI to CPI. Prior to 2011, revaluation orders had used RPI as the measure of inflation, capped at various levels depending on when the benefit accrued.
  - The 2011 revaluation order was based on changes in CPI in the 12-month period to 30 September 2010. This meant that where schemes already revalued deferred pensions, or increased pensions in payment by reference to the annual revaluation orders and the rules did not explicitly refer to RPI, CPI was the measure of inflation to be used from 1 January 2011. The statutory minimum increase was announced each year and was given effect in a revaluation order.
  - The Fund's Trust Deed and Rules (**the Rules**) dated 25 February 1999, stated that the excess would be increased by the percentage appropriate under the revaluation laws. This was approximately equal to the percentage rise in the cost of living between the date the member ceased to be in pensionable service and their normal retirement date, with a maximum of 5% per year compound.
  - Accordingly, under the Rules and in accordance with legislation, pension increases in deferment were increased by reference to CPI.

- The Trustee acknowledged that the communication Mr Y received in 2006, stated his excess pension would increase in line with RPI. However, the Rules took precedence over member communications, and the Trustee was under a legal duty to administer the Fund in accordance with the Rules.
- Mr Y's member file indicated that the Statement, which detailed the change of deferred pensions being increased in line with CPI instead of RPI, was issued to him.

9. On 6 December 2019, Mr Y referred his complaint to The Pensions Ombudsman.

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

10. Mr Y said:-

- He first found out about the change of index to increase the Excess during a conversation with an ex-colleague, in December 2018. He was completely unaware of the change prior to this. Subsequently, he complained through the Scheme's IDRPs, but his complaint was not upheld.
- In its IDRPs response the Trustee included an extract from the Rules which he had not seen prior to then. The Trustee claimed he was sent notification about the change in October 2011. He did not receive the Statement. The only communication he had received about increases was the 2006 Letter. Had he received the Statement, he would have complained at the time. This is exactly what he did in 2019, when he found out about the change.
- The Trustee agreed that it had written to him in 2006 and confirmed that the excess would increase in line with RPI, but it asserts that it has to follow the Rules, which were not provided to him previously. He relied on the information supplied by the Fund for his pension planning. He believes the Trustee should stand by what it had promised.
- On several occasions between 2011 and 2019, he had investigated transferring out of the Fund. However, because he believed that the Excess would continue to increase by RPI, he decided to remain in the Fund. He had again looked at transferring out of the Fund, but until he knew the result of his complaint, he could not do this, as he was unsure what index would be applied following the resolution of his complaint.
- He was unclear about what the Rules state. He is not an expert in pension matters, but cannot see where the Trustee is compelled to increase the Excess in line with CPI. He is also aware that the Trustee is increasing pensions in payment by CPI and he believes this to be incorrect.
- He believes the difference between CPI and RPI is approximately 1% per annum, and because of compounding, the difference may be more over the longer period. At his NRA, he estimated that his starting pension could be approximately £3,500

lower using CPI. The issue would then be compounded once his pension was in payment, and by the age of 75, would be approximately over a third lower.

- He would like RPI increases to be reinstated from 2012 onwards, and to continue throughout the period until he retires. He would also like his pension in payment increased by RPI. This is what he believes he was promised by the Trustee and therefore is his entitlement.
- He retired from full time work in December 2018 and had planned to do a small amount of consultancy work from then until he reached age 60 in April 2022. He had also planned to start claiming his pension from the Fund at age 60.
- As a result of the lower pension caused by the change of index from RPI to CPI, he decided not to claim his pension from the Fund until his NRA. To make up the shortfall he has taken on more consultancy work over the past three years than originally planned, and will have to continue working until April 2024.

### **Summary of the Trustee's position**

11. The Trustee said:-

- It provided Mr Y with a copy of the Rules that detail how preserved pensions should be increased. This was taken from the Rules dated 25 February 1999. Since its response to Mr Y's complaint, the Rules had been consolidated. Rule 9.1.3(a) of the Rules dated 21 April 2021, states that preserved pensions will be increased in line with revaluation laws<sup>1</sup>.
- It acknowledged that the 2006 Letter informed Mr Y that the Excess would increase in line with RPI, as this was the correct position at the time. However, subsequently, the Statement informed Mr Y of the change of index used to revalue the Excess.
- Mr Y has said that he is not an expert in pension matters, and he could not see where it is compelled to increase the Excess in line with CPI. However, it is under a legal duty to administer the Fund in accordance with legislation and the Rules. Accordingly, the Excess is being increased in line with CPI, which is in accordance with legislation.
- Mr Y also said that he was aware that pensions in payment were being increased by CPI and that he also believed this to be incorrect. Following legal advice it was satisfied that it was entitled to increase pensions in payment by either RPI or CPI. Rule 17.2.1 states that pensions in payment shall be "increased in each year in line with the increase in the cost of living (determined by the Trustees)".
- It reviews the index to be used when agreeing pension increases each year and considers all relevant factors including the funding position if the company ceases to be able to support the Fund. The Trustee remains of the view that CPI currently

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<sup>1</sup>A copy of this Rule is set out in the Appendix.

remains the most appropriate index for determining increases for pensions in payment. The decision is one of prudence to ensure that all projected liabilities are met.

## **Adjudicator's Opinion**

12. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised below in paragraphs 13 to 18.
13. The Trustee had to administer the Scheme in accordance with the Rules. The Rules state that the Excess must be increased in accordance with the percentage required by the revaluation laws, between the date the member left service and their normal retirement date. The Rules did not state that the Excess must be revalued in line with RPI. So, it was the Adjudicator's view that there had been no maladministration by the Trustee concerning the way the Excess has been increased since 2012.
14. The Adjudicator accepted that the 2006 Letter had informed Mr Y that the Excess would increase in line with RPI. In the Adjudicator's view, the Trustee did not provide Mr Y with incorrect information as that was the correct position at the time.
15. The Trustee had a duty to inform Mr Y of the change of index used to increase the Excess when the change was made. The Adjudicator noted that the Trustee had sent Mr Y the Statement. However, as the Statement had an incorrect postcode, she was not persuaded that Mr Y had received it. While this amounted to maladministration, for me to uphold a complaint, it was not simply the case that I must identify maladministration. I must also be satisfied that the individual has, as a result, sustained injustice.
16. The Adjudicator noted that the Trustee had sent members a newsletter in 2012, and that this also detailed the change of index. This newsletter was sent to Mr Y's correct address at the time. So, it was likely that Mr Y was notified of the change of index at that time. The Trustee could not be held responsible if Mr Y did not receive the newsletter. As the maladministration (identified in paragraph 15 above) was corrected soon afterwards, the Adjudicator's view was that Mr Y suffered no injustice by the Statement being incorrectly addressed.
17. Regarding Mr Y's comments concerning the index used to increase pensions in payment, it was the Adjudicator's view that pensions in payment were also being increased in accordance with the Rules and legislation, so there had been no maladministration by the Trustee in this regard.
18. Under Rule 17.2.1 the Trustee is entitled to increase pensions in payment by either RPI or CPI. The Trustee had explained that it reviews the index to be used when agreeing pension increases each year and considers all relevant factors including the funding position if the company ceased to be able to support the Fund. The Trustee had decided that CPI currently remained the most appropriate index for determining

increases for pensions in payment. It said the decision was one of prudence to ensure that all projected liabilities are met. In the Adjudicator's opinion that I would not consider the Trustee's decision to have been improperly made.

19. Mr Y did not accept the Adjudicator's Opinion. He provided a spreadsheet detailing the financial impact the change in index has had on his future pension, to show in more detail the injustice he believes he has suffered. He also provided some additional comments and these are summarised below, in paragraphs 20 to 26.
20. The newsletter is a four page document containing accounts and lots of other detail with one short paragraph referencing the change of index. This communication is in total contrast to the 2006 Letter. He did not receive the newsletter. Even if he had, the Trustee had a duty of care to ensure that it communicated a fundamental change to his pension in the same way that it had sent the 2006 Letter.
21. In his view, the Trustee had not fulfilled its duty to inform him of the change of index. One line in a four page newsletter, referencing the Statement, which he did not receive, was not sufficient to fulfil its duty to inform him of such a fundamental change to his pension. As a result of this maladministration, he suffered injustice.
22. In respect of the index used to increase pensions in payment, the Adjudicator found that the Trustee was entitled to increase pensions in payment by either RPI or CPI under Rule 17.2.1. However, the Adjudicator did not look at the changes that were made to the Rules and whether the Trustee had the power to make those changes. He understood that the company had changed the Rules by amendment, on 17 October 1991, and those changes were implemented by the Trustee in 2003. This change allowed the Trustee to use CPI. He queried whether the company and the Trustee had the power to change the Rules.
23. The Trustee claims it had taken legal advice on whether it had the power to change the index to CPI. The Adjudicator requested a copy of the legal advice but the Trustee refused to provide it. He queried why the Trustee sought legal advice and why the Adjudicator was allowing the Trustee to withhold the legal advice it had received.
24. The Trustee has a duty to act in the best financial interests of the members. If the Trustee is supposed to be acting on behalf of the members, he could not see how it could justify reducing members' pensions by using an index that is not in their best financial interests. CPI is in the best financial interests of the company that is required to make up any shortfall in the Fund. He could only conclude that the Trustee was acting in the best financial interest of the company. He argues that by choosing an index that is not in the best financial interest of the members, the Trustee has failed in its primary duty.
25. He reviewed the funding position reported by the Trustee since it made the change to the index in 2011. The Trustee stated that it took the ongoing funding position into account when deciding to use CPI instead of RPI. However, it could be "clearly seen"

that the Fund had been running at a surplus since the Trustee switched the index to CPI from RPI.

26. He also provided details of how Member Nominated Directors (**MNDs**) are now appointed and why he believed this to be unfair.
27. Mr Y requested an oral hearing if the Adjudicator did not change her opinion, following his post Opinion submissions.
28. The Trustee provided a copy of the original Rules dated 24 October 1977 (the **Original Rules**), which were effective from 1 April 1976, and a copy of the Deed of Amendment dated 17 October 1991 (the **Deed of Amendment**)<sup>2</sup>. It also made some additional comments and these are summarised below, in paragraphs 29 to 32.
29. The pension increase rule has evolved since the Original Rules were introduced on 24 October 1977. The key change to allow the Trustee to use its discretion to choose the index, was introduced by an amendment on 17 October 1991. Although the Trustee was satisfied that the amendment to the Rules was valid, for completeness and with due regard to its importance, the Trustee considered it prudent to request formal legal advice in 2012.
30. A Leading QC and a highly ranked Barrister both considered the effectiveness and validity of the amendment in 1991, in their joint legal opinion provided to the Trustee. In that legal opinion, they concluded that the introduction of the discretion was both valid and effective and in accordance with the terms of the Executive Fund's amendment power. Furthermore, the change to the Rules also increased the cap on the increases that were provided to members from 3%, at a time when RPI exceeded 3%, therefore allowing greater increases to be provided to members.
31. The Trustee is a professional body formed of highly experienced and respected Trustee Directors. As required under legislation, the Trustee has appointed professional advisers to ensure that the Fund is administered in accordance with the Rules, pensions law and regulatory requirements. It is of paramount importance to the Trustee that that it acts prudently, responsibly and with integrity in carrying out its duties.
32. The reasons for not disclosing the legal advice to Mr Y are: (i) the advice is privileged and confidential between the Trustee and its legal advisers; and (ii) Mr Y's complaint has not been upheld. The Trustee hopes that its explanation has provided the necessary assurances that the decision taken in 2012 by the Trustee to switch the index to CPI was undertaken appropriately.
33. As Mr Y did not accept the Adjudicator's Opinion the complaint was passed to me to consider. Mr Y's additional comments do not change the outcome. I agree with the Adjudicator's Opinion.

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<sup>2</sup> Relevant sections of the Original Rules and the Deed of Amendment are in the Appendix.

## **Oral Hearing**

34. I have the power to hold an oral hearing under the procedural discretion contained in Section 149(4) of the Pension Schemes Act 1993. However, I tend not to exercise my discretion unless I consider that a complaint cannot be determined without me hearing directly from the parties.
35. After careful consideration of Mr Y's request, I find that there is sufficient information in the written and documentary evidence to make a sound decision and determine the complaint, without the need for an oral hearing.

## **Ombudsman's decision**

36. Mr Y's complaint concerns the index being used by the Trustee to increase the Excess and pensions in payment.
37. The Trustee has to manage the Fund in accordance with the Rules. The current Rules allow the Trustee to decide the index used to increase the Excess and pensions in payment.
38. In his post Opinion submissions, Mr Y raised the point that the Adjudicator did not check if the Trustee had the legal right to change the Rules.
39. I have considered the Original Rules and the Deed of Amendment. The Original Rules state that the GMP of deferred pensions should be increased by such rate as regulations, made under section 45 (1) (b) of the Social Security Pensions Act 1975, specify as being relevant to the date of termination.
40. In relation to pensions in payment, the Original Rules state that these benefits should be increased by the Authorised Increase. Authorised Increase was defined as "an increase proportionate to the increase in the Index." Index was defined as "the All Items Index of Retail Prices published by H.M Government or such other index as may from time to time be agreed for the purposes of the Rules by H.M. Commissioners of Inland Revenue."
41. Clause 11 of the Original Rules permitted the amendment to all or any of the provision of the Original Rules.
42. Rule 9A of the Deed of Amendment states that the Excess will be increased by the percentage appropriate under the Revaluation Laws. In relation to the increase applicable to pensions in payment, Rule 19B of the Deed of Amendment states that pensions in payment, except for GMP, will increase each year in line with the increase in the cost of living (determined by the Trustees).
43. I find that the Original Rules and the Deed of Amendment did not specify that the Excess or pensions in payment should only be increased by RPI. So, the Trustee was not prohibited from changing the index used to revalue these benefits.



44. The Trustee is permitted to obtain legal advice in relation to any amendments it makes to the Rules. The Trustee is permitted to withhold the legal advice it received concerning the change of index from CPI to RPI, as this advice is deemed to be privileged between the client, who is the Trustee and its legal advisers. Mr Y's dissatisfaction with the Trustee not sharing this advice does not mean that there was maladministration by the Trustee.
45. Mr Y raised additional points concerning the appointment of MNDs. These are new points that were not included nor investigated in Mr Y's original complaint. So, I have not made a finding in respect of them.
46. I do not uphold Mr Y's complaint.

**Anthony Arter**

Pensions Ombudsman  
15 December 2022

## Appendix

### Relevant extracts of the Rules for the CEMEX UK Executives' Pension Fund dated 21 April 2021

47. As relevant Rule 9.1, 'Preserved Pension', provides:

"9.1.3... (a):

If the Member leaves Service at least a year before Normal Retirement Date, the pension in excess of GMP will be increased by the percentage required by the Revaluation Laws (which is approximately equal to the percentage rise in the cost of living between the date the Member left Service and Normal Retirement Date, with a maximum of (i) 5 per cent a year compound for pension accrued before 6 April 2009 and (ii) 2.5 per cent a year compound for pension accrued on and after 6 April 2009);..."

48. As relevant, Rule 17.2, 'Pension Increases', provides:

"17.2.1 Each pension in payment, except for any GMP which is in payment, will increase on each 1 January as follows:

(a) increases to pensions in respect of Pensionable Service accrued before 1 December 2011 shall be increased in each year in line with the increase in the cost of living (determined by the Trustees) over the 12-month period ending on the previous 30 September, but shall be subject to a maximum of 5 per cent in the case of a Special Executive or 8 per cent in the case of a Top Executive or in either case such higher percentage as CEMEX decides; and..."

(b) increases to pensions in respect of Pensionable Service accrued on and from 1 December 2011 shall be increased in line with the increase in the cost of living (determined by the Trustees) over the 12-month period ending on the previous 30 September, but shall be subject to a maximum of 2.5 per cent or such higher percentage as CEMEX decides..."

### Relevant Extracts of the Original Rules of the CEMEX UK Executives' Pension Fund dated 24 October 1977

Power to modify Trust Deed and Rules

"11. THE Trustees may at any time and from time to time with the consent of the Company by deed modify all or any of the provisions of the Trust Deed and Rules provided that no such modification shall be made if it would :-

(i) ...

- (ii) diminish any Pension already being paid under the Scheme save with the written consent of the pensioner concerned unless such action is necessary to secure the Approval of the Scheme; or
- (iii) diminish the rights of interests of any Member or other person in respect of benefits already accrued under the Scheme save with the written consent of the Member concerned unless (a) such action is taken prior to the Member's Normal Retirement Date and while he is still in Service and would not prejudice continued Approval of the Scheme and the Trustees (having taken advice from the Actuary) have resolved that such action would be reasonable having regard to any increases in the level or other improvement in any benefits being provided for the Member pursuant to any legislation and other than under the Scheme or (b) such action is necessary to secure the Approval or the continued Approval of the Scheme...

### DEFINITIONS

"Authorised Increase" means in respect of any Members in receipt of a Pension at any 1st day of January an increase proportionate to any increase in the Index since the previous 1st day of January (or later date of commencement of such pension); subject to a maximum increase of 3 percent. or such higher figure as the Company shall decide and which does not infringe any income policy of H.M. Government...

"Index" means the All Items Index of Retail Prices published by H.M. Government or such other index as may from time to time be agreed for the purposes of the Rules by H.M. Commissioners of Inland Revenue...

### PAYMENT OF PENSIONS

- 10. Each Pension becoming payable under the Scheme shall be increased at each first day of January subsequent to the date on which the Pension commenced to be payable by the Authorised Increase based on the amount of such Pension immediately prior to such first day of January...

### CONTRACTED-OUT EMPLOYMENT

- 19. (a)...
- (b) In the Rule words and expressions which have particular meanings ascribed to them in the Social Security Pensions Act 1975 (hereinafter in this Rule called "the 1975 Act") shall have the same meaning respectively...
- (g) In the event of any Member ceasing to be in contracted-out employment before pensionable age the guaranteed minimum pension to which he is entitled under the Scheme from

pensionable age shall be calculated on the basis that the guaranteed minimum pension which has accrued up to such cessation shall be increased for each complete fiscal year after the fiscal year in which such cessation occurred up to and including the last complete fiscal year before attainment of pensionable age by such rate as regulations, made under section 45 (1) (b) of the 1975 Act, specify as being relevant to the date of termination...

**Relevant Extracts of the Deed of Amendment of the CEMEX UK Executives' Pension Fund dated 17 October 1991**

“ ...

1. MEANING OF WORDS USED

...

“Revaluation Laws” means the laws as to revaluation of benefits introduced by the Social Security Act 1985...

9. Early LEAVERS

9A. PRESERVED PENSION. A Member who leaves Service before Normal Retirement Date will receive a pension from life from Normal Retirement Date calculated as the total of...

and increased as follows :-

(a) if the Member leaves Service at least a year before Normal Retirement Date, the pension in excess of GMP will be increased by the percentage appropriate under the Revaluation Laws (which is approximately equal to the percentage cost of living between the date the Member ceased to be in Pensionable Service and Normal Retirement Date, with a maximum of 5% per year compound...

19B. PENSION INCREASES. Each pension in payment, except for any GMP which is in payment, will increase as 1st January in each year in line with the increase in the cost of living (determined by the Trustees) since the previous 1st January, or date of commencement of the pension, if later, but subject to a maximum of 5% in the case of a General Executive or a Special Executive or 8% in the case of a Top Executive or in either case such higher percentage as the Principal Employer decides...”