

Ombudsman's Determination

Applicant	Mr X
Scheme	Railways Pension Scheme (the Scheme)
Respondent	Trenitalia c2c Limited (c2c Rail)

Outcome

1. Mr X's complaint against c2c Rail is partly upheld. To put matters right, c2c Rail shall award Mr X £1,000 in recognition of the serious distress and inconvenience which he has experienced dealing with this matter.

Complaint summary

2. Mr X has complained that c2c Rail improperly reneged on a contractual agreement, given at the time of the restructuring of his employment in 2015, that all service, as opposed to future service only, would be pensionable at his higher consolidated rate of pay in the Scheme.

Background information, including submissions from the parties

3. Mr X is employed as a Shift Production Manager (**SPM**) (formerly Shift Production Supervisor (**SPS**)) by c2c Rail. He is an active member of the Scheme.
4. On 4 July 2012, there was a meeting between c2c Rail and five SPMs, including Mr X, during which c2c Rail offered, in principle, a proposal to restructure the terms and conditions of their employment. The SPMs were represented by the Transport Salaried Staff's Association (**TSSA**).
5. According to a paper presented by c2c Rail at this meeting, one of the suggestions made by it was:

“Pension full salary, but would not be paid for until next July 2013.”
6. TSSA says that the SPMs rejected c2c Rail's proposal because there were deficiencies with other aspects of the offer.

7. Protracted negotiations between c2c Rail and the SPMs, with the assistance of the TSSA, then ensued over the proposed restructure to the terms and conditions of their employment.
8. On 24 December 2013, the Human Resources Director of c2c Rail, Mr G, sent the Head of Human Resources, Ms D, an e-mail concerning the restructure which said:

“With regard to pension, we would want to specify that the salary increase applies for future service only (i.e. we put in a Pensionable Restructuring Premium (**PRP**) – without this it adds an unnecessary burden on the pension scheme.”
9. Mr A, the Engineering Director at c2c Rail, who was involved in the ongoing negotiations with the SPMs, received a copy of this e-mail for his information.
10. Another restructure meeting took place on 14 January 2015 between c2c Rail, some of the SPMs and their TSSA representative at the time, Ms R.
11. c2c Rail however says that it cannot find any minutes detailing what was discussed during the meeting.
12. After this meeting, the negotiations intensified between c2c Rail and TSSA. On 27 February 2015, Ms D sent Ms R copies of the draft employment contracts to be shared with the SPMs. On the following day, Mr H, a SPM who was acting as the union representative for his fellow SPMs, informed Ms R that his contract did not state that remuneration would be “fully pensionable” in the Scheme.
13. In her e-mail dated 12 March 2015, Ms R notified Ms D that:

“I have consulted our members and we wish to raise a number of points and queries regarding the draft. I’ve listed them according to paragraph for ease of reference. Hopefully we can reach an understanding on the various points and move forward...”

Paragraph 7. Remuneration No mention of being fully pensionable. No mention of Bonus...”
14. Ms D replied on the same day as follows:

“Bonus is non contractual and as such will appear in the covering letter rather than the contract. We can mention pensionable in the covering letter”.
15. On 17 March 2015, Ms R asked Ms D to send her a copy of the draft covering letter so that she and the SPMs could examine it because “a number of important issues” had to be covered in the letter.
16. Ms D complied with Ms R’s request and subsequently received an e-mail from Mr H which said that he and the other SPMs had decided to accept the offer made.
17. Ms D replied on 17 March 2015 that she was pleased they had accepted.

18. Both the contract setting out the new terms and conditions of their employment and the covering letter which the SPMs received from c2c Rail were dated 6 February 2015. The documents had, however, been updated to include any amendments made to them up until when the offer was accepted by the SPMs on 17 March 2015.

19. The covering letter said that:

“Please find enclosed a copy of the contract...as earlier agreed between yourself, your trade union representative, Ms R and Engineering Director, Mr A.

All existing pay arrangements made under your previous terms and conditions will cease from 14 February. Your new pay arrangements will take effect...on the 15 February 2015. For clarification, this consists of basic pay only, equating to £52,000 per annum...

As agreed c2c will pay £210 per 4 weeks from the 15 February until 4 July, at which point, the new pension contribution rates for both employee & employer will take effect – based on the new basic pay rate. This ex-gratia payment was agreed to make up for the reduction in total package cost between the start date of the new contract and the subsequent increase in employer pension contributions from 5 July.”

20. Section 11 of the new contract entitled “Pension Scheme” stated that:

“The Manager is eligible to join the NXET Trains Limited Section of the Scheme subject to the trust deed and rules of that scheme as in force from time to time...Their contributions to the Scheme will be deducted from their salary...”

21. The SPMs subsequently received Annual Pension Estimates (**APEs**) from the Scheme administrator, RPMI, for 2015 and 2016 showing that the estimated pension and tax free lump sum available to them on retirement from the Scheme had been calculated using their higher consolidated basic pay for all pensionable service.

22. Some of the SPMs, including Mr X, had not received their APE for 2017 by November 2017. Others had received them but these APEs showed that only part of their consolidated basic pay was pensionable for all service, with the residual being pensionable for future service only by means of a PRP.

23. The SPMs raised their concerns about the APEs for 2017 with c2c Rail.

24. Mr R, the Head of HR and Development, replied in an e-mail dated 26 January 2018 to the SPMs as follows:

“Please see attached a breakdown of the pensionable pay for the SPS staff who were restructured to become SPMs back on 15 February 2015.

Upon this restructuring, where you had the increase in basic salary plus London allowance from £32.7K to a basic salary of £52K, this uplift was to

become pensionable from future service only (i.e. the £19.3K increase was to accrue pensionable service from this date (15 February 2015) and introduced what is known as a PRP.

It would appear that back in 2015, the previous HR team had not completed the proforma to execute the deed to introduce the new PRP.

This is why you will have received a statement from RPMI following the end of 2015 showing this as pensionable for all years of service.

I apologise on behalf of the company that this part of the restructuring was not explained to you clearly...”

25. The SPMs complained to c2c Rail in March 2019 that it had improperly reneged on a contractual agreement given at the time of the restructure of their employment that all service would be pensionable at their higher consolidated basic pay in the Scheme.
26. The Investigating Manager at c2c Rail, Ms P, met with the SPMs and Mr R separately in May 2019 in order to understand fully the nature of the complaint.
27. In her report to c2c Rail, Ms P said that the key points from her discussion with Mr R were as follows:
 - Mr R was the only person left in the management team at c2c Rail who had detailed knowledge of this restructure.
 - From the outset of the proposed restructure, it had been made plain that any changes must be cost neutral*.

*It was unclear to Ms P how c2c Rail had communicated this to the SPMs though.

- Given the strict instruction from Mr G in his e-mail dated 24 December 2013 that the restructure should be cost neutral, it would have been highly unlikely for c2c Rail to have subsequently agreed that the benefits available to the SPMs from the Scheme should be based on their higher consolidated basic salary for all service.
- Mr G or Ms D should have dealt with the introduction of the PRPs which included the completion of a “Proforma Employer Confirmation Letter” (**the Proforma**). They failed to do so and as a consequence of this error, the APEs for 2015 and 2016 sent to the SPMs by RPMI incorrectly showed that their higher consolidated basic salary as being pensionable for all service in the Scheme.
- It was only in October 2016, after one of the SPMs had contacted him with a query about his APE for 2016, that Mr R discovered the mistake and arranged for the Proforma to be completed so that the PRPs could be implemented by RPMI.

- Mr R contacted Ms D on 1 December 2016 to find out why the PRPs had not been introduced but did not receive a response.
- Mr R accepted that the SPMs should have been informed of the mistake and the effect it would have on the calculation of their retirement benefits before the APEs for 2017 were issued to them. It was regrettable that this did not happen.

28. Ms P concluded in her report that:

“It could have been made clearer to the SPMs that their increase in basic salary would apply for future pensionable service only. To avoid any doubt, this should have been formally documented in a meeting and via a follow up letter.

The administration associated with the restructure (notes of meetings, letters, submission of relevant paperwork) was in many cases incomplete.

As a result of the above point (poor administration), the SPMs were unclear on the position of their pension status and this is unsatisfactory, given that individuals may have been planning for their future based on what they believed their pension entitlement to be.

That the pension statements received in 2018 (the lesser amount) is indeed correct.”

29. Ms P sent a letter to each SPM on 18 September 2019 informing them of the findings of her investigation into their complaint.

Mr X's position

30. The evidence submitted by c2c Rail did not reflect the contractual agreement reached with the SPMs in March 2015. “Assumptions and intentions” have been presented as facts by c2c Rail. Important elements of the discussions that took place between Ms R and Ms D which led to the collectively negotiated restructuring agreement have been overlooked or, because of its poor record keeping, simply not found by c2c Rail.
31. c2c Rail previously offered the SPMs fully pensionable pay for all service in the Scheme during a restructure meeting held in July 2012.
32. c2c Rail has relied on an internal e-mail dated 24 December 2013 from Mr G to justify its stance that the increase to the SPMs' basic pay was pensionable for future service only. There is, however, no evidence to show how c2c Rail had communicated this to the SPMs.
33. The e-mail of 24 December 2013 might have shown c2c Rail's position on the proposed restructure at the time, but the seeming “red line” on fully pensionable pay applicable for all service in the Scheme was crossed when the issue was discussed by Ms R and Ms D in 2015. All the SPMs subsequently signed their contract because they believed that this was what had been agreed with c2c Rail.

34. c2c Rail did not use PRPs for previous restructures involving small groups of managers such as Controllers and Driver Managers.
35. c2c Rail chose to implement fully pensionable pay for all service in the Scheme for the SPMs. c2c Rail did not make a mistake by doing so as it now asserts. Its covering letter sent with the contracts was not only silent on the use of the PRP but also stated that the higher consolidated basic pay would be used to calculate the contributions payable into the Scheme by both the SPMs and c2c Rail.
36. Ms P did not have all the available evidence when investigating the SPMs' complaint. In particular, she was not provided by c2c Rail with the chain of e-mails in February and March 2015 between Ms R and Ms D leading up to the contractual agreement.
37. "It is easy for an employer several years after reaching an agreement with a trade union or a group of employees to then declare a mistake was made without any evidence actually being produced. Frankly, that approach undermines every collective agreement as potentially up for change at the whim of an employer and can only mean a significant breach of trust in dealing with that company or individual. What is more galling is that the management team involved with the restructuring were very experienced in what they were doing in agreeing fully pensionable pay from start of service and so would have been aware of the implications in implementing it (something they had also done with the Driver Managers and Controllers in previous restructurings of pay and conditions)."

The position of c2c Rail

38. There is no evidence of any correspondence from c2c Rail which substantiates the SPMs' position that they and Ms R were led to believe that a contractual agreement had been reached at the time of the restructure for all of their service in the Scheme to be pensionable at the higher consolidated basic pay.
39. c2c Rail accepts that it should have made clearer in the covering letter and contract sent to the SPMs that the increase to their basic pay would be pensionable for future service only in the Scheme. There is nothing in these documents, however, which would support a view that the increase should be pensionable for all service. In particular, the covering letter said that the new consolidated pay arrangements only became effective from a prospective date of 15 February 2015 and did not apply retrospectively.
40. Mr G informed Ms D in his e-mail dated 24 December 2013 that a PRP should be implemented for future service when restructuring the terms and conditions of employment for the SPMs. It was with reference to Mr G's instructions that the contracts were drafted and the associated discussions took place in 2015.
41. The APEs for 2015 and 2016 which RPMI sent to the SPMs incorrectly showed that the estimated retirement benefits available to them from the Scheme were calculated assuming the higher consolidated basic pay as being pensionable for all their service in the Scheme.

42. These incorrect estimates did not, however, give rise to any legal right to the higher benefits shown on them. The mistake was rectified in the APEs for 2017 to reflect that the increase to basic salary was pensionable for future service only in the Scheme and explicitly mentioned the PRP.
43. It would like to apologise to the SPMs for its error and also for failing to make it clear to them at the time of the restructure that only future service would be pensionable at their higher consolidated basic pay in the Scheme.

Adjudicator's Opinion

44. Mr X's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of c2c Rail. The Adjudicator's findings are set out in paragraphs 45 to 61 below.
45. Mr X contended that at the time of the restructuring of his employment in 2015 a contractual agreement was reached with c2c Rail that all service in the Scheme accrued during his employment would be pensionable at his higher consolidated rate of pay.
46. Having carefully examined the covering letter and new contract sent to Mr X in March 2015, it was the Adjudicator's view that c2c Rail should have made it perfectly clear in these documents for which period of Mr X's service the increase to his basic pay would be pensionable in the Scheme. Regrettably, c2c Rail failed to do this which, in the Adjudicator's opinion, had largely caused the unfortunate position which Mr X now found himself in.
47. Neither the covering letter nor the contract explicitly stipulated that the increase to Mr X's basic pay would be pensionable for future service only. Conversely, there was nothing in these documents which would support a view that all of his service, both past and future, should be pensionable at his new higher consolidated basic salary.
48. The outcome of Mr X's complaint therefore fundamentally turned on the events leading up to the decision made by Mr X and the other SPMs to sign their new contracts on 15 March 2015.
49. Mr X asserted that, during the meeting on 4 July 2012, c2c Rail had proposed that all of the SPMs' service would be pensionable at their higher consolidated basic pay in the Scheme. However, it was unclear from the paper prepared by c2c Rail for this meeting whether this was indeed its intention. The paper merely stated that one of the proposals had been, "Pension full salary, but would not be paid for until next July 2013." This statement was vague and did not explicitly mention the period of service for which this "full salary" should be pensionable in the Scheme.
50. Mr X also contended that during the negotiations between Ms D of c2c Rail and Ms R of TSSA during February and March 2015, the "red line" on fully pensionable pay applicable for all service in the Scheme was crossed. However, neither TSSA nor c2c

Rail had been able to supply any documentary evidence which categorically proved that this was the case.

51. From the e-mail correspondence at that time between Ms R, Ms D and Mr H, who was acting as the union representative for his fellow SPMs, it was evident that the SPMs' remuneration being "fully pensionable" was mentioned during the negotiations. Unfortunately the e-mails did not shed any further light on whether this criterion applied to all of the SPMs' service or just their future service in the Scheme.
52. The Adjudicator had no reason to doubt what Mr X and the other SPMs had said they wanted to achieve from the collectively negotiated restructuring agreement. However, it was unclear from the evidence whether or not their terms were made plain to c2c Rail. If the TSSA representative had done this, given the clear position of c2c Rail that the increase to their basic pay in the Scheme should be pensionable for future service only, as shown in Mr G's e-mail of 24 December 2013, it would, in the Adjudicator's view, have been highly unlikely for c2c Rail to have agreed to the SPMs' conditions.
53. The Adjudicator could only reach a view based on the available evidence, including the conflicting recollections of what transpired. Although he fully sympathised with Mr X's circumstances, it was his opinion that the evidence fell short of establishing with sufficient certainty that c2c Rail had improperly gone back on a contractual agreement given at the time of the restructuring of his employment that all service would be pensionable at his higher consolidated rate of pay in the Scheme.
54. However, the Adjudicator agreed with the findings made by Ms P, in her investigation of the complaint, that how c2c Rail handled the paperwork associated with the restructuring of the SPMs' employment had been somewhat poor. In particular, the failure of c2c Rail to: (a) make it clear to the SPMs that the increase in basic salary would apply for their future pensionable service only; and (b) retain the minutes of the meeting held on 14 January 2015, in the Adjudicator's opinion, constituted maladministration on its part.
55. Given the conclusions above, the Adjudicator was satisfied that the failure of c2c Rail to complete the Proforma shortly after the contracts were issued to the SPMs in March 2015, so that the PRPs could be implemented by RPMI was another mistake on its part which also amounted to maladministration.
56. As a consequence of c2c Rail's error, RPMI sent APEs for 2015 and 2016 to Mr X which incorrectly showed overstated estimated retirement benefits available to him from the Scheme based on his consolidated basic pay being pensionable for all service.
57. When the error was identified by c2c Rail in October 2016, it arranged for the Proforma to be completed so that the PRPs could be implemented by RPMI but did not inform the SPMs of what had happened. Its failure to do so, in the Adjudicator's opinion, represented further maladministration attributable to c2c Rail.

58. However Mr X was only entitled to the benefits provided by the rules of the Scheme. Exceptionally, in cases where incorrect information had been given redress would be provided if it could be shown that financial loss or non-financial injustice had flowed from reliance on that incorrect information. For example, the member might have taken a decision in reliance on the accuracy of the information, which they would not otherwise have taken. However, they must be able to show both that they relied on the accuracy of the information provided and that it was reasonable to do so. The Adjudicator had seen no evidence which would lead him to such a conclusion in Mr T's case.
59. Moreover, if Mr X suspected that he might have suffered a loss, he had a responsibility to take reasonable steps to mitigate his loss by attempting to return himself, as near as possible, to the position he would have been in. Then to the extent that he could have mitigated, he could not claim that he had suffered a loss as a result of a mistake made by c2c Rail.
60. Although, it was the Adjudicator's view that Mr T had not suffered any actual financial loss, it was clear that he had experienced serious distress and inconvenience because of the maladministration set out in paragraphs 54,55 and 57 above.
61. The Adjudicator noted that c2c Rail had apologised to Mr X for its shortcomings but had not offered Mr X any goodwill award for the distress and inconvenience which he had suffered. The Adjudicator said my awards for non-financial injustice were modest though and not intended to punish a respondent. In the Adjudicator's view, the non-financial injustice which Mr X had suffered was serious enough to warrant a compensation award of £1,000.
62. Mr X did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr X provided his further comments which do not change the outcome.
63. Mr X said that:-
- It was clear from Mr H's witness statement dated 22 September 2021 (as set out in the Appendix) that c2c Rail had offered the SPMs fully pensionable pay applicable for all service in the Scheme during the restructure talks with Ms D and Mr A in 2015. This statement also demonstrated that despite what c2c Rail said its position on the proposed restructure had been in December 2013, an agreement was reached that became a collective variation in the SPM's employment terms.
 - According to TSSA's lawyers, the unilateral decision taken by c2c Rail to change these employment terms several years later by claiming that a mistake had been made was a breach of contract.
 - c2c Rail did not use PRPs in previous restructures of small groups of supervisory grade staff. The SPMs' aspirations for restructuring were based on these restructures.

- It was evident from the comments made by the SPMs on the paper presented by c2c Rail at the meeting in July 2012 that their aim was for “a salary increase that would be fully pensionable from start of service.”
- Mr R, a Train Service Controller, and Mr W, a retired Driver Manager, had provided witness statements (see the Appendix) which showed that following restructures of their pay and conditions, they received higher salaries which were fully pensionable for all service in the Scheme. Mr D, another retired Driver Manager, had verbally confirmed the same arrangement, being involved in the same deal as Mr W.
- In light of the points made above, c2c Rail’s statement that the new contracts were drafted with reference to Mr G’s instructions and the subsequent discussions in 2015 did not reflect how the restructuring actually took place.
- The SPMs would not have accepted the restructure to their terms and conditions of employment, “if the pension issue had not been in line with their expectations.”
- The significant losses suffered by the SPMs to their future pension benefits are unlikely to be recoverable even if they work beyond their Normal Retirement Age (**NRA**) of 60 in the Scheme.
- An award of £1,000 to each SPM for the non-financial injustice which they have suffered is a very small price for c2c Rail to pay when the SPM’s pensions have been “radically changed.”

64. c2c Rail replied as follows:-

- It cannot find any relevant documentation concerning the restructures mentioned by Mr R and Mr W in their witness statements.
- Without knowing the basis of the terms of the negotiation specific to those restructures and the circumstances at that time, it is unable to determine “whether the removal of PRPs was an agreement of that negotiation or an error upon processing.”

65. I note the additional points raised by Mr X but I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

66. Having carefully considered Mr H’s witness statement, I accept that what Mr X and the other SPMs had hoped to achieve from the restructuring negotiations was for all service to be pensionable at their higher consolidated rates of pay in the Scheme.

67. I note Mr H has also said that the SPMs’ aspirations were achieved in the contractual agreement reached with c2c Rail, but I have seen no clear documentary evidence which substantiates his statement.

68. Neither the contracts nor the covering letters issued to the SPMs show that the increase to their basic pay would be pensionable for all service in the Scheme.
69. Furthermore, it is unclear from the e-mails between Ms R, Ms D and Mr H, sent during the restructuring negotiations in 2015 whether the SPMs' wishes had been conveyed lucidly to c2c Rail. If they had, given the position which c2c Rail expressed in December 2013 that the increase to the SPMs' basic pay in the Scheme should be pensionable for future service only and also cost neutral, I find it would have been most unlikely for c2c Rail to have agreed to their request.
70. Although c2c Rail may not have previously used PRPs in the restructures of other small groups of supervisory grade staff such as Train Service Controllers and Driver Managers, this did not, however, mean it could not do so when subsequently restructuring the SPMs' terms and conditions of their employment.
71. c2c Rail was entitled to exercise commercial judgment and take into account its financial interests when negotiating the terms of each restructure. There was no guarantee that the SPMs would be treated in the same way as the other groups by c2c Rail during a restructure.
72. While I sympathise with Mr X's circumstances, I do not consequently consider that the evidence shows that c2c Rail had improperly reneged on a contractual agreement that all service would be pensionable at his higher consolidated basic pay in the Scheme.
73. The APEs for 2015 and 2016, which RPMI sent to Mr X, incorrectly showed overstated estimated retirement benefits available to him from the Scheme based on his consolidated basic pay being pensionable for all service because of a mistake made by c2c Rail.
74. I do not consider that Mr X has suffered any actual financial loss as a consequence of this error. What he has suffered is a loss of expectation. He expected to receive the higher benefits from the Scheme but was not entitled to them. RPMI can only pay him the correct retirement benefits calculated in accordance with the trust deed and rules of the Scheme.
75. However, it is clear to me that Mr X has experienced serious distress and inconvenience because of the c2cRail maladministration identified in paragraphs 54,55 and 57 above. My awards for non-financial injustice are modest and not intended to punish a respondent. I consider that the non-financial injustice which Mr T has suffered is serious and warrants an award of £1,000.
76. I partly uphold Mr X's complaint.

Directions

77. c2c Rail shall within 28 days of the date of this Determination, pay Mr X £1,000 in recognition of the serious non-financial injustice which he has suffered.

Anthony Arter

Pensions Ombudsman
20 June 2022

APPENDIX

Witness Statement from Mr H, a retired Shift Production Manager, dated 22 September 2021

“I confirm that at the time I was involved in the talks about restructuring the SPMs pay, we all understood fully pensionable to mean from start of service so that it would apply to our salaries from when we started work. This was the agreement that we reached with c2c managers Ms D and Mr A.

All we wanted was to be treated the same as the other managers on c2c when they were restructured their pension was from start of service so we just wanted parity with them we used this as a basis of our argument when we held restructuring talks with Ms D and Mr A.”

Witness Statement from Mr R, Train Service Controller, dated 28 March 2022

“...I lost track of my pension details after 2018 as I collected my pension & BRASS that year.

I recall that during 2003 the pay structure for c2c controllers / Train Service Managers went through a restructuring of salary, all the additional payments & alike being placed into a single salary.

At some point there was to be two pensions, the BR unto that date and a Company pension from that date, however, this was changed or never took place as all my pension rights stayed within the BR pension with the normal conditions & there was no restructuring premium involved.”

Witness Statement from Mr W, a former Driver Manager, dated 8 April 2022

“I can confirm that as a Driver Manager employed by c2c Rail our grade underwent a restructuring process in (I believe) 2000, can't be 100% certain of that date as it was over 20 years ago.

As part of this process our salary was increased by quite a lot but we lost allowances and enhancements such as “On Call Allowance” and “unsocial hours payment”. We also lost overtime payments during this process.

Part of this agreement for this process was that the new rate was fully backdated to start of the service.”
