

Ombudsman's Determination

Applicant	Mrs S
Scheme	Scottish Widows Retirement Benefits Scheme (the Scheme)
Respondents	Lloyds Banking Group (LBG)

Outcome

1. Mrs S' complaint against LBG is partly upheld. To put matters right, LBG shall increase its award to £500 for the significant distress and inconvenience caused.

Complaint summary

2. Mrs S complained that LBG has incorrectly calculated the value of her pension benefits. This is because LBG did not include her two periods of maternity leave in the calculation of her pensionable service.

Background information, including submissions from the parties

3. Mrs S joined the Scheme when she commenced LBG employment. During her Scheme membership she had two periods of maternity leave; 15 July 1988 to 20 March 1989 and 3 February 1992 to 30 September 1992.
4. In May 2016, Mrs S queried why these periods of absence did not count as pensionable service.
5. On 30 September 2016, Mrs S opted out of the Scheme and then subsequently transferred her Scheme benefits to Prudential on 3 January 2017.
6. In May 2016, various emails between Mrs S and LBG resulted in her submitting details of why she believed that her period of paid maternity absence should be included in her length of pensionable service. A request was made that the query be referred to LBG's solicitor (the **Solicitor**) for a view on the wording of the Scheme Rules.

7. In July 2016, Mrs S was advised that a response had been received from the solicitor. From the advice given, she felt that the wrong question had been submitted to the Solicitor.
8. In August 2016, a further request was made for LBG to ask the Solicitor for further advice, with details of the specific questions to be asked, to ensure that proper consideration was given to the wording of the Scheme Rules and not the legislative position.
9. Mrs S chased a response in October 2016, and again in January 2017, after which she was advised that the Solicitor dealing with the query had left employment and someone else would investigate the matter.
10. On 29 November 2017, Mrs S raised a formal complaint with LBG. She said she had first contacted LBG in May 2016 and was still awaiting a full response. She appreciated that this could take time, however she felt the delay in responding to a query about the wording of the relevant Scheme Rules was beyond reasonable.
11. On 15 May 2018, LBG issued a response under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). It said that Mrs S had two periods of maternity leave between 15 July 1988 to 20 March 1989 and 3 February 1992 to 30 September 1992. She had been informed by the Scheme administrator that neither of these periods of maternity leave count for pensionable service purposes. This was because the Scheme Rules that were in force at the time date from 1977 (the **1977 Rules**). The 1977 Rules did not contain provisions for paid or unpaid maternity leave to count for the purpose of calculating pensionable service.
12. LBG further explained that the statutory requirement for paid maternity leave to be counted as pensionable service did not come into force until 23 June 1994. Although Mrs S suggests that it would have been possible for employers or Trustees of pension schemes to provide more generous maternity provisions than were required by law this was not a requirement. LBG stated:

“In terms of the provisions in the current Rules, which do allow maternity leave to be counted for the purposes of pensionable service, these would apply to members who commenced maternity leave from the date that the current Rules came into force. It is not the case that the current rules apply retrospectively to past contingent events or circumstances such as temporary absence from work. If the Scheme Rules were to have such retrospective effect it would be explicitly provided for in the Particular Rules, which is not the case here”.
13. LBG maintained that the provisions of the applicable Scheme Rules have been applied correctly and appropriately in Mrs S' case, LBG did not uphold this part of her complaint.
14. In terms of Mrs S' complaint about the length of time that it had taken to provide a conclusive response to her query, LBG said that when the query was first raised in

May 2016, she initially received timely responses. LBG are aware that there were supplementary queries raised following her first line of enquiry. However, Mrs S had not received a detailed response in relation to her query raised on 3 August 2016 and LBG agreed Mrs S should have been provided with a full response more quickly. LBG therefore upheld this part of her complaint and awarded her a payment of £150 in recognition of the delay.

15. On 5 November 2018, Mrs S appealed the stage one IDRPs response as she did not agree with it and raised her complaint under IDRPs stage two.
16. On 4 December 2018, LBG issued its stage two IDRPs response. It said:
17. The Scheme Rules which applied to Mrs S' maternity leave periods were the 1977 Rules. At that time, maternity leave was not pensionable. Statutory requirements for paid maternity leave to be treated as pensionable service came into force on 23 June 1994 (via the terms of the Social Security Act 1989) and following this, the Scheme Rules, which applied from 1996 (the **1996 Rules**), reflected this statutory requirement. The Scheme has at all times complied with its obligations regarding the treatment of benefits in respect of maternity leave and over time new forms of leave, such as family leave. At no time has the Scheme provided additional benefits in respect of maternity leave periods which took place prior to the required legal changes.
18. Mrs S is aware and agrees that the 1977 Rules, which were in force during her maternity leave, do not allow for paid maternity leave to be counted for pensionable service. The law changed on 23 June 1994 to provide those periods of paid maternity leave should be counted for pensionable service.
19. Rule 14 of the 1996 Rules, deals with maternity leave and sets out that a period of maternity leave during which salary or maternity pay is paid will be treated as pensionable service.
20. However, Rule 35 of the 1996 Rules states that the Scheme shall be operated to "conform with the statutory maternity provisions", which were contained in the Social Security Act 1989 and related regulations. This provision provides an "overlay" to the 1996 Rules and confirms that the maternity leave provisions were to be applied in line with the statutory requirements. The statutory requirements only take effect for maternity leave after 23 June 1994. It therefore follows that Mrs S' benefits have been correctly applied in line with the relevant rules.
21. LBG's legal adviser confirmed it would be extremely unusual in any pension scheme for any maternity leave which predated changes to the statutory provisions to be increased on a retrospective basis. This would have required a clear rule change. As has been confirmed above, the 1996 Rules were specifically designed to conform only with the statutory requirements.

22. Applying the statutory change to future maternity leave meant that there was certainty of Scheme benefits and there was consistency and fairness for all Scheme members who had taken maternity leave before the statutory change was implemented.
23. LBG stated, “the relevant rules for your membership are contained in a Deed of Amendment and Rules dated 31 March, 3 and 6 April 2009, which have been further amended from time to time. These Rules apply to service on and from 1 April 2009”.
24. The 2009 Deed of Amendment and Rules specifically deal with the application of former provisions. Those clauses confirm that the new rules only take effect from 1 April 2009, and they do not alter the Scheme benefits built up before that date. The wording is designed to protect benefits for Scheme members, including Mrs S’, which have built up under prior versions of the rules, but it does not have the effect of uplifting or augmenting benefits which have already accrued. LBG was unable to uphold Mrs S’ complaint as she is not entitled to have her maternity leave treated as pensionable service.
25. LBG had considered the delays Mrs S experienced in receiving a detailed response to her August 2016 query. It decided in the circumstances to offer a full and final payment of £300 to compensate her for the delays.

Summary of Mrs S’ position

26. The Scheme Rules dated 5 November 1996 state “the existing Rules shall be cancelled, and the attached Rules shall be adopted”. The existing Rules are dated 8 November 1977 and so if the 1977 Rules have been cancelled, then the new Rules must apply.
27. Undue reliance was being given to the wording contained in Rule 35(a)(9). All the provisions contained in Rule 35 are standard wordings, included to ensure that the Scheme covers complex legislative requirements without the need for extensive and expensive formal rule amendments.
28. She strongly disagreed with the view that it would be very unusual for a pension scheme to include periods of paid maternity leave completed prior to 23 June 1994 retrospectively, especially in respect of active female members on 23 June 1994.
29. Prior to 1993, female members had to have completed a significant period of employment with the employer before being eligible for the benefit. This requirement would again reduce the number of potential beneficiaries of such a change.
30. Prior to the 1990’s the vast majority of female members did not return to work after completing a period of maternity leave. It was only in the 1990’s that the trend of new mothers returning to work after the expiry of the period of maternity leave, started to gather pace. Again, this would reduce the number of potential beneficiaries.
31. Her claim was that the 1996 Rules only apply to active female members in pensionable service on that date. There is nothing to suggest that such a rule change

was to be applied to female members who had died, retired or left the Scheme prior to 5 November 1996.

32. Therefore, her view is that the cost to include any period of paid maternity leave completed prior to 23 June 1994 in the definition of Pensionable Service applicable to active female members on 23 June 1994 would not be cost prohibitive.

Summary of LBG's position

33. Mrs S states in her application that the Scheme rules "specifically state (under the Temporary Absence Rule) that any period of Maternity Leave, during which ordinary pay or maternity pay is being paid, will be included in the calculation of a female member's Pensionable Service". The rule Mrs S is referring to is taken from a set of Scheme rules which took effect from 5 November 1996. These 1996 Rules were not in force at the time of Mrs S' maternity leave and do not apply to her.
34. The Scheme rules that apply to Mrs S' maternity leave are dated 8 November 1977. The 1977 Rules do not allow for paid maternity leave to be counted as pensionable service. Rule 14 of the 1977 Rules (Temporary Absence) sets out where temporary absence will be deemed to be service for the purposes of the Scheme. However, this excludes "after 5 April 1977, unless any legislation demands otherwise, any maternity pay payable under the provisions of Part I of the Employment Protection Act 1975 as amended from time to time".
35. Accordingly, at the time Mrs S took maternity leave, it was clear from the Scheme rules that her periods of maternity leave would not be treated as pensionable service. The benefit statements Mrs S has received since the early 1990s reflects this position.
36. The position on maternity leave changed in 1994, nearly two years after Mrs S' last period of maternity leave. On 23 June 1994, certain provisions of the Social Security Act 1989 came into force. These provisions made sure that periods of paid maternity leave after 23 June 1994 would be counted as pensionable service. As such, from 23 June 1994, the new statute overrode the 1977 Rules so that periods of maternity leave taken after 23 June 1994 should be treated as pensionable.
37. The 1996 Rules are to "be operated so as to conform with... (9) section 23 and Schedule 5 of the Social Security Act 1989 and Regulations made thereunder relating to maternity and family leave." In other words, to conform with the requirement that maternity leave taken after 23 June 1994 is treated as pensionable service.
38. The above would be entirely consistent with how employers treat changes to maternity leave: they apply the changes prospectively and not retrospectively to periods of maternity that had already been taken many years before the change.
39. Mrs S' maternity leave is not pensionable. The Social Security Act provisions, which required maternity leave taken after 23 June 1994 to be pensionable, came into force on 23 June 1994. The 1996 Rules, which changed the Scheme rules to conform with

the Social Security Act, came into force on 5 November 1996. Both of Mrs S' periods of maternity leave (1988 and 1992) occurred before either of the above changes, and so were governed by the 1977 Rules - those rules did not provide for maternity leave to be treated as pensionable service.

Adjudicator's Opinion

40. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by LBG. The Adjudicator's findings are set out below.
41. LBG relied on the 1977 Rules to determine whether Mrs S' maternity leave should have been classed as pensionable service. The 1977 Rules provide:

14 TEMPORARY ABSENCE

(a) Temporary absence will (where subsection (i) applies) or may, at the discretion of the Society, (where subsection (a)(ii)) or (iii) applies) be deemed to be service for the purposes of the Scheme, subject to section (b) below, for the periods stated below where the member is temporarily absent from work with the Society for the reasons indicated:

- (i) sickness or accident, for the period during which he continues to receive either salary (excluding after 5 April 1977, unless any legislation demands otherwise, any maternity pay payable under the provisions of Part II of the Employment Protection Act 1975 as amended from time to time) or sick-pay under the Society's staff sick-pay scheme;
- (ii) whole-time service in the United Kingdom armed forces or any United Kingdom national service organisation or in any work of United Kingdom national importance, up to the full period of temporary absence;
- (iii) any reason not coming within the categories stated above, up to a maximum continuous period of 3 years.

(b) Any period of temporary absence deemed to be service under subsection (a)(ii) or (iii) above may, at the Society's discretion, be ignored in calculating pensionable service or may be deemed to be service for that purpose but not for the purpose of benefits payable on death in service.

42. The Statutory requirements for paid maternity leave to be treated as pensionable service came into force on 23 June 1994. The Scheme Rules were amended to reflect these statutory requirements. Mrs S took maternity leave between 15 July 1988 and 20 March 1989 and again between 3 February 1992 and 30 September 1992. The statutory requirements changed in June 1994 and the 1996 Rules later came into force. Both periods of Mrs S' maternity leave were subject to the provisions of the 1977 Rules which provide that maternity leave is not counted as pensionable service. The Adjudicator agreed with LBG that Mrs S' maternity leave for those periods could not be considered as pensionable service.

43. In relation to Mrs S' contention that the 1996 Rules should apply retrospectively to active female members in pensionable service on the date those rules came into force. The Adjudicator could see why Mrs S believed this situation was unfair, however the 1996 Rules specifically state that the maternity leave provisions were to be applied in line with the statutory requirements which took effect from 23 June 1994 and applied only to maternity leave taken after that date. The provisions for maternity leave in the 1996 Rules cannot be applied retrospectively for members who took maternity leave before this date.
44. The Adjudicator considered the delay in LBG dealing with Mrs S' complaint and concluded that, although LBG had accepted there were delays, £300 was an insufficient amount of redress given the length of time it took LBG to respond to Mrs S' formal complaint.
45. Although it was the Adjudicator's view that Mrs S' maternity leave should not be treated as pensionable service, it was clear that she had suffered some distress and inconvenience because of the maladministration identified. The Adjudicator recommended that LBG, in line with my guidance on non-financial injustice, increase its award to £500 for the significant distress and inconvenience caused to Mrs S.
46. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her further comments which do not change the outcome.

Mrs S' further comments

47. She disagrees with the Adjudicator's understanding of the wording of the Scheme Rules and how they are applied to females in a similar position to her. She believes the standard wording regarding the statutory requirement to include paid maternity leave in the definition of Pensionable Service /Temporary Absence was an underpin to ensure that the Scheme Rules satisfied the legislative requirements going forward without the need for a lengthy and costly rule amendment. As such, she believes there is no exclusion of pre-June 1994 female members in the main body of the Scheme Rules.
48. She thinks it is "inconceivable" that the Trustees' advisers at the time the maternity leave provisions were being altered did not raise the issue of the new legislation with them and that the Trustees did not formally record their subsequent decision.
49. She believes there will almost certainly be minutes of Trustee meetings held in 1993, 1994 and 1995 which record what was discussed regarding the "new" maternity leave provisions, and what was subsequently decided, if not contained with Trustees' Minutes, it may be signed "Trustee Resolutions" recording the decision.
50. She feels LBG should be asked to search and provide these minutes/resolutions as evidence to support its argument. Such a document is key to determining the Trustees' decision at the time and would clarify any ambiguity contained in the 1996 Rules.

51. I note the additional points raised by Mrs S, but I agree with the Adjudicator's Opinion.

Ombudsman's decision

1. Having examined all available evidence carefully, I find that there was no maladministration on the part of LBG when not including both periods of Mrs S' maternity leave as pensionable service. My reasons for reaching this conclusion are essentially the same as those given by the Adjudicator.
52. I agree with the Adjudicator that both periods of maternity leave taken by Mrs S occurred before the statutory requirements changed in June 1994. The Scheme Rules were amended to reflect these statutory requirements and the 1996 Rules came into force, making maternity leave pensionable under those rules. This meant that both periods of Mrs S' maternity leave were subject to the provisions of the 1977 Rules which provide that maternity leave is not counted as pensionable service.
53. The 1996 Rules specifically state that the maternity leave provisions were to be applied in line with the statutory requirements which took effect from 23 June 1994 and applied only to maternity leave taken after that date. The 1996 Rules cannot be applied retrospectively for members who took maternity leave before this date. There is no ambiguity in these clauses.
54. Mrs S feels LBG should be asked to search and provide minutes as evidence to support its argument. However, I did not deem it necessary to request minutes for the Trustee meeting as it would not have any impact on the investigation and the outcome of this complaint.
55. When deciding whether to direct an award for distress and inconvenience, I assess each case on its facts and merits. Having carefully considered the submissions and evidence, I find that the degree of non-financial injustice which Mrs S has suffered does merit the minimum award of £500.
56. LBG agreed there were delays with Mrs S' complaint and awarded £300 compensation. I do not agree this amount is reasonable for the distress and inconvenience caused to Mrs S.
57. When Mrs S brought this issue to the attention of LBG in May 2016, it should have promptly given her a full response. Mrs S got only received a full response in May 2018. I consider LBG's failure to reply sooner represents poor service. My awards for non-financial injustice are modest and not intended to punish a respondent.
58. Therefore, I partly uphold the complaint made by Mrs S.

Directions

59. Within 28 days of the date of this Determination, LBG shall increase its award to £500 to Mrs S, in recognition of the significant distress and inconvenience which she has experienced in dealing with this matter.

Anthony Arter

Pensions Ombudsman
18 October 2022