CAS-53517-H3N1

Ombudsman's Determination

Applicant	Dr R
Scheme	JPMC UK Retirement Plan (**the Plan**)
Respondents	JP Morgan Pension Trustees Limited (**the Trustee**) Mercer Limited (**Mercer**)

Outcome

1. I do not uphold Dr R's complaint and no further action is required by the Trustee or Mercer.

Complaint summary

2. Dr R's complaint concerns the Trustee's decision not to allow him to transfer a proportion of his benefits, which is subject to a defined benefit (**DB**) Underpin (the **Underpin Benefit**), from the Plan unless he obtains advice from an independent financial adviser (**IFA**). He asserts that the Trustee has classified and calculated the value of this benefit incorrectly, and that he does not need to obtain advice from an IFA prior to transferring the value of this benefit from the Plan.

Background information, including submissions from the parties

3. The Plan is a defined contribution (**DC**) Plan and Dr R is a deferred member. A proportion of Dr R's DC benefits is subject to the Underpin Benefit, as he was contracted out of the State Earnings Related Pension Scheme (**SERPS**), at the time that he accrued his benefits in the Plan.

4. The value of the Underpin Benefit will be used to provide Dr R with a Reference Scheme Test (**RST**) pension on retirement. Dr R's benefits are split into: (i) a core DC fund, which is intended to be used to provide his RST pension, and (ii) a non-core DC fund which cannot be used to provide this pension.

5. On 26 February 2020, Mercer, the Plan's administrator, on behalf of the Trustee, sent Dr R an estimate of the retirement benefits available to him on his retirement. The letter explained that:-

    5.1. During his active membership of the Plan, he was contracted out of SERPS on an RST basis. Broadly speaking, his RST pension is equivalent to the pension

he would have received from SERPS had he not been contracted out of SERPS under the Plan. The Plan must provide him with a pension that is at least equal to his RST pension, revalued to his date of retirement.

5.2. At the date he left the Plan his RST pension was £1,160.93 per annum. His current revalued RST pension was £1,478.76 per annum, which would increase in payment in line with the Consumer Price Index (**CPI**), up to a maximum of 5%.

5.3. The cost of providing the RST pension had been estimated to be £50,174.32. This would be deducted from his money purchase fund, which was valued at £82,265.09, as at 26 February 2020. The remaining fund was £32,090.77.

5.4. As at 26 February 2020, the values of his core DC fund and non-core DC fund were £54,228.87 and £28,036.22, respectively.

6. There were further exchanges between Dr R and Mercer concerning the value of the Underpin Benefit and the way the value of this benefit was calculated. The exchanges also concerned the requirement for him to obtain advice from an IFA before the Trustee would permit him to transfer this element of his benefits from the Plan.

7. Dr R said that he was informed by Mercer, in February 2020, that the amount required from his core DC fund, to provide him with the RST pension at retirement, was £50,174.32. But HM Revenue & Customs (**HMRC**) rules, regarding tax-free lump sums, indicated that the value of the Underpin Benefit was less than £30,000. He subsequently emailed Mercer on 10 March 2020, and asked for confirmation that there would be no requirement for him to obtain advice from an IFA before he was able to transfer his benefits from the Plan.

8. On 30 March 2020, Mercer replied to Dr R and said that the value of the Underpin Benefit was in excess of £30,000. So, he needed to obtain advice from an IFA. However, Mercer did not disclose the value of the Underpin Benefit. Dr R replied on the same date and asked Mercer to confirm the value.

9. Dr R said that, on 14 April 2020, he was informed, during a telephone conversation with Mercer, that the cash equivalent transfer value (**CETV**) of the Underpin Benefit was £41,767.12. During the telephone call, he made the note that, if he were to claim the RST pension from the Plan, £50,174.32 would be deducted from his fund to pay for this pension. So, the requirement for him to spend this amount buying a pension, that the Plan had valued at £41,767.12, could not be called a “benefit”.

10. On 13 July 2020, Dr R complained to the Trustee under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). In summary he said:-

10.1. His complaint concerned the Trustee’s insistence that he obtain advice from an IFA before the Trustee would allow him to transfer the value of the Underpin Benefit, so that he could access his benefits flexibly.

10.2. The Trustee had failed to consider that if he were to remain in the Plan, the cost to purchase the RST pension would be greater than the CETV of the Underpin Benefit.

10.3. The actual CETV of his benefits in the Plan was the sum that was invested in his pension fund. For example, if his pension fund was valued at £82,265.09 on the day of transfer, that sum would be transferred to the receiving scheme.

10.4. The figure of £41,767.12, that the Trustee wrongly claimed was the value of the Underpin Benefit, would form part of the actual CETV. He did not understand why the Trustee was insisting that he seek the advice of an IFA. The Trustee's valuation of the Underpin Benefit had no bearing at all on the actual CETV.

10.5. The Trustee was comparing the £30,000 threshold directly against a pension rather than a CETV amount that had been agreed between a member and the Plan. He would not buy the RST pension at the price of £41,767.12. So, saying this was the CETV of the Underpin Benefit was both "absurd and deeply arrogant."

10.6. He had initially tried to transfer his benefits from the Plan in 2016, but the Trustee did not allow the transfer to go ahead. At that time, he thought the transfer had not been granted because he would have been transferring his benefits before his normal retirement date (**NRD**). He subsequently tried to transfer his benefits again in 2020, at his NRD. However, he was told he needed to obtain advice from an IFA.

10.7. He believed the Trustee had used an incorrect figure to determine the value of the Underpin Benefit. He compared the Trustee's calculation of the Underpin Benefit with a retirement quotation he had received from another pension scheme of which he was a member. He noted that the CETV required to provide the RST pension was £20,702.64. This was less than half the CETV of £41,767.12 that had been calculated by the Trustee.

10.8. When he retired from the Plan, he decided to transfer his benefits to a personal pension plan to ensure that his pension pot lasted through the period of his retirement. By using income drawdown, he could pass his pension on to his wife and children after his death. He tried to find an IFA that would provide the necessary "sign-off" at a reasonable rate, but he was quoted fees that amounted to several thousand pounds. The Trustee's refusal to allow him to transfer his benefits, without having to waste large sums of money obtaining the advice of an IFA, resulted in him having to rearrange his financial plans.

10.9. He asked the Trustee to allow him to transfer without seeking advice from an IFA, in light of the complaint issues he had raised. He also requested an award for the financial impact of having to change his financial plans and a separate award for the time and effort that he had spent on this issue.

11. On 7 September 2020, the Trustee replied to Dr R's complaint under stage one of the IDRP. The Trustee explained that Dr R could take his benefits from the Plan in two different ways: (i) retire from the plan; or (ii) transfer his benefits in full to an external provider. The Trustee also said in summary:-

    11.1. The cost of providing Dr R's RST pension from the Plan was calculated in accordance with the methodology adopted by the Trustee. The methodology made an allowance for "prudence", above the Actuary's best estimate of this cost. This was to increase the likelihood that the Plan would remain sufficiently funded to be able to pay benefits to members as they fell due. The RST pension would be paid to Dr R for life irrespective of whether he lived longer than had been estimated, or inflation was higher than expected. It also allowed for the payment from the Plan of contingent RST benefits as required under pension legislation, for example, a spouse's pension on Dr R's death.

    11.2. The calculated cost for providing Dr R's RST pension from the Plan was likely to be significantly lower than the amount he would be charged to secure an equivalent pension from an insurer on the open market. If he were to transfer his benefits out of the Plan, the CETV of the Underpin Benefit would be calculated on a different basis, which was also set by the Trustee.

    11.3. In order to provide Dr R with a CETV, it was required under pension legislation, to adopt a set of assumptions that reflected the best estimate of the cost of providing those benefits from the Plan. Those assumptions were applied to the Plan as a whole, rather than to Dr R's individual circumstances. So, the assumptions did not reflect the investment returns Dr R may have expected to achieve on his own investments, or the age of his spouse.

    11.4. The valuation factor of 20 used by HMRC was not intended to reflect the cost of providing a pension. It was adopted by HMRC for the purpose of measuring benefits against the lifetime allowance. This valuation factor was not used in the calculation of the CETV or for calculating the cost of the RST pension within the Plan.

    11.5. Dr R had referred to his benefits in another scheme and to the lump sum that had been offered to him in a retirement quotation. It appeared that the lump sum was a "commutation lump sum" provided in exchange for him giving up part of his annual pension on retirement.

    11.6. The statutory requirement, for Dr R to take appropriate independent advice on a transfer out of the Plan, was based on the CETV of Dr R's Plan benefits. This was calculated in accordance with the relevant legislation. The commutation lump sum would have been calculated differently from the CETV, so those figures were not comparable.

    11.7. It was required by law to carry out an assessment of whether a member, who had requested a transfer, has safeguarded benefits. The definition of safeguarded benefits included the Underpin Benefits in the Plan which would,

on transfer, be converted to flexible benefits, for example DC benefits. The Trustee explained that these requirements were set out in the Pension Schemes Act 2015 (**the 2015 Act**), and associated regulations. The 2015 Act was designed to ensure that members took advice in order to gain a better understanding of the implications of their decisions, which potentially, involved transferring out valuable pension benefits.

11.8. Where the value of the safeguarded benefits is above £30,000, it must carry out a check to ensure that the transferring member had received appropriate independent advice. If it failed to carry out this check, or carried out the check but failed to confirm that advice had been received, it could not complete the transfer. It would be in breach of the law and would face financial penalties were it not to adhere to the statutory requirements.

11.9. When assessing the value of a member's safeguarded benefits, it was required to use the CETV method. This is expressly set out in Regulation 5 of the Pensions Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015[1].

11.10. Dr R's benefits had to be assessed under these requirements because of the Underpin Benefit. This would have been the case even if the Underpin Benefit did not "bite", meaning that the Plan did not need to top-up a member's benefits, as was currently the case for Dr R. This was because, if Dr R were to remain in the Plan, he would receive an RST pension on retirement, in addition to his excess DC funds. If he transferred to a scheme, which provided only flexible benefits, his entire fund would then be DC in nature, with no guarantee as to the level of payment.

11.11. Dr R's RST pension could have different values attributed to it depending on what was being calculated. The cost of providing him with an RST pension had been calculated by the Plan's Actuary as being £50,174.32, while the CETV of the Underpin Benefit was calculated as £41,767.12. The difference in the figures was due to the Trustee having to apply a prudent funding margin to benefits funded by the Plan. Whereas on transfers out, a best estimate was made of the funds that would be needed to provide the benefits, without a margin for prudence to protect the Plan. It said that the key point was that on either basis the valuation of the Underpin Benefit was above the £30,000 threshold.

12. On 5 February 2021, Dr R appealed the Trustee's decision under stage two of the Plan's IDRP. His main complaint is summarised below:-

12.1. The Plan's provision of the RST pension should not have been treated as a full pension promise. The Trustee was treating a right to receive a benefit as an obligation to receive something that would cause him a financial detriment.

[1] https://www.legislation.gov.uk/uksi/2015/742/regulation/5/made

The Trustee was requiring him to pay a sum that was “greatly” in excess of the sum it would cost the Plan to provide him with an RST pension.

12.2. The amount in “excess” of the cost price of the RST pension, would be taken from his money purchase funds to protect the Underpin Benefit. By definition, DB members of the Plan, who did not contribute to a money purchase fund, would receive pure defined benefits funded by the Plan, without any requirement for them to pay an excess to protect the Plan.

12.3. The Trustee was forcing him to surrender funds from his money purchase funds to provide benefits to pure DB members who were not expected to pay the excess. Consequently, the Trustee was not treating him fairly.

13. On 7 April 2021, the Trustee replied to Dr R under stage two of the IDRP. It upheld the IDRP stage one decision but made some additional comments. These have been summarised below:-

13.1. The Plan Rules (**the Rules**) require an amount to be deducted from Dr R’s DC fund at retirement to provide the RST pension. If Dr R’s DC fund was insufficient to provide the RST pension, the Plan would need to provide a “top-up” to ensure that he would receive his RST pension.

13.2. As a minimum requirement, it was obliged to provide Dr R with an RST pension from the date he was due his retirement benefits from the Plan. This was part of the makeup of Dr R’s Plan benefits and the effect of their interaction with legal requirements to provide a minimum level of annual pension in respect of members who had contracted out service. If Dr R retires from the Plan, he would have no option but to receive an RST pension as the Rules require the Trustee to provide this benefit. This is irrespective of whether his DC funds were sufficient to meet the cost, or whether he considered this benefit to be “harmful” to his financial position.

13.3. The overall level of benefits Dr R would receive if he were to retire from the Plan, is not guaranteed. The benefit promise is that he will receive his RST pension, with an attaching spouse's pension. The level of the RST pension is pre-determined. Consequently, it amounts to a defined benefit promise. If Dr R’s DC funds exceed the amount required to provide the RST pension, he would also receive the excess as pure DC benefits to use as he wished, subject to certain tax rules on the way in which benefits can be taken. There is no benefit promise as to the amount of his excess DC benefits regardless of whether they are taken in the form of an annuity or otherwise.

13.4. If Dr R transferred his benefits from the Plan to a money purchase arrangement before retirement, he would be consenting to his transferred benefits being provided in a different way than would have been the case in the Plan. By transferring, he would be giving up his RST pension promise. If the value of his core fund was below the CETV of the Underpin Benefit, his

core fund would be topped-up by the Plan to reflect the value of the CETV of his Underpin Benefit.

13.5. However, before a transfer to a money purchase arrangement could go ahead, the Trustee was required by law to check that Dr R had received appropriate independent advice. This was because he has safeguarded benefits valued above £30,000. The Trustee did not have any discretion to disapply or waive this requirement.

13.6. The methodology for calculating the Underpin Benefit, in order to test it against the £30,000 figure, is also set out in law. The law expressly requires the Underpin Benefit to be valued using the CETV method. The final valuation of Dr R's Underpin Benefit using this method was £41,767.12. This was considerably above the £30,000 threshold.

13.7. The fact that DB members of the Plan were not required to pay for their RST pension simply reflected the different benefit design under the Rules for those members. In any case, the members concerned did not have any individual DC pot from which an amount could be deducted. This did not mean the funding basis applied by the Plan for providing the RST pension would be any different for those members. In fact, the same basis is used for standard defined benefits and for members where part of their DC fund is used to secure the RST pension.

13.8. Nonetheless, this has no bearing on the requirement for Dr R to obtain appropriate independent advice before a transfer of safeguarded benefits to a money purchase arrangement can be permitted by the Trustee. As the CETV value of Dr R's Underpin Benefit exceeded £30,000, it was unable to proceed with a transfer until it had checked that he had taken appropriate independent advice.

Dr R's position

14. He was being refused a transfer because the Trustee had miscalculated the value of his Underpin Benefit. The Trustee required him to seek financial advice from an IFA when the value of his Underpin Benefit is zero. Consequently, he does not need to seek financial advice because there would be no loss in value if he transferred out of the Plan. The methodology used by the Trustee to calculate the value of the Underpin Benefit was incorrect. The value of £41,767.12 was "wildly different" from any actual benefit that could be realised by a member.

15. The Trustee made no reference to the 2015 Act, which is used to determine whether a benefit is classified as a defined benefit. An RST pension can be a defined benefit but not in all cases. The circumstances under which the RST pension is provided under the Plan means that the RST pension would not be considered a defined benefit.

16. Section 2 of the 2015 Act defines a defined benefit as one where “the scheme provides for all members to be paid retirement income beginning at normal pension age and continuing for life”. It is clear from this that the RST pension is not a defined benefit for the following reasons:-

    - The Plan does not permit members to be paid the estimated level of retirement income. Members must take reduced levels of retirement income from age 60.

    - For the RST pension to be classified as a defined benefit, members must be paid their retirement income from normal pension age. The retirement income in respect of the RST pension begins five years after normal pension age.

17. The benefit promise, namely that the value of the RST pension will be equal to the value of the benefits, is a promise of a cash amount from which benefits must be bought. The level of the cash amount is not a defined benefit because it depends on the predicted life expectancy of the member at age 65. The level of pension that may be provided at normal pension age from this cash amount is also not a defined benefit. This is because it also depends on the life expectancy of the member at normal pension age, as well as other factors.

18. Sections 2 and 5 of the 2015 Act, require that a defined benefit, which must be taken at normal pension age, must not be based on a level of retirement income or other retirement benefits that depend on life expectancy. The cash amount used to purchase the retirement income, and the retirement income itself, depend on life expectancy. So, by law, the RST pension cannot be a defined benefit when the Rules dictate that a member must take the benefit at age 60.

19. The intention of the 2015 Act, is to ensure that benefits are safeguarded where there is a guarantee, either of an annuity rate, or a level of retirement income. A guaranteed level of retirement income is the minimum level of pension that will always be provided on retirement. The actual level of retirement income may be higher than the guaranteed level. In which case, the retirement income is a sum of the income at the guaranteed level and the income at the non-predetermined level. The guaranteed level of annual income will be provided regardless of whether the stock markets have crashed, or the extent to which life expectancy has risen or fallen.

20. It is clear that the Underpin Benefit is not a defined benefit in the Plan. This is because it fails to satisfy the relevant legal requirements and to guarantee a level of retirement income. Securing an RST pension, at the price quoted by the Trustee, would significantly reduce the total benefits provided to a member. It would require the Trustee to access the “ring-fenced” money purchase account so that the Plan can fund its own “profit.” For these reasons, member consent would be required before an annuity could be secured by the Trustee. Consequently, the member is entitled to refuse to secure the annuity.

21. In its response under stage two of the IDRP, the Trustee said that the benefit promise is that he would receive his RST pension, with an attaching spouse's pension. The Trustee also said that the level of the RST pension is pre-determined. Consequently,

it amounts to a defined benefit promise. This statement is incorrect for several reasons. He is only permitted to receive his Underpin Benefit on his NRD. His notional reference scheme level of pension, totalling £1,984.49 per annum, is not pre-determined. An adjustment has been made to the pension to allow for assumed inflationary increases between 8 April 2020 and 8 April 2025.

22. Given the recent surge in inflation, it seemed highly likely that the assumption used by the Trustee would be found to have been inaccurate. He has not been promised a pension of £1,984.49 per annum commencing from age 65. The Rules do allow him to receive it earlier as he must take his benefits at age 60. Furthermore, he has not been promised the notional reference scheme level of pension from age 60.

23. The requirement, for the Trustee to obtain member consent, is confirmed in the promise made by the Plan. Namely, that "at retirement your entire pension account is used to buy your choice of retirement benefits." The Plan will be unable to provide an RST pension without member consent. So, an RST pension, in the form proposed by the Trustee, cannot be promised by the Plan. He does not want the Plan to reduce his total benefits by £8,407.20. He does not consent to the Plan securing an RST pension under any circumstances.

24. The Plan does not promise a defined benefit. It promises a cash balance benefit because it satisfies the relevant requirements of Section 75 of the 2015 Act, which states:

> "A cash balance benefit is a benefit calculated by reference to an amount available for the provision of benefits to or in respect of the member ("the available amount") where there is a promise about that amount.
>
> But a benefit is not a "cash balance benefit" if, under the scheme—
>
> (a) a pension may be provided from the available amount to or in respect of the member, and
>
> (b) there is a promise about the rate of that pension…"

25. The Plan has promised that the available amount will be able to secure an RST pension, but it is unable to promise the rate of pension. This is because of various factors, for example the future rate of inflation and longevity, that are unknown. The cash top-up benefit promised by the Plan is not a defined benefit: it is a cash balance benefit. Cash balance benefits and money purchase benefits are not safeguarded benefits. So, there is no legal requirement for him to receive advice from an IFA before the Trustee can authorise the transfer.

26. Section 48 of the 2015 Act[2] defines safeguarded benefits as benefits other than money purchase benefits and cash balance benefits. It follows that a sufficiently funded money purchase account is not a safeguarded benefit because it is

[2] https://www.legislation.gov.uk/ukpga/2015/8/section/48

considered a money purchase benefit in its entirety. The Underpin Benefit would only give rise to a safeguarded benefit if: (a) the money purchase account was insufficiently funded; (b) there was no promise that the entire pension account could be used to buy the members choice of benefits; or (c) the CETV of the underpin and the remaining amount exceeded the value of the money purchase account.

27. The financial advice requirement was designed for true defined benefit schemes where the burden of risk is borne by the scheme. Defined benefits are considered to be good because the pension scheme safeguards members from these risks. The Trustee has interpreted the advice law in a way that impedes members from leaving a scheme where the burden of risk of the "safeguarded benefit" has been shifted in advance to the member. In effect the goodness has already been "sucked out" of the benefit.

28. The financial advice requirement imposes an expensive obligation on members of pension schemes, whereas members believed that joining a pension scheme would only give them rights. For this reason, "the law must be applied judiciously so as to not look ridiculous. It seems deeply wrong that the law should be used to oblige members to pay thousands of pounds to an IFA in order to avoid an obligation to allow a pension scheme to swindle them."

29. The financial advice requirement is designed to protect members of true defined benefit schemes. It was not designed for members in money purchase schemes who can choose to buy annuities sold on a "for-profit basis." The inconsistency noted above, which is a result of the Plan's interpretation on this law, makes the advice requirement law look ridiculous.

30. He would like The Pensions Ombudsman (**TPO**) to recognise that the Trustee has acted, and continues to act, incorrectly in his case. He would also like the Trustee to allow him to transfer his benefits from the Plan, without requiring him to obtain advice from an IFA. In addition, TPO should award him redress.

31. If TPO determines that he needs to obtain financial advice, he would ask that he is exempted from the requirement to seek financial advice from an IFA. This is because of the expertise he has gained in the finance industry. In particular, in the modelling of prices, values, and financial risks.

Summary of the Trustee's position

32. The specific complaint in this case involves the requirement that a member takes appropriate independent advice on a transfer involving safeguarded benefits valued at more than £30,000. The legal duty, to ensure that this advice has been taken before a transfer can proceed, ultimately falls on the Trustee. Section 48 of the 2015 Act, confirms the duty falls on "trustees or managers".

33. The requirement to obtain appropriate independent advice is covered in Section 48 of the 2015 Act, which states:

> "Where a member of a pension scheme has subsisting rights in respect of any safeguarded benefits, or a survivor of a member has subsisting rights in respect of any safeguarded benefits, the trustees or managers must check that the member or survivor has received appropriate independent advice before… making a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to flexible benefits for the member or survivor under another pension scheme."

34. In his submissions to TPO, Dr R focused on whether the Underpin Benefit met the definition of a defined benefit. That definition has not been brought into law. Furthermore, it is not the relevant question that should be asked. It should be whether Dr R has safeguarded benefits in the Plan.

35. Safeguarded benefits are defined in Section 48 of the 2015 Act. It is any benefit which is not a money purchase benefit or a cash balance benefit. This means that appropriate independent advice will be required on a transfer to a flexible benefit scheme.

36. Section 76 of the 2015 Act, refers to the definition of Money purchase benefits in section 181 of the Pension Schemes Act 1993:

> "…benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member."

37. The benefits would be determined using the value of the member's pension fund, including the value of the employer contributions and any transferred-in benefits. Dr R's benefits are not money purchase benefits as he has a contracted-out underpin, which promises a certain level of benefit. The Trustee has noted that Dr R has not argued that his benefits are money purchase benefits.

38. Cash balance benefits are defined in Section 75 of the 2015 Act, as follows:

> "…a benefit calculated by reference to an amount available for the provision of benefits to or in respect of the member ("the available amount") where there is a promise about that amount."

39. The definition then goes on to provide that a benefit is not a cash balance benefit if, under the scheme, a pension may be provided from the available amount, and there is a promise about the rate of that pension. Cash balance benefits are a benefit where there is a promise as to the amount which will be available in the member's account for providing benefits. In other words, there is a promise as to the value of the pension pot, rather than a promise as to the level of benefit to be provided.

40. That is not the case for Dr R's benefits. The benefit promise, and the benefit that the Plan delivers to members who do not transfer out, is a promised minimum rate of annual pension to be provided by the Trustee. It is a defined benefit because it

defines what the minimum value of the benefit payable is, rather than the benefit being determined by reference to the amount available to provide the benefit.

41. Dr R is entitled to benefits in the "LORP Section" of the Plan. Sub-rule 9 of the Rules sets out the specific contracting-out underpin requirements for the "LORP Money Purchase Section" relating to service after 5 April 1997[3].

42. The Underpin Benefit is equivalent to a defined benefit from a hypothetical reference scheme which provides a pension of at least 1/80ths of earnings, from age 65, and a spouse's pension of 50% of the member's RST pension. Where members take their benefits from the Plan, the defined benefit RST pension is provided by way of an internal annuity.

43. Under the "LORP Section" of the Plan, benefits are in practice provided from age 60, which is when Dr R will reach his NRD. An RST annual pension entitlement figure is calculated at the date a member leaves pensionable service under the Plan, it is then revalued to the member's NRD using statutory revaluation orders. As the member's NRD is before the reference scheme pension age of 65, an early retirement factor is then applied. This is to take into account the fact that the RST pension would be payable from age 60, and so would be in payment over a longer period.

44. The RST pension is payable for life and has an attaching contingent spouse's pension. It is the cost of providing this defined benefit annuity from the Plan which is deducted from the relevant part of the member's pension fund. If the relevant part is insufficient, the Plan will itself make up any shortfall in order to provide the annuity. This is the benefit promise in the Plan. It is a promise that a certain rate of pension will be provided to all members in the "LORP Section", as a minimum.

45. In any event, the definition of "defined benefit" under pension legislation is not strictly part of the test used to determine what is a safeguarded benefit. Dr R's reasons, as to why he considers that the Underpin Benefit is not a defined benefit, are not relevant in this case.

46. The Trustee is obliged to provide, as a minimum, an RST pension for a member that was contracted-out on the RST basis. There is no discretion for the Trustee to disapply or waive this benefit. The RST benefits are defined benefits and so are safeguarded benefits for the purposes of the 2015 Act.

47. The Underpin Benefit was valued at £41,767.12, using the statutory valuation basis. This is significantly above the £30,000 threshold, which triggered the requirement for Dr R to obtain advice from an IFA. If the Trustee had proceeded with the transfer without having carried out this check, it would be in breach of the law, and could be subject to civil penalties. The requirement for the Trustee to check that appropriate independent advice has been taken on a transfer came into force in 2015.

[3] This sub-rule is detailed in the Appendix.

48. There is no requirement for the Trustee to obtain member consent to provide the RST pension when the member takes their benefits from the Plan. In fact, it is an obligation for a contracted-out scheme to provide RST benefits. A member who takes their benefits from a section of the Plan that has an RST underpin, does not have any option regarding the provision of RST benefits. Members cannot forego the RST pension, as these benefits are a statutory requirement.

49. Likewise, the Trustee does not require member consent to use the relevant part of the member's pension fund to provide the RST pension. The Rules provide that the Trustee shall apply the relevant part to provide the RST pension. This means the Trustee is obliged under the Rules to identify and use the relevant part of the member's benefits in this way.

Adjudicator's Opinion

50. Dr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or Mercer. The Adjudicator's findings are summarised below.

51. Dr R is entitled to the Underpin Benefit because he was contracted out of SERPS at the time that he accrued benefits in the Plan. The Rules state that, on retirement, the Trustee must pay Dr R a pension that is at least equal to the pension he would have received under SERPS had he not been contracted out.

52. Section 48 of the 2015 Act states:

> "safeguarded benefits" means benefits other than-
>
> money purchase benefits, and
>
> cash balance benefits."

53. Money purchase benefits are calculated by reference to a payment or payments made by the member or by any other person in respect of the member.[4]

54. In the Adjudicator's view, the Underpin Benefit was not a money purchase benefit because it was not calculated with reference to the level of Dr R's contributions or the contributions his employer made on his behalf. It was also the Adjudicator's view that the Underpin Benefit was not a cash balance benefit[5]. This was because Dr R had not been promised that a specific amount would be made available by the Trustee to provide him with the value of the RST pension.

55. Because of these reasons it was the Adjudicator's opinion that the Underpin Benefit fell within the definition of "safeguarded benefits", as defined under Section 48 of the

[4] https://www.legislation.gov.uk/ukpga/1993/48/section/181/enacted

[5] https://www.legislation.gov.uk/ukpga/2015/8/section/75/enacted

2015 Act. This was because it provided a guaranteed minimum level of RST pension Dr R would be entitled to, should he claim his benefits from the Plan.

56. The valuation method used to calculate the CETV of safeguarded benefits is prescribed by law. The Trustee cannot change the valuation basis. As the value of the CETV for the Underpin Benefit is in excess of £30,000, the Trustee has a legal obligation to ensure that Dr R has received appropriate advice from an IFA before it permits the transfer.

57. Due to the requirement under pension legislation to seek regulated advice, where the value of the member's safeguarded benefits exceeds £30,000, it was the Adjudicator's view that there had been no maladministration on the part of Mercer or the Trustee.

58. The Adjudicator noted that Dr R had had difficulties in obtaining the services of an IFA for this purpose. She appreciated that he would be disappointed that the requirement to obtain advice applies in his case.

59. However, Dr R's expertise in financial matters did not negate the need for the Trustee to ensure that he had received appropriate advice before it allowed the transfer. This was a legal requirement that the Trustee could not waive. So, it was the Adjudicator's view, that I would not direct the Trustee to act outside the law and treat Dr R as being exempt from the requirement to obtain advice from an IFA. Consequently, it was the Adjudicator's Opinion that this complaint should not be upheld.

60. Subsequent to the Adjudicator's Opinion, there were further exchanges between Dr R, the Adjudicator and the Trustee concerning the value of the RST pension, why Dr R's benefits were deemed to be safeguarded and the calculation of Dr R's safeguarded benefits.

61. Dr R did not accept the Adjudicator's Opinion. He explained in detail why he believed his benefits were not safeguarded benefits, this included the way the value of his benefits had been calculated by the Trustee and the assumptions the Plan's actuary used. He also made some additional comments and these have been summarised below.

62. NRD means a member's 60th birthday. In accordance with the Rules, deferred members may only retire earlier or later than their NRD with the consent of the Trustee and the Principal Employer. So, it follows that the only day on which a member has a right to apply to claim their retirement benefits is the NRD. This is a mandatory retirement date.

63. The Trustee is required by law to provide a pension that the Plan's actuaries have certified is broadly equivalent or better than the RST pension the member would have received. The RST pension commences at age 65. A member in the Plan has no right to a pension commencing at the age of 65, since benefits must be taken at their NRD, age 60. The RST pension itself cannot be a safeguarded benefit since a member has no subsisting right to be provided with it.

64. He believes that the Trustee is being disingenuous in claiming a certain rate of pension is routinely provided when this can only be provided in this form at the discretion of the Trustee and Employer. The definition of safeguarded benefits relates to benefits that members have a right to be provided with rather than discretionary benefits that might be refused. In claiming there was a promise of a certain rate of pension the Trustee was telling a lie. The Adjudicator did not challenge the Trustee's lie but seemingly used it justify her decision that there was an underpin.

65. Because of the uncertainty in income level, he has not been promised a right within the Plan to receive a pension of at least a level of £1,478.76 per annum at the mandatory retirement date as the Trustee claims. If he had been unlucky the level of income could have been as low as zero.

66. He had provided mathematical proof showing that the guaranteed level of pension income was zero, and that the guaranteed value of the RST pension was also zero. The "at least" wording in Rule 9.2.1 reflects that the rule applies to all benefits that can be provided from the core account. In the absence of a promised certain knowable level of cash balance benefit or a promised certain knowable level of pension income there can be no underpin.

67. Instead the Plan provides the guarantee of an estimated value of benefits greater than the estimated value of the RST pension by promising to top-up the core account if funds are insufficient. Where the top-up benefit value is greater than zero the core account may or may not be money purchase, but that is not relevant since his account was sufficiently funded on all occasion when the transfer was requested.

68. If there was a certain level of retirement income promised at his NRD, there would be an underpin and the total level of retirement income would make reference to that. However, because Rule 9.2.1 does not promise a certain knowable level of income, the total level of benefits cannot be calculated correctly. This is because the calculation would be using a reference to a distribution of levels of income rather than a single known value. It follows that the pension account is money purchase when it is sufficiently funded.

69. In the findings section of her Opinion, the Adjudicator said:

> "The Rules state that, on retirement, the Trustee must pay Dr R a pension that is at least equal to the pension he would have received under SERPS had he not been contracted out".

70. The Adjudicator is wrong. The Rules do not say this. The Adjudicator has interpreted Rule 9.2.1 as meaning that the level of pension income provided at any age must be identical to that of the RST pension starting at age 65. This is not an interpretation shared by him or the Trustee. He disagrees with that interpretation since it has no basis in law, the Plan's rules or the Plan's implementation of these rules.

71. There is a clear difference in law between pension level and pension value. Rule 9.2.1 specifies that benefits will be provided that are "at least equal in value to those

applicable under the reference scheme specified in Section 12B of the PSA". In reaching her interpretation the Adjudicator had ignored the explicit use of the word value in the rule and interprets the rule as comparing by income level.

72. In estimating a benefit from rule 9.2.1 of £1,478.76 per annum the Plan's actuaries are certifying that this uncertain level is broadly equivalent to a pension that would be provided under the reference scheme. The Plan is complying with the law in providing a pension that its actuaries believe is equivalent by value. Nowhere in the law does it state that the equivalence of offered pension should be based on level rather than by equivalent value that the Plan's actuary certifies.

73. The only CETV estimation that the Plan's actuaries have provided is for a pension starting at 65 paying £1,984.49 per annum that he has no right to receive, and so cannot be a safeguarded benefit. The Adjudicator's opinion is that the CETV of what she believes are his safeguarded benefits provided at NRD of 60 has been calculated correctly. He believes there is a huge contradiction here. In determining that benefits provided at NRD are safeguarded, the Adjudicator has interpreted Rule 9.2.1 as specifying equivalence by level rather than by the explicitly worded equivalence by value. However, in putting an estimated value to these safeguarded benefits at NRD, the Adjudicator has relied on the CETV of reduced reference scheme benefits provided at 60 being equal to the CETV of reference scheme benefits provided at 65.

74. The Adjudicator has used this falsehood to kick-start a bogus circular argument. The Adjudicator decided, incorrectly, that he was promised a guaranteed minimum level of income without even checking whether there was one.

75. The Adjudicator does not appear to realise that all safeguarded benefits have an uncertain value. This is the reason why the method for the actuarial estimation of their value is set out in law. The correct description of benefits is that they have an uncertain value and an uncertain level of income and not safeguarded benefits because they are money purchase benefits.

Ombudsman's decision

76. I have considered the information that all parties to the complaint have provided and find that the crux of Dr R's complaint is whether or not his benefits in the Plan are safeguarded benefits.

77. The 2015 Act defines safeguarded benefits as benefits other than money purchase benefits and cash balance benefits. The definitions of money purchase benefits and cash balance benefits have previously been defined above, in paragraphs 36 to 39, so I will not repeat the definitions here.

78. After considering Dr R's complaint, I find that he does not have money purchase benefits or cash balance benefits. He has safeguarded benefits because of the

promise that he will receive benefits, if he retires from the Plan, of at least equal value to the benefits he would have received from his RST pension.

79. Dr R asserts that the Underpin Benefits are not safeguarded benefits because his NRD is age 60 but the RST pension is not payable until age 65. Under the Rules, it is mandatory for him to claim his pension at age 60 unless the Trustee consents to otherwise.

80. The Trustee has explained that, if Dr R retires from the Plan, he would be claiming his benefits five years earlier than he would have claimed his RST pension. So, an early retirement factor would be applied to his benefits.

81. Having considered Rule 9.2.1, I find that this Rule allows members to be paid the equivalent of at least the value of their RST pension, whenever their benefit is put into payment. So, Dr R's NRD being age 60 and not age 65 does not prevent his Underpin Benefits from being safeguarded benefits.

82. Dr R has raised concerns surrounding how the CETV of his safeguarded benefits has been calculated to establish that they are in fact valued at over £30,000.

83. Regulation 5 of the Pensions Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015, prescribes how the CETV of safeguarded benefits should be calculated. I have not been provided with any evidence that the Plan's actuaries did not calculate Dr R's benefits in accordance with this Regulation.

84. The Plan's actuaries have calculated Dr R's safeguarded benefits to be worth in excess of £30,000. So, it is a legal requirement for the Trustee to satisfy itself that Dr R has received the appropriate advice from an IFA, before allowing Dr R to transfer his safeguarded benefits from the Plan.

85. I find there has been no maladministration by the Trustee or Mercer in the way that they have treated Dr R's benefits as safeguarded benefits and the calculation of the CETV of those benefits.

86. I do not uphold Dr R's complaint.

Anthony Arter

Pensions Ombudsman
22 December 2022

Appendix

Relevant sections of the Consolidated Rules concerning the calculation of the RST Underpin.

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9. CONTRACTED-OUT MEMBERSHIP UNDER SCHEDULE 3

9.1 General

The Trustee shall operate the LORP Section in accordance with the contracting-out laws under the PSA which apply to salary related contracted-out schemes. Members of the Salary Related Section and the Money Purchase Section shall be in Contracted-out Membership and Schedule 3 (Contracting-out) shall apply to them.

9.2 Money Purchase Section - service after 5 April 1997

9.2.1 The benefits for and in respect of a Money Purchase Member in relation to his Contracted-out Membership after 5 April 1997 will, regardless of when they are applied or put into payment, be at least equal in value to those applicable under the reference scheme specified in Section 12B of the PSA. In respect of any such period of Contracted-out Membership after 5 April 1997 of a Member who is, in relation to that period (or any part of it), a Money Purchase Member (for the purposes of this Sub-Rule the "**Relevant Period of Money Purchase Membership**"):

9.2.1.1 on a benefit becoming payable to or in respect of that Member, the Trustee shall identify that part of the Member's Retirement Account Balance which relates to the Employer's Matched Contributions or Core Contributions in relation to the Relevant Period of Money Purchase Membership (the "Relevant Part");

9.2.1.2 notwithstanding any other provision of the Definitive Deed, the General Rules or the Sub-Rules of the LORP Section (other than General Rule 21 (Amendment), Schedule 3 and provisions necessary to retain the Plan's status as a Registered Pension Scheme), the Trustee shall apply the Relevant Part to provide such benefits as may be required to satisfy the requirements of Sub-Rule 9.2.1, provided that:

(a) if the Relevant Part is insufficient to provide those benefits the shortfall is to be made good from the Fund; and

(b) if the Relevant Part is greater than is required to provide those benefits, then only such part of the Relevant Part as is necessary to provide those benefits is to be applied and

the rest of the Relevant Part will form part of the remainder of the Member's Retirement Account Balance.

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