

Ombudsman's Determination

Applicant	Mrs N
Scheme	Universities Superannuation Scheme (the Scheme)
Respondent	Universities Superannuation Scheme Ltd (the Trustee)

Complaint summary

1. Mrs N is a deferred member of the Scheme. She has complained that, when she completed her first period of employment, the Trustee refused to provide her with Scheme benefits accrued from her employer's contributions, as she had been a Scheme member for less than two years.
2. Mrs N has also complained that the Trustee did not provide her with a transfer value and did not allow her to transfer her Scheme benefits. In addition, the Trustee requested a fee for producing a transfer valuation, which was higher than the fee applied to younger Scheme members.
3. In Mrs N's view, the Scheme Rules and the Trustee's actions were discriminatory because of her age.

Summary of the Ombudsman's Determination and reasons

4. The complaint is partly upheld to the extent that the Trustee provided Mrs N with confusing information regarding the treatment of her contributions via salary sacrifice. The Trustee shall pay Mrs N an award of £500, in recognition of the significant non-financial injustice she has suffered.

Detailed Determination

Material facts

5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. On 8 October 2018, Mrs N began employment with the University of Essex (**the Employer**) on a fixed term contract and became a member of the Scheme.
7. At the time of joining the Scheme Mrs N was aged 64.

8. On 18 April 2019, Mrs N's contract with the Employer ended.
9. On 17 May 2019, the Trustee wrote to Mrs N and confirmed that she was entitled to a pension of £22.84 per year, as well as a lump sum of £68.52. The Trustee added that Mrs N was not entitled to a refund of contributions, as although, she had been a Scheme member for a period of less than two years, she had paid contributions via a salary sacrifice¹ arrangement. It also informed Mrs N that if she ever re-joined the Scheme, she would start accruing pension benefits again.
10. On 25 May 2019, the Trustee wrote to Mrs N and confirmed that, as she had reached the normal retirement age (**NRA**) of 65, she could receive her Scheme benefits as a "small pot lump sum" of £513.26.
11. Mrs N questioned the lump sum amount, as it was less than the total contributions paid to the Scheme while she was an active member. She also asked the Trustee to confirm whether she could receive a refund of contributions or transfer her benefits to another pension arrangement.
12. On 8 June 2019, the Trustee wrote to Mrs N and explained how the lump sum amount had been calculated. It also pointed out that the correct amount available to her was £514.22. In the same letter, the Trustee acknowledged Mrs N's request for confirmation of the contributions she made to the Scheme and provided a breakdown of these contributions. The Trustee then said:

"Your contributions were paid at a rate of 8% of your salary, with 7.65% going towards your own pension benefits; the Main section of the scheme, and 0.35% paid towards the supplementary section of the scheme, which pays certain benefits in the event of your death or incapacity."
13. On 21 June 2019, the Trustee wrote to Mrs N and confirmed that:-
 - 13.1. Her deferred benefits in the Scheme were based on employee contributions only, as she had been a member for less than two years.
 - 13.2. As these employee contributions had been paid under a salary sacrifice arrangement, a refund was not possible.
 - 13.3. The statutory right to transfer deferred pension benefits applied where a member had stopped accruing benefits at least one year before their NRA. Mrs N had reached her NRA, so a transfer was not possible.
 - 13.4. The Scheme Rules allowed for transfers to be granted outside of this statutory right, to members who applied to transfer between the ages of 64 and 65. No transfers were permitted after age 65.

¹ Salary sacrifice is a mechanism recognised by HMRC, where an employee agrees to a reduction in their salary or bonus that is equal to their pension contribution and, in exchange, the employer agrees to pay the total pension contributions. See <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim42750>

14. On 2 July 2019, Mrs N complained to the Trustee. In summary, she said:-
 - 14.1. She had not signed up to participate in the Employer's salary sacrifice arrangement.
 - 14.2. She had not been given information about the Scheme and had not applied to join it.
 - 14.3. The restrictions preventing her from transferring her benefits or receiving a refund of contributions were discriminatory.
 - 14.4. She did not agree with the calculations of her deferred benefits, as they did not include employer's contributions.
15. On 19 July 2019, the Trustee responded to the complaint. It said:-
 - 15.1. The Employer had confirmed that Mrs N's enrolment in the Scheme and the salary sacrifice arrangement were outlined in her contract of employment. A Welcome Letter and a Membership Certificate were also sent to Mrs N by email, in December 2018. They included information on how she could access Scheme information online.
 - 15.2. The Scheme complied with pension law requirements and its Rules were not in breach of age discrimination legislation.
 - 15.3. The reason a refund of contributions was not possible was not related to Mrs N's age. Tax legislation prohibited a refund where contributions had been paid via salary sacrifice. This was because the Employer directly paid all contributions.
 - 15.4. The Scheme could not offer Mrs N statutory options due to the overriding legislation in force. In such a situation, benefits had to still be provided, but the Scheme had discretion as to the design of those benefits.
 - 15.5. The Scheme Rules stated that, in these circumstances, the member would receive a preserved pension and lump sum, based on the member's contributions or those equivalent to member's contributions (where they had been paid via salary sacrifice).
16. Following receipt of the Trustee's response, Mrs N complained under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
17. On 3 September 2019, the Trustee did not uphold the complaint. It said:-
 - 17.1. Legislation gave members who left a pension scheme the right to transfer their benefits to another scheme, provided that a request was made at least 12 months before they reached their NRA. As the Scheme's NRA was 65, there was no statutory right for members to require a transfer of benefits after they had reached age 64. This was the case for Mrs N.

- 17.2. While the legislation did not prohibit the Trustee from allowing older members to transfer their benefits, there was no requirement to permit this. The Trustee had not breached any duty by not allowing a transfer.
- 17.3. The Scheme Rules provided that members were entitled to full benefits if they had completed at least two years of qualifying service. Otherwise, they were entitled to benefits based on employee contributions only.
- 17.4. Where contributions had been paid by an employer via salary sacrifice, the benefits were based on the equivalent part of the contributions paid by the employer.
- 17.5. There was no provision in the Scheme Rules which allowed the Trustee to pay full benefits to a member with less than two years of qualifying service. There was also no statutory requirement to do so.
- 17.6. The employer contributions paid while Mrs N was an active member would not be refunded to the Employer. They were retained in the Scheme's general fund.
- 17.7. Employee contributions paid via salary sacrifice were not treated as having been paid by a member. The Trustee was therefore unable to refund Mrs N's contributions.
- 17.8. Details of Mrs N's Scheme membership and participation in the salary sacrifice scheme were outlined in her contract of employment. The Trustee was correct in treating Mrs N's contributions as being paid via salary sacrifice.
- 17.9. The Scheme Rules complied with legislative requirements and did not unlawfully discriminate against older members.
18. In October 2019, Mrs N began employment with the Employer again and resumed paying contributions to the Scheme.
19. On 4 October 2019, Mrs N received confirmation that if she opted out of the salary sacrifice part of the Scheme, she would pay National Insurance on her pension contributions.
20. On 19 December 2019, Mrs N requested that her complaint be reconsidered under stage two of the Scheme's IDRP. She said:-
 - 20.1. When she first began employment with the Employer, she was not given any information about the Scheme or its Rules. She received information eight weeks after commencement of her contract, even though pension contributions had been paid from the outset.
 - 20.2. Following the end of her initial contract, she was informed that she could not derive any benefit from contributions made by the Employer and that she could not transfer her benefits to another pension scheme.

- 20.3. The Pensions Act 2008² referred to minimum total contributions on automatic enrolment to a workplace pension scheme. Some of these contributions must be paid by the employer for the benefit of the employee. She was automatically enrolled in the Scheme, yet she had been denied that benefit.
- 20.4. If the Scheme wanted to deny older members the option to transfer their benefits, it ought to highlight this restriction at the outset.
21. On 19 February 2020, the Trustee informed Mrs N that her benefits would be payable immediately once she left service, because she had become an active member of the Scheme. These benefits would be in respect of her previous and current period of service and would be calculated on the full standard salary basis, rather than on employee contributions only. The Trustee asked Mrs N to confirm whether she still wanted her complaint to be considered under stage two of the IDRPs, given the changes to her membership.
22. On the same date, Mrs N asked the Trustee to provide details of the Scheme benefits that would be payable to her, as her new contract with the Employer was also on a fixed term basis. The Trustee replied that, at retirement, Mrs N would receive a standard tax-free lump sum of £480.96 and a yearly pension of £160.32.
23. On 20 February 2020, the Trustee confirmed to Mrs N that she would also have the option to take a small pot lump sum of £3,917.11.
24. On 21 February 2020, Mrs N asked the Trustee to confirm:-
- 24.1. The transfer value of her Scheme benefits and whether she would be allowed to transfer them to another pension provider.
- 24.2. Her position regarding Scheme membership and benefits, in the event that she took another fixed term contract in the new academic year.
- 24.3. Whether the recent calculations of her Scheme benefits were an exception to the Scheme Rules, or the Rules had been revised. This was because her combined membership was still less than two years.
25. On the same date, the Trustee replied to Mrs N and said:-
- 25.1. She was entitled to full benefits from the Scheme. This was because, in accordance with the Scheme Rules, when a member joined the Scheme again any earlier period of service was “bundled together” with the new period of service.
- 25.2. When a member reached NRA, they could take their benefits without reduction. As this did not involve the granting of deferred benefits, a member was entitled to standard benefits regardless of whether they had reached two years of service or not.

² See <https://www.legislation.gov.uk/ukpga/2008/30/contents>

- 25.3. Her earlier period of service was added to the new, rather than being kept as a separate deferred benefit, so she was entitled to standard benefits in relation to that period of service too.
- 25.4. As she could take immediate payment of unreduced benefits, legislation did not allow her to transfer them. This applied to any member who ceased service after NRA, regardless of their period of service.
- 25.5. While the Trustee had discretion to allow members to transfer after NRA, it did not permit this.
26. On 24 February 2020, Mrs N confirmed to the Trustee that, on the basis of the revised benefits provided to her, she accepted that they were in line with the employer and employee contributions paid. So, that part of her complaint could be treated as settled. She added that the remaining issue was the Trustee's refusal to exercise its discretion and provide her with a transfer value, or to allow her to transfer her benefits. Mrs N maintained that this was age discriminatory.
27. On 30 March 2020, the Advisory Committee responded to Mrs N's complaint under stage two of the Scheme's IDRP, having delegated authority to do so from the Trustee. It agreed with the conclusions reached under the stage one response and did not uphold the complaint. It said:-
 - 27.1. Some of the issues Mrs N had initially raised were no longer in dispute. This was because she had since re-joined the Scheme and was entitled to retire as an active member, receiving full benefits.
 - 27.2. Statute limited circumstances under which members had a right to transfer their pension benefits. This could mean that members were treated differently due to their age. The Trustee's current policy, permitting transfers up to NRA, went beyond what was legally required.
 - 27.3. There was no provision for early leavers to delay the payment of Scheme benefits that became payable at age 65. Once benefits had become payable, it would not be appropriate for them to be transferred out. This was consistent with statutory rights.
 - 27.4. The Trustee's decision to allow transfers up to NRA, but not beyond, was reasonable and proportionate in all the circumstances.
28. On 4 March 2021, the administrator of the Scheme sent a letter to Mrs N which included details of her recorded contributions, together with the implied employer contributions. These were:-
 - 28.1. For the period October 2018 to March 2019: £586.17 in member contributions paid by the Employer under salary sacrifice, and £1,318.88 in implied employer contributions.

- 28.2. For the period April 2019 to March 2020: £76.56 in member contributions paid by the Employer under salary sacrifice, £300.67 in member contributions paid outside of salary sacrifice, and £660.85 in implied employer contributions.
- 28.3. For the period April 2020 to December 2020: £298.90 in member contributions paid by the Employer under salary sacrifice, and £656.96 in implied employer contributions.
29. Mrs N was also advised that if she required a transfer value despite this being an option not available to her, there would be a charge of £352.50.

Summary of Mrs N's position

30. The issue of not receiving any benefits from the Employer's contributions had not been satisfactorily settled. In February 2019, she was informed that a decision was made to grant her a standard pension. But it was not clear whether this decision had been made as an exception to the Scheme Rules, or whether the relevant Rules had been revised.
31. She could not say with confidence that the Scheme Rules, which in her view were unfair and potentially unlawful, would not be applied in subsequent contributions made by the Employer.
32. Trustees had a fiduciary duty to act fairly and impartially towards Scheme members and to avoid conflicts of interest. In her view, the Trustee was in breach of this duty. It had no power to retain contributions within the Scheme, which would benefit longer serving members or the Trustee, at the expense of those with shorter membership, regardless of how modest the amounts were.
33. The Employer had paid the contributions only because Mrs N was employed by it. It was not for her to show a statutory right to those benefits, but for the Trustee to show exactly which legislation permitted it to deprive her of part of her employment benefit package.
34. It was likely that there had been numerous members with short-term employment who had been deprived of their pension benefits. If the Trustee was permitted to act in this way, the Scheme Rules would negate the incentive employees had of automatic enrolment, which required the employer to contribute to their pension.
35. Following the introduction of pension freedom legislation in 2015, it was possible to build up and retain pension benefits until age 75 on favourable tax terms. The Scheme Rules not only denied her the option to transfer out but forced her to start taking pension income regardless of her circumstances and wishes. The consequence was that, if she were to die one day after taking her benefits, the entire value of the remaining benefits would be lost, unless there was a surviving spouse or civil partner. Refusing to permit transfers denied older members the freedom to choose whether to take benefits at age 65 and whether to pass their pension pot to their chosen beneficiaries.

36. The Trustee had the option of revising the Scheme Rules, to enable transfers out at a greater age or to adopt a less discriminatory rule of allowing retention of the benefits within the Scheme. Benefits became payable at prescribed ages only because the current Scheme Rules required it. They could be revised so that it was mandatory, and not discretionary, to permit transfers out to members aged over 65.
37. Updated legislation required trustees to provide transfer values and did not prohibit them from allowing transfers out of a pension scheme. The Trustee had a duty to review the Scheme Rules from time to time and ought to do so following such fundamental changes to general pension rules.
38. The Equality Act (Age Exceptions for Pension Schemes) Order 2010 (**the Equality Act Order**)³ was enacted prior to the introduction of pension freedom legislation and did not compel pension trustees to discriminate.
39. If trustees chose to discriminate on specified criteria, they had to show that their actions were proportionate to achieve a legitimate aim. Saving of cost alone was not an objectively justified aim. The Trustee had not shown that permitting older members to transfer out of the Scheme would cause any undue administrative or cost burden, compared to younger members. In addition, transferring out would save the cost of administering those member's pension payments in the future.
40. She requested that The Pensions Ombudsman (**TPO**) considered the Trustee's initial refusal to provide a transfer value and, subsequently, its demand to charge Mrs N £352.50 to do so. This should be compared with providing transfer quotations to younger members free of charge once in any 12-month period, and then applying a charge of £235 for providing further quotations during that period.

Summary of the Trustee's position.

41. The issue of Mrs N not receiving any benefits from the Employer's contributions, as she did not meet the qualifying criteria, had been settled. She re-joined the Scheme and was subsequently provided with pension benefits. She had not suffered any sustained financial or other injustice.
42. Chapter IV of the Pension Schemes Act 1993 (**PSA 1993**)⁴, gave members the right to transfer their benefits if they left a pension scheme and applied to transfer at least one year prior to their NRA.
43. The Scheme Rules gave the Trustee discretion to allow deferred members to transfer their benefits out of the Scheme, over and above their statutory right. This right had to be exercised before age 64, being 12 months before the Scheme's NRA. The Trustee's policy was to extend this period and allow members to transfer out up to age 65.

³ See <https://www.legislation.gov.uk/ukxi/2010/2133/contents/made>

⁴ See <https://www.legislation.gov.uk/ukpga/1993/48/part/IV>

44. The practice of allowing non-statutory or discretionary transfer values only up to age 65 may be deemed to be direct discrimination on the basis of age. But there were robust grounds to allow this practice by the Trustee, on the basis that it was objectively justified, and it was the subject of a statutory exemption.
45. Objective justification was established on the basis that the practice of providing transfer values beyond age 65 caused logistical, administrative, and cost related issues. In addition, all statutory transfer values were provided only up to 12 months prior to NRA, the reason presumably being that pension schemes must be permitted to administer benefits to come into payment at a prescribed time.
46. The Trustee extended the statutory limit, as it wanted to provide flexibility to the Scheme's deferred members. However, it had a duty to bring benefits into payment and had to establish a framework to allow this discretion, without causing undue cost, uncertainty, and lack of predictability. To extend transfer rights too widely would change the fundamental nature of the Scheme, with the focus of the member's benefit changing from being a guaranteed pension and lump sum to being a transfer value.
47. Any finding that the practice of allowing discretionary transfers after age 64 and up to a specified age was discriminatory and not objectively justifiable would mean that no trustee could permit the practice with any age limit attached. Essentially, it would mean discretionary transfers would be permitted after age 64. This could not be correct in the context of an occupational pension scheme, where benefits became payable at prescribed ages with administration procedures, preservation, and strict compliance.
48. The Equality Act Order⁵, Regulation 31, allowed the practice of applying an age limit for the transfer of the value of a member's accrued rights out of a pension scheme.
49. The Trustee's decision to allow transfers up to NRA, but not beyond, was reasonable and proportionate in all the circumstances.
50. There was objective justification and/or a statutory defence, allowing the continued practice of non-statutory/discretionary transfers up until age 65. There was no breach of trust or statutory duty regarding the issue of a refund of employer contributions made as part of a salary sacrifice arrangement.

Adjudicator's Opinion

51. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised in paragraphs 52 to 63 below.

⁵ See <https://www.legislation.gov.uk/uksi/2010/2133/schedule/1/paragraph/31/made>

52. The Scheme Rules applicable to Mrs N's complaint are the Universities Superannuation Scheme Rules dated 19 November 2015 (**Scheme Rules 2015**), which superseded all previous Rules.
53. Scheme Rules 2015, Rule 8 (see Appendix 1), stated that, if a member suspended active membership in the Scheme but resumed membership at a later date, then the suspended period would be treated as active membership. That rule did not say that the total period of active membership must be over two years of qualifying service.
54. Consequently, an active Scheme member was entitled to standard benefits at their NRA, regardless of whether their total membership was less than two years or more. The Adjudicator concluded that the Trustee had acted in accordance with the Scheme Rules 2015, by offering Mrs N benefits based on her standard salary, instead of employee contributions only.
55. While Mrs N was also concerned that other Scheme members with less than two years of qualifying service might be discriminated against, TPO could only address her complaint and the circumstances relating to her case. Scheme members who were also concerned about their Scheme benefits could raise their own complaints.
56. In 1993, PSA 1993, came into force. PSA 1993, Chapter IV, set out which members acquired a statutory right to a transfer value of their pension benefits. Relevant to Mrs N's case, Chapter IV, section 93(1)(a)(i), stated that this right applied to members of occupational pension schemes whose pensionable service terminated on or after 1 January 1986 and at least one year before normal pension age (**NPA**).
57. In April 2015, the Pension Schemes Act 2015⁶, came into force. It made a number of changes to the transfer rights of members of defined benefit occupational pension schemes. One of those changes was in PSA 1993, Chapter IV, which became PSA 1993, Part 4ZA, Chapter 1. Section 93 was also amended. Relevant to Mrs N's complaint, Section 93(4) stated that a member must have one year or more before their scheme's NPA, in order to have a statutory right to a transfer value.
58. In determining the Scheme's NPA in respect of Mrs N, the Adjudicator noted that:-
- 58.1. The Scheme Rules 2015 defined NPA as, "such age in complete years (rounded down where pensionable age is given in years and months)", where pensionable service started, "after the effective date of any change in pensionable age after 1 October 2011, and each subsequent change in pensionable age".
- 58.2. The Scheme Rules 2015 also defined 'pensionable age' as having the meaning given by Pension Schemes Act 1995 (**PSA 1995**)⁷, Schedule 4 Paragraph 1.

⁶ See <https://www.legislation.gov.uk/ukpga/2015/8/contents>

⁷ See <https://www.legislation.gov.uk/ukpga/1995/26/contents>

- 58.3. The last effective date of any change in pensionable age after 1 October 2011 was on 3 January 2012. On that date, PSA 1995, Schedule 4, was amended so that a person born between 6 April and 5 May 1954, like Mrs N, attained pensionable age on 6 November 2019.
- 58.4. Mrs N's pensionable service began after 3 January 2012. She was born in April 1954, so her NPA in complete years, when rounded down, was 65 in November 2019. Consequently, under the Scheme Rules 2015, she attained the NPA of 65 on 6 November 2019.
59. As Mrs N accrued Scheme benefits with less than one year from her NPA, the Adjudicator concluded that she did not have a statutory right to a transfer.
60. Even though the Trustee had discretion to allow members to transfer their Scheme benefits with less than 12 months before their NRA under the Scheme, the transfer had to take place before the member reached NRA. So, the Trustee had acted in accordance with the relevant Scheme Rules and legislation.
61. The Equality Act 2010, Section 3, stated that the practices, actions, or decisions by the trustees of a pension scheme which were listed in Schedule 1 were not in breach of the non-discrimination rules. One of those practices was described in the Equality Act 2010, Schedule 1, Section 31, as follows:
- “The application of an age limit for transfer of the value of a member's accrued rights into or out of a scheme, provided that any such age limit is not more than one year before the member's normal pension age”.
62. As Section 31 stated that placing an age limit on the transfer of benefits was not discriminatory, provided that the limit was no more than 12 months from the member's NPA, Mrs N had not been discriminated against by not being allowed to transfer her Scheme benefits after age 65.
63. The Trustee was under no obligation to provide Mrs N with a transfer valuation, as she did not have a statutory right to transfer her benefits out of the Scheme. The Trustee had taken a decision, requiring members with no statutory right to transfer their Scheme benefits, to pay a higher fee to obtain a cash equivalent transfer value (**CETV**) than those members who had a statutory right. This was due to the cost of using the service of the Scheme's actuaries. Although Mrs N disagreed with that decision, the Trustee had not breached any Scheme Rules or Equality legislation by imposing such a condition. The higher charge was not determined by the age of the member but, rather, on whether or not the member had statutory rights within the Scheme.
64. Mrs N did not accept the Adjudicator's Opinion and in response made some additional comments. Further comments were also provided by the Trustee.

Summary of Mrs N's post Opinion comments

65. The issue regarding Scheme members with less than two years of qualifying service has not been settled. She has not been told whether the Trustee made an exception in her case. When the Trustee informed her that she would get the benefit of employer's contributions, she had not yet completed two years of qualifying service. In her view, re-joining the Scheme did not necessarily mean that she would complete two years of service. She suspected that the Trustee made an exception in her case. The Scheme Rules were in conflict with the Trustee's fiduciary duty on this issue.
66. The Adjudicator interpreted the Scheme Rules 2015, Rule 8, to mean that, so long as a member resumed contributions, they were treated as having had the minimum two years' qualifying service even when that was not the case. Mrs N cannot see how the Adjudicator can interpret this rule to add words or meaning which is not there. In her view, such an interpretation would bring about an absurd result. For example, if a member left after 23 months' worth of contributions but did not resume membership, they would be denied the benefit. But someone leaving only after three months service and resuming two months later, immediately qualified for standard benefits because that resumption would be treated as completion of two years qualifying service.
67. The Adjudicator's interpretation of the Scheme Rules does not reconcile with the short service definition in PSA 1993 either.
68. The Adjudicator has taken no account of the general rule of law, prohibiting trustees from benefiting from trust funds or acting in conflict with the beneficiary's interest. The Trustee is in conflict with the beneficiary's position. The Scheme Rules also lead to conflict between one group of beneficiaries (those with longer service) and those with less than two years of service. This is because those with longer service presumably also benefit from the general fund to which contributions made by the employer on behalf of those with shorter service are added.
69. While Mrs N understands that TPO can only address her specific circumstances, it is a legitimate question to consider the extent to which the Trustee is benefitting from the breach of its fiduciary duty. When it is clear that a large number of short-term employees are denied the benefit of employer's contributions, it is important to scrutinise and highlight that breach.
70. Though not previously mentioned, it is obvious that favourable tax treatment is given to encourage employers to contribute, on behalf of employees. When considering the legitimacy of the Trustee's actions and the Scheme Rules, it is reasonable to query whether such actions bring them in conflict with tax rules too.
71. Regarding the higher fee demanded by the Trustee in order to provide a CETV, the Trustee had initially refused to provide it to Mrs N. Then, in March 2021, the Trustee demanded a fee. Requiring older Scheme members to make this payment is discriminatory in Mrs N's view. Whilst cost may be a consideration, it can only overcome the charge of age discrimination if accompanied by other substantive

justification to achieve some other legitimate aim. Mrs N had asked that appropriate case law be considered but the Trustee has not provided any supporting information to compare the cost of providing a CETV to people in her situation, as opposed to providing information for free and at a lesser charge to younger members. She cannot see any legitimate aim of discriminating between the age groups. In her view, cost cannot be a legitimate aim, as the Trustee would be incurring more costs in producing information routinely for younger members.

72. She believes that more consideration should be given to case law, in particular the decisions in the McCloud and Sargeant cases, requiring there to be proportionality and legitimacy of aim, not just to save cost, if age discrimination is to be lawful. Unless information is given on an approximate number of older people in situation similar to hers, who are requesting transfer values, and the cost difference in providing this information compared with doing so for younger members, this issue should be looked at in order to consider if the discrimination is legitimate.

Summary of the Trustee's post Opinion comments

73. The letter sent to Mrs N of 4 March 2021, showed a member's contribution amount. This is because when Mrs N re-joined the Scheme her salary was too low for salary sacrifice to be applied. Accordingly, contributions were deducted from salary and paid to the Scheme outside of the salary sacrifice arrangement.
74. It is trite law that trustees of a trust with a trust-based power/discretion are not legally able to fetter that trust-based power/discretion. However, it is the Trustee's position that there is no such fetter under any of the powers/discretions under the Scheme. In this regard and with the number of members of the Scheme, there have to be some practical measures adopted to allow for the application of trust-based powers/discretions on a consistent, regularly reviewed and considered basis.
75. The Scheme has reviewed and continues to review all of its trust-based powers/discretions and has robust governance arrangements which:-
- 75.1. Delegate the exercise of those powers under prescribed circumstances and/or remit.
 - 75.2. Standardise the processes for the consideration of those powers/discretions in terms of the collation of relevant factors and process.
 - 75.3. Rehearse the relevant factors underpinning any decision or policy that is agreed by the Trustee, and relevant processes for the application of such powers/discretions, including the consideration, determination, and escalation of any decision, depending on the circumstances.
 - 75.4. Review the governance procedures and terms of any decisions under the Scheme Rules on a regular and prescribed basis.
76. The Trustee agrees that it is not permitted to fetter its powers/discretions. However, the factors, enquiry, and consideration of any such powers/discretions will depend on

the nature of the power/discretion. A transfer value, for example, is set and the assumptions and methodology for its calculation are prescribed under a policy. This does not mean that because the Trustee follows that policy there is a fetter.

77. The discretion to permit a transfer outside of the statutory regime was introduced to allow the Trustee to have flexibility and members to have choice. However, there are consistent and pervading constraints on the orderly administration of members' retirement journeys and payment of benefits which would apply to all members.
78. Under the Scheme Rules, the benefits of a deferred member come into payment on their "normal pension age". This would mean that, in practice, there are no usual circumstances where a deferred member is considering or has the opportunity to transfer their benefits after NPA. So, it is not entirely correct to refer to a policy but more articulately a practice based on the Scheme Rules.
79. The practice and rules of providing an NPA from which benefits are payable is clearly permitted under the Equality Act 2010⁸, and the Equality Act Order.
80. There can be a review of the merits of the decision taken in relation to Mrs N, however:-
 - 80.1. There are no deferred members to whom a transfer can become payable after NPA, as benefits will have commenced or should have commenced in accordance with the Scheme Rules.
 - 80.2. No specific factors were raised by Mrs N to differentiate her application from any other member.
81. The decision not to allow Mrs N to transfer her Scheme benefits was articulated to her to show consistency and that she was not being treated unfairly or in any way which was otherwise unlawful. The fact the decision was reinforcing or reflecting the practice of the Scheme and the Scheme Rules does not mean that there is a fetter.
82. Mrs N did not make any representations which differentiated her position to that of any other member. There is no fetter within the day-to-day administration of the Scheme. There is simply an implementation of the Scheme Rules.
83. It is recognised that the IDRP is there to review whether or not the Trustee complied with its legal duties in relation to the administration of benefits payable under the Scheme. It is not for the IDRP to re-determine the decision made, but to simply review whether there was a breach of law in the decision that was made by the Trustee.
84. In relation to this complaint, both at stage one and stage two of the IDRP, the decision makers considered the governance behind the application of the policy by the Trustee and whether there were factors that the Trustee should have taken into

⁸ See <https://www.legislation.gov.uk/ukpga/2010/15/contents>

account in its decision, which could have justified moving away from the policy position. There were no such factors found.

85. There are many examples of either the person determining stage one of the IDRP or the Advisory Committee (which decides stage two) changing the position of the Trustee in relation to particular complaints made. In Mrs N's case, neither the person determining stage one of the IDRP, nor the Advisory Committee considered that there were factors that were raised which would give clear grounds to move away from the policy position.
86. There is a clear statutory exemption to age discrimination. The Equality Act Order, Regulation 31, permits the application of an age limit for the transfer of the value of a member's accrued rights into or out of a scheme, provided that any such age limit is not more than one year before the member's NPA. The Trustee extended transfer values from age 64 to age 65, which was Mrs N's NPA under the Scheme Rules.
87. The basis for the additional charge in providing Mrs N with a CETV quotation is not based on age but on whether the information provided is covered by disclosure requirements. The disclosure requirements and pensions legislation allow for CETVs to be provided at different times and on certain conditions. Legislation then allows for different charging based on whether the information is or is not based on disclosure requirements. Any claim that applying a statutory charging structure based on statutory disclosure requirements on the basis of age would be perverse. There are no reasonable grounds for the assertion that the higher charges are being applied based on age.
88. As Mrs N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. I issued a preliminary decision (**the Preliminary Decision**) which did not uphold the complaint.
89. Mrs N made further submissions in response to the Preliminary Decision, which are summarised below, in paragraphs 90 to 94.

Summary of Mrs N's response to the Preliminary Decision

90. As well as pensions legislation, the Trustee was subject to trust legislation. Some of the Scheme Rules placed it in conflict with its duties and obligations under trust legislation.
91. The Trustee said that the cost and administrative burden would be too much to allow older members to transfer out, and that it would change the nature of the Scheme. However, it was likely that requests for transfers out by older members would be rare given the superior nature of defined benefit schemes, which the Trustee had highlighted in the past.
92. The Trustee had not exercised its discretion reasonably. She questioned how it could have exercised its discretion without knowing anything about her circumstances. It had the opportunity to ask her for the reasons she wanted to transfer and details of

her relevant circumstances, but at no stage had it done so. She did not consider it for her to put forward her reasons unless requested to do so.

93. The Trustee could have asked her to complete a questionnaire to gather additional information. However, it simply applied its policy of not allowing a transfer out for older members, and so fettered its discretionary power.
94. It followed that the lack of entitlement of older members to transfer out was the consequence of the Trustee's rigid policy, and this lack of entitlement was used to justify the discriminatory higher charge for providing a transfer value.
95. When asked, Mrs N declined the opportunity to provide further detail in relation to her comment in paragraph 90 above.

Ombudsman's decision

96. My powers are set out in Part X of PSA 1993⁹, and subsequent regulations. This legislation sets out what I can and cannot do. In particular, I cannot change the legislation, or create new legislation. I must apply the law relevant to the applicant at the time in question and determine whether it has been applied correctly. I must decide complaints and disputes in accordance with established legal principles rather than by reference to what I may consider fair and reasonable.

Mrs N's first period of service

97. Mrs N's first period of service with the Employer began in October 2018 and ended in April 2019. According to the section 'Your benefits before April 2016'¹⁰, on the Scheme's website, members who joined the Scheme on or after 1 April 2016 began building benefits in the Retirement Income Builder. Members built up benefits through a Career Revalued Benefits (**CRB**) pension only if they joined the Scheme between October 2011 and March 2016. As Mrs N did not build up benefits through a CRB pension, I do not consider that Rule 8 of the Scheme Rules applies in her case.
98. The relevant Rule applicable to Mrs N's first period of service, which lasted approximately six months and ended when she was aged 64, is Rule 18 of the Scheme Rules 2015, (see Appendix 2). As the Employer operated a salary sacrifice system, all contributions into the Scheme were made by the Employer. It is normally the case that under salary sacrifice an individual does not make any employee contributions. In this instance, the use of salary sacrifice is confirmed in the Trustee's letter to Mrs N, dated 21 June 2019.
99. Scheme Rules 2015, sub-rule 18.2.1, sets out that Mrs N was entitled to a refund of her individual contributions, which I interpret as excluding employer contributions.

⁹ See <https://www.legislation.gov.uk/ukpga/1993/48/part/X/enacted>

¹⁰ See <https://www.uss.co.uk/for-members/your-benefits-before-april-2016>

100. Under Scheme Rules 2015, sub-rule 18.3.1, Mrs N is entitled to a pension and a lump sum when she reached NPA, if she elected to choose these benefits (as defined in the Scheme Rules 2015). I have seen no evidence to show that Mrs N elected for this option.
101. Scheme Rules 2015, sub-rule 18.3.2, makes it clear that contributions made by the employer (instead of by the employee) under salary sacrifice can only be included in any pension and lump sum elected by the member under sub-rule 18.3.1, subject to Rules 5.3 and 6.3 that refer to matching contributions.
102. I consider that the correspondence issued by the Trustee to Mrs N, in respect of the contributions paid to the Scheme, was confusing. The Trustee's explanation of how the salary sacrifice contributions were applied was not sufficiently clear to make Mrs N aware that the contributions were employer contributions and that these were included in the calculation of her benefits. I find this is so because:-
- 102.1. In its letter to Mrs N, dated 8 June 2019, the Trustee said that Mrs N was paying contributions of 8% of her salary. This could have been interpreted as Mrs N paying employee contributions into the Scheme.
- 102.2. The Trustee's letter of 21 June 2019 stated that Mrs N's deferred benefits in the Scheme were based on employee contributions only.
- 102.3. In its response to Mrs N's complaint, dated 19 July 2019, the Trustee said that in respect of deferred benefits the member would receive a preserved pension and lump sum based on the member contributions (or those equivalent to member contributions where they are paid under salary sacrifice). I consider that this explanation by the Trustee implied that the pension and lump sum were based on the member contributions and not the employer contributions as provided via salary sacrifice.
- 102.4. The letter dated 4 March 2021, from the administrator of the Scheme, showed employee contributions paid outside the salary sacrifice, for the period April 2019 to March 2020.
103. The Trustee's correspondence to Mrs N up to September 2019, was confusing, with no clear explanation of how member contributions and employer contributions were applied, how the salary sacrifice mechanism worked, and whether Mrs N had made contributions other than by salary sacrifice. Mrs N's initial complaint appears to stem from the fact that it was not clear to her at that time how a defined benefit pension worked, as she did not appreciate that she would receive a payment for life, rather than have a pot of money that reflected the value of the contributions. The Trustee's correspondence shows a lack of attention and ineptitude which amounts to maladministration.
104. While Mrs N has not suffered a financial injustice in respect of the first period of her service, she has suffered significant distress and inconvenience as a result of the poor correspondence she received from the Trustee.

Mrs N's second period of service

105. In October 2019, Mrs N began employment with the Employer again and resumed contributions to the Scheme. On this basis, Mrs N became an active member of the Scheme from the date she became re-employed by the Employer.
106. However, as set out in paragraph 58 above, on 6 November 2019 Mrs N attained NPA of 65, in accordance with the Scheme Rules 2015. So, from that date onwards, Scheme Rules 2015, Rule 12.1.3 (late retirement benefits), (see Appendix 3), applied for any service after 6 November 2019, as that service built up additional benefits after Mrs N's NPA.
107. In accordance with the Scheme Rules 2015, Mrs N is entitled to her full benefits for all pensionable service as at 6 November 2019. Having left employment after her first period of service, Mrs N was entitled to benefits under Rule 18.3 provided she elected to receive them. However, after she started her second period of service, in October 2019, Mrs N accrued new benefits prior to NPA. After 6 November 2019, she became entitled to late retirement benefits based on her service after this date.
108. I am satisfied that Mrs N's benefits from both periods of service were provided in accordance with the Scheme Rules 2015, and that the Trustee did not make an exception in Mrs N's case or alter these Rules prior to paying her benefits.

Transfer requests

109. Mrs N accrued Scheme benefits with less than one year from her NPA (as defined in the Scheme Rules 2015), so she did not have a statutory right to a transfer.
110. Scheme Rules 2015, Rules 19.3 and 19.5, (see Appendix 4) permit non-statutory transfers "other than in accordance with Part 4ZA of PSA 93". I consider that this wording is broad and provides the Trustee with wide powers to make a transfer unconnected to the statutory provisions.
111. The Trustee has justified its policy to allow discretionary transfers up to age 65, on the basis that the practice of providing transfer values beyond age 65 would cause logistical, administrative, and cost related issues. In addition, all statutory transfer values were provided only up to 12 months prior to NRA.
112. As a general rule, a trustee is prohibited from adopting an irrevocable view or policy in the present as to how it will exercise a power or discretion in the future. While it is permissible for trustees to have policies on how they will exercise their discretion, they must keep an open mind to the possibility of departing from the policy in appropriate cases.
113. Having left service in April 2019, at age 64, Mrs N sought a transfer from the Scheme as a deferred member. I am satisfied that the Trustee's decision not to permit a transfer at this stage was lawful in terms of the application of the Trustee's policy, as it considered its discretionary policy to allow transfers between the age of 64 and 65.

114. However, having reached the age of 65, Mrs N joined the Scheme again and became an active member. On 19 February 2020, while still an active member, Mrs N was informed that she was entitled to her benefits in full once she left service, in relation to both periods of service.
115. Recognising this change in status, the Trustee asked whether Mrs N wished to continue with her complaint. Mrs N confirmed that the Trustee's refusal to exercise discretion to provide her with a transfer remained outstanding. At this stage, I consider that Mrs N was either making a new, second complaint, or was expanding her original complaint as an active member.
116. The response under stage two of the IDRP, dated 30 March 2020, provided confirmation that the Trustee had considered the documents and information relevant to Mrs N's complaint. As well as covering the issues raised in the original complaint, the Trustee also addressed further elements: that the Trustee should give all members the benefit of their employer's pension contributions by having the options to transfer out, and that by not allowing a transfer after the member had reached NPA the Trustee was discriminating against older members. The Trustee confirmed in its response that the Scheme Rules allowed deferred members to transfer benefits over and above their statutory rights, and that the Trustee's policy was to extend this and allow members to transfer out up to age 65.
117. The Scheme Rules 2015, Rule 19.5, allows the Trustee a discretion to permit a transfer beyond age 65, particularly in those circumstances where the member remains in service when aged 65 or over. This point was recognised at the stage two IDRP response, where the Trustee commented that there were limited circumstances where it ought to consider using its discretion.
118. I have considered whether the Trustee's response to Mrs N, on 21 February 2020, is evidence that it did not consider her second request for a transfer, in that it repeated the outcome reached at stage one of the IDRP not to permit a transfer. At face value, it could be argued that this is the case and that Mrs N's second request was not considered, or discretion was not used at this point. However, due to the unusual circumstances of this case, with Mrs N re-joining the Scheme, I find that it was reasonable for the decision to be left to the Trustee to consider during Mrs N's appeal under stage two of the IDRP.
119. In doing so, the Trustee must take all relevant factors into account and disregard irrelevant factors, and must then make a decision that is not manifestly unreasonable. As set out in the stage two IDRP response, the Trustee considered the Scheme Rules, all correspondence with Mrs N, the conclusions reached at stage one of the IDRP, and appropriate legal advice. It is not evident that the Trustee considered any irrelevant factors. Nor is it evident that the Trustee was required to seek additional information from Mrs N regarding her circumstances over and above the information it already held. On this basis, I am satisfied that the decision not to allow a transfer at stage two of the IDRP was within a band of decisions that I consider a reasonable trustee body could make.

120. I find that the Trustee has given Mrs N's complaint sufficient consideration and has not been inflexible in its approach, to the extent that it has fettered its discretion not to allow a transfer.

Age discrimination

121. In order to show direct age discrimination, it must be possible to compare the treatment of the person making the complaint, or their age group, with the treatment which is given or would be given to others of a different age, who are or would be otherwise in the same or a similar position.

122. Mrs N's position is that at age 65 she is entitled to take her Scheme benefits unreduced as soon as she ceases employment. An older Scheme member who was employed would be in the same position in accordance with the Scheme Rules. Alternatively, a member aged 64 would not be able to access an unreduced pension, as they had not reached their Scheme NPA. So, due to the application of the Scheme Rules, members in different age groups are not in a similar position.

123. The principle that it is necessary to have a comparator in order to substantiate a claim of age discrimination was considered by the Employment Appeal Tribunal in the case of *Palmer v Royal Bank of Scotland Plc* UKEAT/0083/14, when it held that the complainant aged 49 was not in a comparable position to those between the ages of 50 and 55. In this case, employees aged 50 or over were offered voluntary early retirement, while those under age 50 were offered voluntary redundancy or redeployment, reflecting the different legal positions of the employees.

124. For Mrs N to be able to establish that direct age discrimination applied, she would need to show that Scheme members of different ages, who were entitled to unreduced benefits as soon as they ceased employment, were treated differently. In Mrs N's case, it is not possible to uphold a claim of age discrimination, as there is no comparator against whom she can show her treatment is less favourable.

125. Mrs N has referred to the Scheme Rules placing the Trustee in conflict with its duties and obligations under trust legislation. I am not aware of any circumstances where this is the case. As Mrs N has declined to provide any further comment on why she believes this to be the case, I have not considered this matter any further.

Directions

126. Within 28 days of the date of the Determination, the Trustee shall pay £500 to Mrs N for the significant non-financial injustice she has suffered.

Anthony Arter CBE

Deputy Pensions Ombudsman
31 May 2024

Appendix 1

127. Scheme Rules 2015, Rule 8

“8. CRB BENEFIT ACCRUAL

- 8.1 An active member shall accrue the prospective right on retirement at normal pension age to an accrued pension amount and an accrued lump sum amount.
- 8.2 For the purpose only of determining the extent of active membership, a period of suspended membership at the end of which the member resumes active membership is to be treated as if it had been a period of active membership and of service.”

Appendix 2

128. Extracts from Scheme Rules 2015, Rule 18

“18 Early leavers without qualifying service

18.1 Application of this Rule

This rule applies to a former member who does not have qualifying service on ceasing service.

18.2 Refund of contributions

Such a former member is entitled to a refund of:

18.2.1 that individual's contributions (excluding MPAVCs and that individual's contributions as referred to in sub-rule 18.2.3), subject to deduction of any tax and an amount in respect of any CEP, plus compound interest at such rate as the trustee company may determine;

18.2.2 an amount equal to the MPAVCs paid by that individual together with the investment return on those MPAVCs, subject to deduction of tax; and

18.2.3 an amount equal to that part of the member's DC account which is attributable to contributions paid by that individual, including the investment return on those contributions, subject to deduction of tax.

18.3 Pension and lump sum option

18.3.1 Notwithstanding sub-rule 18.2, a former member who does not have qualifying service on ceasing service (except an individual who gives notice in writing to their employer of retrospective withdrawal from the scheme in accordance with Rule 39.1) may elect, in lieu of a refund of contributions:

- (a) if they left service prior to 1 April 2022, for the amount under sub-rule 18.2.1 to be applied without the deductions to provide a pension and lump sum for the former member at normal pension age (and corresponding payments on death for the former member's spouse or civil partner, dependants and eligible children) of such amounts as the trustee company may determine, acting on actuarial advice;

[...]

18.3.2 Contributions made by an employer under sub-rule 41 (Salary Sacrifice) (other than matching contributions under sub-rules 5.3 and 6.3) in respect of a member who has become a former member to whom this rule applies shall be included in the amount to be applied to provide the benefits payable under sub-rule 18.3.1.”

Appendix 3

129. Extract from Scheme Rules 2015, Rule 12 (Late Retirement)

“12.1.3 Late retirement benefits

Where the prevailing normal pension age has been attained and service has continued thereafter, the member shall be entitled to receive, from the day after the date of retirement in respect of that individual's active membership, the accrued pension amount and the accrued lump sum amount, with that part of each of the accrued pension amount and the accrued lump sum amount which is attributable to pensionable service accrued or credited prior to that normal pension age increased by such amount as the trustee company may decide on actuarial advice.”

Appendix 4

130. Scheme Rules 2015, Rule 19 (Transfers Out)

“19.1 Statutory right

A member or former member has the right to request a transfer payment of that individual's accrued rights under the scheme, or of that individual's accrued rights under the scheme to flexible benefits or to benefits that are not flexible benefits, to a transfer arrangement in accordance with Part 4ZA of PSA 93.

19.2 Recipient of transfer payment

The trustee company may make a transfer payment only to the trustees or administrator of a transfer arrangement.

19.3 Non-statutory transfers

19.3.1 Money purchase AVC transfer

The trustee company may, if a member or former member so requests, make a transfer payment of that individual's member's MPAVC fund to a transfer arrangement.

19.3.2 Member's DC account transfer

The trustee company may, if a member or former member so requests, make a transfer payment of that individual's member's DC account to a transfer arrangement.

19.3.3 DB rights transfer

The trustee company may, if a member, ex-spouse participant or former member so requests, and on such terms and conditions as the trustee company may require, make a transfer payment to a transfer arrangement of all of that individual's accrued rights under the scheme to benefits that are not flexible benefits in circumstances where that individual would not have the statutory right to apply for such a transfer because either or both of the conditions in section 93(4)(b) and/or section 95(1A) (b) of PSA 93 are not satisfied but where all other conditions in Part 4ZA of PSA 93 are satisfied.

19.4 Special reciprocal arrangements

Where the trustee company has entered into any special reciprocal arrangements under sub-rule 47.5 the amount transferred to another scheme that participates in those arrangements shall be calculated accordingly.

19.5 Non-statutory transfers

At the request of the relevant member, ex-spouse participant or former member the trustee company may, and subject to such conditions as it sees fit to impose, transfer all or part of a member, ex-spouse participant or former member's accrued rights under the scheme to one or more transfer arrangements in circumstances other than in accordance with Part 4ZA of PSA 93. The amount of the transfer payment (or payments) shall be calculated using methods and assumptions decided by the trustee company, subject to any applicable legal requirements.

19.6 Discharge of liability

Following a transfer in accordance with this rule 19 (Transfers out) the trustee company and the scheme shall be discharged from all liability to which the transfer relates."