

## Ombudsman's Determination

Applicant	Ms S
Scheme	Cathay Pacific Airways Limited UK Retirement Benefits Scheme ( <b>the Scheme</b> )
Respondents	The Trustees of the Cathay Pacific Airways Limited UK Retirement Benefits Scheme ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Ms S' complaint and no further action is required by the Trustee.

## Complaint summary

2. Ms S complained that the Trustee has refused to grant consent for her to receive early unreduced retirement benefits from the Scheme.

## Background information, including submissions from the parties

3. Ms S joined the Scheme through her employment with Cathay Pacific Airways Ltd UK (**the Company**) and became an active member of the Scheme on 1 May 1994. The Scheme was administered by Hymans Robertson and overseen by the Trustee.
4. The Scheme is governed by the Cathay Pacific Airways Limited UK Retirement Benefits Scheme Rules (**the Scheme Rules**). The rule specific to Ms S' complaint is Rule 5C which details the following:

### "5C. EARLY RETIREMENT (NOT INCAPACITY)

A Member who leaves Service (not for Incapacity) before Normal Pension Age but after reaching the Minimum Pension Age may with the consent of the Trustees and the Principal Employer choose to receive an immediate pension.

...

In the case of a Member who was in Pensionable Service prior to 1 July 1996 the pension shall be calculated in accordance with paragraph (i), (iii) or (iv) of Rule 9B as appropriate to the circumstances of the Member's time of joining and leaving the Scheme.

...Any pension under this Rule 5C will be reduced for early payment unless the Trustees and the Principal Employer decide otherwise.

Any reduction will be made on a basis certified as reasonable by an Actuary.

PROVIDED THAT

In respect of a female Member who was a Member prior to 1 July 1996 no reduction shall be made to pension attributable to Pensionable Service completed prior to 1 July 1996 if she retires after attaining age 60.”

5. Rule 1 of the Scheme Rules defines Normal Pension Age (**NPA**) and Minimum Pension Age (**MPA**) as follows:-

“Minimum Pension Age means in the case of a Member who joined the Scheme prior to 6th April 2006 the age of 50 and in the case of any Member who joined the Scheme on or after 6th April 2006 and who retires prior to 2010 the age of 50 and any Member who joined the Scheme prior to 6th April 2006 who retires on or after 6th April 2010 the age of 55.

Normal Pension Age means

- i. in the case of a female Member who joined Service prior to 1 July 1996 and who left Service, left Pensionable Service, died or retired prior to 1 October 1996 her 60th birthday, and
- ii. in the case of any other Member his or her 65th birthday.”

6. In accordance with the Scheme Rules, Ms S’ NPA is therefore 65 and her MPA is 50.
7. However, Ms S’ NPA was previously age 60, and only changed to age 65 in 1996. This was as a result of changes implemented following the *Barber*<sup>1</sup> decision in 1990, in the European Court of Justice, which meant that it was no longer possible to operate a pension scheme with different retirement ages for men and women. Due to this, the Scheme Rules were amended by resolution, in 1996, to provide for equalisation of male and female retirement ages. A letter announcing the new changes was issued by the Company Director, R H R Bevan, to all Scheme members (**the Bevan Letter**).
8. On 28 June 1996, the Company provided Ms S with the Bevan Letter and a summary of the main changes (**the Summary**). The Bevan Letter stated the following:
- “A decision has been taken to align the retirement age at 65, but provide for an early retirement option at age 60 for those wishing to do so, with, where company consent is given, a more favourable pension entitlement than would normally be available.

---

<sup>1</sup> *Barber v Guardian Royal Exchange Assurance Group (C-262/88)*

The alignment of the retirement age at age 65 formalises what in effect happens at the moment: Male staff currently retire at 65 and Female staff, as a result of equal opportunities legislation, also have a “right” to continue working until they are 65.

The company’s guiding principle for the alignment of the retirement benefit has been that no existing Scheme member retiring at or after the age of 60 should be any worse off than under present arrangements, within, of course, the constraints laid down by the Inland Revenue Department. I am glad to say that we have managed to do this: indeed it can be argued that for most Male and Female staff that the retirement benefits have been improved for those retiring after the age of 60.”

9. The Summary explained the following:

“...if you are a female member of the Scheme and decide at age 60 that you wish to retire, that part of your pension earned by service prior to 1 August 1996 will not be reduced by the actuarial factor that usually applies on early retirement. That part of your pension earned by service after July 1996 will be reduced if you are retiring without the consent of the Company although this will not be unreasonably withheld.  
...

Existing members of the Pension Scheme (that is employees who are members of the Scheme at the date of this announcement), both male and female, retain the option of retiring early at age 60 without actuarial reduction providing that they are retiring with the consent of the Company.”

10. On 31 December 2005, Ms S left pensionable service and became a deferred member of the Scheme.
11. In August 2016, the Trustee published a Summary Funding Statement which showed that the funding level position (**the funding position**) of the Scheme had deteriorated from 81% as at 31 December 2013 to 70% as at 31 December 2014. The Statement also valued the funding shortfall at £14,668,000.
12. In 2017, the Company published its annual report showing that it had made a loss of HK\$1,259 million (approximately £126 million).
13. In 2018, the Company published its annual report showing that it had made a profit of HK\$2,345 million (approximately £235 million).
14. In 2019, the Company published its annual report showing that it had made a profit of HK\$1.691 million (approximately £170 million).
15. On 9 May 2019, Hymans Robertson issued a retirement quotation to Ms S based on her taking retirement benefits at age 60.
16. On 15 May 2019, Ms S emailed Hymans Robertson querying why actuarial reductions had been applied to her retirement benefits. She said that according to the Bevan Letter, all female members could retire at age 60 without any reductions.

17. On 23 May 2019, Hymans Robertson acknowledged Ms S' email and said that her enquiry was being looked into.
18. Between September 2019 and June 2020, Ms S chased Hymans Robertson for a response. Records from this correspondence show that each time Hymans Robertson told Ms S that her enquiry was being considered by the Trustee.
19. In July 2020, the Trustee issued a Summary Funding Statement which showed that the funding position of the Scheme had improved to 78%, as at 31 December 2019, from 75% as at 31 December 2017. The statement also valued the funding shortfall at £14,381,000.
20. In 2020, the Company published its annual report showing that it had made a loss of HK\$21,648 million (approximately £2,176 million).
21. On 13 July 2020, Hymans Robertson emailed Ms S in response to her enquiry. It said that, after taking legal advice and considering the current position of the Scheme's funding, the Trustee and the Company had concluded that the benefits Ms S accrued from 1 August 1996 could and should be reduced for early payment before age 65.
22. On 14 July 2020, Ms S responded to Hymans Robertson saying that she was concerned her pension would be reduced if she took benefits before age 65, when the Bevan Letter informed her that she would not be penalised for retiring at 60 instead of 65. She mentioned that the Company had already consented for two female Scheme members to receive unreduced benefits at age 60, so she had no alternative but to seek legal advice.
23. On 24 July 2020, Hymans Robertson emailed Ms S informing her that, if she wished to raise a formal complaint about this issue, she could do so under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
24. On 15 October 2020, Ms S formally complained in accordance with the Scheme's IDRP. She argued that the Bevan Letter informed her that under the present arrangement, no Scheme member would be any worse off if they elected to take their retirement at 60, as opposed to 65. She also complained that she was being discriminated against, as she was aware that at least two female Scheme members had received early unreduced retirement benefits at age 60.
25. In 2021, the Company published its annual report showing that it had made a loss of HK\$5,527 million (approximately £550 million).
26. On 3 February 2021, the Company's HR Manager, as stage one decision maker under the IDRP, responded to Ms S's complaint. He said that:
  - According to his interpretation of the Bevan Letter, a Scheme member retiring at age 60 would only benefit from a more favourable pension entitlement than would normally be available if the Company consented to it. The letter did not say or guarantee that any Scheme member would not be worse off by retiring at age 60 rather than at age 65.

- Due to data protection restrictions, he was unable to discuss details regarding individual Scheme members. However, one of the individuals Ms S had referred to, was a deferred member of the Scheme. So, their circumstances were not relevant as they were not in receipt of a pension. In addition, other Scheme members had retired prior to age 65 and had a reduction of benefits applied.
  - The funding position of the Scheme, as at 31 December 2014, was 70%. As at 31 December 2017 it was at 75%, and 78% as at 31 December 2019. These figures were calculated using the actuarial assumptions derived from the Statement of Funding Principles at a set time. The funding position was a snapshot at a fixed date in time. Significant changes in circumstances or the application of different actuarial assumptions could show a significantly different funding position at any point.
  - The funding position, although a factor, was not the only one that the Company considered when making decisions relating to giving or withholding early retirement consent. The overall financial situation of the Company was a factor which was very relevant to any such decisions. From at least 2018 onwards, the Company had not been in a strong financial situation, so it was perfectly reasonable for it to not take on additional costs.
  - Ms S had not been discriminated against, as the Scheme Rules were applied equally to all applicable Scheme members. Given the financial challenges the Company continued to face, its decision to withhold consent was reasonable.
27. On 22 March 2021, Ms S escalated her complaint to stage two of the Scheme's IDRPs. She reiterated the complaint points she raised under stage one of the IDRPs and queried how the Company could decide to withhold its consent in 2020, when she would not reach age 60 until 2022. She said the Company could not foresee what the Scheme's funding position would be in two years' time, so she did not understand why it was speculating on its future position now. Ms S also said that, as the Trustee sought legal advice on whether to reduce her benefits if she retired at age 60, this action had been targeted to her rather than other Scheme members.
28. On 18 May 2021, the Trustee responded to Ms S' complaint under stage two of the IDRPs. It said that:-
- Only at the point that Ms S applied to take early retirement benefits, would the Company and the Trustee's consent be officially recorded, and a decision made on whether to reduce her benefits for early payment.
  - Ms S requested some indicative figures estimating her retirement options at dates in the future. Hymans Robertson supplied Ms S with an estimate which showed that a reduction would be applied to an element of her pension if she chose to take her benefits before age 65. This was in line with the Company's standard practice and the Scheme Rules.

- All estimates issued in recent years had applied this reduction. Neither the Trustee nor the Company anticipated this to change in the immediate future.
- The Company's response dated 3 February 2021 detailed why consent could not be provided to Ms S for early retirement without any reductions being applied.
- Neither the Trustee nor the Company had any objection to Ms S retiring early. Its position was that if she chose to do so, a reduction would be applied to an element of her pension.

29. In her submissions to The Pensions Ombudsman (**TPO**), Ms S said in summary that:-

- She was notified by the Bevan Letter that her retirement benefits would not be reduced if she elected to retire at age 60.
- There was a clear precedence of the Trustee providing other female Scheme members with unreduced retirement benefits. However, the Trustee was choosing to reduce her pension.
- The Trustee points to the Scheme's funding deficit as the reason why her retirement benefits should be reduced. However, she is aware of a Scheme member who received an unreduced pension when the Scheme's deficit was greater than it was now.

30. In its submissions to The Pensions Ombudsman (**TPO**), the Trustee said in summary that:-

- The Scheme's funding position and the Company's financial situation were two important factors in the Company's decision not to allow any early retirements without actuarial reduction. Additionally, the Company was aware of its obligation not to discriminate in favour of female or male Scheme members and so it would need to be very careful before exercising its discretion to consent to unreduced early retirement benefits.
- Ms S named two female Scheme members and stated that they were paid unreduced benefits. One of these individuals was a deferred member so the statement in relation to her was incorrect. The other member did not receive her retirement benefits by reference to the early retirement provisions.
- If the Trustee and the Company were to allow all female Scheme members to retire early as a right and without reduction, they would be perpetuating the discrimination which was brought to an end by the amendment communicated in the Bevan Letter.

## **Adjudicator's Opinion**

31. Ms 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 32 to 39.
32. Ms S' entitlement to receive retirement benefits and the basis on which those benefits are calculated could only be determined in accordance with the Scheme Rules. These rules stipulated that entitlement to a full pension without actuarial reductions arose only at NPA which, in Ms S' case, was age 65. The Scheme Rules also stated that early unreduced retirement benefits before NPA could be provided, but only with the consent of the Company and the Trustee. Therefore, Ms S did not have an inherent right to a full pension before age 65. It was entirely contingent upon her obtaining the necessary consent.
33. Ms S argued that she was promised unreduced early retirement benefits in the Bevan Letter. However, the Bevan Letter in fact, acknowledged the Company's discretion in granting unreduced retirement benefits and did not guarantee automatic entitlement to any such benefits.
34. As the Trustee and the Company had the right to grant or refuse consent in relation to a member's request for early unreduced benefits, the Adjudicator turned to whether discretion was exercised reasonably in Ms S' case.
35. The Trustee explained that it had exercised its discretion and refused Ms S' request for early unreduced benefits due to the Scheme's funding position and because the Company had not been in a strong financial situation since 2018. The Company provided evidence to show that its profits had been heading in a downward trajectory, with it making a £235 million profit in 2018, a profit of £170 million in 2019, then a loss of £2,176 million in 2020 and a further loss of £550 million in 2021. It had also submitted funding statements which showed that, while the funding position of the Scheme improved from 70% to 78% between 2014 and 2019, the shortfall remained around £14 million.
36. After considering the evidence, the Adjudicator was of the opinion that the Trustee had exercised its discretion reasonably in Ms S' case. In view of the financial challenges it was facing, the Trustee could not be faulted for refusing to provide Ms S with early unreduced retirement benefits. The Trustee was entitled to consider both the Scheme's and the members' interests when exercising discretion. The requirement of consent served as a protective measure to ensure that individual requests for unreduced benefits did not unduly burden the Scheme. If the Trustee was to grant Ms S the early unreduced benefits she had requested, the Scheme's funding position could potentially be compromised, affecting its ability to provide adequate benefits to other Scheme members.
37. The Adjudicator acknowledged Ms S' claim that the Trustee had granted consent to other members and allowed them to take unreduced early retirement benefits. However, she did not agree that this was indicative of unequal treatment. She

explained that granting consent in one instance did not obligate the Trustee to do so in all subsequent cases. Each case ought to be evaluated based on its circumstances and the Trustee, as well as the Company, reserved the right to exercise discretion as they deem fit.

38. Ms S complained that as she was not allowed to take her Scheme benefits unreduced, she had been discriminated against. The Adjudicator stated that in her opinion, by applying the relevant Scheme Rules and refusing to give consent due to the Company's and Scheme's financial position, the Trustee did not discriminate against Ms S. Discrimination occurs when one person is treated less favourably than another in the same category. However, Ms S had not submitted any compelling argument or evidence to demonstrate that she had been treated differently to someone in the same category or position as her. The Adjudicator noted that Ms S being treated differently to those outside her category did not amount to discrimination.
39. The Adjudicator concluded that the Trustee's refusal to grant consent to Ms S to receive early unreduced retirement benefits was in accordance with the Scheme Rules and the Bevan Letter. In her opinion, the Trustee's decision in Ms S' case reflected a reasonable exercise of discretion and did not imply unfair treatment, discrimination or maladministration.
40. Ms S did not accept the Adjudicator's Opinion and asked the Adjudicator to reconsider. Ms S provided the following comments:
- The Bevan Letter was issued for the specific reason of giving members the opportunity to receive early unreduced retirement benefits. In order to determine if the Trustee had been fair in her case, it was essential to compare the metrics the Trustee used to grant such benefits to other female members and instances where consent was refused.
  - The Company published a Summary Funding Statement in July 2023 which showed that the funding position of the Scheme, as at, 31 December 2022 was 98%. If she submitted a new request to the Trustee for unreduced early retirement, would the Trustee be willing to grant its consent given that the Company was profitable again and the Scheme was nearly fully funded.
  - Had TPO considered if the basis on which the Trustee and Company had refused her request was reasonable and applied consistently across all the members who used the Bevan Letter to retire early and unreduced.
41. The Adjudicator took Ms S' comments into consideration but concluded that these did not change her Opinion. She stated the following:
- She was unable to answer Ms S' question as to whether the Trustee or Company would make the same decision regarding a reduction to her retirement benefits if she resubmitted a request for early unreduced retirement benefits. Her Opinion was based on the decision which had already been made.



- She could not consider how the Trustee had applied discretion to all other affected members because the provision of other Scheme member's information without their consent would breach Data Protection Regulations. In addition, the decision made for each affected member would have been made at different times. Consequently, the Trustee and Company would have considered different metrics in each case, taking into account each specific member's circumstances.

42. Ms S disagreed with the Adjudicator and the complaint was passed to me to consider.
43. I note the additional points raised by Ms S, but they do not change the outcome. I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

44. Ms S has complained that the Trustee and the Company have refused to grant consent for her to receive early unreduced retirement benefits – although I note that Ms S brought her complaint against the Trustee alone, and not the Company (and so the Company is not a formal party to this complaint). Ms S is of the opinion that the Bevan Letter suggested that all female members could retire at age 60 without any reductions.
45. The first point I need to consider is what the Rules of the Scheme provide for and, as an ancillary point, how that was represented in the Bevan Letter.
46. The Rules, clearly, provide that *“any pension under [this rule] will be reduced for early payment unless the Trustees and the Principal Employer decide otherwise”*. That is, though, subject to the proviso that Pensionable Service accrued *“prior to 1 July 1996”* will not be reduced for a female Member who retires after attaining age 60. So, under the Rules, if Ms S retired early at age 60, it would be for the Company and Trustee to decide whether or not that pension should be subject to an actuarial reduction – save that the element accrued prior to 1 July 1996 would not be subject to that discretion and would not be reduced.
47. Similarly, the Bevan Letter sets out that *“if you are a female member of the Scheme and decide at age 60 that you wish to retire, that part of your pension earned by service prior to 1 August 1996 will not be reduced by the actuarial factor that usually applies on early retirement. That part of your pension earned by service after July 1996 will be reduced if you are retiring without the consent of the Company although this will not be unreasonably withheld.”* It goes on to point out that *“existing members ... retain the option of retiring early at age 60 without actuarial reduction providing that they are retiring with the consent of the Company”* (my emphasis).
48. Therefore, I find that the Rules do give the Trustee and Company the discretion to decide whether or not to reduce Ms S' pension if she takes it prior to age 65 – other than the element accrued prior to the change in NRA in 1996 (which will not be reduced if she takes it after age 60).

49. I also find that the Bevan Letter largely reflects this, although the element that is not subject to a reduction is the Pensionable Service accrued prior to 1 August 1996 (not 1 July 1996, as set out in the Rules). As a part of its correspondence with Ms S, the Trustee also spotted this discrepancy and conceded that it would use the later (and more generous) 'cross-over' date contained in the Bevan Letter and offered the additional month of unreduced Pensionable Service to Ms S.
50. The estimates then given to Ms S accord with the Rules and Bevan Letter as set out above (with consent not being given to the post 1 August 1996 being taken unreduced). So, I find that the Trustee (and Company) are correct in applying a discretion on whether or not to reduce Ms S' post 1 August 1996 benefits in this situation.
51. To the extent that the discretion exists, which I have found it does, I understand that Ms S would like the Trustee and the Company to consent to waive the early retirement reduction in her case. However, neither the Trustee nor the Company have an obligation to do so. The discretionary powers conferred upon the Trustee and the Company by the Scheme Rules and reflected in the Bevan Letter allowed both to refuse consent in relation to a member's request for unreduced retirement benefits.
52. When considering how discretion has been exercised by the Trustee, I can look at whether the correct questions have been asked, that the applicable scheme rules, or regulations have been correctly interpreted and all relevant, but no irrelevant factors have been taken into account. I will not generally interfere in the exercise of discretion unless I consider the decision process was in some way flawed, or the decision reached was perverse. That is, one that no reasonable body faced with the same evidence would have taken.
53. Ms S has claimed that the Trustee and the Company had discriminated against her when exercising discretion in her case. However, I have seen no evidence in support of this claim. In any event, simply because a different decision regarding unreduced early retirement was made for other Scheme members in the past does not imply discrimination.
54. The Scheme Rules relating to unreduced early retirement specify that this option can only be exercised if the Trustee and the Company provide their requisite consent to waive any reductions, likely at a cost to the Company. It is also important to note that, even if the Trustee did consent to Ms S receiving an unreduced pension, it would also require the consent of the Company to implement that decision. In this case, the Company made the decision to refuse consent in Ms S' case taking into account the particular circumstances at that time. I can see nothing wrong with the Company deciding that, in 2020, it was unaffordable for it to grant consent to Ms S receiving unreduced early retirement benefits given the Company's difficult financial situation and the Scheme's funding position at that time.
55. Accordingly, I consider that there has been no maladministration in the way the discretionary power has been exercised in Ms S's case. I find that the Trustee and

CAS-73042-Q4D4

Company have acted in an appropriate manner when deciding to refuse Ms S' request for unreduced early retirement benefits. I find that it correctly applied the legal principles and reached a decision that, given all circumstances, was a reasonable one to have reached. Consequently, the Trustee and Company's refusal does not amount to maladministration.

56. I do not uphold Ms S' complaint.

**Dominic Harris**

**Pensions Ombudsman**

5 January 2024