

Ombudsman's Determination

Applicant	Mr H
Scheme	The Pension Protection Fund (the PPF)
Respondent	The Board of the Pension Protection Fund (the Board)

Referral summary

Mr H has referred an appeal of a decision that was issued by the Board's Reconsideration Committee on 20 April 2021. Mr H's referral is that the Board has not applied any annual increase to his PPF compensation which he is receiving in respect of service before 6 April 1997. Mr H says that this lack of indexation constitutes unlawful age discrimination, because it treats older members of the PPF less favourably than younger members.

Summary of the Deputy Pension Protection Fund Ombudsman's Determination and reasons

The Board is not required to take any action in respect of this referral, because the Reconsideration Committee reached its decision correctly in accordance with the current legislation, namely the Pensions Act 2004, which does not provide for increases to benefits accrued before 6 April 1997.

Detailed Determination

Material facts

1. Relevant extracts from The Pensions Act 2004 (**PA 04**), are provided in the Appendix to this Determination.
2. Mr H was a member of the Sheffield Forgemasters Pension Scheme (**the Scheme**), and his pension in the Scheme commenced in June 1988. His pension in payment increased annually by the Retail Price Index up to a maximum of 3%.
3. The Scheme entered the PPF assessment period on 27 July 2005 and members of the Scheme transferred to the PPF on 18 March 2009. As at the Scheme assessment date, Mr H's pension was £14,370.36 per annum, and he has continued to receive compensation from the PPF at that same rate since March 2009.
4. In or around 2020, Mr H complained to the Board that the amount of his PPF compensation has remained the same. He stated that he believed that the legislation set by the Department for Work and Pensions (**DWP**) concerning indexation of PPF compensation for benefits accrued before 6 April 1997 constitutes age discrimination, and he asked the Board to change the law.
5. The Reconsideration Committee did not uphold Mr H's complaint. In its decision dated 20 April 2021, the Committee explained that the Board must pay PPF compensation in line with the PPF governing legislation, the legislation does not allow for the payment of increases on benefits accrued before April 1997, nor for discretionary payments, and it does not have the power to change the law which can only be changed by Parliament.
6. Mr H referred the matter to The Pensions Ombudsman (**TPO**) following the Committee's decision.

Summary of Mr H's position

7. Mr H submits that:-
 - 7.1. The fact that his PPF compensation does not increase annually amounts to age discrimination.
 - 7.2. He is continually being told "it is the law". The law should be changed.
 - 7.3. In the PPF's Member Focus newsletter of Autumn 2021, the Chief Executive of the PPF confirmed that the PPF has £38 billion in invested assets and the fund ended the year with reserves of £9 billion over and above what is needed to pay all the current members. "That seems to me to be a lot of money which would support the payment of annual increases to us older members whose numbers must be falling".

Summary of the Board's position

8. The Board submits that:-

8.1. Subject to a change to the legislation which governs the PPF, the Board does not have the power to pay annual increases to Mr H's compensation in payment. Mr H does not have a right of action against the Board based on age discrimination either under domestic law under the Equality Act 2010 (**the Equality Act**), or under European Union Law (**EU Law**), to the extent that EU Law has been preserved after the UK's withdrawal from the EU.

8.2. In relation to PPF governing legislation:-

8.2.1. Once the PPF assumes responsibility for an occupational pension scheme, the compensation paid to members is governed by section 162 and schedule 7 of PA 04. Under paragraph 28(2) of Schedule 7, the "underlying rate" of a member's compensation in payment is increased annually each 1 January by applying the "appropriate percentage", the change in CPI to the prior 31 May capped at 2.5%. Under paragraph 28(3), the "underlying rate" is restricted to that part of a member's compensation that is attributable to post-1997 service. That is, pensionable service which occurred after 5 April 1997. No increase applies to PPF compensation that relates to pre-6 April 1997 pensionable service.

8.2.2. The PPF cannot pay additional or different compensation to that which is provided for under PA 04. As all of Mr H's PPF compensation relates to pre-6 April 1997 pensionable service, the Board cannot pay annual increases to his compensation in payment.

8.2.3. While PPF compensation relating to pre-6 April 1997 pensionable service does not benefit from inflation protection, it does benefit from the minimum level of protection that the Court of Justice of the European Union determined in *Hampshire v PPF*¹. This means that Mr H is entitled to at least 50% of the value of the benefits he would have received under the Scheme. Mr H has been assessed and it has been determined that he already receives compensation that meets the 50% requirement.

8.3. In relation to the Equality Act:-

8.3.1. Section 61(1) of the Equality Act provides that occupational

¹ Courts of Justice of the European Union Case C-17/17.

pension schemes must be taken to include a non-discrimination rule. However, this non-discrimination rule does not apply to the PPF as it is not an occupational pension scheme.

8.3.2. Under section 29(1) of the Equality Act, persons concerned with the provision of services to the public must not discriminate against a recipient of the service. However, under paragraph 2(6) of schedule 3 and paragraph (1) of schedule 22 of the Act, there is no contravention of section 29 in relation to age discrimination if a person does something pursuant to an “enactment”. An “enactment” includes an Act of Parliament such as PA 04. There is no basis in the Equality Act for Mr H to bring a claim of age discrimination against the Board.

8.4. In relation to EU Law:-

8.4.1. The decision of the Court of Appeal in *Secretary of State for Work and Pensions v Hughes* [2021] EWCA Civ 1093², does not affect Mr H’s referral when considered in light of the European Union (Withdrawal) Act 2018 (**the Withdrawal Act**). The effect of the Withdrawal Act is that the provisions of the EU Charter³ (Article 21 of which prohibits discrimination on grounds including age) and the general principles of EU law, which were fundamental to the decision in *Hughes*, do not quash or disapply an Act of Parliament unless proceedings were commenced prior to the completion of the Brexit transitional period on 31 December 2020 (**IP completion day**). The relevant provisions of the Withdrawal Act are paragraphs 39(3) and 39(5) of Schedule 8, and this reasoning was considered in *Secretary of State for Work and Pensions v Beattie* [2022] EAT 163.

8.4.2. Mr H did not begin proceedings until after IP completion day (unlike in *Hughes*). Mr H did not complete the PPF’s internal statutory review process until 20 April 2021 and TPO did not receive Mr H’s complaint until 20 December 2021, and he cannot rely on paragraphs 39(3) or 39(5) of Schedule 8 to the Withdrawal Act.

8.4.3. Mr H is effectively seeking to have the provisions of paragraph 28 of Schedule 7 of PA 04, quashed or disapplied insofar as they do not provide for increases in payment to compensation related to pre-97 pensionable service. This means that the savings provisions under paragraph 39(5) of Schedule 8 to the Withdrawal Act, do not apply

² In *Hughes* it was decided that the PPF compensation cap, under paragraph 26 of Schedule 7 of PA 04, constituted unlawful age discrimination under the EU Charter and/or the general principles of EU law.

³ Charter of Fundamental Rights of the European Union.

either, and Mr H cannot rely on the EU Charter or the general principles of EU law as the basis of a legal right against the Board.

8.4.4. Because Mr H cannot rely on the EU Charter or the general principles of EU law, there is no right of action against the Board on grounds of age discrimination.

8.5. It is sympathetic to Mr H and appreciates the difficulty for the many members who will be seeing the real value of their compensation decrease over time, particularly at a time of high inflation. But the PPF is bound by the terms of its own governing legislation and, subject to a change to that legislation, it is unable to pay increases on Mr H's compensation.

8.6. It is not for the Board to have a position on the policy arguments underlying the legislative position; it simply provides PPF compensation in accordance with PPF governing legislation.

8.7. There are arguments that could be made were it to become necessary to consider whether any age discriminatory treatment could be objectively justified. However, if the matter were to come before a court, it would be for the DWP to make any such arguments in court proceedings.

Conclusions

9. Mr H has complained that his PPF compensation (which wholly relates to pre-1997 service) does not receive any annual increases. He accepts that the relevant legislation, PA 04 and The Pensions Protection Fund (Compensation) Regulations 2005 (**the Compensation Regulations**), do not provide for pre-1997 annual increases and that the Board is calculating his pension in accordance with that legislation.
10. Mr H considers that the lack of indexation, for benefits accrued pre-1997, amounts to age discrimination. He has stated that "Someone needs to get the law changed so that old people get an annual increase from the PPF".
11. I would firstly clarify that I do not have the jurisdiction to change legislation. Mr H's referral concerns the Board's determination of his entitlement under the compensation provisions of the PPF. This is a reviewable matter under paragraph 16 of Schedule 9 to PA 04. My jurisdiction in respect of a reviewable matter is to investigate and determine what (if any) is the appropriate action for the Board to take in relation to the matter. In particular, I have to determine whether the Board's Reconsideration Committee reached its decision correctly. If I find that the Reconsideration Committee reached its decision correctly, I must determine that it is not appropriate for the Board to take any action in relation to the matter. If, on the other hand, I find that the Reconsideration Committee did not reach its decision correctly, I must determine what

action (if any) the Board should take in relation to the matter and remit the matter to the Board with directions for the purposes of giving effect to the determination⁴.

12. I recognise that Mr H's case could be interpreted as a complaint of maladministration, alongside or instead of a reviewable matter. There may arguably be maladministration if the Board has not paid the correct compensation due to age discrimination considerations. I have jurisdiction to consider a complaint alleging injustice in consequence of maladministration by the Board, set out in section 208 of PA 04. To the extent that Mr H's referral does contain alleged maladministration, I confirm that my obligations are the same as for a reviewable matter: to determine whether the Reconsideration Committee reached its decision correctly and remit the matter to the Board with directions as appropriate⁵.

Did the Reconsideration Committee reach its decision correctly?

13. In its decision of 20 April 2021, the Committee explained that the Board must pay PPF compensation in accordance with the PPF governing legislation, the legislation does not allow for the payment of increases on benefits accrued before April 1997, nor for discretionary payments, and it does not have the power to change the law which can only be changed by Parliament.
14. The legislation was outlined in the Board's formal response to Mr H's referral to TPO. In summary, paragraph 28 of Schedule 7 of PA 04, provides for the indexation of post-1997 service (defined in paragraph 28(6) of Schedule 7 as service accrued on or after 6 April 1997). There is no provision in PA 04 or in PPF regulations for the indexation of benefits incurred in respect of service before 6 April 1997. The Board has a discretion under paragraph 29 of Schedule 7 to apply a higher increase to PPF compensation, but only in respect of the "underlying rate", which is restricted to pensionable service that occurred on or after 6 April 1997.
15. Given that Mr H alleges age discrimination, I have considered the extent to which the relevant provisions of PA 04 and the Compensation Regulations are overridden under retained EU Law or UK law (that is, the Equality Act and the Human Rights Act 1998) as a consequence of any applicable age discrimination requirements. The relevance of this assessment is that if the applicable legislation is overridden, the Reconsideration Committee is unlikely to have decided the reviewable matter correctly if it concluded that the Board had to pay benefits in accordance with the legislation governing the PPF. Whereas if the legislation is not overridden, the Reconsideration Committee would have reached its decision correctly in line with the legislation which does not provide for the indexation of benefits accrued pre-1997.

⁴ Section 213 of PA 04, Regulation 16 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 SI 2005/2024.

⁵ Section 214(2) of PA 04, Regulation 14 of the Pension Protection Fund (Investigation by PPF Ombudsman of Complaints of Maladministration) Regulations 2005 SI 2005/2025.

The Equality Act

16. I consider that section 29, 'Provision of services, etc', of Part 2 of Chapter 2, of the Equality Act is relevant in this case. Section 29 states that:

"(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment."

17. The complaint that a lack of indexation for benefits accrued pre-1997 amounts to age discrimination arguably falls under section 29(2)(a) and/or 29(2)(c), on the basis that the complaint concerns discrimination as to the terms of PPF compensation paid to Mr H and/or the subjecting of Mr H to financial detriment.

18. The Board relies on paragraph 2(6) of Schedule 3⁶ and paragraph 1(1) of Schedule 22⁷ of the Equality Act in its defence. Paragraph 2(6) states that:

"Section 29 does not apply to anything done in connection with the imposition of a requirement or condition which comes within Schedule 22 (statutory provisions)."

Paragraph 1(1) Schedule 22 states that: "A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column."

19. Applying the columns of the table, this means that the Board does not contravene the relevant provisions of the Equality Act in respect of the protected characteristic of "age", so far as the Board is acting pursuant to "a requirement of an enactment". This exception is referred to in the Equality Act as statutory authority, and the relevant caselaw confirms that it is interpreted narrowly and applies to acts done in the necessary performance of an express obligation in an enactment. The exception does

⁶ 'Services and public functions: exceptions'.

⁷ 'Statutory provisions'.

not apply to acts done in the exercise of a power or discretion conferred by the enactment⁸.

20. It is my view that the Board's actions in not increasing Mr H's benefits accrued pre-1997 have been carried out in accordance with a requirement of an enactment, that is section 162(1) of PA 04, which states that "Schedule 7 makes provision for compensation to be paid in relation to a scheme for which the Board assumes responsibility in accordance with this Chapter" and paragraph 28 schedule 7 of PA 04, which only provides for the indexation of benefits accrued post-1997. The Board has no discretion to apply increases to benefits accrued pre-1997.
21. Even if the Board's actions were (at face value) discriminatory under section 29, as those actions were necessary to perform its express obligation under PA 04, the exception in paragraph 1 of Schedule 22 means that section 29 does not apply to them.
22. I therefore find that the PPF legislation governing the indexation of benefits is not overridden by section 29 of the Equality Act.

The Human Rights Act 1998

23. Although not expressly mentioned, Mr H's broad submission could include an argument that the lack of indexation in PA 04 for pre-1997 accruals amounts to unlawful age discrimination and is incompatible with Mr H's rights under the Convention on the Protection of Human Rights and Fundamental Freedoms (**the Convention**), such that a court could make a declaration of incompatibility under the Human Rights Act 1998 (**HRA**).
24. The power to make a declaration of incompatibility in relation to primary legislation, such as PA 04, is set out in section 4⁹(1) and (2) of the HRA. Namely:
 - "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
 - (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."
25. Section 4(5) defines "court" for these purposes, and neither I nor the Pension Protection Fund Ombudsman is covered by that definition. Therefore, I do not have the power to make a declaration of incompatibility in relation to PA 04.
26. If Mr H wished to pursue this argument, he would need to make a claim to one of the bodies listed in section 4(5), such as the High Court of England and Wales.

⁸ *Hampson v DoE* [1991] 1 AC 171 at 181, *Ahmed v Amnesty* UKEAT/0447/08.

⁹ 'Declaration of incompatibility'.

EU Law

27. I also find that the indexation provisions of the PPF's governing legislation are not overridden by the EU Charter (Article 21) and general principles of EU Law. I agree with the Board's submission that further to the Withdrawal Act and the ET's decision in *Secretary of State v Beattie*, Mr H cannot rely on the EU Charter, because:-

27.1. He did not commence proceedings until after exit day (30 December 2020). Mr H did not complete the PPF's internal statutory review process until 20 April 2021 when the determination of the PPF Reconsideration Committee was notified to him, and TPO did not receive his referral until 20 December 2021.

27.2. He is effectively seeking to have paragraph 28 Schedule 7 of PA 04 quashed or disapplied to the extent that paragraph 28 does not provide for increases to PPF compensation in respect of pre-1997 service.

28. The legal basis supporting this view is correctly set out by the Board in its formal response to Mr H's referral. In summary:-

28.1. Section 5¹⁰(4) of the Withdrawal Act states that:

"The Charter of Fundamental Rights is not part of domestic law on or after exit day"

28.2. Paragraph 3 of Schedule 1¹¹ of the Withdrawal Act states that:

"(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law."

28.3. Paragraph 39(3) and (5) Schedule 8¹² of the Withdrawal Act, provides that the disapplication of the EU Charter and the general principles of EU law do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before exit day; or any proceedings begun within the period of three years beginning on IP completion day so far as the proceedings involve anything that occurred before exit day and the challenge is not for the disapplication or quashing of (amongst other things) an Act of Parliament.

¹⁰ 'Exceptions to savings and incorporation'.

¹¹ 'Further provision about exceptions to savings and incorporation'.

¹² 'Consequential, transitional, transitory and savings provision'.

29. Together, these provisions of the Withdrawal Act mean that Mr H has no right of action against the Board for failing to comply with the Charter or EU Law. He did not start his complaint until after exit day, and the transitional provisions in paragraph 39 of Schedule 8 do not apply to his complaint as it seeks to quash or disapply provisions of an Act of Parliament.

Decision

30. Having considered the arguments put forward by Mr H, as I have set out in paragraphs 9 – 29 above, I find that the Reconsideration Committee reached its decision correctly in accordance with the current legislation, namely PA 04, which does not provide for increases to benefits accrued pre-1997.
31. In respect of the effect of discrimination legislation, I find that the Reconsideration Committee was correct not to treat the relevant provisions of PA 04, as impacted by the Equality Act or EU Law, and I confirm I am not empowered to consider any incompatibility with the HRA.
32. While I very much empathise with Mr H's position, the Board is required to administer the PPF in accordance with PA 04 and the Compensation Regulations. I consider that the Board has done that.
33. I find that the Reconsideration Committee's decision was reached correctly and there is no further action required by the Board.

Anthony Arter CBE

Deputy Pension Protection Fund Ombudsman
23 October 2023

Appendix

Extracts from the Pensions Act 2004

1. As relevant, Section 162 of Chp 3, Part 2, 'The pension compensation provisions', provides:

“(1) Schedule 7 makes provision for compensation to be paid in relation to a scheme for which the Board assumes responsibility in accordance with this Chapter, including provision for—

- (a) periodic compensation to be paid to or in respect of members,
- (b) lump sum compensation to be paid to members,
- (c) a cap to be imposed on the periodic compensation and lump sum compensation payable, and
- (d) annual increases to be made to periodic compensation.”

2. As relevant, paragraph 28 of Schedule 7, 'Annual increase in periodic compensation', provides:

“(1) This paragraph provides for the increases mentioned in sub-paragraph (3)(b)^[13] of paragraphs 3^[14]...

(2) Where a person is entitled to periodic compensation..., he is entitled, on the indexation date, to an increase under this paragraph of—

- (a) the appropriate percentage of the amount of the underlying rate immediately before that date, ...

(3) In sub-paragraph (2)—

“**appropriate percentage**” means the lesser of—

- (a) the percentage increase in the general level of prices in Great Britain for the period of 12 months ending with the 31st May last falling before the indexation date, and
- (b) 2.5%;

“**indexation date**” means—

¹³ Sub-paragraph 3(b) states: “any increases under paragraph 28 (annual increases in periodic compensation).”

¹⁴ Pensions in payment.

(a) the 1st January next falling after a person first becomes entitled to the periodic compensation, and

(b) each subsequent 1st January during his lifetime;

“**underlying rate**” means, in the case of periodic compensation under paragraph 3..., the aggregate of—

(a) so much of the amount mentioned in sub-paragraph (3)(a) of the paragraph in question as is attributable to post-1997 service, and

(b) the amount within sub-paragraph (3)(b) of that paragraph immediately before the indexation date.

...

(3A) For the purposes of paragraph (a) of the definition of “appropriate percentage” in sub-paragraph (3), the Secretary of State may (from time to time) decide, as the Secretary of State thinks fit, the manner in which percentage increases in the general level of prices in Great Britain are to be determined.

(3B) The Secretary of State must publish any decision made under sub-paragraph (3A).

...”