

Ombudsman's Determination

Applicant	Mr Y
Scheme	The CCHT Pension Fund (the Fund)
Respondent	Trustees of the CCHT Pension Fund (the Trustees)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by the Trustees.

Complaint summary

2. Mr Y has complained that, as part of the Fund's winding up process, the Trustees proposed to return 50% of the surplus assets (**the Surplus**) to the principal employer, Central and Cecil Housing Trust (**CCHT**). He says that the whole of the Surplus should be used to enhance the Fund's members' benefits.

Background information, including submissions from the parties and timeline of events

3. 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.
4. On 29 November 2021, the Trustees purchased a bulk annuity policy (**the Policy**) with Legal & General Assurance Society Limited (**L&G**). With the exception of benefits already covered by other policies, the Policy secured, in full, the benefits due to the members of the Fund.
5. In December 2021, The Trustees wrote to the Fund's members to notify them of the purchase of the Policy.
6. On 6 May 2022, CCHT exercised its powers under the Trust Deed and Rules that governed the Fund, dated 30 January 2004 (**the Rules**), to terminate its liability to pay contributions to the Fund. It directed the Trustees to commence winding up the Fund. An extract from the Rules can be found in the Appendix.
7. On 30 May 2022, the Trustees wrote to the Fund's members to notify them of the winding up of the Fund.

8. On 15 June 2022, the Trustees discussed possible approaches for the distribution of the Surplus.
9. On 22 June 2022, the Trustees wrote to members to communicate their provisional decision. They asked that any representations relating to their decision be received by 22 August 2022. In summary, they said:-
 - The Surplus was estimated to be around £970,000.
 - Under the Rules, they had the power to consider whether the Surplus was used:
 - to increase benefits payable to members and other beneficiaries;
 - to provide a different benefit for or in respect of members and beneficiaries;
 - to provide a benefit to anyone whose benefits have been forfeited; or
 - a combination of these options.
 - Any remaining balance was required to be returned to CCHT after the deduction of tax.
 - They had provisionally concluded that 50% of the Surplus should be used to enhance the benefits of members whose pensions had been secured under the Policy. The other 50% should be returned to CCHT. In making their decision, they had taken into account:-
 - The Surplus had arisen due to a combination of CCHT's contribution payments and investment returns. Additionally, members had paid contributions into the Fund between 2006 and 2014.
 - Members would be receiving the benefits to which they were entitled under the Rules.
10. Mr Y wrote to the Trustees saying that the whole of the Surplus should be used to enhance the Fund's members' benefits.
11. On 2 September 2022, the Trustees wrote to the Fund's members. They said that no comments had been received concerning their proposal for the use of the Surplus. So, they intended to proceed as communicated in their letter of 22 June 2022. However, representations could be made to The Pensions Regulator (**TPR**) by 2 December 2022 if anyone considered that any of the requirements of section 76(3) of the Pensions Act 1995 had not been met.
12. On 22 September 2022, having become aware of Mr Y's representations, the Trustees met to re-consider the Surplus distribution in the light of his comments.
13. On 3 October 2022, the Trustees wrote to Mr Y. They apologised that they had not replied to him sooner as they were not aware of his response at the time of writing to members on 2 September 2022. They said:-

- Before reaching a decision on the use of the Surplus, they were required to consider a number of factors and also a range of options. These included using all of the Surplus to enhance members' benefits.
 - They were satisfied, in the light of Mr Y's representations, that their decision was fair and reasonable in the circumstances, and they intended to proceed on this basis.
14. On 7 October 2022, the Trustees wrote to the Fund's members to update its letter of 2 September 2022. They said that a representation had been sent but not received by them at the time of their letter. They confirmed that they had met to reconsider their decision and decided to proceed with their original plans. They said that they were satisfied that the proposal complied with the legal requirements of section 76 of the Pensions Act 1995 (**Section 76**).
15. On 16 November 2022, Mr Y raised a complaint for consideration under the Fund's internal dispute resolution procedure (**IDRP**). In summary he said:-
- The Trustees' decision had reduced the potential enhancement to members' benefits.
 - The Trustees had failed to disclose any impact assessment supporting their decision, despite claiming that they had taken advice.
 - The window for those potentially impacted by the Trustees' decision to comment was very short.
 - He had been told that his complaint to The Pensions Ombudsman would affect the Fund. He considered this to be a direct threat intended to halt his legitimate complaint.
 - It was unclear how his benefits would be enhanced.
16. On 20 December 2022, the Trustees provided their response to Mr Y under the IDRP. They had not upheld Mr Y's complaint. A summary of their response is provided in paragraphs 17 to 28 below:-
17. They were satisfied that their decision in relation to the use of the Surplus was the result of a proper process and they had acted in accordance with their duties and statutory requirements.
18. It was a common misapprehension that trustees had a duty to enhance members' benefits. Their duty was to ensure that members received the benefits to which they were entitled under the Rules.
19. They had previously agreed with CCHT that the statutory funding objective for the Fund was to target 100% funding compared with insurance company buy-out costs of members' full benefit entitlements. CCHT had agreed to make contributions for this

purpose. In agreeing this objective, no allowance was made for discretionary increases to benefits above those to which members were entitled.

20. They had reviewed their decision for the second time as a result of Mr Y's representations.
21. When exercising their discretion, they were obliged to act honestly and in good faith and to take account of relevant factors. It was up to them to determine what factors were relevant and the weight to be attached to each.
22. Mr Y wanted all of the Surplus to be used to enhance members' benefits. CCHT preferred that all of the Surplus be returned to it, which could then be used to facilitate its charitable aims. In making their decision, the Trustees had considered a number of factors including:
 - the scope and purpose of clause 27 of the Rules;
 - the interests of the members and the purpose of the Fund;
 - the source and size of the Surplus;
 - the size of the benefits accrued in the Fund, noting that the Fund was contracted-in to the earnings-related part of the State Scheme;
 - the overall circumstances of the Fund;
 - the current levels of high inflation and the inflationary protection provided by the Fund. This included the fixed 5% per annum increases granted on pensions accrued before July 2006;
 - the costs of increasing members' benefits;
 - the impact of different potential uplifts to members' benefits;
 - the Fund's statutory funding target; and
 - the interests of CCHT.
23. They had taken independent legal and actuarial advice to ensure that proper process was followed. Any analysis they had received was never intended to be shared and they were not obliged to carry out a formal impact assessment.
24. They had recognised that CCHT had a legitimate interest in the Surplus. It had arisen in a large part due to CCHT's £3 million contributions to the Fund in 2016/17 and further deficit recovery payments of £0.85 million from 2016 onwards. CCHT had also paid the Fund's running costs which amounted to £0.72 million over the same period.
25. Repaying part of the Surplus to CCHT did not reduce members' entitlements as surplus funds were never theirs to claim.

26. Members had been given two months to make written representations to the Trustees. After this, a further three months had been given for them to make representations to TPR on certain specific points. As far as they were aware, no other representations had been made. The periods given were reasonable and in line with industry practice. The timescales complied with Section 76 and Regulation 15 of the Occupational Pension Schemes (Payments to Employer) Regulations 2006.
27. They were unable to identify the comments giving rise to Mr Y's concern that he had been threatened. They were dismayed he had received a threat and offered to undertake further investigations if Mr Y could provide more details.
28. They were not in a position at the current time to confirm how benefits would be enhanced and figures would be provided in due course. They anticipated that benefits secured with L&G would receive an additional pension calculated as a percentage of the current pension entitlement.

Adjudicator's Opinion

29. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised in paragraphs 30 to 45 below:-
30. The Adjudicator considered how the Trustees had exercised their discretion under the Rules and whether the decision-making process was correctly followed when proposing to pay 50% of the Surplus to CCHT. The Adjudicator said that the parameters of his investigation were whether the Trustees:
 - followed the relevant requirements of the Rules;
 - interpreted the Rules correctly;
 - took into account the appropriate factors when reaching their decision; and
 - made a reasonable decision.
31. Clause 27 of the Rules deals with the position on a winding-up of the Fund. Broadly, the Rules require the Trustees to secure member benefits. In relation to any surplus assets, the relevant clauses are 27(4) and 27(5).
32. Clause 27(4) details the ways in which the Trustees may use all or part of the Surplus to provide additional benefits. The Trustees had a discretion as to how much of the Surplus, if any, it wished to use in this way. In the Adjudicator's view, it was therefore open to the Trustees to decide not to use all of the Surplus to augment members' benefits.
33. Having decided to use 50% of the Surplus to augment members' benefits, clause 27(5) states that any remaining assets, less tax, must be returned to the employers that were participating in the Fund. In this instance, the Adjudicator understood that

there was only one participating employer, CCHT. So, the Trustees were not required to make a decision about how the remaining surplus should be allocated between employers.

34. In the Adjudicator's opinion, the Trustees followed the requirements of the Rules and interpreted these correctly.
35. The Trustees had secured members' benefits in full, and they had agreed that 50% of the Surplus would be used to enhance these benefits. In their communication to members of 22 June 2022 and their IDRPs response to Mr Y of 20 December 2022, the Trustees provided a broad indication of the factors they had considered when coming to their decision on the distribution of the Surplus.
36. It is generally accepted in law that trustees are able (and may in fact be under a duty) to take account of a sponsoring employer's interests when exercising their powers under a pension scheme, provided that those interests are relevant.
37. The factors that the Trustees took into account included:
 - the source of the Surplus;
 - the interests of the members of the Fund;
 - the interests of CCHT;
 - the fact that member benefits had been secured in full and the level of inflation protection provided; and
 - the fact that CCHT had made significant deficit recovery payments to ensure that the Fund's statutory funding objective was met.
38. In the Adjudicator's view, all of these factors were relevant to the Trustees' decision in relation to the distribution of the Surplus. Furthermore, the views of the membership of the Fund were also a relevant factor for the Trustees to consider as part of their decision-making process.
39. The Trustees letter of 22 June 2022 explained their proposal for the use of the Surplus and invited members to make representations by 22 August 2022. While Mr Y said that he considered the time provided for comments to be very short, the Adjudicator's view was that this was not the case, and adequate time was given.
40. Mr Y's response was the only one received by the Trustees. While there was some initial confusion over receipt of his representations, once the Trustees became aware of them, these were discussed at a meeting on 22 September 2022. Further comments were made by Mr Y on 16 November 2022 as part of his IDRPs complaint and these were considered by the Trustees and responded to on 20 December 2022.
41. Given the evidence, the Adjudicator's view was that the Trustees communicated the proposal to the members of the Fund and invited them to comment on it. Additionally,

the Trustees considered the representations they received in relation to their proposal for the use of the Surplus.

42. In summary, the Adjudicator's view was that the Trustees took into account all relevant matters and no irrelevant ones in reaching their decision.
43. A final question the Adjudicator had to consider was whether the decision the Trustees made was unreasonable.
44. The factors that the Trustees took into account when making their decision together with their proposal to use 50% of the Surplus to enhance members' benefits, indicated, in the Adjudicator's view, that they considered the members' position. After considering relevant factors, the Trustees decided against any further augmentation of the members' benefits and instead chose to return the other 50% of the Surplus to CCHT.
45. In the Adjudicator's opinion, this was not an unreasonable decision or one that was perverse to the extent that no other reasonable decision-maker could have made it. This was not to say that other trustees could not have reached a different decision which was also not unreasonable or perverse.
46. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y did not provide any new evidence or comments in response to the Opinion.
47. I agree with the Adjudicator's Opinion.

Ombudsman's decision

48. Mr Y's complaint concerns the Trustees' proposal for the use of the Surplus following the winding up of the Fund. He is unhappy that only 50% of the Surplus is being used to enhance members' benefits.
49. In considering Mr Y's complaint, I am unable to make a finding on whether the Trustees complied with the statutory requirements which govern refunds of surplus to an employer on a winding up. This is because of the exclusion from my jurisdiction contained in Regulation 4(2)(b) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 which states:

"For the purposes of the investigation or determination of any complaint or dispute, the Pensions Ombudsman shall not make any findings of fact to the effect that a person responsible for the management of an occupational pension scheme had failed to comply with the requirements under the following provisions of the 1995 Act: (b) section 37 and 76 (payment of surplus or excess assets to the employer)".
50. Compliance with Section 76 is a matter for TPR. In its letter of 2 September 2022, the Trustees gave members three months in which to make representations to TPR if

anyone considered that any of the requirements of section 76(3) of the Pensions Act 1995 had not been met. I have seen no evidence to suggest that any representations were made.

51. As compliance with Section 76 is excluded from my investigation, the scope of my considerations will be restricted to the points identified by the Adjudicator in paragraph 30 above.
52. I have reviewed the Rules and the actions taken by the Trustees. For the reasons stated by the Adjudicator, I find that the Trustees correctly interpreted the Rules and followed the relevant requirements when deciding how to deal with the Surplus.
53. While the Rules do allow for part, or all, of the Surplus to be used to provide additional benefits, it is left to the Trustees' discretion to decide how much is used in this way. Any remaining Surplus will then be returned to CCHT.
54. The Trustees proposed to use 50% of the Surplus to provide additional benefits, resulting in a return of the remaining 50% to CCHT. For the reasons stated by the Adjudicator, I find that the Trustees took into account appropriate factors and came to a reasonable decision in the circumstances. Furthermore, the Trustees consulted with the members of the Fund in relation to their proposal for the use of the Surplus. Mr Y was the only member who made representations, and these were considered by the Trustees and responded to.
55. I do not uphold Mr Y's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman
1 November 2023

Appendix

Extract from the Fund's Trust Deed and Rules dated 30 January 2004

"27. TERMINATION AND WINDING UP

(1) The Scheme will terminate:

(a) on the effective date of any termination by the Principal Employer of its liability to contribute to the Scheme; [...]

(2) At any time after the Scheme terminates, the Trustees may decide to wind it up. Subject to the power to defer winding up conferred on them by section 38 of the Pensions Act 1995, the Trustees must wind up the Scheme if so directed by the Principal Employer (as long as the direction is given before an order has been made against the Principal Employer, or it has passed a resolution, for its winding up).

(3) If the Scheme winds up, the Trustees must pay from the Scheme all expenses and liabilities incurred in administration and management of the Scheme or in connection with its termination or winding up and any unpaid benefits which became due before the winding up began.

After paying (or reserving for) those items, the Trustees must apply the remainder of the Scheme's assets towards satisfying its liabilities [...]

(4) If any assets of the Scheme remain after the Trustees have satisfied the Scheme's liabilities under subclause (3), the Trustees may use all or part of them in one or more of the following ways as long as that is consistent with Approval:

(a) to increase a benefit provided for or in respect of any person under subclause (3);

(b) to provide a different benefit for or in respect of any of those persons;

(c) to provide a benefit for or in respect of any person whose benefits have been forfeited under clause 19.

(5) Any assets of the Scheme which ultimately remain must, subject to compliance with section 76 of the Pensions Act 1995, be paid (less tax) to the Employers participating in the Scheme on the termination date, in proportions the Trustees decide."