

Ombudsman's Determination

Applicant	Mr N
Scheme	Royal Pharmaceutical Society Of Great Britain Staff Pension Scheme (the Scheme)
Respondent	The Royal Pharmaceutical Society of Great Britain (the Society)

Outcome

1. I do not uphold Mr N's complaint, and no further action is required by the Society.

Complaint summary

2. Mr N's complaint is that he has not received an increase to his pension in payment since 2010. He believes that this amounts to discrimination as other portions of the Scheme membership, with similar service dates, are entitled to automatic increases.

Background information, including submissions from the parties

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. Between 15 November 1965 and 1 September 2000, Mr N was employed by the Society, and he was a member of the Scheme, an occupational defined benefit arrangement.
5. Mr N left the Scheme in September 2000 and claimed his pension. At that time, the Scheme was administered in accordance with the Definitive Trust Deed and Rules dated 21 December 1992 (**the Rules**). In particular, rule 21(5) stated:

“ Whenever the Index is, at the time of a payment of pension to any person, higher than it was at the time of commencement of that person's pension (after allowing for any appropriate re-basing of the Index), the Trustee may, at their discretion and provided that the Society consents, add a further sum from the fund to the payment so as to increase it by not more than a ratio equal to the ratio of the said increase in the Index...”
6. Rule 21(6) stated:

“Where a pension has commenced under the Scheme before 1 January 1994 to or in respect of any Member or Dependant, the annual amount of that pension will be increased with effect from 1st April in each year commencing on or after 1st January 1993 by the lesser of (i) the increase in the Index (calculated as hereinafter provided) and (ii) 5%...”

7. On 6 April 1997, the Pensions Act 1995 (**the 1995 Act**) came into force. Section 51 of the 1995 Act, “annual increase in rate of pension”, made it a statutory requirement for any benefits accrued on or after 6 April 1997, to receive index linked annual increases. However, there was no requirement to increase any benefits, in excess of a members guaranteed minimum pension (**GMP**), that were accrued before this date (**Pre 97 Benefits**). Schemes were able to provide more generous increases if they wished to, and were able to.
8. Up until 2007, Mr N received annual discretionary increases to his pension. However, for the tax year 2007/08, he did not receive a discretionary increase. Thereafter, up until 2010, Mr N received discretionary increases.
9. In December 2015, an actuarial valuation on the Scheme’s assets, technical provisions, surplus and funding level was undertaken. The result of the valuation identified a deficit of £6.1 million with a funding level of 83%.
10. On 20 March 2019, the Society Assembly (**the Assembly**) met to discuss the provision of a Pre 97 Benefit discretionary increase. It was aware that the Scheme required £600,000, per year, to eliminate the increasing deficit. The cost of awarding a discretionary increase was £70,000 for every 1% awarded for each year. It was agreed that no discretionary increases would be awarded to members with Pre 97 Benefits.
11. On 10 December 2020, the Pharmaceutical Society Staff Pension Trustees Limited (**the Trustees**) met for their quarterly Trustee meeting. They discussed the possibility of a discretionary increase of 0.5% for members with Pre 97 Benefits that came into payment after 1 January 1994. Taking into account the present climate, the Scheme deficit and increased contributions from the Society due to the last triennial valuation, it was decided that it was unlikely that the Society would agree to any discretionary increases for the year.
12. In March 2021, the Assembly agreed with the recommendation of the Trustees and did not agree to any discretionary increases for the year.
13. On 14 September 2021, the Trustees met to discuss the proposal of a discretionary increase for Pre 97 Benefits for April 2022. The Trustees said, in summary, that:-
 - The last discretionary increase was in April 2011 to members on lower pensions. Thereafter, each year, the Trustees had requested a discretionary increase for Pre 97 Benefits with the Society declining each request.

- The Society increased its yearly contribution into the Scheme from £600,000 to £700,000 to help reduce the deficit.
- The Trustees held the necessary discretion to apply a discretionary increase. However, it was compelled to approach the Society for the funding required to support any increases.
- Examples should be provided to the Society demonstrating how, by not increasing a member's benefits, this would eventually erode the value of a member's pension. The suggested discretionary increase for April 2022 was 3%, or in line with the retail price index (**RPI**) if lower.
- A letter would be drafted to the Society, for the Assembly to discuss, which took into account the points raised during the meeting.

14. On 1 October 2021, the Trustees wrote to the Society and said:-

- There was no funding allowance, at present, for any discretionary increases. If an increase was approved, the Scheme would require additional funding over what had already been agreed from the last Scheme valuation.
- Based on the advice of the Scheme Actuary, the Trustees believed that a discretionary increase of 3% was appropriate. Or an increase in line with the Consumer Price Index (**CPI**) when the figures were announced in November 2021.
- Based on the most recent funding report from the Scheme Actuary, dated 5 May 2021, the Scheme's funding position was:
 - assets of £44.5 million;
 - technical provisions of £47.7 million;
 - a deficit of £3.2 million; and
 - a funding level of 93%.
- The funding level had improved over the years and the underlying investments had been reconfigured to protect it from inflation, interest rate shock and any economic downturn.
- No additional funds would be required to implement the recommended increase as the most recent valuation could be adjusted to take into account a possible discretionary increase. The expected cost of the proposed increase was £420,000 on the Scheme's technical provisions.

15. On 17 November 2021, the Assembly met to discuss the discretionary increase proposal. The Scheme was still in a deficit of £3.2 million. So, the Assembly did not agree that it was appropriate to award a discretionary increase as this would

negatively affect the deficit and the contributions the Society was making to reduce the deficit.

16. On 19 April 2022, Mr N wrote to the Society and said:-

- Under the Scheme, some pensioners were entitled to an automatic cost of living increase, in line with the RPI, capped at 5%. However, some pensioners, including himself, were only entitled to discretionary increases when voted for by the Assembly.
- In 2005 and 2006 the Society consented to discretionary increases; however, his pension only received respective increases of 2% and 1.35%. Other pensioner members received increases in line with the RPI of 3.1% and 2.75% respectively. In 2007, his pension was not increased at all.
- He believed that the Assembly was unaware that the discretionary increases were linked to the cost of living. It appeared that the Assembly possibly viewed the increase as an “icing on the cake” style of award.
- Minutes from the Assembly meeting, on 16 March 2007, said: “Under the rules of the Royal Pharmaceutical Society staff pension scheme payments are subject to statutory increases and may be further increased at the discretion of the Society”. The element of his pension that did receive increases, the GMP element, made up less than 5% of his annual pension payments. So, any statutory increases were small compared to any discretionary RPI increases.
- The 16 March 2007 meeting agenda included a proposal that discretionary increases should be approved. However, the decision not to approve the discretionary increases was based on the disagreement of one single member of the Assembly. It was said that this decision was “due to difficult financial pressures facing the Society at present”.
- The decision not to award any discretionary increases would have a detrimental effect on a number of Scheme pensioners. However, in 2008, a substantial discretionary increase, in line with the RPI, was awarded, with a discretionary increase of 1.6% being awarded in 2009.
- Since in 2010, he had not received any discretionary increases to his Pre 97 Benefits. This had a continually detrimental effect on him and other pensioners as the cost of living increased.
- Since he looked into the matter of discretionary increases, he found that pensioners who retired before 1 January 1994 were entitled to automatic RPI increases capped at 5%. However, those who retired after this date, with Pre 97 Benefits, had no such guarantee in place.
- This meant that members with comparable service dates would be treated differently depending upon whether or not they retired before or after 1 January

1994. This created a vast disparity and, in his view, amounted to discrimination and was a grossly unfair situation that needed to be remedied.

17. On 14 June 2022, the Secretary for the Trustees provided their response to Mr N and explained that:-
 - It had taken note of the detailed information he provided regarding the actions of the Society and the Assembly, in consenting to discretionary increases. However, the Secretary was only able to comment on the actions and obligations of the Trustees, not those of the Society.
 - Before 6 April 1997, there was no requirement to provide increases to benefits in excess of the GMP. Thereafter, following a change in legislation, the Scheme was required to apply yearly increases to any benefits accrued post 6 April 1997.
 - Prior to 6 April 1997, the Rules provided special provisions for Scheme members who retired before 1 January 1994. That is, they were entitled to increases to their pension in payment, in line with the RPI, up to 5%. The Rules were amended and replaced in 2007; however, any amendments to pension increases did not apply to members who retired before 2007.
 - His benefits and pension payments were calculated in accordance with the provisions of the Rules prior to any amendments in 2007. While benefits were revalued up until his pension went into payment, this did not mean he was entitled to increases on the excess portion of his pension when it was in payment.
 - His Pre 97 Benefits are only eligible to receive discretionary increases, upon the agreement of the Society. The Trustees did not hold the necessary discretion to amend the Rules, or award any increases beyond what the Rules provided.
18. On 7 July 2022, Mr N responded to the Trustees and said that his letter of 19 April 2022 was addressed to the Society, not the Trustees. Mr N's response is summarised below, in paragraphs 19 to 30.
19. There were colleagues who he worked alongside with for a number of years who receive automatic increases to their pension by virtue of the fact they retired before 1 January 1994.
20. He noted that the Trustees were required to act in accordance with the Rules; however, his complaint was that the Rules were unfair and discriminatory in nature. Due to the provisions of the Rules, he had not received any increase to his excess benefits for the last 12 years.
21. As he understood it, the Trustees held the necessary discretion to apply increases to the pensions of members who retired after 1 January 1994. However, the Trustees were unwilling to do so unless the Society agreed to provide additional funding to cover the cost of the increases.

22. In an attempt to address this issue, he had previously applied for a role on the Trustees' board. However, most recently he was told that the chosen candidate had the necessary skill set required for the evolution of the Scheme.
23. It should be open for increases to be applied to all pensioner members' benefits that were accrued prior to 6 April 1997, not just after this date. Before any overriding legislative changes came into effect all pensioner members were treated equally.
24. While the Rules applicable to his benefits did not provide for automatic increases to excess benefits, they did provide for discretionary increases in line with the RPI. For a number of years, discretionary increases were applied to his and other pensioner members' benefits. It was the abandonment of this practice which caused unfairness.
25. A Scheme booklet dated 1 January 1996 (**the 1996 Booklet**) said: "The scheme links benefits to your years of service and earnings at retirement." He understood that this generally referred to the years of service used to calculate his entitlement at retirement. However, it would not be unreasonable to infer that the number of years would also be reflected in increases in pension payments. There was nothing in the booklet to suggest that the Rules would go against the statement referred to.
26. Under the section "Main benefits and contribution provisions", the pension increases section stated: "5% pa (or the increase in the RPI if lower) to pensions in payment prior to 1 January 1994, except on Guaranteed Minimum Pensions which receive increases of 3% pa (or the increase of RPI if lower). Pension increases at this level are also to be funded for pensions which come into payment between 1 January 1994 and 31 December 1996 inclusive." Thereafter a list of increases paid to deferred and in payment pensions was provided from 1986 up to 1995.
27. Overall, the booklet, to anyone reading it, inferred that increases would be provided each year for all Scheme members, not just some.
28. Between 2010 to 2022, his pension had only increased by a gross percentage of 6.7%. This was due to the statutory increase to his GMP, and the increase to his post 5 April 1997 excess benefits. If his excess pension increased, in line with the RPI for this period, it would be 45% higher. This would amount to £98,000, which he was claiming for as a financial loss.
29. The post 2007 amended Rules provided increases for pensioners who retired before 1 January 1994. A provision for increases to benefits built up after April 2006, in line with RPI up to 2.5%, was added. Despite the amendments, the discretionary provision for increases in excess of the GMP, prior to 6 April 1997, remained. This was unfair and discriminatory.
30. He expected a response from the Society to his complaint, with information on how it would compensate him and any other affected pensioners.
31. On 9 September 2022, the Chief Operating Officer (**COO**) for the Society provided his response and did not uphold Mr N's complaint. He explained that:-

- When the 1995 Act came into force, it included a statute which stated that pension schemes were required to offer a minimum level of statutory increases to all members benefits from 6 April 1997, not before. Due to the way in which legislation evolved, this meant that there were different requirements depending on when a member accrued their benefits.
 - The statutory position prior to 6 April 1997 was that there was no requirement to offer an increase to benefits in excess of the GMP, unless the scheme rules provided for such an increase. It was appreciated that this meant some pensioners would not receive increases while others did.
 - The Trustees were required to comply with, and act in accordance, with the Rules. As the Rules did not allow for him to receive an automatic increase to his Pre 97 Benefits, this section would remain at its current rate. This was until the Trustees exercised their discretion to award an increase to his Pre 97 Benefits, with the Society's consent. The Society, despite the Trustees' discretion, could decline any discretionary increases by not agreeing to fund them.
 - Members who retired before 1 January 1994 were entitled to RPI increases capped at 5%. This was due to a provision that was introduced, via the Rules, prior to or around 1972. The reasoning behind this was unavailable due to the time that since passed. Any disparity between himself and this section of the membership did not breach overriding legislation or the law.
 - Advice was obtained from the Scheme's legal counsel as to whether or not the disparity in the Rules amounted to discrimination. Without waiving privilege to this advice, it was confirmed that the differences did not amount to age discrimination.
 - Before the Society could agree to any discretionary increase to one class of members, due consideration must be given to all the Scheme beneficiaries, and the broader financial position of the Scheme. If and when the Scheme is in a financial position to do so, the Society would consider future discretionary increases.
32. On 26 September 2022, the Trustees met to discuss the proposal for a discretionary increase for Pre 97 Benefits, effective from April 2023. During the meeting, they said:-
- Inflation was high at the time and the Pre 97 Benefit members had not received a discretionary increase since 2011 for members on a lower pension, and 2010 for the remaining Pre 97 Benefit members.
 - The estimated cost for the proposed increase was based on the Scheme's funding level as of 31 December 2021, calculated by reference to the basis of the 2018 valuation. At the time there was a surplus of £800,000 and the Scheme was funding at a level of 102%.

- The estimated costs on the Scheme's technical provisions for a 3% increase was £350,000, an increase of 5% would cost £580,000, and an increase of 10% would cost £1,120,000.
 - The COO of the Society, who acted as one of the Trustees, while noting his conflict of interest, said he would encourage the Assembly to give ample thought to the discretionary increase. It was suggested that it may be appropriate to wait until the 31 December 2021 valuation was complete and finalised, so that more accurate cost figures were available.
 - The Society was keen to apply a discretionary increase in light of current inflationary pressures. However, it was also conscious that the 31 December 2021 valuation was still ongoing, the implications of which were still being negotiated between the Trustees and the Society.
33. On 16 November 2022, the Assembly met to review the Trustees' proposal to provide a discretionary increase. Overall, the Assembly elected not to fund a discretionary increase as the Scheme's liabilities were increasing and the Society needed to increase its contributions from mid-2025 through to 2029.
34. On 15 December 2022, the Trustees attended their quarterly meeting to discuss the Society's decision not to fund a discretionary increase in April 2023. During the meeting, it was noted that:-
- There was no legal or legislative requirement for the Society to agree to the funding of a discretionary increase. The decision not to fund the increase was due to affordability; however, if the Scheme could afford to fund the increase, without a contribution from the Society, then an increase was supported.
 - One of the Trustees noted that it was only a small portion of the Scheme membership that did not receive an increase on the Pre 97 Benefits. In addition to government support for energy prices that was the main contributor to inflation levels, state pension recipients were due to receive a 10% increase in April 2023.
 - Overall, the Trustees appreciated that they held the necessary discretion to apply discretionary increases, but they required the Society's support and funding to apply any such increases. While the Scheme was underfunded, no discretionary increase should be approved at the time.
35. On 4 May 2023, Mr N wrote to the Trustees and expressed his disappointment that there was no discretionary increase for 2023. He explained that he, and others in his position, joined the Scheme under the impression that, on retirement, they would receive annual increases to their pension. This was reinforced by the Scheme booklet from 1996. Since 2010, a portion of the membership had not received any increases to their excess pension.
36. On 9 May 2023, the Trustees responded to Mr N and said that his letter of 4 May 2023 echoed the same comments brought forward under his complaint in 2022.

Responses were already provided by the Trustees and the Society in response to his grievances about discretionary increases.

37. On 14 May 2023, Mr N asked the Trustees to answer his question on whether or not it was aware that members in his position received virtually no increases to their pension year on year. He queried if a request for a discretionary increase was made, and then declined by the Society. Or did the Society pre-empt the request at a Trustees meeting, and say that it was not prepared to fund discretionary increases.
38. On 30 May 2023, the Trustees responded to Mr N and said a request for a discretionary increase was made to the Society. The request included an outline of the relevant provisions under the Rules, market information and the impact of allowing discretionary increase to the Scheme as a whole. The request was discussed during two meetings in October and November 2022, and latterly declined.
39. On 5 June 2023, Mr N reiterated his question from his letters of 4 and 14 May 2023. He also asked why the Society had denied discretionary increases, since 2010, which had subsequently acted to devalue his and other pensioners' benefits.
40. On 20 June 2023, the Trustees responded to Mr N and reiterated the position regarding discretionary increases.
41. On 23 June 2023, Mr N wrote to the Trustees to further query the fairness of the discretionary increases. However, in response to Mr N, the Trustees explained that they had nothing further to add to the response they had already provided to him on the subject.
42. On 21 September 2023, the Trustees' quarterly meeting took place, during which they noted a draft memorandum of understanding (**MOU**). The MOU was established by the Society to provide the Trustees with a framework to use when considering any discretionary increases. These conditions were:
 - current inflation levels;
 - the impact a discretionary increase would have on the Scheme's liabilities;
 - the impact on the Scheme's journey plan;
 - the fairness between each section of the membership;
 - the requirement for additional funding from the Society;
 - consistency between different pensioners; and
 - precedent risk.
43. After the Trustees reviewed the framework, and the proposed discretionary increase, it was established that none of the conditions under the draft MOU were met. In particular, the Scheme was in a deficit and the Society was paying contributions to

meet the longer-term funding target. A request for a discretionary increase was not supported, as the MOU indicated the Society would not agree to such a request.

44. In December 2023, the Trustees agreed not to implement a discretionary increase for the Pre 1997 Benefit pensioners, for April 2024. This was because the necessary conditions for a discretionary increase had not been met under the MOU. (see appendix for the conditions of the updated MOU).
45. On 23 September 2024, the Trustees agreed again not to apply for the funding for a discretionary increase, for April 2025, as the conditions under the MOU were not met.
46. Mr N remained dissatisfied with the Trustees' explanation as to why he had not received any discretionary increases since 2010. As his pension had not increased with the cost of living, it had, in essence, depreciated in value. He believed that the practice adopted by the Society amounted to discrimination, so he referred his complaint to The Pensions Ombudsman (**TPO**) to investigate.

Adjudicator's Opinion

47. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Society. The Adjudicator's findings are summarised in paragraphs 48 to 59.
48. Regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996 No. 2475), sets time limits on the matters TPO can investigate. Complaints referred to TPO must be referred within three years of the events that gave rise to the complaint; or within three years of the date that the individual became aware of it, or ought to have been aware of it.
49. The Adjudicator was unable to investigate elements of Mr N's complaint from between 2010 and 2018. This was because they were time barred under regulation 5 as the matter was not brought to TPO within three years of the event being complained about, or when Mr N was reasonably aware of the matter, which he was from 2010 onwards.
50. The relevant rules in Mr N's case, relating to increases, were rules 21(5) and 21(6). Rule 21(5) allowed the Trustees the discretion to provide index linked increases to in-payment pensions, in excess of GMP. This was however, on the basis that the Society consented to such an increase. Rule 21(6) stated that if a member's pension was put into payment before 1 January 1994, then their benefits in excess of GMP automatically received an index linked increase (RPI), capped at 5%.
51. Once the 1995 Act came into force, it required all pension schemes to apply index linked increases to benefits accrued on, or after, 6 April 1997. However, the 1995 Act was silent on whether or not an increase should be applied to the Pre 97 Benefits. In most cases, this meant that trustees/scheme administrators were not required to increase Pre 97 Benefits unless the rules/regulations contained provisions to do so.

52. Having reviewed the Rules, the Adjudicator's view was that the Trustees and the Society had acted in accordance with the Rules. The decision not to award discretionary increases could not be challenged on this basis. There were no provisions within the Rules to provide members with Pre 97 Benefits, who retired after 1 January 1994, with automatic increases.
53. The Adjudicator commented that it was important to consider the decision-making process undertaken by the Trustees and the Society in deciding whether or not to allow discretionary increases for Pre 97 Benefits. Importantly, there are well established principles that a decision maker is expected to undertake when exercising discretion. These are: the correct question is asked; the Rules and overriding legislation is correctly applied and interpreted; all relevant factors are taken into account; and the decision was not perverse.
54. It was noted that the Trustees did apply for discretionary increases for Pre 97 Benefits in 2019, 2020 and 2021; however, it elected not to do so in 2022, 2023 and 2024. The Society declined each request for any discretionary increases. From 2023 onwards the MOU was agreed upon between the Trustees and the Society with an agreed framework that needed to be met before the Trustees could apply for any discretionary increases.
55. Based on the information available, the Society/the Assembly's decision to decline any requests for discretionary increases to the Pre 97 Benefits was based primarily on: the funding position of the Scheme; the additional contributions required from the Society to fund increases; the effect discretionary increases would have on the Scheme's long term funding plan; the impact discretionary increases would have on the wider membership; and the rate of inflation when making any decisions.
56. The Scheme was in a deficit between 2019 and 2024 with the Society gradually increasing contributions to reduce the deficit, while also maintaining the technical provisions required to fund the Scheme benefits. Any agreed upon discretionary increases would need to be funded by additional contributions from the Society. These contributions were derived from the Society's operating revenue and represented a significant liability.
57. Overall, the Adjudicator was satisfied that the Society had asked itself the correct questions, taken into account only relevant factors, and any decisions made in the exercising of its discretion were in line with the Rules. The outcomes reached by the Society were reasonable based on the information provided by the Trustees. Any other decision maker, properly directing itself, would likely arrive at the same outcomes as the Society.
58. The notional loss of £98,000 which Mr N quoted could not be considered as a financial loss as he was never entitled to automatic increases on his Pre 97 Benefits. While it was unfortunate that Mr N's benefits had not kept up with the rising cost of inflation, he had not suffered a financial loss.

59. The Adjudicator explained that for Mr N to hold a valid discrimination case, it would need to be proven and accepted that he was treated less favourably than another individual in the same category. Mr N retired after 1 January 1994, and was in a different category compared to those who did retire before 1 January 1994. Accordingly, Mr N being treated differently to those outside of the category he was in did not amount to discrimination, nor was there any basis for Mr N's comments that the Rules were discriminatory.
60. Mr N did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr N provided his further comments which are, in summary:-
- His main point of contention was that the Rules were unfair in that they did not provide the right to an automatic increase for members who retired after 1 January 1994 with Pre 1997 Benefits. This meant that a significant portion of his excess benefits were not protected against the rising cost of inflation.
 - The Rules were agreed upon by the Society, in consultation with the Trustees. The Rules were approved by the Society's governing body, which up until 2010 was known as the Council, there after it was the Assembly's responsibility. There was no view given on whether the Society could afford the liability of paying annual increases to members who retired after 1 January 1994. He believed that the Society had financial reserves that could be used to fund the aforementioned increases.
 - He believed it was discriminatory to award members who retired post 1 January 1994, on lower pensions, to receive a discretionary increase in 2011. It was unclear why some were eligible for an increase whereas some, on higher pensions, were not. The member on a lower pension now received a permanently increased benefit, which could act to reduce the chances of other pensioners receiving increases.
 - He believed that it could be argued that he was in the same category as members who receive a discretionary increase. That is until he was still in the employment of the Society beyond the 1 January 1994.
 - The Scheme was contracted out of the State Earnings Related Pension Scheme (**SERPS**). As he understood it, as the Scheme was contracted out, it needed to provide him with a benefit equal to what he would have accrued under SERPS. In his view, this had not occurred as a significant portion of his pension did not receive an increase.
 - The 1996 Booklet explained that members who retired before 1 January 1994 would receive increases in line with the RPI capped at 5%. It went on to say, "Pension increases at this level are also to be funded for pensions which come into effect between 1 January 1994 and 31 December 1996 inclusive". This bridged the gap between 1 January 1994 and the statutory requirements brought in by the 1995 Act.

- He did not believe that it was the Society's intention, at the time, that a portion of the membership would not receive discretionary increases. He also believed that it was the Society's original intention that all members should benefit from the requirement to increase a member's benefits in line with the provisions of the 1995 Act.
- He believed that being a member of the Scheme amounted to a form of contract. Both the member and the Society contributed into the Scheme. These contributions were paid on the basis that the member will receive a pension upon retirement. The fact that his pension had- previously increased in line with inflation should act to mean that this was "custom and practice" and an "implied term of the contract".

Ombudsman's decision

61. I understand that Mr N's complaint concerns the Society's decision not to approve any discretionary increase from 2010, up until the present day.
62. I note that I am only able to investigate the discretionary increases from 2019 onwards, as the element of Mr N's complaint between 2010 and 2018 is time barred under regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996 No. 2475). For this reason, I am also unable to comment on the increase that Mr N has said members on lower valued pensions received in 2011, as this is also time barred as Mr N was aware of it at the time, and did not bring the issue to TPO within three years.
63. I note that Mr N has said that the Rules and provisions relevant to him and his membership are "unfair". It is not my role to consider whether the Rules are fair and reasonable. My role is to determine if the Rules have been interpreted and implemented correctly, and in accordance with any overriding legislation. Further, if there is any evidence of maladministration in the adoption of the Rules, I will then comment on what steps need to be taken to correct any errors, if there are any.
64. Rule 21(5) provides the Trustees with the discretion to apply additional index linked increases to pensions in payment. This is on the basis that the inflation linked index is higher than it was at the time the pension payments commenced. This, however, is only possible with the consent of the Society. Rule 21(6) is also of concern to Mr N, and forms the basis of his complaint. This rule allows for an automatic increase in a members in payment pension, of the lesser of the increase in the index, or 5%. However, this rule is only applicable to members who retired before 1 January 1994, not after.
65. Section 51 of the 1995 Act required all schemes to implement annual index linked increases to pensions in payment, from 6 April 1997. It did, however, not make any provision for increases to be applied to Pre 97 Benefits in excess of an individual's GMP. The Rules do not provide for any automatic increase to the Pre 97 Benefits, that is unless the individual retired before 1 January 1994. So, any Scheme member

who retired after 1 January 1994, is not eligible to receive guaranteed increases on their Pre 97 Benefits.

66. In Mr N's case, the Rules do not provide for automatic increases to his Pre 97 Benefits as he did not retire before 1 January 1994. Consequently, Mr N is only entitled to automatic increases on his post 1997 benefits. This is in addition to the statutory increases he receives on the GMP element of his pension. Overall, I am satisfied that the Society and the Trustees have acted in accordance with the Rules, as well as the provisions of the 1995 Act. There is nothing further to consider on this matter.
67. In so far as to the Society's decision-making process behind discretionary increases, I agree with the outcome reached by the Adjudicator. The Society, and the Trustees, have a duty to ensure that the Scheme is sufficiently funded with enough provisions to provide for the membership as a whole over the coming years. It is not within my remit for me to comment on whether the Society itself has sufficient financial reserves to pay for any discretionary increases.
68. I will only consider the decision-making process used by the Society in deciding whether or not to approve, or decline requests for discretionary increases. This is to ensure that the basic principles mentioned by the Adjudicator in paragraph 53 are followed (with the differences that apply to discretionary decisions made by an employer, and those made by a trustee), and that neither the Society nor the Trustees fetter their discretion. Based on the evidence available, I find that there are no flaws in the decision-making process, so there is no requirement for the Society or the Trustees to reconsider any of their decision from 2019.
69. Mr N has said that a condition of the Scheme being contracted out of SERPS was that it was required to provide him with benefits equivalent to those he would have accrued in SERPS. I believe Mr N may have misunderstood how contracting out of SERPS works. Mr N is correct in saying that the Scheme was required to provide a minimum level of benefit in return for contracting out of SERPS. Under the Scheme, in respect of his pre 1997 service, this benefit is known as GMP, which receives a statutory increase. Mr N's Pre 97 Benefits are separate from the GMP he holds due to the Scheme being contracted out of SERPS.
70. Mr N has referred to the 1996 Booklet which explained that Pre 97 Benefits, for members who retired between 1 January 1994 and 31 December 1996, would be funded, inclusive. Mr N has taken this mean that his Pre 97 Benefits should receive increases. I do not agree with this as Mr N did not claim his pension until 2000. In any event, irrespective of what the 1996 Booklet said at the time, it does not override the Rules, which will always prevail. It is clear that at one point the Society was able to sufficiently fund discretionary increases; however, it has no longer decided to.
71. I note Mr N's comments that his participation in the Scheme, as a contributing member formed a contract, and that by previously receiving discretionary increases on his Pre 97 Benefits, the increases became "custom and practice". While I

appreciate that Mr N may have become accustomed to receiving yearly increases, up until 2007, the Rules have always been clear in that these increases, for Pre 97 Benefits, are not an entitlement, and are only discretionary. Consequently, I do not agree that the payment of previous increases amounts to “custom and practice”.

72. I appreciate that Mr N will be disappointed with this outcome; however, he is not entitled to automatic increases on his Pre 97 Benefits. The Society has acted within the scope of the discretion available to it under the relevant Rules, as well as acting in line with overriding statutory legislation.
73. I do not uphold Mr N’s complaint.

Dominic Harris

Pensions Ombudsman
18 March 2025

Appendix

Extract of the memorandum of understanding between the Trustees and the Society

“Agreement between the Company and the Trustees

Where the Company's consent is required by the rules of the Scheme to award a discretionary pension increase, the Trustee acknowledges that, generally, the Company will only consider awarding such a discretionary increase if the following conditions are met:

- The funding of the Scheme is estimated by the Scheme Actuary to be higher than the Technical Provisions assessed at 31 July each year and the payment to grant the increase does not cause this level to fall below 100% fully funded on the Technical Provisions basis;
- The Company is not making any contributions to fund any pension liability to meet the Long-Term Funding Target for the Scheme, and the payment of the discretionary increase will not require any direct additional funding from the Company to fund the one-off annual increase;
- The Trustee has no concerns regarding the financial strength of the Company and its assets and there are no regulatory changes which are known to be coming into force which may change the way Defined Benefit pension schemes are managed;
- The request is for a one-off payment for the specific forthcoming year of the pension payment and is not to cover any historical or future payments of this kind; and
- The Trustee makes a request to the Company to agree to a discretionary increase before the 30th September prior to the increase so the proposal may be presented to both the Finance and Investments Committee and Assembly.

The Trustee also acknowledges that the Company will not normally consent to a discretionary pension increase beyond the lower of either the annual February RPI index that year or 3%. The equivalent cost for providing the increase will be calculated as at the rate published the year before.

The Trustee may decide not to award a discretionary increase even if all of the above conditions are met.”