

Ombudsman's Determination

Applicant	Mr S
Scheme	Steel Services (1991) Pension and Life Assurance Scheme (the Scheme)
Respondents	1) Rowanmoor Trustees Limited (the Current Trustee) 2) Royal London 3) Pannells Financial Planning Ltd (Pannells)

Complaint Summary

1. Mr S says he was given a reasonable expectation that the Scheme would make up any shortfall required to provide his guaranteed minimum pension (**GMP**) (the **Guarantee**). He maintains that the Current Trustee is attempting to go back on the Guarantee and deny him his correct entitlement.
2. Mr S also contends that the former trustee, and joint owner of Steel Services (the **Former Trustee**), made changes to the Scheme that were detrimental to members but failed to notify members. Because of those changes, he will not benefit from pensions contributions he made after 5 April 1997 (his **Post 1997 Contributions**).

Summary of the Ombudsman's Determination and reasons

3. The complaint should be partly upheld against Royal London to the extent that it made misrepresentations to Mr S concerning his Post 1997 Contributions.
4. The Scheme was established in August 1988 as a final salary work based pension scheme. It was contracted out of the state second pension on a salary related basis until 5 April 1997. Thereafter, it was contracted out on a protected rights basis until 5 April 1999, at which time the Scheme ceased to contract out. It was formerly known as "The Steel Services Pension and Life Assurance Scheme".
5. Mr S was in contracted out employment under the Scheme between 6 April 1978 and 5 April 1999.

6. The Rules which established the Scheme says that the principal employer and the trustees may together change the Rules, and may do so retrospectively. The Scheme benefits were subsequently converted to money purchase benefits for past and future service. Rule 17B of the Rules made on 5 December 1991 (the **Previous Rules**) states:

“...**GMPs**. If a Member has a guaranteed **minimum** in relation to the pension provided for the Member under the Scheme in accordance with Section 35 of the [Social Security 1975 Act]: -

(a) the weekly rate of the Member’s pension (excluding **pension provided by additional voluntary contributions**) from age 65 if a man or 60 if a woman (“pensionable age”) will not be less than the guaranteed minimum;”

7. Under the Previous Rules, the term “Accumulated Fund” means the fund paid by the member and his or her employer plus a “fair share”, determined with actuarial advice, of any income, gains and losses on the Scheme assets. The Previous Rules state that each member’s benefits held at 30 September 1991, will be converted to a money purchase value, for benefit calculation purposes only, and the value allocated to the member’s own Accumulated Fund. It also states that no beneficiary will be entitled to any specific assets of the Scheme.
8. On 3 November 2006, the then legal advisers (the **Former Legal Advisers**) wrote to the Former Trustee and copied in the Scheme’s pension advisers, PKF Financial Planning Ltd (**PKF Financial**). They referred to two memorandums (the **Memos**) from their predecessors: a memo dated 2003 saying that any GMP could be met by the entire funds, and an earlier memo, dated 2000, indicating that GMP could only be met from “Pre 1997 funds.” They said:

“You have asked me to determine whether the entire pension fund of a member can be used to cover his/her guaranteed minimum pension (“**GMP**”) or if this can only be covered by the fund that existed prior to 1997. I have analysed the two documents that you have sent to me: Rules of the Steel Services 1991 Pension and Life Assurance Scheme dated 5 December 1991; and Definitive Trust Deed and Rules of the Steel Services 1991 Pension and Life Assurance Scheme dated 1 July 1998 [(the **Current Rules**]

...

... The Previous Rules promise, in accordance with the applicable statute, that members are entitled to GMPs.

The Current Rules override the Previous Rules except to the extent that the Previous Rules are more beneficial to members than the Current Rules... (the **Advice**).”

9. The Current Trustee, Royal London, Pannells and the Former Legal Advisers have not been able to locate a copy of the Memos.

10. The Former Legal Advisers concluded that all parts of a member's pension pot could be used to provide the GMP. And that it was possible to use the member's entire "Retirement Account" to cover the GMP liability, and any statutory increases. They said that this was supported by the duty on the trustees of the Scheme "under paragraph 5 (3) of Schedule F of the Current Rules."
11. Paragraph 5 (3) of Schedule F: "Retirement Benefits" of the Current Rules provides that:

“(1) No pension payable under this Schedule shall be less than the Member's Guaranteed Minimum Pension accrued before 6 April 1997.

A Member's Retirement Account shall, notwithstanding anything else in these Rules, be used to provide his Guaranteed Minimum Pension in priority over the provision of any other benefit.”
12. Regarding the GMP, Appendix II: "Offsetting benefits against Guaranteed Minimum Pensions or Protected Rights Pensions" of the Current Rules says:

“(1) any pension payable under the Rules to any Member or Beneficiary may be offset against any Guaranteed Minimum Pension except to the extent that:

 - (a) any part of the pension is an equivalent pension benefit (within the meaning of the National Insurance Act 1965;
 - (b) it is prohibited by sections 87 to 92 (inclusive) of the 1993 Act [**“Anti franking legislation”**];
 - (c) any part of the pension represents an increase due to the revaluation of Deferred Benefits, calculated in accordance with the Rules.

(2) Any pension or benefit payable to a Member or Beneficiary may be offset against his Protected Rights Pension.”
13. The "Anti franking legislation", in broad terms, provides that statutory indexation of a member's GMP is paid on top of any amount by which the scheme benefits exceed the GMP, and is not deemed as offset or "franked" against other scheme benefits. In respect of a pension member, the protection applies where there is a break between the date on which contracted out employment under an occupational pension scheme, which is not a money purchase contracted out scheme, ends and the date the GMP comes into payment.
14. Paragraph 5 (3) of Schedule F of the Current Rules states:

“If a Member's Retirement Account is insufficient to provide the whole of his Guaranteed Minimum Pension, the balance of his Guaranteed Minimum Pension shall be provided from the General Account.”

15. The Retirement Account is broadly defined as being equal to member contributions of 4% of pensionable pay, and employer contributions towards the same. While the General Account refers to the part of the Scheme assets and monies not attributable to any member.
16. Following the Advice, the Former Trustee provided the Former Legal Advisers with a letter from the Scheme Actuary dated 1 December 2006. In the letter, the Actuary said that he had noted the Advice. However, in his experience, “post 97 protected rights funds” could not be used to cover the GMP due to section 159 of the Pensions Act 1993 (the **PSA 93**). Nor, in his view, could “post 97 non-protected rights fund” be normally applied in this way.
17. Section 159 of PSA 93 deals with assignment, or agreement to assign, guaranteed minimum pension benefits and protected rights payments under an occupational pension scheme, or charge on that pension or those payments. It makes all such agreements void.
18. On 7 December 2006, the Former Legal Advisers replied saying that their opinion set out in the Advice remained unchanged. They asked for examples where the Actuary had come across an issue with “section 159.”
19. Around April 2006, Royal London took over the administration of the Scheme from Cartwright’s, the previous pension providers. Royal London was instructed by the Former Trustee to administer the Scheme in accordance with the Advice. As such, Royal London considered that all pension contributions, apart from additional voluntary contributions (**AVCs**), should be offset against a member’s GMP liability.
20. Mr S attained normal pension age (**NPA**), age 63, in April 2014. Around the same time, Royal London, then Scottish Life, issued him with a “quotation of withdrawal options” as at April 2014. It showed post 6 April 1997, (**Post 97**), protected rights and non-protected rights member contributions of £1,717 and £14,936 respectively. It quoted a paid up value of £7,925 made up of member and employer Post 97 protected rights contributions, and a paid up value of £33,446 in respect of member and employer Post 97 non-protected rights contributions. The quotation included the following additional notes on the GMP in a smaller font:

“Guaranteed Minimum Pension Notes:

- (1) The fund available to offset the cost of the Guaranteed Minimum Pension at age 65 amounts to £172463.75
- (2) The scheme actuary has calculated that the cash equivalent transfer value of the GMP is £102587.92
- (3) The Scheme provides the larger of the cash equivalent transfer value and the members full individual account.”

21. The quotation shows a paid up value of £131,092 secured by total contributions due prior to 6 April 1997 (**Pre 97**). The sum of £172,463.75 is the total of the Pre and Post 97 member and employer contributions detailed in the quotation.
22. Mr S' quotation of withdrawal options as at April 2016 shows a similar breakdown and contains similar notes on the GMP.
23. In the intervening period, Royal London issued pension statements to Mr S based on its standard template, which was not personalised for the Scheme. Mr S' annual statement as at 1 April 2014, (the **2014 Statement**), shows a value in respect of his investment account of £173,909 at 31 March 2014. It states:

“The total Fund Value above can be split as £131901.59 in respect of service up to 6 April 1997 and £42008.15 (including Protected Rights of £7973.99) in respect of service post 6 April 1997. On retirement, the benefits that can be provided from the Pre 6 April 1997 Fund will be compared against any Guaranteed Minimum pensions earned whilst contracted out prior to 6 April 1997, and the higher granted.”
24. Mr S' annual statements as at 1 April 2015, and 1 April 2016, contain similar wording and provides a similar breakdown to the 2014 Statement.
25. In early January 2016, Mr S applied to take his pension with effect from April 2016: age 65. That same month, the Former Trustee resigned as trustee and the Current Trustee was appointed Trustee to the Scheme.
26. On 21 April 2016, Royal London offered Mr S the option of paid up benefits in the Scheme, or an estimated transfer value of £191,021. The value of Mr S' Pre and Post 97 normal contributions included in the total transfer value was £13,928 and £16,813 respectively.
27. On 25 April 2016, Royal London provided Mr S with a retirement illustration as at April 2016, which detailed four options. This included the option to take a lump sum of £46,282 plus a total pension of £7,341 in respect of his GMP (the **April Quote**).
28. The April Quote showed a Pre 97 fund value of £144,739, and fund values of £8,802 and £37,479 in respect of Post 97 protected and non-protected rights respectively. The accompanying notes said:

“The above figures, which are not guaranteed, have been prepared on the best information available to us. In the event of a variation of more than 10% between the above figures and the annuity available at the time of settlement, the member will be given the opportunity to reconsider the retirement benefit option selected.”

29. Mr S chose option 1: which included a cash benefit of £46,282. Royal London received his retirement paperwork on 16 May 2016.
30. Shortly after this, Royal London notified Pannells that it had made an administrative error in its calculations. Royal London issued Mr S with a corrected quotation on 26 May 2016, However, this did not include an option to take a cash benefit.
31. In the case of the other pension schemes administered by Royal London, only premiums in respect of Post 97 contracted out service are used to offset the GMP. Royal London has explained that the April Quote confirmed that the cost of providing the GMP amounted to £208,360, and that a shortfall payment of £63,621 was required to proceed. As Royal London used £144,739 to offset the cost of the GMP, the calculation wrongly indicated that £46,282 was available to provide Mr S with a lump sum. However, in line with the Former Trustee's instructions in 2006, it should have been used to meet the cost of the GMP.

32. Summary of Mr S' position

- Sometime around February 2016, he received verbal confirmation of his retirement lump sum from Pannells. He then told his sons that he would share some of the lump sum with them. He made one payment in April 2016, and further amounts since July 2016. He gave £25,000 to one son because he was moving, and gave some monies to his other son to put towards the cost of some courses, as he had been made redundant.
- Prior to receiving the corrected pension figures, he considers that he was intentionally led to believe that he would gain an additional benefit from his Post 1997 Contributions.
- It appears that amendments were made to the Scheme Rules. However, this was not shared with members. He also did not receive a copy of the member booklet.
- The Advice states that the Previous Rules cannot be overridden if they are more beneficial to members than the Current Rules. This implies that the Scheme provides similar protection to the "triple lock" on State pensions. He finds it odd that no one has been able to trace a copy of the Memos.
- He was told by the Former Trustee that, by continuing to pay into the Scheme, he would increase his pension pot. He relied on this information and continued to do so for a further 17 years.
- As far as he was concerned, his pension was split into two parts: GMP built up before 6 April 1997, and a tranche that would provide an additional pension, or lump sum. He considered the shortfall would be met by the Scheme. As he is not a legal expert, he did not query it at the time, as he assumed it was all being handled by the Scheme. He is surprised that there was an expectation on him to query certain

paperwork when he assumed that the trustees would be looking after his best interests and updating members on any “adverse issues”.

- Because of the misinformation, or lack of information, he has lost all the contributions he made after 5 April 1997. In his view, the trustees reneged on the Guarantee provided at the time.
- He expected that, like past employees, he would receive a pension and lump sum on his retirement. The annual statements he received confirmed this. Furthermore, they indicated that Pre 97 contributions must provide the GMP. They did not state that the Post 1997 fund must also go towards this. Consequently, he assumed that those contributions would be ring-fenced.
- He considers that the Former Trustee improperly made decisions that were detrimental and not in the interest of beneficiaries. The Former Trustee was a majority shareholder/owner/managing director of the company. Having read the Pension Regulator’s guidance on “conflict of interest”, he is concerned that there was a possible conflict with the Former Trustee’s first fiduciary duty as trustee. The guidance states that “improperly made decisions not in the interest of the beneficiaries should be void.”
- Until the position changed more recently, the managing director was the sole trustee. Trustees are not permitted to advance the interests of one beneficiary at the expense of another, profit from their position as trustee, or place themselves in a position where their interests conflict with those of the trust.
- The managing director gave assurances that he had set £2 million aside to fund the Scheme’s deficit. This led employees to believe that he was making up the shortfall required to provide the GMP.
- He considers that the managing director used his position as trustee to “mould” the Scheme to his advantage, because he realised that if members did not continue to pay in contributions, he would be “worse off”. He decided not to share this information with them. However, Mr S accepts he cannot prove this.
- The Managing Director encouraged members to continue to pay into the Scheme in the knowledge, he had as trustee, that they would not benefit from making additional payments. In Mr S’ view, this was so that he could reduce the financial obligation on the Company to pay additional contributions.
- Employees were not given any details [about the Scheme]. Requests for information were ignored, and appeals for meetings and to see pension representatives declined. He can now see that this was because they would have stopped making pension contributions if they had been aware of the true facts.
- He finds it upsetting that he continued to pay into a pension scheme for nearly 20 years, as advised by his employer, on the understanding that he was building up a good pension for his retirement.

- He has suffered a “consequential loss” as a result of the Former Trustee’s breach of trust. Had he been made aware of the true position, he would have invested the additional contributions he made in an alternative pension scheme.

33. Summary of the Current Trustee’s position

- The trustees’ role is to administer and manage the Scheme in accordance with the Scheme’s governing documentation for the benefit of all its members.
- The Former Trustee took legal advice in 2006 and were advised that the Scheme allows all member and employer pension contributions to be used to cover the cost of the GMP benefit. Consequently, both Pre and Post 97 contributions are available to provide GMP benefit.
- The Current Trustee is satisfied that Mr S’ benefits comply with both the Previous Rules and the Current Rules. Under the Previous Rules, his entitlement is the minimum of the accrued GMP and his fund value, his pension was provided to him on this basis.
- Due to the recent fall in gilt yields, and the corresponding increase in the cost of funding the GMP, members reaching pension age are unable to take a lump sum on retirement. However, they are given the option to transfer out, should this be more beneficial to their individual circumstances.
- The employer continued to make deficit recovery contributions into the Scheme to cover the accrued shortfall, as the total value of the GMPs was higher than the assets held in members’ Retirement Accounts. It has subsequently been confirmed to the Current Trustee, that the Company is winding down its operations. As such, the Current Trustee has instructed the Scheme Actuary to assess the Section 75 debt on wind up, so that the Current Trustee can process a claim for any remaining monies in the Company to be paid as a final contribution to the Scheme.

34. Summary of Royal London’s position

- Royal London is unable to comment on the practices and rational used prior to 2006. Royal London has always administered the Scheme on the basis that it is a money purchase scheme with a GMP underpin, as advised by the trustees and their advisers. Royal London’s funding valuations have been carried on that basis.
- Royal London acknowledges that it provided Mr S with an incorrect retirement quotation in April 2016. Royal London also accepts that this gave him an expectation that he had a cash sum option on his policy. However, there is no excess fund available to provide him with a lump sum.

- In the case of the Scheme, Royal London received specific advice via the Former Trustee concerning the GMP. However, Royal London considers the approach it uses for the other schemes it administers, where only premiums paid in respect of Pre 97 contracted out service are offset against the GMP, to be industry practice, and consistent with the interpretation of pension legislation used by most lawyers.
 - The paperwork Mr S received, was based on the standard GMP procedures Royal London uses for the other schemes it administers.
 - While the Scheme has adopted a different approach for the GMP, Royal London includes additional notes at the bottom of the quotation of withdrawal options. It should have been clear from this that the amount stated in the April Quote, as being available to provide the GMP, was incorrect.
35. During the investigation, the Current Trustee asked its lawyers for confirmation on whether they agreed with the Advice. They confirmed that they agree that all tranches of a member's account can be used to provide the member's GMP.
36. As recommended by the Adjudicator, Royal London paid £1,000 to Mr S to put right the significant non-financial injustice it caused to him.
37. Mr S says that he planned his retirement and made gifts based on the alleged guaranteed benefits the trustees promised him. The April Quote gave him a reasonable expectation that he would receive £46,282 as a lump sum and the revalued GMP.
38. Mr S considers an award of £46,282, to compensate him for the alleged loss of the lump sum, would put the matter right.
39. We issued a preliminary decision on 27 November 2018. In response to this, Royal London agreed to refund the contributions Mr S paid into the Scheme since March 2006, with simple interest at the base rate for the time being quoted by the reference banks. Mr S submitted evidence to support that he would have invested those contributions in a freestanding additional voluntary contribution (**FSAVC**) policy with Sun Life Financial of Canada (**Sun Life**), which he took out in September 1998.
40. Sun Life has confirmed that Mr S contributed to his FSAVC policy on a regular basis between March 2006 until April 2016, when he took his benefits. He paid a total of £31,254.60 during the period in question, and split his contributions equally between the Managed Fund and Equity Fund. Sun Life was also able to verify that those contributions bought 6993.660 and 6528.422 units in each fund respectively, after allowing for policy fees deducted over the same period.
41. Sun Life has calculated that Mr S' post March 2006 net units in the Managed Fund had a value of £21,316.68 as at 28 April 2006, while his net unit holdings in the Equity Fund were worth £21,400.17 as at the same date.

42. In addition to returning his post March 2006 contributions to him, Royal London has agreed to calculate and compensate Mr S for the notional investment growth he would have achieved on the contributions, assuming he had invested them with Sun Life.

Conclusions

43. In the absence of a valid legal claim, Mr S is only entitled to receive the amount of benefits prescribed in the Scheme Rules. That is, his benefits based on the correct interpretation and application of the Scheme provisions.
44. The Scheme has a complex history. It was set up as a contracted out defined benefit scheme in 1988, and then converted to a money purchase arrangement for past and future benefits. It then ceased to contract out in April 1999.
45. The Current Rules state that retirement pension payable on early, normal or late retirement shall not be less than the member's GMP accrued before 6 April 1997. It says that, notwithstanding anything else stated therein, a member's Retirement Account will be used to provide the member's GMP in priority over the provision of any other benefit. It is clear from those Rules that, any Scheme pension, except for EPB, any pension protected by the anti-franking provisions, and revaluation on deferred benefits, can be offset against the GMP. I am not aware of any statutory provision that precludes this practice.
46. I also note that the Current Trustee of the Scheme sought legal advice on the construction of the Rules. And that the latest advice is in keeping with the advice the Former Trustee received in 2006 and in 2003, to the extent that it confirms that a member's GMP may be funded with his or her own Post 97 contributions.
47. In the absence of any limitation in the Scheme's governing documentation, that prohibits the Current Trustee from continuing with its current practice, I find no valid grounds to direct that the Current Trustee should do otherwise.
48. Turning now to the alleged misrepresentations. Mr S asserts that he was given repeated assurances by the Former Trustee, that gave him the reasonable expectation that the contributions he made after 5 April 1997, would be used solely to provide him with additional benefits, and not offset against his GMP benefits. Mr S maintains that those assurances amounted to a guarantee on the part of the trustees. However, he has provided no documentary evidence of what he says was communicated to him at the time. Without evidence to corroborate his assertion, I can find no valid basis on which to uphold this aspect of his complaint.
49. I note that Royal London took over the administration of the Scheme in 2006. I also note that Royal London was instructed by the trustees at the time to administer the Scheme in accordance with the Advice.

50. Mr S says that, based on verbal confirmation from Pannells around February 2016, he made financial gifts to his sons: one payment in April 2016, then further payments after June 2016. I am not entirely convinced that it was reasonable for Mr S to go ahead and make the financial gifts based on a verbal confirmation from Pannells.
51. The quotation of withdrawal options issued in 2014, and the options provided to Mr S in April 2016, confirmed the fund value available to offset the cost of the GMP. The amount quoted is the sum of the member and employer Pre and Post 97 contributions. Given the discrepancy in the information provided in the quotations, and what Mr S says he had been led to believe about the Scheme, he ought to have queried the information. No suggestion has been made that he did.
52. Even if Mr S could show that his reliance on the information he received from Pannells, and that contained in the April Quote, was reasonable, the evidence does not support that he would have acted differently and not gifted monies to his sons.
53. Mr S was issued with a corrected quotation around late May 2016. However, he continued to gift money in the knowledge that the lump sum option had been withdrawn. Consequently, I am not convinced from his actions that he would not otherwise have made those gifts.
54. With regard to the annual statements provided by Royal London, they indicated that only Mr S' Pre 97 funds would be compared against his GMP. And, that the higher of the two values would be provided to him. This is a misrepresentation and reinforced Mr S' understanding that his GMP would be financed exclusively by his Pre 97 pension pot. Consequently, he continued paying into the Scheme and has received no financial benefit from the personal contributions he made.
55. Mr S is entitled to be refunded the contributions he paid into the Scheme since the first annual statement issued by Royal London, which indicated that his Post 97 Contributions would be ring-fenced.
56. Mr S' further submissions, and the details provided by Sun Life, strongly suggests that he would more likely have paid those contributions into his FSAVC policy. It is therefore appropriate that he be compensated for the investment growth, he would otherwise have earned, had he invested them with Sun Life.
57. I note that Royal London has agreed to provide redress on these terms.
58. The amount of £1,000 Royal London has already made to Mr S for non-financial injustice is in line with what I would direct in similar cases and therefore I do not make any additional award.

Directions

Within 28 days of the date of the Determination Royal London shall, with effect from the date of the first annual statement issued to Mr S by Royal London:

- (i) refund to Mr S the value of his normal contributions paid since that date; and
- (ii) pay an amount equivalent to the investment returns he would have earned on the returned contributions, had he invested them in his Sun Life FSAVC policy.

Anthony Arter

Pensions Ombudsman
28 February 2019