

Ombudsman's Determination

Applicant	Mr G Dyson and 15 others (the Applicants)
Scheme	Union of Shop, Distributive and Allied Workers (Udaw) Staff Superannuation Fund (the Fund)
Respondents	Trustees of the Fund (the Trustees)

Outcome

1. I do not uphold the Applicants' complaint and no further action is required by the Trustees.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The Applicants' complaint is about the decision of the Trustees to alter the rate of increase of their pension from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI).

Background information, including submissions from the parties

4. The Applicants are 16 pensioner members of the Fund, who are all being represented by Mr N. The facts and arguments raised by each of them are identical and all the Applicants' complaints were dealt with by the Trustees as one complaint, so it is reasonable to do the same here.
5. In January 2000, the Trustees wrote to members about proposed amendments to the rules governing the Fund (the Proposal). At the time, the Applicants were all contributing members of the Scheme, but are now pensioner members.
6. The Trustees said that the Fund was facing a funding deficit and the proposals would go towards restoring it to a sound financial position. In summary, the Proposal would remove the automatic 5% pension increase rate for future service. For past service, it would give active, deferred and pensioner members the option to switch to "inflation linked increases capped at 5%".

7. In a document headed 'Summary of proposed alterations to the Trust Deed and Scheme', the Trustees provided details of the proposed changes to the Trust Deed and Scheme Rules dated 31 December 1949 (the **Original Deed**). For contributors into the Scheme at 21 January 2000, the Proposal gave two options as to how increases to their deferred/pension in retirement falling on or after 1 April 2000 would be calculated:-

"Under option 1:-

- that part of the deferred/retirement pension (and any survivor's pension) that relates to Qualifying Service before 1 April 2000 is increased each year by 5%;
- the balance of the deferred/retirement pension (and any survivor's pension) is increased each year by the smaller of 5% and the percentage increase in RPI over the previous 12 months ended 30 September...

Under option 2:-

- the whole of the deferred/retirement pension (and any survivor's pension) is increased on 1 April each year by the smaller of 5% and the percentage increase in RPI over the previous 12 months ended on 30 September...

If no option is chosen, the Contributor is deemed to have chosen option 1...

To provide for Contributors who choose option 2 to receive...a service credit on 1 April 2000 equal to 5% of their Qualifying Service as at 31 March 2000 and to treat the credit as Qualifying Service..."

8. The Summary of proposed alterations ended with a note:

"The above is a summary of the proposed Rule changes. The full details are set out in the Resolution of the Committee attached."

9. In a document headed 'Resolution of the Committee dated 7th January 2000', the Trustees set out the rules as they would read after amendment. It included a new Rule 11(d):-

"Rate" means in relation to any 1st April the smaller of:-

- 5%; and
- The percentage increase in the Index of Retail Prices published for the previous 12 months ended 30 September. The percentage will be taken as zero if it would otherwise be negative. If the Index of Retail Prices is not published in respect of the relevant period, the Committee may substitute such percentage as they consider to be a reasonably likely figure on the

basis of the information available to them and after consulting the Actuary to the Fund”.

10. The Resolution then set out the two options, with Option 2 using the term ‘the Rate’ to express how increases would apply if it was chosen.
11. If the amendment was approved by a two-thirds majority of voters, Stage 2 would involve members choosing between the two options.
12. The changes were approved and the two options above were put to members (the **Option Exercise**).

Option A

To retain pension increases to the pension I will have earned up to 31 March 2000, at the fixed rate of 5% per annum...I understand that my rate of contribution to the Fund will increase to 8% of my salary from 1 April 2000.

Option B

To receive a credit to my contributory service, calculated as 5% of my contributory service earned to 31 March 2000. To receive pension increases to the pension I will have earned to 31 March 2000...in line with the percentage increase in RPI over the previous 12 months ended on 30 September, subject to a maximum guaranteed increase of 5% each year...To retain my current rate of contribution to the Fund.

13. Ultimately, all the Applicants chose Option 2. One of the Applicants, Mr E, initially did not make a choice and was deemed to have chosen Option 1. However, following a meeting with the Fund Secretary, Mr E chose Option 2.
14. In 2007, there was another change to the Fund. Among other things, one of the changes was to “reduce the increase in pensions in payment from RPI up to 5% on pre-commuted pension to 2.5% on pre-commuted pension for service after 6 April 2007...Please note that all of the proposed alterations to the Trust Deed and Scheme affect future service only from 6 April 2007. Past service pensions in payment and deferred pension provision are unaffected” (the 2007 Proposal).
15. In 2014, the Trustees wrote to the member about the consolidation of the Original Deed in the new Definitive Deed (the **2014 Deed**). The letter said that:-

“If you are currently receiving a pension from the Fund, you will not see any change to the amount or timing of your pension payments and your pension will continue to increase in line with the existing Rules.

If you have withdrawn from the Fund...and are not yet in receipt of your pension, your benefits are unchanged and are as quoted in your leaving service statement”.

16. In April 2016, the Trustees of the Fund announced that pension increases in line with inflation, which were previously linked to RPI, would now be linked to CPI. For pensions in payment, they said that the change will come into effect in April 2017.
17. In June 2016, the Applicants, who were all pensioner members of the Fund at this time, disagreed with the decision of the Trustees and complained under Stage 1 of the Scheme's internal dispute resolution procedure (**IDRP**). The Applicants said:-
 - The Trustees had acted outside of their power and the rules governing the Fund by changing the basis of future pension increases from RPI to CPI. Rule 11(d) defines "Rate" as relating to RPI.
 - The Trustees have implemented a change to their subsisting rights without their consent. This is a detrimental change as they will suffer a loss of future income.
 - The Applicants believe that the change was implemented to reduce the deficit in the Fund and is being driven by that.
 - The Applicants consider that there is conflict of interest issue concerning the Trustees, as most of them have dual fiduciary responsibilities to the Fund and Usdaw.
 - The Option Exercise created a contract between the Applicants and the Trustees. As a result, RPI was 'hard-wired' into their pensions and the change from RPI to CPI is a breach of contract.
18. On 5 July 2016, the Trustees did not uphold the complaint. They said:-
 - The Trustees took independent legal advice which confirmed that the rules governing the Scheme give them a discretion to adopt a suitable index for applying inflationary increases.
 - The application of Section 67 of the Pensions Act 1995 and the change from RPI to CPI has already been considered by the courts. In *Danks v QinetQ Holdings Ltd*, the court confirmed that a right to receive future increases was not a subsisting right, and changing it did not breach Section 67 of the Pensions Act 1995.
 - The Trustees followed proper process, and did so in accordance with the principles in *Edge v Pensions Ombudsman* when arriving at the decision to exercise their discretion. The Trustees considered several factors, including the funding position of the Scheme.
 - The Trustees have dealt with any issues of potential conflict of interest in accordance with the Pension Regulator's guidance.
 - The communications regarding the Options Exercise were not drafted to create a contract which overrode the Trust Deed and Rules.

19. On 30 July 2016, the Applicants appealed under Stage 2 of the IDRP. They said:-

- The Trustees have failed to satisfy the complaint previously set out under Stage 1 of IDRP.
- They dispute the Trustees' belief that case law supports their decision in relation to subsisting rights.
- The Applicants dispute that the Trustees have followed proper process in arriving at their decision to change the index for future inflationary increases.
- The Trustees have failed to satisfactorily respond to the conflicts of interest issues raised.
- The Applicants entered into a contract with the Trustees on the basis of the Option Exercise and the Proposal "hard-wired" RPI into their pensions in payment. Accordingly, there is a clear breach of contract.

20. On 14 October 2016, The Trustees issued the Stage 2 IDRP decision. They said

- The Applicants do not have an accrued right to have future pension increases linked to RPI. The Trustees do not need an amendment to the Rules to be able to apply CPI increases. CPI was not a recognised index for calculating statutory pension increases until 2010, some years after the correspondence the Applicants rely upon was issued. Besides, referring to The Trustees' discretion to amend the basis of pension increases in the correspondence issued in 2000, would not have added anything to the correspondence.
- In 2000 and 2007, the Fund was governed by the Original Deed. The Original Deed was amended from 1 April 2000, to the effect that pension accrued from that date would increase in line with the "Index of Retail Prices" subject to a maximum of 5%. Pension accrued before 1 April 2000 would increase at 5% or in line with the Index of Retail Prices subject to a maximum of 5%. Members that chose the latter were given an additional service credit or uplift. The Original Deed defined "Index of Retail Prices" as "the Government's Index of Retails Prices (all items) published by the Department of Employment or such other index considered suitable by the committee and approved for use in connection with the scheme by the Commissioners of the Inland Revenue".
- The definition of "Index of Retail Prices" gives the Trustees discretion to choose an index other than RPI. While the definition mentions a scenario where if the index of the Trustees' choice is not published, increases can still be applied by the Trustees after advice from the Actuary, the Trustees can adopt an alternative index in other circumstances.
- The Original Deed was subsequently replaced by the 2014 Deed. This provides for the inflation linked portion of a member's pension to be increased in line with the "Index". The "Index" is defined in the 2014 Deed as "the

Government's Index of Retail Prices (All Items) or such other Index considered suitable by the Trustees". Accordingly, under both the Original Deed and the 2014 Deed, there is a discretion for the Trustees to adopt an alternative measure of inflation, and RPI is not 'hard-wired' into the Fund. The Trustees quoted *Danks v. QinetiQ Holdings Ltd*, and *Arcadia Group v. Arcadia Group Pension Trust*. In both cases, the courts held that RPI was not "hard-wired" into the respective schemes and the trustees were able to choose an alternative index for pension increases.

- The Trustees said that applying CPI to future increases would not take away accrued benefits or breach Section 67 of the Pensions Act 1995.
- The Option Exercise did not result in separate contractual relationship with members. The Option Exercise was about members choosing from options that had been added to the Original Deed, and it did not give a contractual right to have pension increases based on RPI. Option 2 only referred to service prior to 1 April 2000; increases to pension after this date became inflation-linked for all members, regardless of the option chosen. Furthermore, the communications sent to members in 2000 and 2007 interchangeably used the terms "inflation", "5%" and "RPI". In hindsight, it may have been helpful to have mentioned that the Trustees retained a discretion to choose a suitable index.
- With regard to the claim of conflict of interest, the decision to adopt CPI was unanimous. The Trustees are obliged to act impartially and in a manner that they believe is fair and equitable; however, they are not obliged to treat each class of beneficiary equally. The Trustees' actions have promoted the Union's continued viability and furthered their primary concern of ensuring the security of benefits. The funding position made it appropriate to consider the effect of continuing to award RPI-based pension increases. In April 2016, the Trustees undertook refresher training on relevant topics to update their knowledge on pension matters.
- The Trustees took appropriate independent legal advice and considered the relevant factors before making their decision.

21. The Applicants remained unhappy with the Trustees' response and brought their complaint to this office. They reiterated their complaint to the Trustees. The Applicants maintained that:-

- The Trustees acted outside of their powers;
- The Trustees are varying a subsisting right which, under Section 67 of the Pensions Scheme Act, requires the individual consent of members;

- The Trustees have used the 2014 Deed to allow them to reach a different interpretation of their powers so, it must follow that they did not have the power before then to change the index.
- The definition of “Rate” hard-wired the use of RPI into the Original Deed. The definition does not refer to an alternative index and specifies the circumstances in which the Trustees may substitute a percentage (not an index).
- It is incorrect for the Trustees to contend that the 2014 Deed supersedes any previous Trust Deed and Rules; it is a consolidation and updating of the previous Trust Deed and Rules. The applicable rules are those applying to individual members when they cease to be contributors. As there is an obvious conflict between the Original and 2014 Deed, the old rules (the Original Deed) should prevail.
- The Option documentation binds the Trustees and forms the basis of a contract with them. The Applicants were not motivated by the service credit incentive and were well aware of the benefits of RPI as opposed to CPI.
- The Trustees did not consider their obligations regarding conflict of interest. The Trustees have refused to disclose relevant documents and this lack of transparency shows that they have failed to balance the need for openness with their desire to withhold ‘working papers’.
- The Trustees failed to follow the internal dispute resolution procedure as the Applicants were not allowed to choose both of their representatives, and were prevented from attending the IDR hearing in person. Accordingly, the Applicants had to rely on a written submission.

22. The Trustees provided their response to this office. They stood by the decisions at Stages 1 and 2 of the IDR and made some additional comments.

- The purpose of the 2014 Deed was to consolidate previous amendments to the Original Deed, reflect changes in legislation and simplify the language used. The removal of the defined term “Rate” was a change in the 2014 Deed but this made no difference. Before the 2014 Deed, the “Rate” referred to the lower of the “Index of Retail Prices” and 5% or 2.5%, which allowed the Trustees to exercise discretion to select an alternative index to RPI. Under the 2014 Deed, the reference to “Index Rate” means RPI or such other index considered suitable by the Trustees.
- The documents issued in 2000 as part of the Proposal and Option Exercise made clear that they were subject to the Original Deed. They did not form a binding contract in their own right, but were a member’s exercise of a choice.
- The Applicants have not provided any evidence or reasons to suggest that they would have made a different decision if they had known that RPI might be changed.

- It is not unusual for trustee boards to include senior officers of the sponsoring employer. Four of the nine trustees were member-nominated and could also be said to have had a potential conflict of interest. The Trustees had refresher training on conflicts of interest in April 2016, after the decision to change from RPI to CPI, but they were aware of their obligations prior to this

23. The Applicants replied and said:-

- RPI was hard-wired into the Fund by the amendments to the Original Deed in 2000, and the term “Rate” was included in the amendments. The Trustees do not have any discretion to make the change from RPI to CPI.
- RPI increases did induce them to choose Option 2 and was an important part of their decision. They relied on the offer of RPI to make their choice.
- All the elements for a contract were present in the Option Exercise – offer, acceptance and consideration. Therefore, the completed option forms formed a contract.
- Decisions regarding the complaint were made by Usdaw, and the Trustees have not provided evidence of their discussions on the decision to change from RPI to CPI. The Trustees did not engage flexibly with the Applicants during IDRP. The previous cases mentioned by the Trustees are not relevant.

Adjudicator’s Opinion

24. The Applicants’ 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 briefly below:-

- A similar complaint (ref: PO-15416 by Ms S) has already been considered and determined by the Deputy Ombudsman (the Previous Determination).
- The Previous Determination held that the Option Exercise did not create a contract. The Original Deed provides discretion for the Trustees to change the index used for pension increases and there was no contract that pension increases would be based solely on RPI.
- The information in the Proposal or the Option Exercise was not misleading.
- The Trustees could not have reasonably known in 2000 that CPI would be adopted to replace RPI in the future. However, it may have been helpful for the Trustees to have clarified in member communications that they retained the discretion to use an alternative index.
- The details of the complaint were essentially the same and the Adjudicator did not see any grounds on which to reach a different outcome.

25. The Applicants did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Applicants and the Trustees provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the Applicants for completeness.

Ombudsman's decision

26. The Applicants say that:-

- The legislative changes in 2010 did not apply to the Fund as it is a private scheme.
- The Previous Determination accepts that, with hindsight, the Trustees could have referred to the discretionary power. Had this been clear, the Applicants would not have chosen Option 2, which expressly referred to RPI.
- The proposal to amend the Original Deed was about the guarantee of RPI.
- The documents sent before and after the 2000 rule change confirm that pension increases would be in line with RPI.
- The financial incentive received by the Applicants was a contributory factor in their choice but not the sole factor.
- The Ombudsman is wrong not to hold that the amendment guarantees an RPI increase for Option 2 members.
- As a condition of employment, the Applicants were enrolled in the Fund, and the terms and conditions form part of the contract of employment.

Legislative changes

27. It is correct that the introduction of legislative changes in 2010, that yearly increases in pensions would be calculated by CPI instead of RPI, primarily related to public sector schemes. The Government announced, as part of the June 2010 Budget, that from April 2011, it planned to use CPI rather than RPI as the measure by which annual increases to certain state benefits and public-sector pensions would be increased. In July 2010, the Government announced that CPI would also apply to private sector occupational pensions from April 2011, and CPI would be used for statutory increases on pensions. Accordingly, the changes related to the statutory minimum levels by which private sector schemes revalue pensions. Private sector schemes were not bound to effect the change from RPI to CPI, but the minimum revaluation level was set as CPI and it was a matter for the individual schemes to decide whether to introduce the change.

28. The Trustees took independent advice on whether they had the power to do so within the existing rules of the Fund, and the advice was that they could do so. It is reasonable for a body of trustees to rely on expert advice it has received, and that is what the Trustees have done in this case.

Subsisting right

29. I have noted the comments by both sides on this issue and it is my finding that the Trustees' decision to move the basis of increases from RPI to CPI does not have any effect on the Applicants' subsisting rights. There has been no change to their pension benefits, merely to the future basis of inflationary increases on those benefits. Following the decision in *Danks and Others v Qinetiq Holdings Ltd and Another* [2012] EWHC 570 (Ch), the Trustees' decision did not amount to a detrimental modification to the Applicants' subsisting rights, because a choice of index was always permitted under the Scheme rules. In those circumstances, the Applicants did not have an accrued right to pensions increases at a specific rate until the specific rate had been chosen and applied each year.

Amendment and Option Exercise

30. The 2000 Proposal and Option Exercise introduced a change to the basis of pension increases, but did not make any changes to allow the Trustees to implement the change from RPI to CPI. That decision was made 16 years later in 2016 under a power which was in existence prior to 2000. In my view, it is implausible to suggest that the Trustees planned to make the changes 16 years prior to setting them in motion in 2000.
31. The Applicants mention that the Option form uses the word 'guarantee' in respect of RPI increases to pensions. In fact, the portion of the form referred to says the member agrees to "receive pension increases...in line with the percentage increase in RPI over the previous 12 months ended on 30 September, subject to a maximum guaranteed increase of 5% each year". The word guarantee is used in relation to the ceiling of 5% a year. It is not addressing choice of index. Rather it says there is an overall limit of 5% on the increase which is guaranteed.
32. The Proposal introduced the two options available to members for calculating the basis of pension increases, using the term "the rate" to describe Option 2. The Proposal also introduced an amendment to the Original Deed, Rule 11(d), which defined "Rate" in the context of the "Index of Retail Prices". The Original Deed defined "Index of Retail Prices" as "the Government's Index of Retail Prices (all items) published by the Department of Employment or such other index considered suitable by the committee and approved for use in connection with the scheme by the Commissioners of the Inland Revenue".
33. Accordingly, the Original Deed allows the Trustees to choose an alternative index for calculating pension increases. The amendment to the Original Deed was to incorporate a change in the method of calculating pension increases, but crucially, it

did not amend this original discretion about which index could be used. I understand that the Applicants were unaware of this discretionary power, but that is a separate matter to the complaint that the Trustees acted outside of their powers. The Trustees have exercised a discretionary power to choose another suitable index as they were entitled to do.

34. The Applicants maintain that this discretionary power appears to have been introduced by the 2014 Deed as the Trustees are relying on it to effect the change from RPI to CPI. The Applicants say that their benefits are secured under the Original Deed so they do not agree that the 2014 Deed, if indeed it does allow this discretionary power, should affect them. Alternatively, the Applicants contend that, although they all retired prior to 2014, their benefits are reinforced in the 2014 Deed when it refers to the "Index Rate".
35. It is my view that the discretionary power to choose another suitable index was already in the Original Deed and the revised drafting of the 2014 Deed did not remove that power.
36. The Applicants believe that Rule 11(d) only allows the Trustees to apply another index if RPI is not published. This is because the section says – "If the Index of Retail Prices is not published in respect of the relevant period, the Committee may substitute such percentage as they consider to be a reasonably likely figure...". I disagree. I agree with the Trustees when they say that the circumstances under which they can substitute the index is not exhaustive. The Original Deed says that the Trustees may apply RPI "or such other index considered suitable by the committee" and does not limit the discretion to circumstances where the RPI is not published.
37. Rule 11(d) merely says what options the trustees have if RPI is not published in the period under review. If RPI is published in the period under review, the Trustees are still able to apply "such other index" they consider suitable.
38. With regard to the subsequent use of RPI in communications sent to the Applicants after the Option Exercise, the Applicants say that they had an expectation that increases would continue to be linked to RPI. As I have already said, the Options exercise has to be understood within the framework of the rules in which it took place. Communications about it also need to be construed in that context. Understood in that context, I am not satisfied that the references to RPI were a clear and unambiguous statement that RPI would always be used in future.

Contract

39. The Applicants contend that the Option Exercise created a legally binding contract to increase pensions at RPI going forward. I do not agree. The Proposal and Option Exercise were concerned with the plans to amend the Original Deed in such a manner that members could opt out of receiving fixed rate increases to their pension;

it was not intended to create a freestanding guarantee to calculate all future increases in line with RPI.

40. I find that there was no intention to enter into a separate and binding contract with regard to the sole use of RPI as a measure of pension increases for the fund to the exclusion of any other index which was permitted by the rules. The Trustees first amended the rules to permit the Option exercise then to take place within them. I am therefore not satisfied that the Option exercise created an enforceable contract outside the Scheme rules.
41. The Applicants have argued that they would have made a different choice in 2000 had they understood that RPI was not guaranteed. I can see no basis on which the Applicants can amend their choice regarding the Option Exercise which took place within the rules. The Applicants have made their choice and the Trustees can only pay their benefits in accordance with the decisions made.
42. The Applicants have latterly added that a case can be made out that, as membership of the Fund is written into their employment contract, any amendments to the Fund are by necessity contractual too. I do not agree that this is the case. Membership of the Fund is governed by the Original Deed and the 2014 Deed, not individual employment contracts. Even if a case can be made out that the particular employment contract somehow overrides the rules of the Fund, then that would make this an employment issue which I am unable to consider.

Conflict of interest

43. The Applicants allege that there is a conflict of interest as some of the Trustees are officers of Usdaw and were not acting in the best interests of the Fund when deciding to change from RPI to CPI. The Trustees are made up of Usdaw officials and member-nominated staff, so I am satisfied that there is a reasonable mix to avoid any conflicts of interest. It is usual that the trustee body will have this mix of senior members of the sponsoring employer and employees. This does not mean that the trustees are not independent of the employer, or that the employer wields undue influence over a scheme. I have not seen any evidence that, because of this change, the Trustees have acted against the best interests of the scheme members and the Fund.
44. The Trustees appear to have noted the relative financial health of the Fund, considered legislative changes, and taken expert advice, before taking the decision to change the basis of pension increases going forward. While it may be that the Trustees had training on conflicts of interest after this decision, that does not mean that the Trustees were unaware of their responsibilities beforehand.

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45. Therefore, I do not uphold the Applicants' complaint.

Karen Johnston

Deputy Pensions Ombudsman
31 July 2018

Appendix

The Original Deed defined the “Index of Retail Prices” as:-

“the Government’s Index of Retail Prices (all items) published by the Department of Employment or such other index considered suitable by the committee and approved for use in connection with the Fund by the Commissioners of the Inland Revenue”.

The 2014 Deed replaced the Original Deed. It provides for the inflation-linked portion of a member’s pension to be increased in line with the “Index”. This is defined as:-

“the Government’s Index of Retail Prices (all items) or such other index considered suitable by the Trustees”.

Rule 11(d):-

“Rate” means in relation to any 1st April the smaller of:-

- 5%; and
- The percentage increase in the Index of Retail Prices published for the previous 12 months ended 30 September. The percentage will be taken as zero if it would otherwise be negative. If the Index of Retail Prices is not published in respect of the relevant period, the Committee may substitute such percentage as they consider to be a reasonably likely figure on the basis of the information available to them and after consulting the Actuary to the Fund”.