

Ombudsman's Determination

Applicant	Ms S
Scheme	Usdaw Staff Superannuation Fund (the Fund)
Respondents	Trustees of the Usdaw Staff Superannuation Fund (the Trustees)

Outcome

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

Complaint summary

3. Ms S' complaint against the Trustees is about their decision, in 2016, to exercise their discretion to change the rate of increase on her pension in payment from the basis of the Retail Prices Index (RPI) to the Consumer Prices Index (CPI). Ms S' claims that, when she agreed to the change in the rules governing the Fund in 2000, she was not made aware that the Trustees could change the basis of the increase without her agreement.

Background information, including submissions from the parties

4. In 1977, Ms S started employment with Usdaw and joined the Fund.
5. In January 2000, the Trustees wrote to members about proposed amendments to the rules governing the Fund (the Proposal). It should be noted that Ms S had started receiving her pension by this point in time.
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 said that there would be two stages. Stage 1 would involve

members voting to amend the rules governing the Fund to implement the changes. If the amendment was approved by a two-thirds majority of voters, Stage 2 would involve members choosing between two options:-

Option 1 – “To retain annual increases to my pension...at the fixed rate of 5% per annum...”

Option 2 – “To receive a further increase of 7½% to my pension on 1 April 2000; To receive annual increases to my pension...at the rate of the smaller of 5% and the percentage increase in RPI over the previous 12 months ended on 30 September...”

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. The attached Resolution dated 7 January 2000 set out the rules as they would read after amendment. It included a new Rule 11(d). This defined ‘Rate’ as: ‘the smaller of 5%; and the percentage increase in the Index of Retail Prices published for the previous 12 months...’ 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.
10. The changes were approved and the two options above were put to members (the Option Exercise). On 21 February 2000, Ms S chose Option 2.
11. On 28 March 2000, the Trustees confirmed to Ms S that “future pension increases will be based on [RPI] as at September of each year”.
12. Subsequent letters from the Trustees about the annual increase, referred to Ms S opting for increases in line with RPI.
13. In March 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.
14. Ms S disagreed with the decision and complained to the Trustees. She said:
- The Option forms signed in 2000 constituted a contract to pay increases at RPI or 5%. Alternatively, if no contract was formed then it is not binding on her.
 - The intention of the Trustees in 2000 was to link pension increases to RPI. If it was not, then she had agreed to Option 2 without knowledge of the Trustees’ intentions and her decision is void.
 - The Trustees are not free to substitute an alternative to RPI.
15. The Trustees did not agree that a contract was formed in 2000 to provide benefits other than those provided for in the rules governing the Fund. In the internal dispute resolution procedure (IDRP) stage 2, they said:

- The changes in 2000 related to the Original Deed, and members were then given the option of how increases would apply to their pensions.
 - From 1 April 2000, the Original Deed was amended to provide that pension accrued before that date would increase at 5% (Option 1) or in line with the Index of Retail Prices, subject to a maximum of 5% (Option 2).
 - Members like Ms S that chose Option 2 received an additional service credit or uplift to their initial pension.
 - There was no intention to create a contract outside of the Original Deed.
 - It is unsurprising that the 2000 communications did not refer to CPI because, between 1997 and 2010, the overriding legislation required the relevant increases to be in line with RPI. CPI was only introduced in 2010 due to a change in legislation and neither Trustees nor members could have foreseen the change in 2000.
 - The wording used in the historic communications reflected the practice at the time. Although, with hindsight, reference could have been made to the discretionary power of the Trustees, it does not consider it would have added anything to the understanding of the changes at the time.
 - No clear representation was made that RPI would always be the relevant index.
 - It is unlikely that, without the benefit of hindsight, Ms S would have chosen Option 1, bearing in mind that an incentive for members was the uplift in pension.
16. Ms S remained unconvinced and brought her complaint to us. She considers that she was knowingly misled with regard to the options provided to her and her future entitlement.

Adjudicator's Opinion

17. Ms S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised briefly below:
- The Proposal was about 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 about the method of inflationary increase to be applied if the changes went ahead.
 - The rules governing the Fund do not say that RPI would always be the governing index used for pension increases. The Original Deed also shows that the Trustees have discretion to change this.
 - None of the documentation provided to Ms S makes a specific commitment that all benefits must be increased in line with the RPI, and always will be. There cannot

have been any intent to form legal relations concerning the use of RPI. There was therefore no contract in place entitling Ms S to pension increases on the basis of solely RPI.

- Ms S did choose Option 2 and the Trustees can only pay her ongoing benefits in accordance with her decision.
 - The reference in the annual letters from the Trustees to Ms S, after 2000, that pension increases would be “in line with the [RPI] figure” did not represent a clear and unambiguous statement that RPI would be used permanently.
 - Even if, as Ms S argues, she reasonably believed at the time of the Option Exercise that, future increases would be in line with RPI based on what she had been told, that would not on its own entitle her to those increases.
 - On balance, it is unlikely that Ms S would have done anything differently if the Proposal and/or Option Exercise literature had clearly said, as the Trustees have suggested, that while present revaluation and increases were linked to RPI, there was no guarantee that RPI, as opposed to some other measure of inflation proofing, would be used in the future.
 - Although Ms S’ motivation for choosing Option 2 may not have been solely financial, she received a financial inducement for doing so, which was likely to have been a contributory factor in her decision.
 - The information in the Proposal or the Option Exercise was not misleading.
 - The Trustees could not reasonably have known in 2000 that the government would adopt CPI instead of RPI in the future. However, in hindsight, it may have been helpful for the Trustees to have clarified in member communications that they retained the discretion to use an alternative index.
18. Ms S did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Ms S provided her further comments, many of which had been considered previously and do not change the outcome. I agree with the Adjudicator’s Opinion, summarised above, and I will therefore only respond to the key points made by Ms S for completeness.

Ombudsman’s decision

19. Ms S reiterates that the complaint is about her questioning whether the Trustees had a discretionary power to substitute an alternative index to RPI. She does not consider that the Opinion fully addressed her claim that, by agreeing to Option 2, she entered into a contract with the Trustees. She says that she was misled by the Trustees in 2000, as the Proposal did not contain any reference to the Original Deed and the discretion it conferred on them over the choice of index.

20. It is noted that Ms S wishes her complaint to be clarified to say that her dispute is not about the Scheme rules, but she questions the right of the Trustees to act in the manner they have done.
21. I acknowledge that Ms S' complaint is about whether the Trustees have a discretionary power to make the change from RPI to CPI. This issue has already been addressed in the Opinion.
22. Paragraph 23 of the Opinion also addressed the issue of whether the Option Exercise created a contract. I agree that it did not. It is not my view that the Option Exercise was intended to create legal obligations between Ms S and the Trustees, with regards to the sole use of RPI as a measure of pension increases for the Fund. The wording of the Summary and the Resolution made it clear that what was happening was a rule change to permit the two Options to be given to members under the Rules. That Option was then given. I find that the Trustees had no intention to create a contract outside the Rules of the Scheme. There was therefore no meeting of minds necessary to form a new contract. In any event, even if there had been a new contract (and this is not intended to detract from the finding that there was not) the term used in the Resolution was 'Index of Retail Prices' a term which was already defined in the Rules and which permitted the use of CPI instead of RPI.
23. Ms S objects to the fact that the Proposal did not include references to the Original Deed and the Trustees' discretion over choice of index. She considers that this amounts to a misrepresentation of the position by the Trustees. As mentioned in the Opinion, the main purpose of the Proposal was to introduce the plan to amend the Original Deed so that members of the Scheme could get a choice whether or not to receive fixed rate increases to their pension. The Proposal did not intend to make any changes to the index to be utilised for inflationary increases, in the event that the proposed changes in the Proposal were accepted. It is common ground that at the time, the use of any index other than RPI was prevented by the operation of law.
24. Therefore, it is not surprising (or misleading) that the discretionary power over the choice of index was not mentioned. The Trustees cannot be criticised for not having the foresight to know that the law would later be altered freeing up the full scope of their existing discretion. It is often said that things may seem obvious in hindsight, but that is not an allegation that can be upheld in this case. It is my view that the Trustees provided the relevant information to the members, so that they were able to make a choice specific to the issue under consideration, that they explained the Options as they were understood at the time and disclosed the technical mechanics by which the changes were to take place.
25. Ms S mentions that the Trustees have an obligation to the members to ensure that propositions put to those members are understood by them and full disclosure is made – this is true. However, I have seen no evidence to suggest that, at the time of the Proposal (and the Option Exercise), members did not understand the issues at hand, or that the Trustees withheld relevant information from those members regarding their discretionary power to amend the index – it simply was not the issue

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under consideration at the time and I cannot see any basis to conclude that it should have been. If any members were confused about the choices to be made at the time, they were able to contact the Trustees for clarification (bearing in mind that the Trustees were unable to provide advice).

26. Therefore, I do not uphold Ms S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
28 September 2017