

Ombudsman's Determination

Applicant	Mr N
Scheme	TRW Pension Plan (the Scheme)
Respondent	TRW Pensions Trust Ltd (the Trustee)

Complaint Summary

Mr N has complained that the Trustee has incorrectly interpreted the rules relevant to his application for ill health early retirement (**IHER**) from Early Leaver status.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Trustee because it has correctly applied and interpreted the rules in relation to Mr N's application for IHER.

Detailed Determination

Material facts

1. In May 1993, the Scheme issued a document entitled Ill Health Review Procedure. Under "The meaning of 'ill health'" it states:

"For members who have left the Scheme with a deferred pension, an ill health early retirement pension will be approved if your disability makes you permanently unfit for any paid employment."
2. The rules of the Scheme are set out in the Definitive Trust Deed and Rules dated July 1993 (**the 1993 Rules**). Two key definitions are:

"**Early Leaver**" means a person whose Pensionable Employment ends before Normal Retirement Date and is entitled to a pension from the Scheme which has not started. It excludes a Member and a Pensioner.

"**Member**" Means a person who has been admitted to membership of the Scheme. It excludes an Early Leaver and a Pensioner.

3. Mr N left employment in October 2001, ceasing to be a Member, and becoming an Early Leaver. On leaving employment Mr N made an application for IHER, initially on an Early Leaver basis. I understand the basis of the application was subsequently changed to Member status because Mr N pursued a complaint at the time and an error was identified in the dismissal process.
4. On 27 September 2006, the 1993 Rules in relation to IHER were altered by a Deed of Amendment (**the 2006 Rules**), executed by the Principal Employer and the Trustee. This deed changed the rules relating to IHER for both Members and Early Leavers.
5. Mr N's existing Member status application was declined by the Trustee and the matter was determined by this Office in August 2007. The complaint was not upheld. Part of that complaint was that the Trustee had wrongly interpreted '*normal occupation*' within the rules. The Ombudsman concluded that the Trustee had interpreted it correctly on the basis that it referred to his normal occupation with any employer, not just Mr N's previous employer. Mr N attempted to appeal the decision through the Courts, but the appeal was brought out of time.
6. Mr N pursued a further complaint about the way that the Member status IHER application was handled, and eventually closed. The Ombudsman issued a Determination addressing those issues in March 2012.
7. In November 2012, Mr N appealed that Determination in the High Court. He also argued that the Trustee had failed to communicate the outcome of the August 2007 Determination to other members of the Scheme. The High Court judgment concluded that the 2007 Determination had not altered the rules and therefore there was no requirement for the Trustee to inform the other members. The Judgment is relevant to the current complaint because, in the course of reaching that conclusion, the Judge stated:

"The Rules have not been changed since 1993."
8. In 2015, Mr N pursued a complaint about the way in which the Scheme rules, for IHER from Early Leaver status, were constructed. The complaint was referred to this Office and the Deputy Pension Ombudsman determined that the issues raised could only be considered if Mr N had submitted an application on an Early Leaver basis which he had not done at that time. The Deputy Pension Ombudsman suggested Mr N do so to establish whether or not he would be successful in his application.
9. In February 2016, Mr N made an application for IHER on an Early Leaver basis. The Trustee declined the application as Mr N supplied no medical evidence to support it.
10. Following this, the matter was referred to this Office. Mr N's stance is that regardless of the medical evidence he might have provided, the Trustee would nevertheless have applied a flawed interpretation of the Scheme Rules and denied his ill health retirement application, causing him a financial loss.

11. The Trustee has agreed that it is the correct interpretation of the Scheme Rules which is in dispute, and needs to be clarified, not the recent decision to decline IHER.
12. The complaint was referred to this Office and considered by an Adjudicator. He concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised briefly below: -
 - The Scheme Rules had been amended in 2006, through a properly executed deed, and it was the 2006 Rules which applied to Mr N's current application for IHER.
 - The 2006 Rules meant, in summary, that an ill health pension would be paid to an individual who, in the opinion of the Trustee, is permanently prevented from undertaking any paid employment, including self-employment.
 - In the High Court judgment regarding one of Mr N's previous complaints, the Judge had said that there had been no rule changes since 1993, so the Adjudicator could understand why Mr N thought that the 2006 Rules might not apply. However, the Adjudicator concluded that the Judge made that statement in the context of Mr N's previous application, which was not subject to the 2006 Rules. In the context of that case there was no reason for the Judge to be aware of the 2006 Rules, or comment on them.
 - Irrespective of the comments made by the Judge in the High Court Hearing, the 2006 Rules were properly executed and form part of the Scheme Rules to which Mr N's current IHER application is subject.
 - The Adjudicator took the view that under The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (the Regulations), the 2006 Rules had materially altered the Scheme Rules and that having done so, the Trustee ought to have made members aware of that change. By failing to do so, the Trustee had made an administrative error.
 - Having said that, the 2006 Rules were properly executed and the Regulations only required members to be informed of changes up to three months after they had been implemented. So this would not have been a consultation announcement, but an information update to members. In the circumstances, even if the Regulations had been followed, the Adjudicator took the view that the 2006 Rules would still have been implemented and Mr N's application would still be subject to them.
 - The Adjudicator believed that Mr N could not now make an application from Early Leaver status under the 1993 Rules. He had previously exhausted his Member status application by taking it as far as the High Court. He has a current application under the 2006 Rules and it is that application which is being considered here.
 - Additionally, the 1993 Rules had stricter eligibility criteria, and so if he is ineligible under the 2006 Rules, the Adjudicator could not see how a backdated application would be successful.

- In conclusion, the Adjudicator could find no flaw in the execution of the 2006 Rules, and whilst they ought to have been disclosed to Mr N, that error had not caused him any financial injustice or distress and inconvenience to warrant any award.
13. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

Summary of Mr N's position

14. Mr N provided a list of points of law which he considered the Ombudsman must follow when determining the complaint, but to date has not; they are:-
- The correct interpretation of the criteria for ill health is 'unable to follow normal occupation for TRW or any other employer', as confirmed by the previous determinations and High Court Judgment.
 - The criteria had not changed since it was written.
 - The Trustee has discretion to close applications for ill health retirement without warning or reason.
 - Under contract law, contradictory conditions are illegal, and in the event of a contradiction the primary condition takes precedence.
 - The Trustee must adopt the correct interpretation of the Scheme Rules, act appropriately and apply the correct weight to evidence.
 - The Trustee must disclose any changes to the accessing of accrued benefits.
 - The Ombudsman cannot address complaints that do not affect the complainant and must investigate where they do.
 - The Ombudsman must inform The Pension Regulator of any maladministration by the Trustee.
 - The Ombudsman can be appealed through the High Court.
15. The membership of the Scheme ought to have been consulted on the 2006 amendment before it was implemented. Had the amendment been disclosed it would have been subject to legal challenge and would not apply. As the 2006 Rules were not disclosed, they were invalid, not legal, and made under false pretences.
16. If the Trustee is guilty of maladministration by not disclosing the change, the Ombudsman cannot presume no harm has been caused by that error. Had the change been disclosed Mr N would have objected and made a further application as a safeguard before the change was introduced.

17. The Adjudicator had acknowledged that the 2006 Rules had not been interpreted correctly in the context of the previous Ombudsman's determinations and the High Court judgment, and therefore the amendment is not legal.
18. The Trustee has never administered a correct interpretation of the Scheme Rules or communicated it to members.
19. The Adjudicator reached his Opinion on the basis that the 2006 Rules changed the rules, but in fact they were made as a correct interpretation of the existing rules, so the Opinion was factually incorrect.
20. The Trustee amended the rules in order to deny Mr N from making a successful application.
21. The most recent application is not the subject of the complaint. That application was only made on the previous Ombudsman's insistence. The complaint is in regard to his original application from Early Leaver status in 2001, which has not been determined before and was not relevant until the application from Member status was closed by the Trustee. Therefore his application should be processed on the basis of the 1993 Rules.
22. The Trustee has alleged that Mr N is able to carry out his normal occupation for TRW or any other employer, despite the fact that he left TRW on the basis that he was unable to follow his normal occupation, and it is this issue which remains unresolved.
23. The weight of evidence, including that of an appropriate specialist, shows he is unable to follow his normal occupation. The Trustee's position is therefore unsustainable.
24. Mr N is willing to attend an examination but the Trustee has made considerable effort to avoid arranging one.
25. In order to be successful in an application under the 2006 Rules he would need to make false claim about his employment status to meet the criteria.
26. Following the change, the criteria has not become less difficult to meet. Instead of the test of partial incapacity, under the 1993 Rules, the new test is solely of total incapacity.
27. The Trustee's position was that the total incapacity criteria applied both prior to and following the amendment, but the Ombudsman has not taken that contradiction into account.
28. The onus is on the Trustee to provide further medical evidence to support its finding that he is not entitled to IHER, as it already has records provided by Mr N to support his claim.

29. There is a “contradiction between the terms for active membership and the latent ‘for TRW or any other employer’ clause regarding the following of normal occupation”, and that the Adjudicator has failed to identify that contradiction.
30. Mr N only asks to be medically assessed against the correct interpretation of the Scheme Rules. To not be given this opportunity would be an injustice.

Summary of the Trustee’s position

31. The Trustee argues that the Scheme Rules have been properly interpreted and applied in respect of his recent application for IHER.

Conclusions

32. I can only consider Mr N’s most recent application for IHER, and only in respect of the interpretation of the rules for Early Leavers. His previous applications and the interpretation of the rules in relation to active members have been considered at length by this Office and by the High Court.
33. Mr N has argued that his original application from Early Leaver status, made in 2001, has not been the subject of a complaint or determination, and therefore he should be able to pursue that application now. I do not agree. That application was not pursued at the time because Mr N was given the opportunity to pursue an active member application instead. Mr N has since made a further application and it would not be appropriate for me to disregard that and return to the 2001 application.
34. As it is not appropriate to consider the application from Early Leaver status made in 2001, it is only relevant to consider the application made in 2016. Mr N argues that the pre 2006 Rules should be applied to his 2016 application, but I cannot agree that an application should be retrospectively considered under a different set of rules. That would go against the general principal that, assuming it is properly carried out, scheme rules can be amended over time.
35. Having considered the 2006 Rules, and the amending Deed, I am satisfied that the Scheme Rules were amended in accordance with the Trust Deed amendment clause (see Appendix 1 below). The 2006 Rules are therefore the correct rules under which Mr N’s 2016 application has to be considered.
36. The 2006 Rules state:

“An Early Leaver who is entitled to a deferred annual pension under this Rule may request the Trustees in writing as follows:

 - (a) (i)...
 - (ii) If the Early Leaver is suffering from Total Incapacity (as defined in Rule 9(1)), to pay him an immediate annual pension instead of the

deferred pension. The immediate annual pension is equivalent to the Scale Pension.

(b) ...

The Trustees may accept or reject the request (except in relation to Rule 10(4)(a)(ii) where they must accept it if the Early Leaver satisfies the condition in that Rule)..."

37. Total Incapacity was also subject to a new definition under the 2006 Rules:-

"9 (1) ...

Total Incapacity means Ill-Health which in the opinion of the Trustees is sufficiently serious to permanently prevent a Member from undertaking any paid employment with any employer or self-employment."

38. Mr N disagrees that these rules should be applied to his application for IHER on a number of points, which I will address below.

39. Mr N has argued that the Trustee ought to have consulted the members on the 2006 Rules, before they were implemented. Had they been disclosed as he says they ought to have been, the amendment would have been subject to legal challenge and he would have objected. I do not agree that these changes ought to have been disclosed prior to coming into force. The Deed of Amendment shows that these changes were submitted to the member committee as required, and I would argue that this forms the consultation that Mr N believes ought to have happened.

40. In any event, any legal challenge would only have been successful on the basis that the amendment was somehow flawed. As the amendment was properly executed by the Trustee and did not impact accrued rights, I cannot see on what grounds a challenge would have been successful.

41. There are circumstances where trustees of a pension scheme are required to consult with members. These are set out in The Occupational Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006, as listed changes (see Appendix 2 below). None of the listed changes relate to a trustee's ability to determine eligibility for ill health pension benefits.

42. Mr N has suggested that the Adjudicator acknowledged that the 2006 Rules had not been interpreted correctly in the context of the previous Ombudsman's determinations and the High Court judgment, and so the amendment is not legal. I cannot see where the Adjudicator made such an acknowledgment, but I also cannot see why the amendment would not be valid. Irrespective of what the Adjudicator may or may not have said, the 2006 Rules were properly implemented in accordance with the Scheme rules and were in place prior to the Ombudsman's determination and the subsequent High Court judgment; although they were not relevant to the consideration of those cases because Mr N's earlier application predated it.

43. As to whether the Trustee has previously administered a correct interpretation of the Scheme Rules, or communicated it to the members, the previous Ombudsman and also the High Court, took the stance that the 1993 Rules were being interpreted correctly by the Trustee and I am not going to revisit that question. I take the view that the 2006 Rules are being appropriately interpreted by the Trustee.
44. Mr N has argued that the Adjudicator has misunderstood the 2006 amendment, and that this did not change the Rules, but instead merely reworded the existing Rules in order to better reflect the Trustee's approach to such applications. Regardless of whether that is the case, I am not persuaded that this influences the outcome of Mr N's current complaint. I find that the Trustee's application and interpretation of the 2006 Rules to Mr N's current application, is correct. As a result, the underlying nature of the change, and whether there was one, is irrelevant to Mr N's complaint.
45. Mr N has disputed the suggestion that the result of the amendment was a less onerous criteria for IHER. I take this stance because under the 1993 Rules, regardless of any Incapacity "The Trustees may accept or reject the request." This discretion for the Trustee to accept or reject the request was removed in the 2006 Rules. Under the 2006 Rules the Trustee was obliged to accept the application where Total Incapacity had been established.
46. Mr N highlights that under the 1993 Rules, the criteria for IHER from Early Leaver status could be met through partial incapacity, but that was removed in the 2006 Rules, which required Total Incapacity. Therefore, in his view, the 2006 Rules' criteria is more difficult to meet. However, the Trustee has confirmed that the established practice under the 1993 Rules was that an application from Early Leaver status would only be awarded where there was Total Incapacity. That stance is evidenced by the IHER booklet, dated May 1993. This confirms that IHER from Early would be approved "...if your disability makes you permanently unfit for any paid employment,"
47. Mr N cannot see why the amendment was made other than to deny him from making a successful application, however I do not agree that was the reason. There are many reasons why scheme rules might be amended, and it is not uncommon for rules to be amended to provide clarity on an issue that may have been open to ambiguity.
48. In Mr N's case, I agree with the Adjudicator, that the 2006 amendment ought arguably to have been disclosed to members within three months of coming into force, at the latest, and that failing to do so could be classed as maladministration. However, I do not see that this materially affects Mr N's position. Once the amendment had come into force Mr N could only have pursued a new Early Leaver's IHER application under the 2006 Rules. There was no scope for an application to be made under the 1993 Rules once the amendment had been made. Additionally, as the amendment was properly implemented, I cannot see that the amendment could have been reversed once made, even if Mr N had challenged it.

49. Mr N says that in order to be successful in an application under the 2006 Rules he would need to make a false claim about his employment status in order to meet the criteria. I would suggest that if Mr N thinks he would need to make a false claim to meet the criteria, then he does not meet the criteria under the 2006 Rules.
50. Mr N has commented that the onus is on the Trustee to provide further medical evidence to support its finding that he is not entitled to IHER benefits, as it already has records provided by him to support his claim. Mr N is referring to medical evidence provided under his previous applications. This is a new application, as at February 2016. I find that it is reasonable for the Trustee to request up to date medical evidence for consideration.
51. Mr N also argues that there is a “contradiction between the terms for active membership and the latent ‘for TRW or any other employer’ clause regarding the following of normal occupation”, and that the Adjudicator has failed to identify that contradiction. In my view this comment refers back to the issues already determined by this Office and the High Court. It would not be appropriate for me to comment on it.
52. I appreciate that Mr N has a strongly held conviction that he should be entitled to IHER. To date he has had three previous determinations and a High Court judgment which have found either that the Trustee is correctly interpreting the Rules, or that Mr N has failed to follow the relevant process. I fully appreciate that this will have had a significant impact on Mr N’s life. However, I can only direct a distress and inconvenience award where significant distress and inconvenience has been caused, by errors or omissions of the Trustee, in relation to the specific issue complained of, and there are none..
53. Therefore, I do not uphold Mr N’s complaint.

Anthony Arter

Pensions Ombudsman
21 February 2018

Appendix

Appendix 1

Definitive Trust Deed and Rules

30. Alterations

After consulting the Actuary and any Members' Committee, the Trustees may at any time and from time to time with the consent of the Principal Employer alter or modify all or any of the trusts, powers or provisions of this deed or of the Rules. Any such alteration or modification may have retrospective effect. Any such alteration or modification shall be made by deed executed by the Trustees and by the Principal Employer and as from the stated effective date this deed and the Rules shall be read and construed as if any alteration or modification so made were duly incorporated therein

Appendix 2

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006

8 Listed changes: occupational pension schemes

(1) Listed changes that affect occupational pension schemes are-

- (a) to increase the normal pension age specified in the scheme rules for members or members of a particular description;
- (b) to prevent new members, or new members of a particular description, from being admitted to the scheme;
- (c) to prevent the future accrual of benefits under the scheme for or in respect of members or members of a particular description;
- (d) to remove the liability to make employer contributions towards the scheme in respect of members or members of a particular description;
- (e) to introduce member contributions in any circumstances in which no such contributions were previously payable;
- (f) to make any increase in member contributions by or on behalf of members or members of a particular description;
- (g) to make any change specified in paragraph (2) or (3).
- (h) to change the rate at which-
 - (i) pensions in payment under the scheme are increased, or

(ii) pensions or other benefits payable under the scheme are revalued,

but only where that change would be, or would be likely to be, less generous to members or members of a particular description.

(2) A listed change affecting only money purchase benefits is to make any reduction in the amount of employer contributions towards the scheme in respect of members or members of a particular description.

(3) Listed changes affecting only benefits which are not money purchase benefits are-

(a) to change to money purchase benefits some or all of the benefits that may be provided under the scheme to or in respect of members or members of a particular description;

(b) to change, in whole or in part, the basis for determining the rate of future accrual of benefits under the scheme for or in respect of members or members of a particular description;

(c) to modify the scheme under section 229(2) of the Pensions Act 2004 (matters requiring agreement of the employer) so as to reduce the rate of future accrual of benefits under the scheme for or in respect of members or members of a particular description;

(d) to make any other reduction in the rate of future accrual of benefit under the scheme for or in respect of members or members of a particular description.

(e) to change what elements of pay constitute pensionable earnings, or to change the proportion of or limit the amount of any element of pay that forms part of pensionable earnings, for or in respect of members or members of a particular description.

(4) "Normal pension age" has the meaning given by section 180 of the Pension Schemes Act 1993 (normal pension age).

(5) "Pensionable earnings" means the earnings by reference to which pension benefits are calculated, and an "element of pay" includes basic salary, a pay rise, an overtime payment, and a bonus payment.