

Ombudsman's Determination

Applicant	Mr S
Scheme	The Thales UK Pension Scheme (the Scheme)
Respondent	Thales UK Pension Scheme (the Trustee)

Outcome

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

Complaint summary

3. Mr S disagrees with the decision of the Trustee to rely on legal advice as to the interpretation of the Scheme rules in relation to the index linking of pensions in payment. The Trustee has decided that pensioners' benefits ought to have had increases applied using the Consumer Price Index (**CPI**) rather than the Retail Price Index (**RPI**) since 2011. As a result, Mr S' pension is being "frozen" until it reaches the level it should have been if CPI had been correctly applied from 2011.

Background information, including submissions from the parties

4. Mr S retired and starting taking benefits from the Scheme in 2004.
5. In 2010, the Government decided that for statutory schemes, CPI index linking should be applied to pensions in payment, rather than RPI. As such, The Occupational Pensions (Revaluation) Order 2010 (**the Order**) was enacted to accompany the Pensions Schemes Act 1993 (**the Act**). The Order provides the index rates and the relevant caps that apply, and took effect from January 2011.
6. Part 2(1) of Schedule 3 of the Act says:

"the Secretary of State shall in each calendar year by order specify ... a revaluation percentage ... for each period which is a revaluation period in relation to that order"

Part 2(3) provides that the relevant revaluation percentage will be that:

“... which appears to the Secretary of State to be the percentage increase in the general level of prices in Great Britain during the period which is the reference period in relation to the revaluation period.”

7. Although the Scheme is not a statutory scheme, Rule 1.11 of The Thales Optronics Pension Scheme Rules (**the Rules**) state:

“the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent as specified by order under Section 2 of Schedule 3 of the Pensions Schemes Act.”

8. On 31 January 2017, the Trustee wrote to members, including Mr S, informing them that, following a review of the way in which pension increases are paid, it had received legal advice that “your TOPS-related pension should increase in accordance with the relevant statutory requirements for pension increases and not simply by RPI subject to a 5% maximum.” The letter went on to explain that since 2011, the Trustee ought to have applied CPI rather than RPI increases to pensions above the Guaranteed Minimum Pension (**GMP**), meaning that members like Mr S had received higher benefits than they were entitled to. As a result, the Trustee decided not to reduce pensions in payment to the correct level and seek recovery of the overpayments, but to suspend future increases until pensions in payment equalled the level they ought to have been if CPI had been applied from 2011. The employer had agreed with the Trustee to fund the additional cost in doing this.
9. Mr S was unhappy with this. He complained to the Trustee and requested further information, including details of the legal advice the Trustee had received. The Trustee responded on 25 May 2017:

“One interpretation is that Rule 1.11 should be read as requiring the Trustee to use the index specified in the order under Section 2 of Schedule 3 of the Pension Schemes Act as *it stands from time to time*. The statutory order originally provided for increases based on RPI (which would explain why reference is made to RPI in Rule 1.11) but has required the use of CPI since 2010/11 and so would provide for CPI from that date. **This is the construction Counsel strongly believes is correct.**

An alternative interpretation is that Rule 1.11 should be read as requiring the Trustee, for all time, to use the index that was specified in the order under Section 2 of Schedule 3 of the Pension Schemes Act as *at the time the Rules were put in place in 2000* so that, when the order subsequently moved to CPI, that change did not automatically flow through to TOPs pension increases. **Counsel does not believe a Court would support that view.**

The Trustee has tested Counsel thoroughly and is satisfied that it should follow the advice which it has received. Counsel is an expert in the field of pensions with considerable experience of how the Courts interpret pension scheme rules. It is not

appropriate for the Trustee to turn to the Courts to test every point it faces and, in this case, based on Counsel's clear advice, the Trustee has concluded that it should apply Counsel's opinion in practice."

10. Following this, Mr S contacted this service and was referred to the Scheme's internal dispute resolution procedure (**IDRP**). The Trustee responded to say it would treat its letter of 25 May 2017 as the first stage IDRP decision and gave a second stage IDRP decision on 8 August 2017. This letter reconfirmed that its decision had not changed from that of 25 May 2017.
11. As Mr S remained unhappy with the response, he asked this service to consider his complaint.

Adjudicator's opinion

12. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised briefly below:-
 - When it comes to changes of RPI to CPI index linking, the Ombudsman has previously made decisions that rely on the wording of the scheme rules. In this case, the Adjudicator agreed with the Trustee that the relevant Scheme rule is contradictory as it makes reference to both RPI and the Act. She felt that the Ombudsman would not criticise the Trustee for seeking professional legal advice and, in having sought that advice, deciding to act on it.
 - The Adjudicator felt the Trustee's approach to the issue of the overpayment was reasonable. She explained that a member only has a right to their correct benefits from the Scheme and cannot continue to receive benefits higher than what they are entitled to. It was her view that the Ombudsman would also not criticise them for taking this approach.
13. Mr S asked for the Ombudsman to reconsider the Adjudicator's Opinion on the basis that, "I still feel there is scope for the rules to be 'interpreted' differently from what has been decided by Thales Council."
14. As Mr S did not accept the Adjudicator's opinion, the complaint was passed to me to consider. Mr S' further comments do not change the outcome. I agree with the Adjudicator and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

15. It is my role to consider whether there has been an error of law or maladministration and whether Mr S has suffered an injustice as a result.

16. Looking at the relevant Rule, I cannot criticise the Trustee for being unsure of whether the intention was to pay RPI or CPI linked increases and for their decision to seek legal advice to clarify this. Therefore, the Trustee was entitled to question the validity of the payments it was making to pensioners.
17. The Trustee is within its right to seek legal advice over how the relevant rule should be interpreted. There is no maladministration in its decision to do this, nor is there any maladministration in its decision to prefer one piece of advice over the other. The Trustee has a duty to all members, not just pensioners, to make sure that benefits are being paid correctly. The cost of paying higher pensions to pensioners has an effect on the benefits of future pensioners, and the Trustee was right to address the matter as soon as it became aware.
18. I am satisfied that the interpretation that the Trustees have placed on the rule is a reasonable one, formed after proper consideration of the advice received. I do not consider they fell into any error of law.
19. Therefore, I do not uphold Mr S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
17 November 2017