

Ombudsman's Determination

Applicant	Mr N
Scheme	Oracle UK Pension Plan (the Plan)
Respondents	Trustees of the Oracle UK Pension Plan (the Trustees)

Outcome

1. I do not uphold Mr N's 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. Mr N has complained that the Trustees have incorrectly interpreted the rules of the Plan and his benefits should be based on a Total Annual Benefits (**TAE**) basis for all of his service up to 31 May 2004 and not on a basic salary basis for service from 10 December 1998.

Background information, including submissions from the parties

4. Mr N was a member of the Plan from 1 October 1997 to 31 May 2004 when the Plan was closed for future accrual. The Plan was originally governed by a Trust Deed and Rules dated 23 December 1993 (**the 1993 Rules**). The 1993 Rules provided the following definitions which taken together determine the extent of the defined benefit underpin provided by the Plan:

"Final Pensionable Salary" means the highest annual average of the Pensionable Salaries paid to the Member for any period of three or more consecutive years (or during such shorter period during which emoluments have been received) ending not earlier than ten years before the Relevant Date. For the purposes of this definition each year's Pensionable Salary shall be increased by the lesser of 5% per annum and the increase in the Index from the last day of such year's Pensionable Salary up to the Relevant Date.

"Pension Guarantee Formula" means in respect of a Member, the annual amount which results from multiplying his Final Pensionable Salary by the fraction $1/80^{\text{th}}$ for each year of his Pensionable Service.

“Pensionable Salary” is determined by the basis on which a Member elects to contribute to the Scheme and means either his Basic Salary or his Total Annual Earnings as the case may be PROVIDED THAT in respect of a Member who, during his Pensionable Service, elects to change the basis on which he contributes to the Scheme from Basic Salary to Total Annual Earnings (or vice versa) then Pensionable Salary means Basic Salary.

“Total Annual Earnings” means all of a Member’s annual earnings which are subject to income tax under Schedule E.

5. When Mr N joined the Plan he elected to contribute on a TAE basis.
6. On 10 December 1998, the Principal Company and the Trustees executed a new Definitive Deed and Rules (**the 1998 Rules**) to replace the 1993 Rules. The 1998 Rules replaced the definitions for Final Pensionable Salary, Pension Guarantee Formula, Pensionable Salary and Total Annual Earnings as follows:

“Final Pensionable Salary” means the greater of:

- (a) the Member’s annual rate of Pensionable Salary paid to him in the 12 months immediately prior to the Relevant Date; and
- (b) the highest annual average of the Pensionable Salaries paid to the Member for any period of three or more consecutive years (or during such shorter period during which Pensionable Salaries have been received) ending not earlier than ten years before the Relevant Date. Such Pensionable Salaries of a year other than the current pay year shall be increased in proportion to any increase in the Index over the period to the Relevant Date.

“Pension Guarantee Formula” means in respect of a Member, the annual amount which results from multiplying his Formula Salary by the fraction $1/80^{\text{th}}$ for each year of his Pensionable Service.

“Pensionable Salary”

- (a) in respect of a member who became a Member on or after 1st June 1993 means Basic Salary; and
- (b) in respect of an employee who became a Member before 1st June 1993, is determined by the basis on which the Member elected to contribute to the Plan and means either his Basic Salary or his Total Annual Earnings (as the case may be) PROVIDED THAT in respect of a Member who, during his Pensionable Service, elects to change the basis on which he contributes to the Plan from Basic Salary to Total Annual Earnings (or vice versa) then Pensionable Salary means Basic Salary.

“Total Annual Earnings” means all of a Member’s annual earnings which are subject to income tax under Schedule E.

The 1998 Rules also introduced a new definition of Formula Salary as follows;

“Formula Salary” means in relation to a Member, such salary as shall be determined from time to time by the Principal Company PROVIDED THAT it shall never be less than a Member’s Pensionable Salary nor greater than the Permitted Maximum.”

7. Mr N says that he was Chair of the Trustees of the Plan and he queried the changes made by the 1998 Rules varying the benefits for those members who joined after 1 June 1993 as no Section 67 Certificate was completed as required by the Pensions Act 1995. He raised this issue with the Trustees’ lawyers in 2013. He left Oracle in 2013 and resigned as a Trustee in December 2013.
8. Mr N says he requested a transfer value quotation on 30 June 2014 and made subsequent requests. In November 2015 he received a reply from the Trustees saying that the Trustees had decided it was not possible to remove rights retrospectively and that his underpin benefits would be on a TAE basis for benefits accrued up to 10 December 1998, but benefits accrued after this date would be on a basic salary basis.
9. Mr N says that as a result of the Trustees’ decision his underpin benefits from 10 December 1998 to June 2004 are significantly reduced being based on the much lower basic salary rather than the higher TAE basis. He estimates that this equates to a potential difference in annual pension of more than £2,000 a year. Mr N wants the Trustees to agree that his underpin benefits from age 65 are calculated on a TAE basis for the whole of his pensionable service from 1 October 1997 to 31 May 2004. Mr N would also like confirmation that this change is being applied to all affected members, including appropriate payments to those affected members who have transferred their benefits out of the Plan.
10. The Trustees say that Mr N’s claim that the Trustees received “clear legal advice” that the 1998 Rules were invalid in their entirety is not an accurate reflection of the position. The Trustees received legal advice on a number of occasions which highlighted the risk that the 1998 Rules could be found to be invalid but were advised that it was appropriate to proceed on the basis that they were valid prospectively. This approach is supported by case law.
11. To support their view the Trustees have referred to certain legal precedents and arguments put forward in a number of legal cases including *Besttrustees plc v Stuart* (2001) PLR 283, *R v Minister for the Civil Service* (2010) EWHC 1463 (Admin) and *Foster Wheeler v Hanley* (2009) EWCA Civ 651. The *Besttrustees* case concerned a purported retrospective amendment to equalize normal retirement ages. Mr Justice Neuberger held that although the amendment was invalid insofar as it operated retrospectively, it was valid prospectively and said:

“I consider, therefore that one looks to see what is the valid exercise of the power and what is the invalid exercise. The valid exercise, if there was an exercise of the power, was to effect a variation with effect from 26 April prospectively. The invalid attempted exercise was to effect a variation retrospectively to 6 April 1994. To my mind, conceptually these two components of the single exercise are easily separable one from the other.

...

It seems to me, however, that one must not only ask oneself whether there is anything in the exercise of the power which leads one to believe that, had the trustee been told that it was not possible to exercise the power retrospectively, it would not have exercised the power as it purported to do prospectively at all, or, in the alternative, in the way that it did.”

12. The Trustees say that in the case of the Plan, all parties clearly intended to execute the 1998 Rules. The drafting and agreeing of a new deed and rules is a substantial project which requires input from the employer, trustees and normally two sets of legal and actuarial advisers. The drafting would presumably have been negotiated and discussed at length between the parties. It is therefore plain that all parties would have intended the 1998 Rules to have effect prospectively, to the extent that they are ineffective prospectively. Therefore, there is clear legal precedent to support the Trustees’ view that the 1998 Rules have prospective effect and are not void in their entirety for lack of a Section 67 certificate.
13. Mr N, as Chair of the Trustee Board was a recipient of the legal advice and, during his period of trusteeship he and the then trustees administered the scheme on the basis that the 1998 Rules were fully valid.
14. The Trustees say the Plan has always been administered on the basis that members had the choice whether to pay contributions on a basic salary or TAE basis. The underpin was calculated on a basic salary basis for post 1 June 1993 joiners. For pre 1 June 1993 joiners, the underpin was calculated on the same basis as they elected to contribute to the Plan. This is supported by the 1993, 1996 and 1997 booklets and the 1998 Rules. Mr N would have received the 1997 booklet and so his understanding on joining the Plan would have been that his underpin would have been calculated on a basic salary basis only.
15. Until June 2000, in cases of members who were making contributions on a TAE basis, but whose underpin was considered to be on a basic salary basis (i.e. according to the definition in the 1998 Rules those members who had commenced pensionable service after 1 June 1993), all (5%) contributions went into the core contribution policies. (The core contributions are compared with the DB benefit). After this date the contributions of those same members were split with 5% of basic salary going to core and the balance going to non-core. On 12 August 2003, there was a bulk transfer of the current deemed value of the excess contributions from the core accounts to a non-core account for each affected member. This brought the

treatment of contributions in line with the definitions in the 1998 Rules. In other words, where a member was contributing on a TAE basis but his underpin was calculated on a basic salary basis (as is the case for Mr N), contributions in excess of 5% x basic salary were effectively treated as AVCs (so the member retained the benefit of these contributions). The Trustees have been unable to locate any member communications from 2003 regarding the transfer of contributions.

16. The Trustees say over time, it became clear, following legal advice, that there were concerns over the validity of the 1998 Rules. The issue first arose during the drafting of the 2004 Rules. One of the issues identified was that the 1998 Rules purported to backdate the change that the underpin would be calculated on a basic salary basis only to 1993. The legal advice was that this provision could have prospective effect only – it could not operate to detrimentally affect accrued rights.

17. The extract from the relevant legal advice shows that Mr N is taking one paragraph, that is paragraph 1.15 out of context. Paragraph 1.15 says:

“Therefore it would seem likely that the 1998 Rules are void in their entirety and should be disregarded.”

18. But the Trustees say that further paragraphs of the legal advice and in particular, paragraphs 1.17 and 1.22 say:

“1.17 However, while there is a technical argument that the 1998 and 2003 deeds may be invalid due to the lack of a section 67 certificate/evidence of member consent, our view is that, given that all parties executed both deeds (which would have required detailed review and negotiations), the intention was that both deeds had effect and the terms set out in the deeds would apply.

...

1.22 We would advise that benefits continue to be administered as if the 1998 and 2003 deeds were valid, to the extent that the 1998 Rules did not, in fact, detrimentally affect members' accrued rights. Therefore in respect of individuals who were members when the 1998 Rules came into force, and to the extent that their “Formula Salary” is less than their “Final Pensionable Salary” as defined in the 1993 Rules, “Formula Salary” should be read to mean “Final Pensionable Salary” (as defined in the 1993 Rules).”

19. To support this the minutes of the Trustees meeting dated 5 July 2012 state the following:

“LF stated that although the 1998 Rules are technically not valid, the intention was that the 1998 Rules should take effect and to the extent that members' rights/benefits were not eroded by the provisions in these Rules governing the document should be treated as being valid (sic).”

20. Eversheds were the Trustees' legal advisor. The Trustees say that the wording of the legal advice is slightly misleading as the legal advice was that there was a risk that the 1998 Rules were invalid, rather than definitely not valid. However, the overall thrust of the advice (i.e. to administer the Plan on the basis that the 1998 Rules were valid prospectively) is clear. Mr N was chair of Trustees at this meeting.
21. Notwithstanding the legal advice received Mr N and the Trustees continued to administer the Plan on the basis that the 1998 Rules were fully valid. An example can be seen from the initial results of the May 2013 valuation. This document was commissioned by the Trustees at a time when Mr N was Chair of Trustees and shared with the employer. Critically, it states:

“The Trustees have received legal advice that the ‘Second Definitive Deed and Rules’ dated 10 December 1998 (the 1998 Rules) may be void as a Section 67 certificate does not appear to have been provided at the time. Following legal advice, the Trustees have agreed to administer the Plan on the basis that the 1998 Rules are valid. The liability results shown in this report have been calculated consistently with this administration practice.”
22. The Trustees say that this clearly indicates that Mr N agreed with the approach to treat the 1998 Rules as valid. The 2010 valuation was also carried out in accordance with the above which details a consistent treatment with the above. Appendix C (the benefit schedule) of the valuation report clearly states that, for the purposes of calculating the underpin, TAE is only applicable for members who joined prior to June 1993.
23. The Trustees view is that, despite the absence of a Section 67 certificate, the 1998 Rules are not void in their entirety. The Trustees believe the 1998 Rules are valid insofar as they retrospectively improve benefits and also that they have prospective effect insofar as they reduce benefits. The 1998 Rules are only void to the extent that they attempted to retrospectively reduce accrued benefits.
24. In November 2013, shortly before his resignation as a Trustee of the Plan, Mr N raised a question on the specific issue of whether members who joined the Plan while the 1993 Rules were in force should be able to accrue benefits on a TAE basis. The immediate advice received was that the Trustees had several options on which they could adopt a risk based approach but that further investigation was recommended in particular regarding what information had been given to members. The Trustees subsequently made the decision, following updated legal advice to allow for case law and the information given to members referred to above and previously, to treat the 1998 Rules as prospectively valid only. This necessitated a change of administration and re-classification of contributions from non-core to core, to tie in with the fact that the basis on which the underpin was calculated had changed (for certain members) to a TAE rather than basic salary basis between 1993 and 1998. This decision was made on 2 February 2015.

25. The Trustees would also make the observation that Mr N was an extremely committed and intelligent Chair of Trustees. He served as a Trustee for a long time and was fully engaged with the Plan and its administration throughout his tenure as a Trustee. Mr N instigated a large scale data cleanse and benefit audit, during which he was personally involved in ensuring that the data (including salary figures used as part of benefit calculations) were correct. During this time, whilst Mr N did raise the question as to the validity of the 1998 Rules, he and the Trustees continued to administer the Plan on the basis that the 1998 Rules were completely valid. This includes other members in a similar position to Mr N, in respect of whom the underpin was calculated on a basic salary basis for all accrual. His actions during his tenure as Chair of Trustees are not wholly consistent with his current contention that the 1998 Rules are void in their entirety.
26. The Trustees acknowledge that the delay in providing the transfer value quotation has been unacceptable. The delay was due to a long running benefit review/audit which meant the benefits of certain categories of members had to be recalculated. Mr N has now been provided with a transfer value quotation together with an offer of £500 as compensation for the distress and inconvenience he has experienced.

Adjudicator's Opinion

27. Mr N'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:-
28. It is clear from the evidence submitted that the 1998 Rules were enacted without the benefit of a Section 67 certificate and as such the sections that purported to amend and reduce some of the terms retrospectively are invalid. Section 67 of the Pensions Act 1995 (PA95) (as amended) contains restrictions on powers to alter occupational pension schemes. It applies where a power to modify a scheme is exercised to make a change which would, or may, adversely affect members' subsisting rights'.
29. Section 67 defines subsisting rights as any right which the member has earned under the scheme, will accrue in future, or any entitlement to the 'present payment of benefits'. And, in the case of survivors, any entitlement or right to future benefits.
30. The question that arises, therefore, is whether the lack of a Section 67 certificate makes the whole of the 1998 Rules void and invalid. The Adjudicator reviewed the arguments put forward by the Trustees and the various legal cases that had been suggested as setting a legal precedent. The Adjudicator thought that there was a great deal of merit in the argument put forward in respect of the Besttrustees case as outlined above. The Adjudicator considered the question raised by Mr Justice Neuberger as to what the Trustees would have done if they had been told that they could not retrospectively reduce the benefits. The Adjudicator considered, on the balance of probabilities, that the Trustees would have continued with the

retrospective improvements in benefits and the prospective reduction in benefits, as this is the practice now being followed by the Trustees.

31. The Adjudicator also considered that it was reasonable for the Trustee to continue to administer the Plan as if the 1998 Rules are valid in respect of the retrospective improvements and the prospective reductions in benefits. Thus, it is reasonable for Mr N's pensionable service from 10 December 1998 to be calculated on a basic salary basis.
32. The Adjudicator considered that the Trustees had explained the reason for the late issue of the transfer value quotation and whilst it is understandable that the benefit review/audit took some time it still amounts to maladministration. The Trustees had offered some compensation for this delay which is in line with our guidelines. The Adjudicator did not consider that any higher amount was warranted and if Mr N wishes to take up this offer he should contact the Trustees direct.
33. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments, some of which are points of clarification 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 Mr N for completeness.
34. Mr N says he raised a query with the Plan Lawyers in October 2013 as a result of a query from a member regarding the salary basis that was being used to calculate their Pensions Underpin. Up until this point, it had been accepted practice by all involved with the Plan that if a member had joined the Plan after 1 June 1993, their Pensionable Salary and therefore Pensions Underpin could only be based on Basic Salary as indicated in each set of Trust Deed and Rules from the 1998 Rules onwards. This was how the Plan was administered and he was not aware of any advice received by the Trustees that challenged this accepted approach. Indeed the Benefits Audit commissioned by the Trustees in 2012 confirmed this understanding. He was therefore surprised to see the wording in the Opinion which suggests that this issue was known earlier, which he does not believe to be the case. Mr N can see that this misleading wording is taken from the response by the Trustees dated 6 September 2017 which he had not been given sight of previously.
35. Mr N had looked again at the relevant Trust Deed and Rules and realised that the first time there was any mention of the restriction of Pensionable Salary to Basic Salary was the 1998 Rules and thus this was a retrospective change that had the effect of reducing accrued benefits. Therefore, he queried with the Plan Lawyers whether the Trustees had been administering the Plan incorrectly for affected members. Given that additionally the validity of the 1998 Rules was in question, he queried whether this change should in fact apply from the date of the 1998 Rules rather than June 1993 or in fact from the date of the first set of Rules which did not have questionable validity, that is from 2004. This matter was still being reviewed by the Plan Lawyers when he left Oracle in December 2013 and as a result of leaving he had no viable option to continue as a Trustee.

36. Mr N says that in raising the complaint he was looking for assurance that retrospective adjustments were being made for all members whose benefits had been incorrectly calculated (including both current and past members and those who had transferred out of the Plan). This was for service up to December 1998 which was subsequently accepted by the Trustees in February 2015 (some 16 months after he raised the query) and also for service up to 2004 which was the date that he felt the changes should apply from. He has not received any confirmation that this correction for service up to December 1998 has been applied to all current and past affected members and for those members who had already transferred out their benefits.
37. Mr N does not agree with paragraph 11 above. Whilst he was a Trustee, the practice was to accept that the validity of the 1998 Rules was questionable and therefore only apply any changes introduced by the 1998 Rules that had the effect or potential to enhance member benefits. The only such significant change he can recall was applying the extension of the definition of Final Pensionable Salary to use the last 12 months pensionable salary. This was applied with the agreement of the sponsoring employer. However, despite this agreed approach, nobody recognised that the Trustees should question the change of basis for Pensionable Salary from June 1993 that the 1998 Rules introduced, until he raised the query in 2013. Mr N believes that it is only as a result of the review carried out after his query was raised that led to the Trustees taking the position indicated in this paragraph.
38. Mr N does not agree with the contents of paragraph 13 above and believes this is an important point as the approach taken by the Trustees was not on the basis that the 1998 Rules were fully valid, but rather that any changes introduced by them which had the effect or potential of increasing member benefits should be applied given the questionable validity.
39. Mr N does not agree with the contents of paragraph 17 above and that there appears to be an erroneous assumption that he based his statement below on the document from Eversheds:

“The clear legal advice given to the Trustees, whilst I was involved with the Plan, was that the 1998 Rules were "invalid in their entirety". However, where the 1998 Rules had the effect of increasing member benefits prospectively, it was advised that these specific changes should be implemented.”

It is therefore claimed that he is taking this advice out of context. However, his statement was based on an email from the Trustees' lawyers in March 2012 which said, “In terms of your question about the 1998 Rules, whilst we have previously advised that they are invalid in their entirety (due to a lack of a s.67 certificate), we have also noted that all parties have worked on the assumption that they were valid.” This email gave advice on how prospective improvements in benefits as included in the 1998 Rules should be applied.

40. Mr N acknowledges that the points he has raised above may not materially affect the opinion, but felt that it was important that relevant wording is modified to reflect the actual situation more accurately.

Ombudsman's decision

41. Mr N has raised a number of points of clarification regarding the Adjudicator's opinion and the information obtained from the respondents. I can understand Mr N's concern that the reasons for his complaint are understood, however, I am satisfied that the complaint should not be upheld.
42. The Trustees received advice that 'benefits continue to be administered as if the 1998 and 2003 Deeds were valid to the extent that the 1998 Rules did not, in fact, detrimentally affect members' accrued rights'. I am satisfied that following the decision of 2 February 2015, it was reasonable for the Trustees to administer the Plan on the basis that the detrimental changes intended to be introduced by the 1998 Rules were to have prospective effect only. Thus, I am satisfied that it is reasonable for them to calculate Mr N's pensionable service from 10 December 1998 on a basic salary basis.
43. Mr N has also said that in raising the complaint he was looking for assurance that retrospective adjustments were being made for all members whose benefits had been incorrectly calculated (including both current and past members and those who had transferred out of the Plan). The Trustees have said that they have taken advice on appropriate actions to identify and rectify members affected by the issue. I would expect the Trustees to take such action and I have no reason to doubt that this action is being taken.
44. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
18 July 2018