

## Ombudsman's Determination

Applicant	Mr N
Scheme	EDS Retirement Plan ( <b>the Plan</b> )
Respondent	EDS Trustee Limited ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Mr N'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 N's complaint is that he has received incorrect increases to his pension since it was put into payment. Mr N interprets the Plan Rules to mean that his pension should receive the higher of 5% or the increase in the Retail Prices Index (**RPI**) per annum. However, the Trustee interprets the Plan Rules to mean that Mr N should receive the lower of 5% or the increase in RPI per annum, and this is what Mr N has been receiving.

## Background information, including submissions from the parties

4. On 1 March 2001, Mr N was one of a group of staff who transferred to Electronic Data Systems, the Plan's principle employer, from Royal Bank of Scotland (**RBS**). Mr N became a member of the Plan which included transferring his RBS pension benefits and he became a "Transferring RBS Member". In addition, Mr N held accrued benefits from the National Westminster Bank Pension Fund (**the NatWest Fund**) which were also transferred to the Plan.
5. On 31 May 2002, Mr N retired from the Plan.
6. In 2016, Mr N began making enquiries about the increases he was entitled to, following which, in early 2017, the Plan administrator supplied Mr N with a link to access the Trust Deed and Rules dated 28 June 2011 (**the 2011 Rules**). The wording of Rule 10.1.1 and Appendix 4 within the 2011 Rules relating to increases caused Mr N to question the increases he was receiving.

7. On 3 April 2017, Mr N raised his complaint under the Plan's two stage internal dispute resolution procedure (**IDRP**). Mr N complained that the wording of Appendix 4 within the 2011 Rules meant he should have been receiving a minimum annual increase of 5% but that he had not been receiving this. Appendix 4 states "...increases at a rate by reference to the percentage increase in the Retail Prices Index during the previous twelve months, or if it is less, 5% shall apply..."
8. The Trustee did not uphold Mr N's complaint at either IDRP stage. At stage two it stated that the applicable rules were the 2002 Rules, not the 2011 Rules, and that Rules 21(1)(ii) and 45(6) meant that his pension was subject to an increase of the lesser of RPI or 5% each year. It said that if you look at the 2002 Rules in the context of the wider background information that was available at the time, and the meaning of the words themselves, the Trustee's position was correct. The Trustee also said that Mr N had been issued with a number of documents confirming the correct position.
9. Mr N disagreed with the Trustee and brought his complaint to this office.

### **Applicable Rules**

10. The Trustee has confirmed that Mr N's benefits are subject to the Trust Deed and Rules dated 11 June 2002 (**the 2002 Rules**). The applicable sections are set out below: -

#### **"Pension Increases**

21(1) All pensions in course of payment shall be reviewed annually on each 1 April (or on such other date each year as the Trustee shall determine from time to time) and shall be increased annually on a compound basis. The rate shall be:

- (i) Before 6 April 1997 such rate as the Trustee in conjunction with the Company may determine for each year not being less than 3 per cent, and
- (ii) After 5 April 1997 by the percentage increase in the Index during the previous twelve months, or if it is less, 5 per cent

..."

"45(6) Rule 21 is qualified to the following extent. The provision as detailed in sub-Rule 21(1)(i) shall not apply to a Transferring RBS Member. In respect of such a Member the provision as in sub-Rule 21(1)(ii) shall apply to all the pension of the Member, subject to the exclusions concerning voluntary contributions, pension payable under Rule 9 and pension conferred as a result of a transfer of assets pursuant to Rule 17, as detailed in Rule 21.

Accordingly, all such pension of the Member shall increase at a rate by

reference to the percentage increase in the Index during the previous twelve month [sic], or if it is less, 5%.

...”

## **Adjudicator’s Opinion**

11. Mr N’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 the Pensions Ombudsman considers a complaint, he will look at whether the rules and legislation have been correctly applied by the Trustee. Deciding whether there has been an error of law or maladministration in the way that the Trustee has approached the pension entitlement. If an error has occurred the Ombudsman can direct that the Mr N is put back into the correct position under the rules, however the Ombudsman cannot make directions to award more than the member is entitled to under the rules unless there is a legal reason to do so.
- This complaint concerns the interpretation of the rules regarding pension increases in payment. Mr N believes that the rules entitle him to a minimum increase of 5% or RPI if it is higher. The Trustee maintains that the rules provide for increases in line with RPI up to a maximum of 5% pa.
- The courts have developed a number of presumptions and rules to assist both in the interpretation and construction of written instruments such as legislation, or in this case pension scheme rules. The Adjudicator looked at the construction of the Plan Rules in line with this.
- The intentions, when writing the rules, are found by giving words their ordinary and natural meaning in context; that is, words should be given their common or ordinary meaning as they apply generally, within the context of the facts and circumstances known or assumed by the parties at the time the document was written. The interpretation that provided the most commercial common sense will also be favoured where there is more than one possible meaning.
- If this approach produces an absurd result, or one which is inconsistent with the rest of the instrument, the court will modify the grammatical and ordinary sense of a word, but only so far as is necessary to avoid the absurdity or inconsistency. If these approaches do not help, the court may consider the rationale behind the instrument for assistance in interpreting it, including looking at the law as it was before the instrument was enacted.
- On a simple reading of Rule 21(1), as qualified by Rule 45(6), the Adjudicator disagreed with Mr N’s position. The rule states “the percentage increase in the Index during the previous twelve months, or if it is less, 5 per cent”. The Adjudicator agreed with the Trustee that “or if it is less” refers to the 5%. Meaning

that if the increase in RPI is greater than 5%, the increase will be 5%, whereas if the increase in RPI is less than 5%, RPI will be used. The Adjudicator said that she could not see that giving the rule its plain and ordinary meaning led to an absurd result.

- This interpretation is consistent with the statutory position which is set out in Section 51-55 of the Pension Act 1995 as amended with effect from 6 April 1997 which covers indexation. Requiring occupational schemes to provide Limited Price Indexation for pensions in payment, which is the lower of RPI or 5%.
  - Following this, it is the Adjudicators view that the correct interpretation of the rules entitles Mr N to receive the lower of RPI or 5% per annum increases in payment. Which means that Mr N has been receiving the correct pension increases to date and therefore, he has suffered no financial loss.
  - In addition, the evidence available suggests that Mr N has consistently been informed of the correct increases applicable to his benefits. Therefore, Mr N has not suffered a loss of expectation.
12. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his 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 Mr N for completeness.

### **Ombudsman's decision**

13. Mr N disagrees that the 2002 Rules are applicable to his benefits. He says that the 2002 Rules dated 11 June 2002, are after his date of leaving pensionable employment and retirement date of 31 May 2002. Mr N claims that either the previous rules, dated 3 December 1999 (**the 1999 Rules**) should apply, or if it is correct that his pension should be subject to a set of rules dated subsequent to his retirement date, then it must be the most current set of rules, being the 2011 Rules.
14. The Trustee agrees that, at the point Mr N left pensionable employment the 1999 Rules were applicable to his benefits. However, it has also provided evidence that the 1999 Rules made no provision for his RBS transfer and were replaced in their entirety by the 2002 Rules, as clause 1(b) of the 2002 Rules sets out. Therefore, the 2002 Rules replaced the 1999 Rules and became applicable to Mr N's benefits.
15. The subsequent Rules, dated 5 March 2004 and 28 June 2011, include a clause confirming that for those members that retired, left pensionable service or died prior to the prescribed or effective date of those subsequent rules, shall be subject to the governing rules in effect prior to the prescribed or effective date. The prescribed and effective dates of the subsequent rules are after 31 May 2002 when Mr N left pensionable employment and retired, which means that none of the subsequent rules replace the 2002 Rules. Therefore, I am satisfied that the rules applicable to Mr N's benefits are the 2002 Rules.

16. I note Mr N's comment that no further transfers from RBS have taken place yet the 2011 Rules include an appendix applicable to RBS members. I can understand why this could lead him to believe that this means the 2011 Rules apply to his benefits. However, as set out above the applicable rules for a particular member depend upon when that member left pensionable employment, retired or died, as well as the clauses in the different sets of rules which determine whether those rules replace previous rules in their entirety or only apply to those who have not left pensionable employment, retired or died. If there continue to be members of the Plan who are transferring RBS members but have not left pensionable employment, retired or died then it is necessary to include rules applicable to them in any revision of the rules as the Trustee has done.
17. Mr N also disagrees with the Adjudicator's interpretation of the Plan Rules, maintaining his position that the correct interpretation is a minimum 5% increase per annum is payable. He has said that if it was intended to be the maximum "then the wording used within rule 10.1.1.b of the 2011 rule would have been utilised in appendix 4 where it states to a maximum of 5%, alleviating any misunderstanding of the true meaning of the wording."
18. I have considered the wording of Rule 21(1) of the 2002 Rules, as qualified by Rule 45(6) and I agree with the interpretation that the Trustee and Adjudicator have taken. In this consideration I have looked at the Rule in its ordinary meaning, as well as taking into account the context of the facts and circumstances known or assumed by the parties at the time the document was written. As explained by the Adjudicator, at the time the 2002 Rules were written the statutory requirement for increases in payment was set out in Section 51-55 of the Pension Act 1995, as amended with effect from 6 April 1997, providing the lower of RPI and 5% per annum for pensions in payment, known as Limited Price Indexation.
19. I am satisfied that Trustee has correctly interpreted and applied the 2002 Rules and that Mr N has been receiving the correct increases in payment since his retirement date.
20. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**

Pensions Ombudsman  
26 April 2018