

## Ombudsman's Determination

Applicant	Mr S
Scheme	Balfour Beatty Pension Fund ( <b>the BBPF</b> )
Respondent	Trustee of the Balfour Beatty Pension Fund ( <b>the Trustee</b> )

## 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 is explained in more detail below.

## Complaint summary

3. Mr S disagrees with the Trustee's decision that his benefits should be payable, unreduced, from age 60 in respect of his service in the executive section of the BBPF Birse Section but from age 65 with regard to his service in the BBPF Birse Section. He is claiming that information he received from the BBPF, since he joined the executive section in 1994, indicated that his normal retirement age (**NRA**) for all of his scheme membership was at age 60.

## Background information, including submissions from the parties

4. Mr S joined the Birse Group Retirement Benefit Scheme (**the Birse Scheme**) on 14 December 1981. On 12 February 1994, he joined the senior executive section of this scheme until he became a deferred member in April 2001. At the time Mr S became an executive member, he received correspondence that indicated the NRA was age 60 and benefits could be taken unreduced from that point. Therefore, he says he was under the impression that any necessary decision or augmentation to allow for this had already been made in his favour by the Birse trustees.
5. When he became a deferred member in 2001, Mr S was provided with a leavers statement showing an NRA of 60 and no indication of a reduction to his benefits.
6. In 2006, Mr S requested a cash equivalent transfer value (**CETV**), which he received. Again, it stated a single NRA at age 60.
7. In April 2007, the Birse Scheme merged with the BBPF. Emails provided by the Trustee from this time (12 February 2007) mentioning executive members stated:

“note that benefits in the Senior Executive category may not apply from the date of joining the scheme so it will be important for Jackson King to provide full data for these people.... are there any members who have benefits which are not in accordance with these documented terms?”. A spreadsheet of affected members was provided, but the Trustee submit that they no longer have a copy of it. However, the information in it was used to set members up on the BBPF administration system.

8. In relation to members of the Birse section who were executive members, the relevant scheme rules are shown in the Appendix. In summary, these state that executive members of the BBPF have a NRA of 60. However, for service before a member became a senior member will be calculated on a basis determined by the Trustee.
9. In 2008, Mr S requested another CETV. His independent financial advisor (**IFA**) received a letter and transfer pack dated 30 July 2008. Within this pack, under Section F, it stated that a deferred pension is payable from age 65. Mr S states that the reference to this later retirement date was buried within this one section and therefore he could not have reasonably been able to identify it.
10. In a letter to the BBPF dated 28 October 2015, the IFA mentioned a letter to Mr S from the scheme dated 14 November 2013. According to the IFA, this letter showed an NRA of 65, which he was now querying on behalf of Mr S. Mr S states that the letter was not detailed enough to identify an issue at that point, nor was he well enough to take the matter up with the Trustee until 2015. Mr S also states that it was not until he received a retirement quotation in 2015 that he became aware of the two different retirement dates which would apply in the calculation of his benefits.
11. Following his dispute with the Trustee, Mr S raised a complaint under the BBPF's internal dispute resolution procedure (**IDRP**). The Trustee provided a response on 20 June 2017. The IDR accepted that the information Mr S had received was unclear and failed to explain the difference between his two periods of service. However, the Trustee relied on the BBPF rules which stated that the Trustee could determine the calculation of non-senior member service. The Trustee had determined that for all applicable members, the NRA would remain at 65 for non-executive members and that there would be significant costs to the scheme to do otherwise. The Trustee also made an offer of £750 to recognise the distress caused to Mr S by the provision of incorrect information.
12. Mr S was unhappy with the response and wrote to the Trustee on 29 June 2017. He declined the offer of £750 and argued that the scheme rules give no clear indication of how the Trustee should treat non-executive membership. He did not feel that the Trustee's argument in relation to cost should be relevant, in that he is entitled to his full benefits from age 60, as evidenced by the information he had received since 1994. He asked that the Trustee reconsider its decision using the powers in Rule S21.29(d).

13. The Trustee responded on 19 July 2017. The Trustee again agreed that the information Mr S had been provided with in the past was incorrect. However, its view remained unchanged as the Trustee had determined that any non-executive membership had a NRA of 65 and that this would continue to be applied to his benefits.
14. Mr S remained unhappy with the response and made an application to this office.
15. As part of the investigation, the Trustee was asked to comment on whether it had exercised a discretion in relation to the retirement dates being applied to Mr S. The Trustee replied on 21 March 2018 and provided background as to the merger into the BBPF of the Birse Scheme. The Trustee said:

“Under the terms of the merger deed, the trustee of the BBPF agreed to provide members with the same benefits as they had under the Birse scheme.

As part of the due diligence process prior to the scheme merger, BBPF advisers discussed the Birse senior members with the advisers to the Birse scheme. Our understanding based on the discussions was that, where members had both senior and non-senior Birse benefits, the non-senior benefits retained their normal retirement date (NRD) of 65.

This would seem to be the logical approach in any event. The benefit structures for senior and non-senior benefits are different, with different NRDs and different accrual rates. Moving from one tier to the other should not automatically affect the benefits built up before the move...

So, essentially, the decision was made at the time of the merger to continue to calculate benefits for Birse members in the same way as under the Birse scheme, and this is reflected in the merger deed.”

16. The Trustee also stated that it would consider exercising its discretion, but only if the Trustee was directed to do so by this office. However, the Trustee did have concerns, should this be the case, that Mr S would be in a better situation than other scheme members and the funding strain this would put on the scheme.
17. Mr S was asked for his comments in relation to the Trustee’s position. He says that he met with a former Birse director whose recollection was that the intention of the company was to:

“...fund enhancement of my standard section benefits to provide a single NRD of 60 for both standard and senior section entitlement. He also discussed the matter with a previous senior HPA colleague, who, although not having direct knowledge of my particular situation, has confirmed that the principle of the company funding enhancements to standard section benefits to bring them in line with senior section NRD’s was an established one.”

18. Following this, the Adjudicator decided to expand the complaint to look at whether the former trustees exercised a discretion in Mr S' favour and, if he was able to provide evidence of this, that the Trustee had changed the original decision which meant that his scheme membership had two separate NRAs.
19. The Trustee replied on 9 May, 14 June and 13 September 2018, reiterating its letter of 21 March 2018, (that it did not agree that a discretion had been exercised in Mr S' favour and, as part of the due diligence process, this was discussed and agreed prior to the schemes' merger). The Trustee said it was willing to consider any evidence Mr S had to the contrary, but also noted that the cost of paying Mr S benefits from age 60 had been estimated by the scheme actuary to be approximately £250,000.
20. Mr S submitted that his annual statements were evidence, as well as a statement from a senior manager of the former Birse Scheme administrators (who is also his IFA). In essence, the IFA stated that it was his recollection that it was the former trustees' intention that on becoming an executive member, all of Mr S' benefits would be payable from age 60. He believes that the information provided to Mr S since 1994 supports this decision.
21. Following this, the Trustee sought legal advice on Mr S' further evidence and submitted the following:

“At the time of the scheme merger in 2007, the Balfour Beatty Pensions Centre and the BBPF advisers, Willis Towers Watson, went through a due diligence process with the Birse scheme and its advisers. This included working with AON Hewitt (actuaries to the Birse Scheme) ... (trustee of the Birse scheme and also Birse payroll manager) and Jackson King (administrators to the Birse scheme).

In view of the time that has elapsed, we have limited documentary evidence relating to that due diligence process, although we have managed to find one email chain of relevance ... As you will see, this shows that questions were asked about the senior members' entitlement, and details/spreadsheets provided. It also includes a statement from the Birse scheme actuary that benefits in the senior category may not apply from the date of joining the scheme. This supports our view that under the Birse scheme, if a member had benefits relating to the period before his promotion to the senior category, those benefits were treated differently.

Unfortunately, we have not been able to find the emails that followed, or the spreadsheets themselves. However, we used the data provided during the due diligence process to record the Birse members' entitlement in the BBPF. For example, we attach a copy of Mr S' member record as at 2008, which records a retirement date of 4 September 2022 (his 65<sup>th</sup> birthday). This would have been based on information provided to us.

We note the statement provided by ... in support of Mr S. He worked for Jackson King, the former administrators of the Birse scheme. He is also Mr S' financial adviser. He says that it is his understanding that Mr S' non-senior benefits were

enhanced to be payable from age 60, with the cost of that enhancement being met by the company. We note his comments but can only reiterate that our administration of the Birse section is based on the information given to us at the time of the merger by the advisers to the Birse scheme, including Jackson King.

We do not doubt ... integrity, but it may be that he had misunderstood the position, and in turn potentially led Mr S to misunderstand his benefit entitlement. If Mr S' benefits had been enhanced as ... claims, one would expect there to be clear records of the enhancement. The absence of such records indicates there was no enhancement and that ... is mistaken in his view."

## Adjudicator's Opinion

22. Mr 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 below:-

- The Trustee agrees that Mr S was provided with incorrect information and therefore the Adjudicator considered whether Mr S had relied on the negligent misstatement to his detriment. Her opinion was that Mr S was now being provided with the correct information regarding his benefits, which were in accordance with the relevant scheme rules. There was no evidence submitted that Mr S had relied on the misinformation to his detriment (in that he had not made any financial commitments based on a retirement age of 60); or that he could show he had mitigated any perceived losses. Finally, there was an argument that he ought to have known the correct position based on the 2008 transfer pack and the 2013 letter, and so perhaps Mr S ought to have been aware that the information he was receiving was incorrect.
- The Adjudicator was not, in her view, satisfied that the evidence submitted by Mr S showed that there was a decision by the previous trustees to augment his benefits in 1994, or at the time of the merger with BBPF. There was no evidence to show that additional funding had been put aside to pay for such an augmentation. While it may have been the original trustees' intention, there was, in her opinion, no evidence to support this, beside anecdotal statements.
- The Trustee had previously offered Mr S £750 to recognise the non-financial loss in providing incorrect information. The Adjudicator felt that, as this was above the amount the Ombudsman would normally award (£500 in respect of significant distress and maladministration), that if Mr S was interested in accepting the offer he should contact the Trustee directly.

23. Mr S did not agree with the Adjudicator's Opinion in relation to the complaint concerning augmentation of his benefits and submitted, in summary:-

- He says the Trustee has stated the issue was discussed but it has failed to provide documentary supporting evidence of this. He reiterated previous points raised during the investigation.
- He says he spoke to former managers of Jackson King (the former administrators of the Birse Scheme) who remember that the original intention was that all senior members of the scheme should have an NRA of 60 for all of service, both before and after becoming members of the senior management section of the scheme. In relation to the email of 12 February 2007, Mr S submits that he received the following explanation from the former administrator:

“In some cases, the pre-Executive service accruals were enhanced from 1/60<sup>th</sup> to 1/30<sup>th</sup>, whilst in other cases they were not, but in all cases the Trustee decided that the NRA of the Executive scheme would apply to the full accrued benefits. Prior to the scheme administration being handed over the Balfour Beatty EM dealt personally with a number of retirements of Executive members and that Trustee decision was consistently applied. EM is certain there were no cases where Executive scheme members had dual NRAs.”

- As previously submitted as part of the investigation, Mr S relies on the statements he has received, together with a statement from the previous scheme administrators, as evidence that his NRA for all service is age 60.

24. The Trustee was asked to comment further on Mr S’ response to the Opinion, in particular the points that he raised regarding the interpretation of the email of 12 February 2007:

“As previously explained, when the Birse scheme merged into the Balfour Beatty Pension Fund (BBPF) in 2007, we went through a due diligence process. As we were taking the Birse administration in-house following the merger, this process was extensive, and very thorough. We worked closely with various individuals at Jackson King (the Birse administrators)...We also worked with ... (the Birse senior payroll manager and one of the Birse trustees), and the Birse scheme actuaries, Hewitts.

We used the information provided during this due diligence process to set up the Birse scheme members on the BBPF’s administration system. We also had specific, separate, discussions with Jackson King about the calculation of benefits for members who had both executive and non-executive service, the first time we were required to calculate benefits for a member in this category. Based on the due diligence process and these additional discussions, we have treated all members with executive and non-executive service, including Mr S, as having dual NRAs.

We understand from Mr S’ response that ... has recently told him that executive members do not have dual NRAs. Mr S has also stated that we have failed to provide any documentary evidence to support our understanding of how his benefits

are calculated. We can only reiterate that we set up our member records based on information given to us by the Birse trustees and their advisers (including Jackson King and ...), at the time of the merger and shortly afterwards. Based on that, we believe that members in Mr S' position do have dual NRAs. This would appear to be the logical way to calculate their benefits in any event. The executive and non-executive benefits are calculated differently under the rules, both in terms of accrual rate and the NRA. There is no obvious reason why moving from non-executive to executive status should change the way in which the non-executive benefits are calculated.

Mr S has suggested that the records of pre-merger retirements should confirm how benefits were calculated in the Birse scheme. There are very few Birse members with executive service, and even fewer who have both executive and non-executive service. Unfortunately, despite checking, we have not been able to identify any members in this category who retired before the merger.

Crucially, the BBPF trustee believes that, if Mr S' non-executive benefits had been uplifted to give him a retirement age of 60, there would be clear documentary evidence to support this. This would have been a significant decision by Birse and/or the Birse trustees. Mr S joined the Birse scheme on 14 December 1981 but was not promoted to the executive category until 12 February 1994. Reducing the NRA for his 1981-1994 benefits would have been a substantial uplift, with cost implications for the scheme and its sponsoring employer. Willis Towers Watson, the actuaries to the BBPF, have estimated the current cost of this to be around £250,000. If such a decision was made in 1994, we would expect there to be specific evidence of it.

The Trustee's position is that Mr S is entitled to benefits calculated in accordance with the rules of the BBPF. The relevant rule (Rule S21.29 of the Birse section) says that, where a Birse executive member has benefits relating to a period of service prior to becoming an executive member, those benefits are calculated on such a basis as is determined by the trustee. In June 2018, the trustee did, at your request, consider exercising its discretion under Rule S21.29 to augment Mr S' benefits, so his non-executive benefits are payable in full from age 60. However, the trustee decided not to augment his benefits in this way, for the reasons explained to you in our letter of 14 June 2018. The trustee therefore concluded that his executive and non executive benefits should continue to be calculated separately.

Our position therefore remains that Mr S' non-executive benefits have an NRA of 65, and he has (regrettably) been provided with incorrect information by the administrators of the Birse scheme. However, the fact that he has been provided with incorrect information does not in itself mean that he is entitled to a higher level of benefits from the BBPF. We have offered him an ex gratia payment, which we believe is suitable compensation for his distress and inconvenience."

25. As Mr S did not accept the Adjudicator's Opinion, the complaint has been passed to me to consider. Mr S has 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 S for completeness.

### **Ombudsman's decision**

26. Mr S is correct that there is no specific documentation provided by the Trustee which prove, categorically, that he has an NRA of 65 for his non-executive period of service. But this absence does not automatically mean that Mr S is correct in his interpretation. There is other evidence which, on the balance of probabilities, can be relied on to show the opposite.
27. If, as Mr S claims, it was the intention of the previous trustees to augment his benefits in the way he is suggesting, then I would expect there to be documentation kept by the Trustee to show where the funds had come from to do this and to whom those additional funds were to be allocated to. As there is no evidence of this, either when Mr S entered the executive section in 1994 or when the Birse Scheme transferred, it is more likely than not that neither the former or the current trustees intended to augment Mr S' benefits. This is also reflected in the BBPF rules. Any such funding would be expected to be paid at retirement and the cost of such an augmentation might change in the intervening period. Any such shortfall would be a risk for the Trustee and the sponsoring employer and it would be unusual for such funding to have been provided without documentation to support it. Besides the leavers statement and CETV, Mr S cannot show that there is any reference to a dual NRA of 60, either in any guarantees from the previous trustees or the support of the BBPF Rules.
28. It is clear that Mr S was provided with incorrect information in relation to his NRA and this is accepted by the Trustee. This is clearly maladministration. However, I agree with the Adjudicator that Mr S has not been able to show that he relied on the negligent misstatement to his detriment. The provision of incorrect information does not give the member an automatic right to those benefits; they are only entitled to the benefits as defined by the scheme rules. The Trustee has now provided Mr S with details of his correct entitlement, as provided for under the appropriate BBPF Rules, and Mr S is entitled to his executive benefits from age 60 and his non-executive benefits from age 65.
29. However, the provision of the misinformation has caused Mr S some distress and inconvenience. Having said this, for me to uphold Mr S' complaint, I would have to find that he has suffered injustice for which no appropriate redress has been offered. The Trustee has offered Mr S £750 in recognition of the distress and inconvenience caused to him. I find this to be an appropriate offer in the circumstances and that further directions from me are unnecessary.



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30. Therefore, I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
26 March 2019

## Appendix

### BBFP Rules (Schedule 21 – Birse Section)

#### S21.29 Senior Members

The provisions of this Birse Section apply to Senior Members, subject to the following modifications:

- (a) the Normal Retirement Date of a Senior Member shall be his 60<sup>th</sup> birthday;
- (b) each Senior Member shall pay contributions to the Fund at the rate of 8% of his Contribution Earnings;
- (c) subject always to the Maximum Benefit, where a Senior Member retires from the employment of the Company at Normal Retirement Date, his pension shall be calculated as follows:
  - (i) in respect of Pensionable Service completed as a Senior Manager on or after 1 October 2005, one thirtieth of his Career Averaged Revalued Earnings for each year of Pensionable Service; and
  - (ii) in respect of Pension Service prior to 1 October 2005, either:
    - (A) If the Senior Member was in Pensionable Service as a senior member in the Birse Scheme on 24 November 1989, one thirtieth of his Pensionable Earnings for each year of Pensionable Service;
    - (B) If the Senior Member was not in Pensionable Service as a senior member in the Birse Scheme on 24 November 1989, one thirtieth of his Pensionable Earnings for each year of Pensionable Service completed as a Senior Member after 24 November 1989 and before 1 October 2005,

Provided that benefits payable in respect of Pensionable Service in the Birse Scheme completed before 6 April 1999 will be no worse than those benefits would have been, had they been calculated immediately before 3 April 1999 on the basis of the Member's Historic FPS immediately before 3 April 1999 and subject to the HMRC limits that applied at the time;

- (d) any service in respect of which benefits are calculated under the terms of this Rule S21.29 will not also be counted as Pensionable Service for the purposes of any other part of this Birse Section. However, some Senior Members have benefits relating to their period of Pensionable Service prior to becoming a Senior Member. These benefits shall be calculated on such basis as is determined by the Trustees;
- (e) the benefits payable to and in respect of a Senior Member shall, where relevant, be calculated having regard to the principles set out in this Rule S21.29.