

Ombudsman's Determination

Applicant	Mr N
Scheme	Railways Pension Scheme (the Scheme)
Respondent	Railways Pension Trustee Company Limited (the Trustee)

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 is unhappy that he has not received his Railways Pension Scheme 1994 Pensioner Section (**RPS**) benefits in line with the preferential, Schedule 8 terms. He has also complained about the lack of information that was provided when the Trustee wrote to him to discuss the possibility of amalgamating his former RPS rights.
4. Between 1979 and 1995 Mr N worked for British Rail. During this period, he accrued just over 15 years pensionable service with the RPS. In 1995, Mr N was made redundant by British Rail.
5. In 2002, Mr N joined Network Rail and became a member of the Railways Pension Scheme Network Rail Section (**NRS**).
6. On 21 October 2002, the Trustee wrote to Mr N about transferring his RPS benefits into the NRS. Mr N did not transfer his benefits because the predicted figures for the combined benefits were less than the prediction for keeping them separate.
7. Mr N was made redundant in 2014. Rule 11A of both the RPS and NRS (see Appendix) allow Members to receive benefits prior to their Normal Pension Age (**NPA**), but not earlier than Normal Minimum Retirement Age (**NMRA**). In 2014 the NMRA was 55; however, Mr N's NMRA was protected at 50. Because Mr N relied on his protected NMRA the payment of his benefits was also subject to Paragraph 22(7)(a) and 23(7) of Schedule 36 the Finance Act 2004 (see Appendix) which stipulates that all benefits in a scheme must be paid at the same time.

8. Under the rules of the RPS and NRS, a member who retires early shall be subject to a reduction for early payment of their retirement benefits. However, there are two possible bases for calculating the reduction, on 'such basis as is determined by the Trustee having considered the advice of the Actuary' or 'Schedule 8' terms. Schedule 8 terms provide better retirement factors when calculating early retirement than would otherwise be the case.
9. Rule 11A of the NRS says that Members are eligible to take benefits with Schedule 8 terms if they elect to receive their benefits immediately upon leaving pensionable service. Otherwise, the agreement of the Trustee would be required for Schedule 8 terms to be applied. With this in mind, Mr N elected to receive his benefits immediately.
10. On 8 January 2015, Mr N received confirmation that his NRS benefits would be calculated with Schedule 8 terms. However, he was told that he needed to apply to the Trustee to get his preserved RPS benefits put into payment and invited to submit supporting information in respect of his application to receive them on Schedule 8 terms. It was at this point that Mr N was told that benefits from both sections of the Scheme needed to be paid together.
11. On 12 January 2015, Mr N wrote to the Trustee and applied for his RPS benefits to be calculated with Schedule 8 terms. The Trustee declined and paid the RPS benefits on a cost neutral basis.
12. On 8 November 2015, Mr N acknowledged that he was physically and mentally capable of work, but he had been unable to secure employment for a "significant period".
13. A series of correspondence followed and, on 10 September 2016, Mr N appealed the Trustee's decision to pay his RPS benefits on cost neutral terms. Mr N felt that his RPS benefits should be paid on preferential terms because: -
 - In order to take his NRS benefits using Schedule 8 terms, without requiring Trustee consent, he had to take his benefits immediately. He also had to take his RPS benefits at the same time. Mr N contends that this forced him to take his RPS benefits at a reduced rate.
 - He did not leave Network Rail voluntarily, he left due to compulsory redundancy. Because Mr N was under his NPA, he has been forced to retire with reductions to his Scheme benefits.
 - His entitlement to Schedule 8 terms was not assessed correctly.
14. The Trustee instructed a Committee to consider Mr N's appeal. On 22 May 2017, the Trustee wrote to Mr N to decline early payment of his RPS benefits using preferential reduction factors. The Committee commented that it did not feel Mr N's circumstances were exceptional.

15. On 30 June 2017, the Trustee wrote to Mr N regarding his RPS benefits. The letter stated that had Mr N's RPS benefits been paid on the Schedule 8 factors his lump sum would have been £58,921.67 instead of £49,108.11. His annual pension would have been £8,838.25 rather than £7,366.19.
16. On 29 September 2017, Mr N, through his solicitor, raised some further complaint points. Mr N said that the transfer option information supplied by the Trustee on 21 October 2002 was incomplete. Mr N said that, had he been provided with the full information, he would have transferred his RPS benefits into the NRS. His solicitor also sought to draw attention to *Scally v Southern Health and Social Services Board (Scally)* and the Deputy Pension Ombudsman's determination in the case PO-1334.
17. On 3 January 2018, the Trustee responded to Mr N's complaint. It said that it had received legal advice that stated that each application must be considered on its own merits, but it had to temper this with the, "issues and circumstances of the Section as a whole." The Trustee clarified it would continue to apply cost neutral early retirement factors, unless in cases of exceptional circumstances.
18. Mr N, through his solicitors, wrote to us on 24 January 2018. They said that the legal advice the Committee relied on should be produced as evidence.

Adjudicator's Opinion

19. 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:-
 - Mr N has complained that the Trustee should have informed him that his eligibility for Schedule 8 reduction terms would have been affected by his decision to keep his benefits separate. Mr N contends that if he had been provided with the full information in 2002 he would have amalgamated his benefits. The Adjudicator believed that it was possible Mr N could have profited from keeping his benefits separate, and it is only with hindsight that he can conclude it would have been better to amalgamate them.
 - Mr N also complained that the Trustee should have told him that all benefits from the Scheme needed to be taken together. However, the requirement for all benefits from the Scheme to be taken at once was implied into the Scheme rules in the Finance Act 2004. The Trustee would not have been aware of this at the time it wrote to Mr N with transfer information, so it could not have been expected to advise him of the changes.
 - In 1995, Mr N left the Scheme upon becoming redundant. Because he did not immediately elect to receive benefits upon leaving this pensionable employment, he required Trustee consent in order to receive his preserved RPS benefits under Schedule 8 terms.

- When considering the application, the Trustee explained that, due to a shortfall of assets over liabilities, it would only grant benefits using Schedule 8 terms in exceptional circumstances. As the power to grant Schedule 8 terms is discretionary, the Trustee is able to consider the Scheme's funding position when making a decision. As such, the Adjudicator did not believe the Trustee's decision was perverse.
 - The Trustee said that the Committee considered Mr N's application taking into account his financial circumstances, his capacity to work and any dependents reliant on his income. The Adjudicator felt the Trustee considered all relevant evidence and followed the correct process.
 - Mr N has complained that he did not leave Network Rail voluntarily. He contends that his compulsory redundancy forced him to retire with reductions. The Adjudicator did not agree with this point. Mr N did not need to take his benefits in 2015, he could have kept both sets of benefits within the Scheme until his NPA to receive them in full. The Adjudicator did not think Mr N could rely on the case of Scally as part of his complaint. The Scally case revolved around the contractual duty of employers to properly inform their employees about their rights. Mr N has brought the complaint against the Trustee, who is not his employer, so Scally principles do not apply.
20. 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.
21. Mr N said that he was made compulsorily redundant in 2014. He says that without a job and income he had to apply for his pension immediately on being made redundant. He also complained that the Adjudicator had not explained how the Finance Act 2004 implied a change to the rules.
22. 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

23. Mr N has said that his RPS benefits should be paid using Section 8 terms. I do not agree.
24. Mr N was made redundant in 1995. This put an end to his pensionable employment in the RPS. Rule 11A(1) makes it clear that if a Member does not elect to receive his benefits immediately on leaving Pensionable Service, the agreement of Trustee is required. In 1995, when Mr N left the Scheme, he did not elect to take his benefits. It follows that, when Mr N eventually decided to take his benefits from the RPS, he required the consent of the Trustee to do so. In those circumstances, Rule 11A of the RPS also gives the Trustee a discretion about which reduction basis to apply.

25. My role is to consider whether the decision was reached in a proper manner rather than to substitute my own decision for that of the Trustee. There are some well-established principles which a decision maker is expected to follow in exercising its discretion. Briefly, the decision maker must apply the relevant Rules, must consider and weigh all the relevant matters and no irrelevant ones and must not fetter its discretion. Further, the decision maker must not reach a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
26. The Trustee told Mr N that there was a shortfall of assets over liabilities, so it would only grant benefits using Schedule 8 terms in exceptional circumstances. The Trustee also confirmed that the Committee had considered Mr N's financial circumstances, capacity to work and dependants when reaching its decision.
27. Rule 11A provides the Trustee with a discretion to reduce benefits on such basis as is determined by the Trustee having considered the advice of the Actuary rather than reducing them on the more preferential Schedule 8 terms. Although the Trustee said that preferential terms would only be granted in exceptional circumstances, I do not believe the Trustee fettered its decision. It is clear that Mr N's circumstances were explored thoroughly, ensuring that the decision was made in a proper manner. I am therefore satisfied that the Trustee acted properly when rejecting Mr N's request for his RPS benefits to be paid with Schedule 8 terms.
28. Mr N has also complained that his compulsory redundancy left him without an income, so he was forced into taking his pension benefits. He has said that he was unaware that all benefits prescribed under the Scheme had to be taken at the same time. He contends that this meant that he was forced to retire with reductions to his benefits.
29. I cannot agree with Mr N on this point. Whilst I sympathise with his comment that he had not been able to find further employment, the Trustee did not force him to claim his retirement benefits when he did. He had the option of leaving both benefits unclaimed until his NMPA of 55 or of retiring when he did and taking all of his benefits at once, subject to the provisions of the Rules, including any Trustee discretion about the basis of benefit reduction.
30. Mr N had to take all his benefits under the Scheme on the same day, in accordance with Schedule 36 Paragraph 22(7)(a) and 23(7) of the Finance Act 2004. He could not leave the RPS benefits deferred within the Scheme but that was a situation caused by the operation of a law external to the scheme. It was not one brought about by the Trustee. Moreover, the Trustee would not have been aware of the provisions of the 2004 Act when it wrote to Mr N with the transfer information in 2002. Therefore, the Trustee could not have been expected to advise Mr N of these provisions.

31. Mr N has also said that the Trustee should have informed him in 2002 that his eligibility for Schedule 8 reduction terms would be affected by his decision to keep his benefits separate. He said that had he been provided with the full information he would have amalgamated his benefits. On 21 October 2002, the Trustee provided Mr N with a comparison document which compared the transfer terms currently available and what benefits would be available if he kept them separate. Mr N confirmed that he kept his benefits separate because the quotations provided suggested he would receive better benefits if he kept them apart. He is now complaining that the comparison document should have highlighted the differences between the sections with regard to early retirement, especially Rule 11. I do not believe this argument can be successful. The comparison document did not purport to be a detailed document, so I do not think it needed to go into how each section calculates early retirement benefits. In addition, the comparison document provided contact details for further enquiries and suggested that Mr N may want to seek financial advice regarding the transfer. If Mr N had concerns about what would happen in the event of redundancy, he should have asked for further information to make an informed decision.
32. Viewed from the perspective of 2002, it was entirely possible that Mr N could have gained from keeping his benefits separate. It is only with hindsight that he can conclude it would have been better to amalgamate them. On balance I am not persuaded he can prove that he would have acted differently even if he had appreciated the variance in how each section calculates early retirement benefits.
33. In conclusion, I am satisfied that the Trustee acted properly in exercising its discretion to decline his application for Schedule 8 terms. The Finance Act 2004 meant that Mr N had to take all his benefits under the Scheme at the same time, so he cannot argue that he wanted to keep his RPS benefits deferred. Whilst Mr N may wish that he had amalgamated his benefits, he is taking this position using hindsight, and I cannot attach fault to the Trustee for this decision.
34. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
17 October 2018

Appendix

Extract from the 1994 Pensioners Section of the Scheme

Rule 11 Other Choices for Early Leavers

11A Early Benefits

- (1) A member entitled to deferred benefits (see Rule 9 (Early Leavers)) may elect to receive his benefits on a date earlier than Pensions Age (but not earlier than Normal Minimum Pension Age). If a Member does not make a choice under this Rule 11 (Other Choices for Early Leavers) immediately on leaving Pensionable Service, the agreement of the Trustee is required.
- (2) The benefits shall be reduced:
 - (i) if the Trustee should then so decide, on such basis as is determined by the Trustee having considered the advice of the Actuary (due regard being had to sub-paragraph (4) below); and
 - (ii) subject to any such decision under sub-paragraph (2)(i), as set out in Schedule 8.
- (3) If an election under this Rule would result in the pension payable to the Member being less than the aggregate of:
 - (i) the State Graduated Retirement Benefit; and
 - (ii) whichever is the lesser on the date the pension would become payable of the Contracted-out Pension and the Forecast GMP,the election shall not be permitted.
- (4) The Trustee must be reasonably satisfied that the reduced benefits are at least equal in value to the deferred benefits (including future increases) that would otherwise have been provided under Rule 9 (Early Leavers).

Extract from the Network Rail Section of the Scheme

Rule 11 Other Choices for Early Leavers

11A Early Benefits

- (1) Subject to paragraph (1A) below, a Member entitled to deferred benefits (see Rule 9 (Early Leavers)) may elect, provided he is at Normal Minimum Pension Age or above and the election is made immediately on leaving Pensionable Service, to receive his benefits immediately, being a date earlier than age 60 (where the Member is RPS 60 Member) or age 65 (where the Member is a RPS 65 Member). The benefits shall then be paid and reduced:

- (a) for Category One Members, in respect of all Pensionable Service and for Category Two Members in respect of all Pensionable Service accrued up to and including the later of:
 - (I) 30 June 2009; and
 - (II) the date on which the Member became a Category Two Member;
 - (i) where the Member left Service and Pensionable Service on the same date, as set out in Schedule 8; and
 - (ii) where the Member elects to have his benefits paid early in accordance with Rule 16 (Opting-Out), on a basis determined by the Trustee having considered the advice of the Actuary (taking account, in respect of a Mixed PA Member where any of his PA 60 Benefits are calculated under this Rule 11A (Early Benefits), of the Pension Age applicable to that Mixed PA Member's PA 60 Pensionable Service), and
- (b) for Category Two Members, in respect of Pensionable Service accrued on and from the day after the later of:
 - (i) 30 June 2009; and
 - (ii) the date on which the Member became a Category Two Member:
 - on a basis determined by the Trustee having considered the advice of the Actuary (taking account, in respect of a Mixed PA Member, of the Pension Age applicable to that Member's PA 65 Pensionable Service and, where any of his PA60 Benefits are calculated under this Rule 11A (Early Benefits), of the Pension Age applicable to that Mixed PA Member's PA 60 Pensionable Service)

Pensions Tax Manual – PTM 062220

Taking benefits – Paragraph 22(7)(a) and 23(7) Schedule 36 Finance Act 2004

When a member with a protected pension age takes their pension and / or lump sum benefits before normal minimum pension age, they must become entitled to all of their pension and lump sum rights that were not in payment on 5 April 2006 under the registered pension scheme on the same day.

This condition also applies where there has been a block transfer of rights. The scheme that receives the block transfer must crystallise all the uncrystallised pension and lump sum rights for the individual on the same day.

This condition (taking all benefits on the same day) will still be met where the individual dies within six months of the payment of a pension commencement lump sum and before becoming entitled to the relevant pension.

The Finance Act 2004

Paragraph 22(7)(a) Schedule 36 Finance Act 2004

22(7)(a) The retirement condition is met in relation to the member and the pension scheme if—

(a) the member becomes entitled to all the pensions payable to the member under arrangements under the pension scheme (to which the member did not have an actual entitlement on or before 5th April 2006) on the same date, and

(b) the member is not employed by a sponsoring employer after becoming entitled to a pension under the pension scheme.

Paragraph 23(7) Schedule 36 Finance Act 2004

The retirement condition is met in relation to the member and the pension scheme if the member becomes entitled to all the pensions payable to the member under arrangements under the pension scheme (to which the member did not have an actual entitlement on or before 5th April 2006) on the same date.