

## Ombudsman's Determination

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| Applicant  | Mr R  |
| Scheme     | Land Rover Pension Scheme ( <b>the Scheme</b> )                   |
| Respondent | Jaguar Land Rover Pension Trustees Limited ( <b>the Trustee</b> ) |

### Complaint Summary

Mr R's complaint concerns revaluation changes made by the Trustee. He considers that the Trustee cannot make such changes to benefits he has accrued without his consent, as these form part of his subsisting rights. He says that the amended method of revaluation which applies to his accrued benefits as an active member is less generous than that which applies to deferred members of the Scheme.

### Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against the Trustee because:-

- An active member's subsisting rights at the time of the 2017 Amendments did not include revaluation, on any particular basis, of a pension in deferment.
- The increases applying to Pre Career Average Revalued Earnings Benefits for pensionable service after the 2017 Amendments does not affect: a member's right to receive a deferred pension in the event that they opt out of pensionable service; the rate of revaluation of that deferred pension; or the right to transfer out of the Scheme.

## Detailed Determination

### Material facts

1. Mr R is a member of the Scheme.
2. On 6 April 2017, the Scheme was amended (**the 2017 amendments**) so that with effect from that date, benefits would accrue on a Career Average Revalued Earnings (**CARE**) basis rather than on a final salary basis. The changes which applied (and are relevant to this complaint) are as follows:-
  - For as long as they remain in pensionable service, on each 6 April all accrued benefits for active members' pre-6 April 2017 service, are increased by CPI, plus 0.5%, capped at 2.5%.
  - For members who had left pensionable service, deferred benefits pre-6 April 2017 are increased each 1 May by 5% or, if less, RPI, in respect of pensionable service up to 5 April 2009. From 6 April 2009, these benefits are increased each 1 May by 2.5% or, if less, in line with RPI.
3. Mr R subsequently complained to the Trustee concerning the changes made to the Scheme. He said:-
  - In respect of accrued benefits, the Trustee had a legal duty not to reduce them.
  - However, the rules of the Scheme were being changed so that the accrued benefits of active members were to be uprated between now and their date of retirement in line with the Consumer Prices Index (**CPI**) plus 0.5%, up to a maximum of 2.5%.
  - The benefits of deferred pensioners in the Scheme would be uprated more generously, with those which accrued up to April 2009 uprated at the Retail Prices Index (**RPI**) up to 5%. The company had confirmed that no changes would be made to the uprating rules for deferred pensions.
  - Changing the revaluation rate applicable to active members' benefits seemed to be a reduction in accrued benefits.
4. In September 2017, the Trustee responded to the complaint under stage one of the Internal Dispute Resolution Procedure (**IDRP**). The Trustee said:-

"The requirement to protect accrued benefits applies at a point in time and as increases related to future pay rises [sic] have not yet been accrued, they are not covered by this requirement. It is, therefore, permitted to make such a change as long as the benefits accrued up to the date of change are protected. Your benefits at 5 April 2017 were calculated based on the scheme rules at that time and will increase in future in line with CPI + 0.5% up to a maximum of 2.5% p.a. and so have been protected as required. There is no

requirement for benefits to increase whilst in service on a comparable or better basis than would be the case if you left the scheme.”

5. Mr R replied saying:-

- The Pensions Regulator’s legal position was that a detrimental modification could only be made with the individual employee’s consent. It defined a detrimental modification as one which would adversely affect any subsisting right of a member of the scheme.
- It said subsisting rights are determined as if the member had opted to terminate their pensionable service immediately before that time. Hence, he would have been entitled to a deferred pension under the rules of the Scheme calculated in line with the rules in place at the time. The Trustee could not reduce those subsisting rights without his consent.
- For deferred pensions accrued up to 5 April 2009, the revaluation was previously capped at 5%. After the recent changes, the revaluation of benefits accrued before 2009 was capped at 2.5%, a reduction of a subsisting right. As such, it would qualify as a “detrimental modification” and could only take place with his consent.

6. In October 2017, the Trustee responded under stage two of the IDRPs. The Trustee said:-

- Had Mr R left pensionable service on 6 April 2017, his deferred benefits would have been entirely final salary and revalued during deferment based upon RPI subject to various caps. This was what was described as his subsisting rights at the date of change.
- Should Mr R leave pensionable service any time after this date, his benefits would be a mix of final salary benefits, in relation to service before 6 April 2017 (**Pre-CARE Benefits**), and CARE benefits. The Pre-CARE Benefits would be uplifted from this date by capped CPI until the date he left pensionable service. They would then be revalued during deferment based upon capped RPI. Mr R’s CARE benefits would be revalued during deferment based upon capped CPI.
- Therefore, the change had no impact on the way that the pre-6 April 2017 component of his benefits would be revalued during deferment, this being capped RPI, which was the critical legal test. His subsisting rights had therefore not been affected.
- The Trustee was satisfied that the amendments made on 6 April 2017 did not affect Mr R’s subsisting rights. Hence his consent was not required to bring about the amendments, which complied with the Scheme’s power of amendment.

7. In November 2017, Mr R referred his complaint to this Office for an independent review.

### **Summary of Mr R's position**

8. The new rules froze his final salary benefits as at the date of the changes and promised to revalue them at CPI, plus 0.5%, up to a maximum of 2.5% whilst in service. This was a less generous revaluation rule than that applying to the preserved benefits of deferred pensioners.
9. The Trustee's actions amounted to a detrimental modification which could only be made with his consent.
10. The Trustee had said that the method to increase deferred benefits was only to be applied to the benefits of a member who had left pensionable service and that as he was continuing in pensionable service, he did not have subsisting rights to the deferred pension increase method for pre-6 April 2017 benefits. However, the accumulation of his final salary benefits had been stopped as at the date of the changes and frozen at that level. Therefore, the already accrued final salary benefits had indeed been deferred. Since they were deferred benefits, they should be treated as such under the rules of the Scheme.
11. He did not dispute that the rules of the Scheme allowed the Trustee to choose a different index from the "general index of retail prices." However, the rules did not allow the Trustee to substitute a different cap from the one defined in the Scheme's rules.
12. Further, the rules did not allow the Trustee to choose one index to apply to one class of deferred benefits and a different index to apply to another class, this being the deferred benefits held by continuing active members compared with those who had ceased to be active members.

### **Summary of the Trustee's position**

13. The Trustee did not agree that the Revaluation Percentage was a detrimental modification for the purposes of Section 67(4) of the Pensions Act 1995, as it did not, and could not, affect the member's subsisting rights.
14. The requirement to protect subsisting rights applied at the point when the rules were amended. As Mr R continued in pensionable service after the rules were amended, his subsisting rights were determined as though he had opted, immediately before 6 April 2017, to terminate his pensionable service. The Trustee had to consider whether members' benefits were affected by a modification on a before-and-after snapshot basis. Mr R's accrued defined benefits, immediately before and after the modification, were not affected detrimentally.
15. The use of RPI as the index for revaluation was neither a right nor a subsisting right. The extent and value of an increase could not be known until it was applied and an individual's benefits came into payment.

## Conclusions

16. The Trustee has made changes to the basis upon which Mr R's benefits in the Scheme will be revalued. Mr R considers that the right to have his pre-April 2017 benefits revalued on the same basis as that of a deferred member is a subsisting right, so not applying that method of revaluation to pre-April 2017 benefits while he remains in pensionable service contravenes section 67 of the Pensions Act 1995.
17. In order to assess this point further, I will consider the definition of a subsisting right. The definition of a "subsisting right" under section 67A(6) of the Pensions Act 1995, includes, at any time, any right which has accrued to or in respect of a member of an occupational pension scheme to future benefits under the scheme rules.
18. In the case of an active member, his or her subsisting rights at a particular time are to be determined "as if he or she had opted, immediately before that time, to terminate his or her active membership."
19. Considering section 67A(7) of the Pensions Act 1995, had an active member opted out of the Scheme immediately before 6 April 2017, he or she would have been entitled to either:
  - (i) a deferred pension, calculated in accordance with Rule 13.5 of the Scheme's rules dated 23 March 2016, which were in force immediately before 6 April 2017 (**the 2016 Rules**); or
  - (ii) a transfer of his or her benefits out of the Scheme, under Rule 24 of the 2016 Rules.
20. The above entitlement at the point of opting out of the Scheme would not have included any revaluation increases which might have been applied during any future period of deferment, as no period of deferment would have elapsed at that point. It would not be certain whether the member would actually defer his or her benefits or transfer them out of the Scheme.
21. Further, revaluation in deferment is contingent upon a member leaving pensionable service without immediately taking his or her pension. Where a pension scheme's benefits are amended for future service, there remains the possibility that a member will stay in pensionable service until retirement, in which case he or she would never become entitled to revaluation of his or her deferred benefits.
22. I do not find that the revaluation of deferred benefits in this case is a subsisting right of a member, nor does it form part of the subsisting rights of a member who was in active membership immediately before 6 April 2017.
23. In any event, I do not consider that the rate of revaluation during deferment was altered by the 2017 Amendments. Following those amendments, members remain entitled to take a deferred pension under Rule 13.5 of the Scheme rules that replaced the 2016 Rules when the 2017 Amendments were made (**the 2017 Rules**). Rule 13.5

of the 2017 Rules provides the same benefits for deferred members, in respect of their Pre-CARE Benefits, as Rule 13.5 of the 2016 Rules did.

24. Further, following the 2017 Amendments, members who opt out of the Scheme would also be entitled to transfer out of the Scheme, on the same terms under the 2017 Rules as they could under the 2016 Rules.
25. In conclusion, an active member's subsisting rights at the time of the 2017 Amendments did not include revaluation, on any particular basis, of a pension in deferment.
26. Further, the provision, under the 2017 Rules, of increases to Pre-CARE Benefits during continued pensionable service after the 2017 Amendments, does not affect: a member's right to receive a deferred pension in the event that that he or she opts out of pensionable service; the rate of revaluation of that deferred pension; or the right to transfer out of the Scheme.
27. I do not uphold Mr R's complaint.

**Anthony Arter**

Pensions Ombudsman  
2 October 2019

## **Appendix**

### **Pensions Act 1995**

#### **Section 67 - The subsisting rights provisions**

- (1) The subsisting rights provisions apply to any power conferred on any person by an occupational pension scheme to modify the scheme, other than a power conferred by—
  - (a) a public service pension scheme, or
  - (b) a prescribed scheme or a scheme of a prescribed description.
- (2) Any exercise of such a power to make a regulated modification is voidable in accordance with section 67G unless the following are satisfied in respect of the modification—
  - (a) in the case of each affected member—
    - (i) if the modification is a protected modification, the consent requirements (see section 67B),
    - (ii) if it is not, either the consent requirements or the actuarial equivalence requirements (see section 67C),
  - (b) the trustee approval requirement (see section 67E), and
  - (c) the reporting requirement (see section 67F).
- (3) The subsisting rights provisions do not apply in relation to the exercise of a power—
  - (a) for a purpose connected with debits under section 29(1) of the Welfare Reform and Pensions Act 1999, or
  - (b) in a prescribed manner.
- (4) References in this section and sections 67A to 67I to “the subsisting rights provisions” are to this section and those sections.
- (5) Subsection (6) applies in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification where a member of the scheme dies before the requirements mentioned in subsection (2), so far as they apply in his case, have been complied with in respect of the modification if—
  - (a) before he died he had given his consent to the modification in accordance with section 67B(4)(b), or
  - (b) before he died, or before the trustees of the scheme had become aware that he had died, the trustees had complied with section 67C(4)(a), (b) and (d) in respect of the modification in his case.

(6) Any of the requirements mentioned in subsection (2), as it applies in respect of the modification—

(a) which is satisfied in the case of the member, or

(b) which would have been satisfied in his case had he not died before it was satisfied,

is to be taken to be satisfied in the case of any survivor of the member in respect of the modification.

### **Section 67A - The subsisting rights provisions: interpretation**

(6) “Subsisting right” means—

(a) in relation to a member of an occupational pension scheme, at any time—

(i) any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or

(ii) any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules, and

(b) in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member .

For this purpose, “right” includes a pension credit right.

(7) At any time when the pensionable service of a member of an occupational pension scheme is continuing, his subsisting rights are to be determined as if he had opted, immediately before that time, to terminate that service.

### **Section 67B - The consent requirements**

(1) References in the subsisting rights provisions to the consent requirements, in respect of a regulated modification, are to be read in accordance with this section.

(2) The consent requirements apply in the case of an affected member—

(a) if the modification is a protected modification;

(b) if it is not a protected modification, unless the actuarial equivalence requirements apply in his case.

(3) The consent requirements consist of—

(a) the informed consent requirement (see subsection (4)), and

(b) the timing requirement (see subsection (6)).



(4) The informed consent requirement is satisfied in the case of an affected member if before the modification is made—

(a) the trustees have—

(i) given him information in writing adequate to explain the nature of the modification and its effect on him,

(ii) notified him in writing that he may make representations to the trustees about the modification,

(iii) afforded him a reasonable opportunity to make such representations, and

(iv) notified him in writing that the consent requirements apply in his case in respect of the modification, and

(b) after the trustees have complied with paragraph (a)(i), (ii) and (iv), the affected member has given his consent in writing to the modification.

(5) If—

(a) the modification is not a protected modification, and

(b) before the modification is made the trustees notify an affected member in writing that—

(i) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but

(ii) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification,

the trustees are to be taken to have complied with subsection (4)(a)(iv) in respect of him.

(6) The timing requirement is satisfied in the case of an affected member if the modification takes effect within a reasonable period after the member has given his consent to the modification in accordance with subsection (4)(b).