

## Ombudsman's Determination

Applicant	Mr S
Scheme	Sappi UK Pension Scheme ( <b>the Scheme</b> )
Respondents	PAN Governance LLP ( <b>PAN</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by PAN.

## Complaint summary

2. Mr S has complained that the index used for pension increases has changed from the Retail Prices Index (**RPI**) to the Consumer Price Index (**CPI**). Mr S has also made a number of other comments regarding the change to CPI including:-
  - (i) the removal of member nominated trustees and the appointment of PAN as a sole trustee;
  - (ii) the absence of consultation on the move to CPI;
  - (iii) there is no need to move to CPI as the Scheme is fully funded; and
  - (iv) the Trustee, PAN, is working in the company's interests and not the members' interest.

## Background information, including submissions from the parties

3. This complaint is similar to a complaint that I have previously determined (**PO-23717**) and I do not consider that Mr S has provided any new arguments that would change that decision. The main points of that determination are repeated below.

## The Second Definitive Trust Deed and Rules of The DRG Pension Fund, dated 31 August 1989

4. 'Members' Pensions', of Section B - 'Provisions Relating to Full Members', Provision 23 states:

“(B) A pension in payment to a Pensioner on a 31st March will be increased on the following 1st November at the lesser of:

- (1) the rate of increase in the Index (as defined in General Rule 25) published in the April prior to the 1st November concerned over the level of the Index published in the preceding April, and
- (2) a rate of three per cent.”

5. General Rule 25, ‘Inland Revenue Limits’ states:

“Post retirement increases:

The maximum amount of a pension ascertained under this Rule (less any amount which has been voluntarily surrendered to provide a dependant’s pension) may be increased, after its commencement, in proportion to the increases in the Index or, if greater, at the rate of three per cent per annum compound.”

‘Index’ is defined as:

“the Index of Retail Prices published by the Department of Employment or any other official cost-of-living selected by the Trustee Company and approved by the Board of Inland Revenue.”

## **The Scheme’s Definitive Trust Deed and Rules, dated 27 May 2005**

6. Rule K.1.1. ‘Pension Increases’ states:

“...the rate of increase of pension in excess of GMP shall not be less than 5% (or the increase in the Retail Price Index, if less)...”

7. Schedule 3, ‘Definitions’ states:

“Retail Price Index shall have the same meaning as the Index in Schedule 5 (Inland Revenue limits)”.

8. Schedule 5, ‘Inland Revenue limits’, states:

“Index means the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any index which is accepted by the Commissioners of Inland Revenue for this purpose”.

9. In October 2016 Mr S received a letter from PAN which explained that Sappi (UK) Sales Office Limited (the Principal Employer) would be writing to him with the option to exchange future increases (called ‘Pension Increase Exchange’ or ‘**PIE**’) to all or part of his pension for a one-off uplift from 1 April 2017.

10. Mr S duly received an explanatory Booklet (**the Booklet**) and was notified that Workplace Solutions had been employed to give advice. The Booklet stated under ‘Inflation Index’ that currently the inflation index used for most purposes in the Scheme was RPI, but that this might change.

11. Mr S did not take up the PIE option.
12. Subsequently the Principal Employer approached PAN about using CPI in place of RPI as the reference index for increasing pensions in payment under the Scheme. After obtaining legal and actuarial advice PAN concluded that CPI was a more appropriate inflation index for determining future pension increases. An announcement was issued to Scheme Members.
13. Mr S unsuccessfully complained about the index change via the Scheme's internal dispute resolution procedures.

**Mr S' position**

14. Mr S says:-

- The prime role of the Trustee is to protect the interests of the beneficiaries and not to work hand in glove with the employer to reduce the outgoings of the company to the ongoing detriment of the beneficiaries.
- The appointment of PAN as sole trustee and the removal of the member nominated trustees does not seem to be good practice. If the member nominated trustees were still in office this change to RPI would not have been attempted.
- The Scheme was fully funded and the company had just come off the back of a PIE exercise where the nominated independent advisers gave a written confirmation that future pension increases would be at RPI.
- The Rules of the Scheme were never intended to be interpreted in this way and the phrase "Retail Prices Index" was supposed to mean just what it says.
- The DRG scheme was to be increased at RPI and there was no mention of any other index. The letters issued when the DRG pension pots were transferred guaranteed that members would be no worse than under the DRG scheme and were protected in law by the Transfer of Undertakings legislation.
- "Members should have been consulted about the Rules change from RPI to CPI.
- The Trustee has said that the Scheme was not fully funded on a self-sufficiency basis There are several ways to define this but at the time of the change to CPI it was fully funded in most respects.
- While the Booklet mentioned that the inflation index used by the Scheme may change it did not say to what or when and it was not highlighted to him by any financial adviser. The figures he received from Workplace Solutions pertaining to the PIE option confirmed future pension increases at RPI.
- He will suffer a financial loss by the application of CPI to future increases in his pension in payment.

- He believes the decision in the recent BT Scheme case is relevant and would prevent the trustee from changing the index to CPI.

### **PAN's position**

#### **15. PAN says:-**

- PAN was appointed on 21 May 2015 to work with the then current member nominated trustees and worked harmoniously with them for two years or so. The Scheme's principal employer then decided to move to a sole corporate trustee for valid reasons and is consistent with similar moves that have taken place in other pension schemes.
- Mr S argues that the Scheme is fully funded and so there is no financial requirement to move to CPI. The funding position of the Scheme has been provided to Mr S and whilst it could be argued that the Scheme is fully funded this could change in the future and the Scheme would be reliant on the company, Sappi, for support. The Scheme's advisers have provided a detailed analysis of the effect of losing the sponsor's support and the consequent need for self-sufficiency funding.
- Leading Counsel advised PAN:-
  - The phrase 'Retail Prices Index' is not used literally in the Scheme Rules, but as a term of art, and so it includes the full extent of the wording used in the Scheme Rules definition of RPI.
  - In accord with the High Court's decision in *Arcadia Group Ltd v Arcadia Group Pension Trust Ltd* [2014] EWHC 2683 (Ch) (31 July 2014), (**Arcadia**), the Scheme Rules contain (through the definition of RPI) an implicit power of selection requiring a decision to be made about the appropriate index that should be applied.
  - On consideration of the Scheme Rules as a whole, there is a strong argument in support of the Principal Employer holding the power of selection unilaterally, without the requirement for a Trustee decision. However, it would be a safer course of action to assume that the power of selection is to be exercised jointly by the Principal Employer and the Trustee.
  - The consultation requirements under the Pensions Act 2004, were not necessary as there were no "affected members", as defined in the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.
- PAN's Leading Counsel's advice set out the appropriate decision-making process, and considered all the relevant factors, both in favour and against a switch from RPI to CPI.

- There was no amendment made to the Scheme Rules as they already contained an implicit power of selection. Consequently, members consent to the switch from RPI to CPI was not required.
- Scheme communications defer to the governing Scheme Rules. The Booklet stated that the inflation index used by the Scheme could change in the future. Therefore, PAN disagrees that Scheme communications established RPI as a norm.
- PAN recognises that it is likely that future pension increases will be lower than if RPI had been retained. However, it felt there were good reasons in favour of the switch to CPI, including improved security of benefits, certain well-published defects in the RPI methodology and the Principal Employer's chosen deferred remuneration policy.
- The potential improvement in security of members' benefits and also the offer of a new and increased guarantee would be relevant factors in favour of such a switch.

### **Ombudsman's decision in PO-23717**

16. I previously determined in PO-23717 that whilst the applicant may feel that his pension had been devalued, he is only entitled to the benefits provided in accordance with the Scheme Rules. The Rules allow pension increases to be measured by use of CPI, there is no guarantee of any particular index, so this is actually a loss of expectation.
17. The Rules of The DRG Pension Fund state that post retirement increases are "in proportion to the increases in the Index or, if greater, at the rate of three per cent per annum compound." 'Index' is defined as: "the Index of Retail Prices published by the Department of Employment or any other official cost-of-living selected by the Trustee Company and approved by the Board of Inland Revenue."
18. The Rules of the Scheme define RPI as "the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any index which is accepted by the Commissioners of Inland Revenue for this purpose".
19. The decision to change the index used for pension increases from RPI to CPI was jointly agreed between the Principal Employer and PAN.
20. CPI comes within the definition of "Retail Prices Index" under both sets of Rules. CPI is an index used to measure price increases and is accepted as an appropriate index for pension increases in payment by HMRC.
21. RPI has been referred to in Scheme literature in the past because that was the only index used by Government for statutory pension increases. However, in the 2010 June Budget the Government announced, that with effect from April 2011, annual statutory increases for public sector schemes would be calculated using CPI. In July

2010, the Government announced that the change would be extended to private pension schemes, depending on the wording of the scheme rules.

## **Adjudicator's Opinion**

22. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by PAN. The Adjudicator's findings are summarised below.
23. Taking the determination in PO-23717 into account, the Adjudicator was not persuaded that Mr S had provided any compelling arguments which would lead to a different conclusion.
24. The decision to move to a sole corporate trustee was within the remit of the Principal Employer and PAN's appointment in this role cannot be viewed as some kind of conspiracy as Mr S implies. PAN is an independent organisation and as Mr S has stated it does have a duty to act in the best interests of all the members. Therefore, when PAN was asked by the company to consider a change in the index from RPI to CPI it obtained appropriate legal and actuarial advice regarding the effect of such a change.
25. The legal advice concluded that such a change to CPI was possible under the Rules of the Scheme and that there was a strong argument that the power to make such a change lay with the employer. PAN approached the change on the basis that the power lay jointly between the employer and the trustee. PAN took account of all the arguments for and against a change to CPI and concluded that it would agree to a change to CPI as it would improve the security of the Scheme for the membership as a whole.
26. In the Adjudicator's opinion, PAN had correctly considered whether it would be a proper exercise of that power to agree to the company's proposal to change from RPI to CPI and was fully aware of the legal principles that guide such decisions, namely to:
  - (a) exercise any power vested in it for the purpose for which it was given;
  - (b) give proper consideration to relevant factors and exclude irrelevant factors;
  - (c) ask itself the correct questions;
  - (d) direct itself properly in law; and
  - (e) not arrive at a perverse decision (being a decision that no reasonable body of trustees would arrive at).
27. The Adjudicator concluded that PAN had considered the correct Rules, taken professional advice as required, considered the employer's request as is reasonable and reached a decision which was not perverse. It was reasonable for a body of trustees to rely on the expert advice it had received, which PAN had done.

28. Mr S also said he believed the decision in the recent BT case was relevant and would prevent the trustee from changing the index to CPI.
29. The Adjudicator concluded that the decision in the BT case relied on an examination of the wording of the BT Pension Scheme's (**the BT Scheme**) trust deed and rules. The BT Scheme allowed for pensions in payment to increase each year in line with RPI subject to the proviso that "if [RPI] ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides" may be used in its place.
30. The Adjudicator noted from his reading of the judgment that the appeal failed because the Court agreed that the BT Scheme wording only allowed an alternative index to be used if the Retail Prices Index was discontinued or became inappropriate. As the Retail Prices RPI continues to be a recognised index the trustees of the BT Scheme could not simply use an alternative index.
31. In rejecting the appeal, Lady Justice Asplin, taking guidance from the recent Barnardo's case, reiterated that the precise wording of a scheme's rules remains the crucial factor. As the interpretation of such rules can only be taken on a case-by-case basis, the judgment was of quite specific application.
32. The wording of the definition of Index in the Sappi Scheme is different to the BT Scheme as it does allow an alternative index to be used and does not require the Retail Prices Index to be discontinued. Therefore, there is no reason why PAN should not use an alternative index subject to having taken appropriate actuarial, covenant and legal advice. The Adjudicator considered that it is not unreasonable for the Trustee to have decided to change the Index from RPI to CPI in the expectation of improving the security of the Scheme for the membership as a whole
33. Mr S did not accept the Adjudicator's Opinion and the complaint was 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.
34. Mr S says that PAN accepts that the Scheme is fully funded and then hypothesises that this could change in the future. But the Scheme could also continue to be in surplus in the future, particularly as the outgoings to beneficiaries will be smaller. Similarly, he is not aware of any suggestion that Sappi will withdraw its support for the Scheme.
35. Mr S also says it is pleasing to see that PAN agrees its actions have and will continue to make the beneficiaries worse off than if RPI was retained. He is personally unaware as to why the security of benefits might be at risk and albeit if they are actually deemed better as a consequence, this is to the detriment of the beneficiaries. It does seem that there must have been huge changes in the responsibilities of the trustees to protect the beneficiaries' financial wellbeing compared to his understanding and time spent as a trustee. Now it seems that the trustees protect the company's interests more than the employees' interests.

## **Ombudsman's decision**

36. While I can understand Mr S' concerns at the change from RPI to CPI I do not find that PAN has approached this subject in anything other than a professional manner. PAN has obtained appropriate legal and actuarial advice over the change, which included advice on the legal factors that should be taken into account, as set out in paragraph 15 above. PAN also obtained actuarial advice, prior to the actuarial valuation, on what would happen if Sappi withdrew its support for the Scheme and this advice was included in the formal response to the complaint. The formal response also confirmed that since the 2017 actuarial valuation has been signed off changes have been made to improve the guarantee from Sappi.
37. A change or improvement to the guarantee would obviously improve the security of the Scheme for the membership as a whole. PAN has also stated that it wishes to move towards a self-sufficiency funding target and the adoption of CPI will improve the funding position towards the self-sufficiency target and give greater security to all the members.
38. Finally, I do not find that there have been any changes in the responsibilities of the trustees to protect the beneficiaries' financial wellbeing compared to Mr S' time spent as a trustee. All trustees have the same responsibilities as before, but they must also take into account the employer's position and its ability to meet the costs of the Scheme. This may require some compromise from time to time as regards the pace of funding and also to consider diligently any proposals from an employer such as a change from RPI to CPI. It is not to reject out of hand any proposal that a trustee may personally feel is detrimental to his or her own position.
39. I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
18 September 2019