

Ombudsman's Determination

Applicant	Mr K
Scheme	Atkins Pension Plan (the Plan)
Respondent	Atkins Pension Trustee Limited (the Trustee)

Complaint Summary

Mr K's complaint concerns the Trustee's interpretation of 'proportionality' and the application of this when calculating his first pension increase. He does not believe that excluding partial months is proportional and says that this has impacted his pension and his spouse's pension as well.

Summary of the Ombudsman's Determination and reasons

The complaint shall be partially upheld against the Trustee because:-

- it retrospectively applied Rule 14(a)(i) of a deed of amendment dated 26 May 1989, as amended by a Trust Deed of amendment dated 4 August 1997, in error, when calculating Mr K's first pension increase; and
- it took an unacceptable amount of time to recognise that it had done so, despite a number of investigations into Mr K's complaint.

The Trustee shall provide redress to Mr K in accordance with the Directions set out in paragraph 64 below.

Detailed Determination

Material facts

1. Mr K was an active member of the Plan from 1 June 1983, up to his retirement on 3 February 1999. When he retired, he opted to take a tax-free cash sum, but deferred taking his residual pension until 3 August 2001. He also had a guaranteed minimum pension (**GMP**).
2. On 1 April 2002, Mr K received his first pension increase, which was subject to Rule 14(a)(i) (**the Rule**) of a deed of amendment dated 26 May 1989 (**the 1989 Deed**), as amended by a Trust Deed amendment dated 4 August 1997 (**the Trust Deed**):

“(A) sub-Rules 14(a)(i) and (ii) of the Rules are cancelled and replaced as follows:

- (i) in respect of a Member who joined the Plan (other than as a Life Assurance Member) before 1st April 1996
 - (A) The pension in payment to the Member shall be increased on each 1st April at the rate of 5% if the Member has not attained State Pensionable Age or at the rate of 5% of that part of the pension which exceeds the GMP (as defined in the Contracting-out Rules) if the Member has attained State Pensionable Age (but in either case reduced to the extent necessary to ensure that the amount of the pension does not prejudice Approval of the Plan)
 - (B) That part of the pension in payment to a spouse or Dependant of the Member following his death which exceeds the GMP (as defined in the Contracting-out Rules) (if any) shall be increased on each 1st April at the rate of 5% (but reduced to the extent necessary to ensure that the amount of the pension does not prejudice Approval of the Plan)

and for this purpose the first such increase shall without affecting the liability of the Fund prior to 1st July 1979 be deemed to have been made on 1st April 1979

except that if the pension has been in payment for less than 12 months the first increase shall be reduced **proportionately** [emphasis added].”

3. The 1989 Deed also provided the following amendment power, “Clause 3”, which enables the Trustee to modify the Plan’s Rules:

“In the event of any such modification alteration amendment or extension the Trustees shall forthwith notify the Members affected thereby in writing either by letter handed to the Members personally or sent to them through the post in a prepaid letter addressed to them at their last known address or by notice exhibited on the Employers’ notice boards or in any of the Employer’s offices.”

4. In 2015, HM Revenue & Customs (**HMRC**) informed Mr K that his state pension was changing. When Mr K queried this, HMRC responded on 11 November 2015, with the following:-

- The revaluation of his GMP applied by the Plan had been changed, which had increased his GMP entitlement from the Plan. The GMP was originally recorded as a section 148 revaluation, but the Plan had recently contacted HMRC to confirm that it used fixed rate revaluation. So, Mr K’s account was amended to incorporate this, which affected his state pension.

5. On 15 December 2015, after Mr K had been in contact about the change to his GMP, the Plan’s administrator (**the Administrator**) responded. It reconfirmed that HMRC’s records were originally incorrect, and that after the amendment, Mr K was now in

receipt of his correct benefits. However, this meant that Mr K had been receiving an incorrect additional state pension.

6. On 23 December 2015, Mr K emailed the Trustee asking for a copy of the rules which applied to the Plan (**the Plan Rules**) in order to verify the calculations made. At this point, Mr K identified that his calculations (based on days in payment) for the first pension increase did not match the value that he had received. So, he queried how the increase was prorated. It appears that Mr K received the Plan Rules the same day, and that the 'prorated' query was forwarded to a previous administrator.
7. On 5 May 2016, Mr K emailed the Trustee, as he wished to be advised about how the 3 August 2001 values had been calculated. He noted that the Plan Rules did not provide details of how 'proportionate' or 'pro rata' increases were to be applied, but the ratio of the number of days in payment during the year seemed reasonable to him.
8. On 22 December 2016, the Administrator wrote to Mr K after a review of his benefits and the calculation method used. It confirmed that the first increase was proportionate, based on complete months. So, as Mr K's pension had been in payment for seven complete months, his increase was 2.92%.
9. On 11 January 2017, as a result of a telephone call from Mr K, the Administrator wrote to him to confirm how the late retirement factor was calculated and provide a breakdown of the spouse's pension which applied to the Plan. It said that the factor was a combination of the 5% pension increase (compounded) multiplied by the applicable late retirement factor (8%). It also shared the following:

"Period late:	2 years, 6 months	
Pension increase:	$1.025 \times 1.05 \times 1.05$	= 1.1300625 (A)
Late retirement factor:	$8\% \times 2.5$	= 1.20 (B)
Your factor:	$(A) 1.1300625 \times (B) 1.20$	= 1.35607"
10. On 18 January 2017, Mr K responded. He was concerned that the calculation for the first pension increase (following the pension coming into payment) appeared to only include complete months. He said that this ignored 29 days of payment in his case, which was not proportionate and meant that members were not being treated equally in accordance with the Plan Rules. He queried where this "concept of proportion [came] from".
11. On 3 August 2017, the Administrator replied by saying that the application of complete months in the calculation came from another clause in the Plan Rules. It said that this was in line with other pension arrangements and with statutory pension increases (section 54(2) of the Pensions Act 1995 (**the 1995 Act**) (see Appendix A). It also provided the following clause:-

"For the purposes of the [Plan] Rules and this Appendix the calculation of an amount of pension in respect of each year of Scheme Service shall be

construed as including a proportionate amount in respect of the completed months in any incomplete such year.”

12. On 1 September 2017, Mr K emailed the Trustee as he believed that the calculations on that basis were discriminatory and based on an incorrect interpretation of the word “proportionately”. He made the following points:-

- Following the introduction of the 1995 Act, ‘proportion’ must be such that all members are treated equally. This could only be achieved by taking into account all of the pension in payment for the first 12 months.
- The fact that other administrators have adopted the same application of ‘proportionate’ does not mean that it is correct.
- There was no definition of ‘proportional’ in the Plan Rules.
- The clause the Administrator had quoted was irrelevant as it was unrelated to the increase in pension.
- The reference to section 54(2) of the 1995 Act was out of context. Mr K said that this was supplementary to sections 51 and 53. He believed that section 51 set a “safety net” of at least a 5% annual increase rate in 1995, and that it was assumed that the annual rate of inflation would be higher. Section 54 repeated the “at least”, so Mr K argued that this was set as the minimum to be exceeded rather than the standard to follow.
- By basing the calculation on complete months, this discriminated against any member who was not born on the first of the month or chose to retire on that date. He believed that this was in contravention of the “equal treatment rule” at section 62 of the 1995 Act, which was incorporated into the Equality Act 2010.

13. The Trustee accepted Mr K’s correspondence as an application under the Plan’s Internal Dispute Resolution Procedure (**IDRP**). It responded under stage one of the IDRP on 3 October 2017, and made the following points:-

- Discrimination legislation only applied where a person had suffered discrimination as a result of having a protected characteristic. As the length of a member’s pensionable service was not a protected characteristic, it was not applicable.
- It was legal to use complete months to calculate proportional increases. This was supported by the Pensions Act 1995, which used complete months as the benchmark for that purpose.
- Although the term “proportionately” was not defined in the Plan Rules, it did not mean it was wrong to calculate proportions by reference to complete months.
- Clause 2(b) of the 1989 Deed (**the 1989 Clause**), provided that the Trustees had full power “to determine all questions and matters of doubt arising in connection with the Fund and whether relating to the construction thereof or the benefits

thereunder or otherwise.” So, the Trustee determined that for ‘Existing Members’, the unit of measurement when determining what a “proportionate” increase would be was a complete month.

- This method of proportioning increases was common practice in private sector occupational schemes. With regard to public service pensions, the annual Pension Increase (Review) Orders require the first pension increase to be calculated proportionately using complete months. As a result, this methodology is one that is extremely common and therefore a reasonable one for the Trustee to adopt.
14. On 8 November 2017, Mr K replied as he still believed that the calculations did not treat members equally. He argued that depending on when members were born, some were being overpaid and others, underpaid.
 15. On 13 February 2018, the Trustee issued its stage two response under the Plan’s IDRPs. It reiterated the rule in question, the relevant part of the Pensions Act 1995, which adopted a similar approach and its understanding of Mr K’s position. It noted that although there was no express definition of “proportionately” in the Plan Rules, this did not mean that the most favourable interpretation for the member should be adopted. It said that a court would construe pension scheme rules against the background of administrative practice and relevant legislation. Both practice and statute supported the use of complete months to proportion the first pension increase.
 16. After further review of the complaint, the Trustee discovered an error in September 2019, which affected Mr K’s benefits. The IDRPs investigations incorrectly concluded that the Trust Deed had validly introduced the Rule in relation to service prior to the Trust Deed. However, this was contrary to the restriction under the Plan’s power of amendment and statutory restrictions under section 67 of the 1995 Act (see Appendix B). As the Rule could not be applied retrospectively, the requirement to proportion the first year’s pension increase should not have applied to Mr K’s first pension increase.
 17. The Trustee confirmed that it would recalculate Mr K’s pension on the basis that a full annual increase (for the benefits accrued before the introduction of the Trust Deed) should have been paid on 1 April 2002. It said that interest would also be paid at the rate of 1% simple, over the base rate, in respect of past underpayments. It apologised for the error and offered £500 in recognition of the distress and inconvenience caused.
 18. In response, Mr K questioned whether the Trust Deed applied to those who were members of the Plan before the Trust Deed’s implementation. He thought this would “prejudicially affect any rights of entitlements already accrued”.

Summary of Mr K’s position

19. The Trust Deed cannot be applied retrospectively. If the introduction of the Trust Deed was not validly made, this would potentially invalidate the Rule, as his understanding was that if the Rule was not lawful, it had no effect and did not apply. It

was also important to consider which document made the Rule valid and at what point in time, if it was not valid from 4 August 1997.

20. The word 'proportionately' is not defined in the Plan Rules. However, the calculation used by the Trustee does not apply a proportionate reduction for the first increase as it does not account for the whole time the pension has been in payment. As a result, the calculation is an approximation and is not sufficiently accurate to account for the value of a member's deferred pay.
21. Taking this into account, the majority of members are being underpaid and a few members could be overpaid. So, members are not being treated equally, as the Trustee's interpretation of 'proportionately' results in a systematic underpayment of pensions for most members. Further, this application impacts the spouse's pensions, meaning these could also be underpaid.
22. A mathematical approach is universally understood, so this is the only way to "understand the consequences of the Trustee's interpretation". A purely textual approach in this case did not have regard for the practical consequences of the construction, as explained in paragraph 21 above. The relative quantity is time, so the Trustee should use a unified quantity. Months of a year is not a unified quantity and results in inequality.
23. There is no evidence of the Plan's members being informed of the proportional first increase rule either before or after the amendment deed was delivered. The 1989 Deed was also signed and delivered after the date the provisions were to come into force and contained a clause stating that the deed shall have effect as though it had been executed on 6 April 1988. His understanding is that a valid deed cannot contain retrospective provisions. So, if the May 1989 deed is invalid, it must follow that the August 1997 Amendment deed has no effect.
24. After finding a letter sent to members dated March 1996, he noted that there was no mention of a change to the first pension increase. As there was no evidence that the Trustees had informed members of the change either before or after the Trust Deed was delivered, he questions whether the backdating of the amendment amounted to a "procedural impropriety".
25. There had been a decision to merge three schemes and add a fourth 'new' scheme on 1 April 1997 to coincide with the 1995 Act. In January 1997, the employer issued a notice that the contributions would be introduced in April and a newsletter was published to explain the policy. This said that "your existing benefits will not be affected". The Trustees had not informed members of a change to the first pension increase at this point and no deed of amendment had been delivered. So, it cannot be perceived that there was any will or intent to introduce a proportionality rule.
26. The first pension increase for the new 1997 membership also contained a rule involving proportionality, which is defined and measured to the nearest whole month. As a result, the Trustee is effectively measuring in half months. While this was more accurate, it still results in inequality. He believes that the Rule must have been drafted

at the same time as the 1997 Amendment clause considering the new membership deed were to be delivered by 1 April 1997.

27. The Trustee minutes indicate that new personnel and/or a payroll computer was due to come online on 1 November 1996. Considering that the Trustee was able to calculate in half months for the 1997 membership, the Trustee's argument about complexity and cost for individual calculations is not credible.
28. It is an assumption to think that the proportionality rule was worded to be similar to the 1995 Act. There is similar wording at section 105 in the Pension Schemes Act 1993, which may be the origin of the Rule. However, the Plan was not subjected to this and operated until August 1997 without one. In any case, the Plan stands on its own rules and is not subject to the 1995 Act's regulations regarding proportional increases.
29. He questions how his benefits were going to be recalculated.

Summary of the Trustee's position

30. Mr K's first pension increase was incorrectly calculated because the Trust Deed that introduced the Rule was not validly made as it did not have retrospective effect. This does not mean that the introduction of the Trust Deed itself was not valid. Rather, it was validly made for new joiners and for existing members' benefits after the date of the amendment but not validly made in respect of existing members' benefits that had built up prior to the date of the change. As a result, Mr K should have received a full annual increase to his pensionable service before the date of the Trust Deed, but a "proportionate" increase applied to his pensionable service thereafter.
31. It provided minutes from the Trustee meetings where a draft of the Trust Deed was discussed (see Appendix C for relevant excerpts). These demonstrated that the draft was circulated to the Trustee for comment, and that legal advice was sought about the wording of it. However, it was unable to locate a copy of the letter which was issued to staff about the changes being made.
32. The March 1996 Letter that Mr K provided, notified members of the main amendments made by the 1997 Deed (see Appendix D). The material amendment is included, along with information about member and employer contribution holidays, but the technical detail of the prorating of the first pension increase is not mentioned. The Trustee said it is entitled to make a judgment about the degree of "materiality" of any amendment. So, it can choose to omit technical and/or less substantive amendments. This is a reasonable and proportionate approach as it would be impractical for the Trustee to notify members of every technical or minor amendment made to the Plan.
33. The absence of notifying members about the detail of this amendment does not make the amendment invalid. The power of amendment in the 1989 Deed (see Appendix E) requires the Trustee, with the consent of the Company, to declare an amendment in order for it to be made to the Plan's Trust Deed and Rules. Once the amendment is

made, the Trustee is required to notify affected members in writing, in a variety of ways. Failing to notify members of an amendment after it has been made does not restrict the power of amendment. Rather, the notification requirement is a procedural formality that takes effect once the amendment has been made.

34. There is no requirement for an amendment to be made by deed. The fact that a deed of amendment is dated after an amendment takes effect does not contravene the power of amendment and so does not make the amendments invalid.
35. *Barnardo's v Buckinghamshire & Ors*¹ considered the proper approach to the construction of pension scheme documents. It proposed the following:-
 - It was appropriate to give weight to textual analysis, by concentrating on the words which the draftsmen had chosen to use. Less weight should be given to the background factual matrix than might be appropriate in certain commercial contracts.
 - The emphasis on textual analysis as an interpretative tool did not derogate from the need to avoid undue technicality and to have regard to the practical consequences of any construction. This endorsed the views expressed in *In re Courage Group's Pension Scheme*², that the provisions of a pension scheme should, where possible, be construed to give reasonable and practical effect to the scheme.
 - The legal and taxation context is relevant to the construction of pension scheme documents.
36. The proper construction of the Rule should be considered in the context of the introduction of statutory increases under the 1995 Act, which came into force shortly before the relevant wording in the Rule. Taking this into consideration, it is logical to assume that the amendments to the Rule were intended to operate in harmony with that legislation. Section 54 of the 1995 Act supports the argument that the Rule is satisfied by paying a first year increase reflective of the number of complete months since the pension came into payment. A construction of the Rule which requires or permits the use of monthly increments would also avoid the additional complexity and cost of having to undertake individual calculations on the basis of the number of days in which the pension has been in payment. Further, this basis is consistent with common practice in private sector occupational pension schemes, both at the time the Rule was implemented and subsequently.
37. It disagreed with Mr K's mathematical approach to the interpretation of "proportionately" and noted that there were other definitions of the word. It believes that the correct approach was to analyse the context in which the word appears in order to determine the meaning it should be given in the context of the Rule. It argues that the reason for the Rule was to ensure that where a member has been retired for

¹ [2018] UKSC 55

² [1987] 1 WLR 495

less than a full year, they do not receive a full year's increase. Rather, members will be entitled to part of the full annual increase rather than a full year or none at all. It is not intended to "prescribe in precise mathematical terms how this is to be achieved." Otherwise, this would have been set out in the wording of the Rule.

38. The existence of the 1989 Clause means the unit of measurement can be decided by the Trustee. So, the Trustee's approach is within the scope of the Rule, and it cannot be considered as unreasonable or irrational. This approach did not mean that the pension has been calculated incorrectly or that Mr K has received less than what he is entitled to. Although this approach is not the most favourable to the members, it does not make it unreasonable or lacking in proportionality.
39. It should be noted that the wording in the Rule makes reference to "less than 12 months". This indicates that the draftsmen intended that the period the pension had been in payment for, should be considered in monthly increments. This was chosen over the use of "365 days". So, following a textual analysis of the Rule, a first year increase which reflects the number of complete months since the pension came into payment satisfies the "proportionately" requirement.
40. As a result, Mr K's pension will be recalculated on the basis that a full annual increase should have been paid on 1 April 2002 in respect of pensionable service prior to 4 August 1997 and a proportionate increase, reflecting the number of months since the pension came into payment, in respect of pensionable service after 3 August 1997. Interest will also be paid at the rate of 1% simple over the base rate in respect of past underpayments.
41. While Mr R has included the impact on other members and different pension schemes as a comparison, it has only commented on the substantive issues raised in relation to Mr R and the Plan.

Mr K's additional comments in response to the Trustee's position

42. He notes that there is no requirement for amendments to be made by deed. However, Clause 3 of the 1989 Deed allows the Trustee to declare any modification, alteration amendment or extension with consent of the Company. As the Trustee has chosen to make declarations by deed, it is bound by the rules and procedures for execution of deeds. One of these provisions is that a deed cannot be made retrospectively. So, a valid deed needs to be signed and delivered on or before the date the amendment is due to come into force.
43. Taking this into consideration, he questions whether the Trustee's actions result in the following:-
 - The 1989 Deed fails because it contains provisions due to commence on 6 April 1988 but was not signed and delivered until 26 May 1989.
 - The consolidated amendments will continue to be valid by virtue of their original declaration deed, provided they were executed correctly.

- Any subsequent amendments to the failed deed will have no effect and so will be invalid.
 - The 1997 Deed fails on two counts:
 - It contains provisions due to commence on 1 April 1996 but was not signed and delivered until 4 August 1997.
 - It attempts to amend the May 1989 Deed which has failed and so is invalid.
44. The second part of the 1989 Deed's Clause 3 says that in the event of an amendment, the Trustee shall notify members affected in writing. It then lists ways of doing so along with four restrictions on the powers of the Trustee. He disagrees with the Trustee saying that the notification was a procedural formality rather than a restriction. He understands this to be an "explicit instruction" or an order to the Trustee to notify the affected members about any change. He views it as a vital part of the declaration process and necessary for any amendment to be valid. After checking his file, he cannot find any examples he may have received, so he suspects that the Trustee has notified very few changes. As the clause refers to any amendment and the notification shall be 'forthwith' he questions whether it confers any rights whatsoever on the Trustee to decide which amendments to notify.
45. With regard to the construction of the Rule, he asks whether the ability to easily clarify the Rule rests with the Trustee?

Conclusions

46. Mr K's complaint involves assessing: the validity of the Trust Deed that introduced the Rule; the validity of the 1989 Deed; whether the Trustee has the power to interpret the Rule; and the reasonableness of the Trustee's interpretation of the word "proportionately". I shall address each in turn. However, it should be noted that in support of his arguments, Mr K has compared the Plan to other pension schemes and has commented on the broad impact of the introduction of the Rule on other members. For the purposes of this investigation, my remit is limited to the impact that any errors have had on Mr K. Further, when assessing the Trustee's acts and omissions in relation to the Plan, my remit is to conclude whether these amount to maladministration. Comparisons to other pension schemes would not establish this and so would be inappropriate.

Validity of the 1997 Deed

47. Mr K has questioned the validity of the 1997 Deed for the following two reasons: he believes it has incorrectly introduced retrospective changes; and the procedural requirements for the amendments were not followed. Having reviewed the submissions and the information provided, I consider that the 1997 Deed was validly introduced.
48. Mr K recognises that the Plan Rules do not require amendments to be made by deed. Rather, subject to the Trustee obtaining consent of the Company, the Trustee may

amend the Plan Rules by a declaration. I consider that the wording of the March 1996 Letter, “the Trustees in consultation with Company adopted the following changes”, is sufficient to amend the Principal Deed and Rules of the Plan from 1 April 1996 in accordance with the Plan’s amendment power. This indicates that the Company provided consent, otherwise, if it had not provided its express or implied consent, it would have prevented or objected to the changes.

49. The fact the Trustee and the Company then formally recorded this change on the 4 August 1997, by way of deed of amendment, is an accepted practice which was common to many pension schemes at that time. As Mr K has identified, a deed is a formal instrument for recording a change to the Plan Rules that has already taken place. In this instance, it did not introduce a new change from 4 August 1997, as this change, where effective, was already in place.
50. As recognised by the Trustee, the amendment did not fully take effect as intended due to the protections introduced by section 67 of the Pensions Act 1995 on 6 April 1997, in respect of existing member benefits that had built up prior to the change. Nevertheless, the amendment was validly made for new joiners and for existing members in respect of their future service.
51. With regard to the procedural requirements, according to Clause 3 of the 1989 Deed, the Trustee was required to notify members once the Trust Deed had been executed. In this instance, there appears to be no evidence demonstrating that this was the case. However, I note that members were informed of the main amendments made by the 1997 Deed in the March 1996 Letter, prior to the Trust Deed being executed. It has been necessary to take into consideration case law on this matter, notably the following:-
- Warren J.’s conclusion in *Premier Foods v RHM Pension Trust Ltd*³ (**Premier Foods**), “There is a well-established principle that in choosing between an interpretation which makes the instrument valid and effective and one which makes it invalid or ineffective, the court should lean towards the construction which saves the instrument.”
 - Newey J.’s ruling in *Briggs and Others v Gleeds & Ors*⁴ (**Briggs**) decided that the failure to witness the signatures of partners on various deeds meant that the deeds were invalid, as they failed to comply with the statutory requirements for the valid execution of deeds.
 - Mr Justice Morgan’s references to the principles in *Davis v Richards and Wallington Industries*⁵ in *Coats UK Pension Scheme Trustees Limited v Styles & Ors*⁶ (**Coats**) where he said “I ought therefore to be prepared to assume that the Trustee intended to exercise that power. I do not need to be given evidence by the

³ [2012] EWHC 2974

⁴ [2014] EWHC 1178 (Ch)

⁵ [1990] 1 W.L.R. 1511, [1990] 3 WLUK 31

⁶ [2019] EWHC 35 (Ch)

Trustee of a positive intention to exercise this specific power. In this case, there is no sufficient evidence that the Trustee did not intend to exercise that power. What would be required in that respect would be positive evidence that the Trustee had the positive intention not to exercise the power.”

52. Unlike the deeds reviewed in Briggs, the Trust Deed was executed correctly, but applied incorrectly. So, I consider the Trust Deed to be valid in that respect. Further, given the judgments in Premier Foods and Coats, I find that the Trust Deed should be considered as effective as was intended by the Trustee. The fact that the members were informed of the main amendments to their benefits demonstrates the positive intention, with nothing to support the view that the Trustee had positive intention to not exercise its power.
53. I appreciate that the Trustee chose to formalise the amendments by Trust Deed and why Mr K believes that this means the notification to members is an explicit requirement and not a “procedural formality”. However, as found in the case of HR Trustees Limited v Wembley Plc⁷, non-compliance with the formal requirement of the amendment power is not necessarily fatal to the amendment of a pension scheme’s rules. This is because the notification requirement is separate from the amendment itself, so failure to satisfy the formality to notify member does not make the amendment invalid.
54. I also note that Mr K believes that there was no intent as the March 1996 Letter did not explicitly state the change being made to members’ first pension increases. However, it is not unusual for trustees to only inform members of the main changes taking place, rather than every technical change. I do not consider the omission of this particular change from the March 1996 Letter is sufficient to invalidate the 1997 Deed.

Validity of the 1989 Deed

55. This Deed confirms that amendments were made to the Plan effective from 6 April 1988, and recital 3 explains that the deed represents a consolidation of previous deeds that, as far as I am aware, were validly executed.
56. I do not agree with Mr K’s overall view that deeds of amendment cannot be applied retrospectively, as there is sufficient case law to show that where the necessary formalities are met, the courts will not find a retrospective amendment invalid. For example, in Burgess & Ors v BIC UK Ltd⁸, the court found that a new trust deed and rules for the scheme entered into in 1993, but backdated to 1990 could retrospectively provide for the higher increase on the basis that there were a number of provisions in this deed that would allow for the granting of increases without requiring any particular formalities to be completed.

⁷ [2011] EWHC 2974

⁸ [2018] EWHC 785 (ch)

57. The power of amendment in the Principal Deed is silent in respect of retrospective amendments. In addition, at the time the 1989 Deed was executed the statutory restrictions, regarding retrospective amendments introduced by section 67 of the 1995 Act, were not in place. Consequently, the fact that the 1989 Deed included amendments that pre-dated its execution, does not render it invalid.

The Trustees' power to interpret the Rule

58. With regard to the Trustee's interpretation of the Rule, the 1989 Clause provides the Trustee with the power to determine all matters of doubt in relation to the Plan or the construction of it. As "proportionately" is not defined within the Trust Deed, the clause applies and enables the Trustee to provide its interpretation of the Rule. This leaves the question of whether its interpretation is correct.

The reasonableness of the Trustee's interpretation of the word "proportionately"

59. The most recent approach to the construction of pension scheme documents, as identified by the Trustee, was considered in *Barnardo's v Buckinghamshire & Ors*. So, there must be weight given to the textual analysis by focusing on the choice of words. The relevant test for this follows Lord Wilberforce's call for an objective exercise in *Reardon-Smith Line Ltd v Hansen-Tangen*⁹:

"When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

60. For the Trustee's interpretation to be considered as an error, it has to be found that no reasonable trustee could have made the same decision. When considering that the same approach has been adopted in section 54 of the 1995 Act, and appears in industry practice for the calculation of first increases, I find the Trustee's interpretation reasonable. While I appreciate Mr K's concerns about this being a minimum that should be achieved, this does not render the interpretation incorrect. I do not consider that the Trustee has done the following when reaching its interpretation:-

- Taken irrelevant considerations into account.
- Failed to take any relevant considerations into account.
- Committed some other procedural impropriety.
- Acted in such a way that no reasonable body of trustees, properly directing themselves, could act.

61. Where there has been an error, the Trustee has acknowledged that it acted incorrectly when it retrospectively applied the Rule to Mr K's benefits that had

⁹ [1976] 1 WLR 989

accrued before the Trust Deed was implemented. In recognition of the distress and inconvenience, it has offered to recalculate his benefits so that the Rule is only applied to benefits accrued after its execution; pay interest (outlined in paragraph 17) in respect of past underpayments; and pay £500 in recognition of the distress and inconvenience caused.

62. While I appreciate that the Trustee offered redress as soon as it found the error that had been made, I have to consider the time taken for this error to come to light. Given that Mr K first raised his complaint about the Rule in December 2015, I would have at least expected the incorrect, retrospective application of the Rule to have been found in the IDR process. The fact that it took approximately three and a half years, after a number of reviews into this specific matter, is unacceptable. Although, I understand not all of the time taken between 2015 and 2019 is attributable to the Trustee, I have taken into consideration that this error first impacted Mr K in 2002. So, by the time Mr K raised his concerns in 2015, 13 years had passed where the Trustee had the opportunity of identifying the error. As a result, the Trustee's award shall be increased to £1,000 in recognition of the serious distress and inconvenience caused.
63. With regard to the Trustee's offer to recalculate Mr K's benefits so that they are correct, and to apply interest to the past underpayments, I find this to be adequate redress.

Directions

64. Within 28 days of the date of my Determination, the Trustee shall:-
- pay £1,000 to Mr K for the serious distress and inconvenience caused;
 - recalculate Mr K's benefits, ensuring that the benefits accrued before the implementation of the Trust Deed are not subject to the Rule; and
 - pay the interest it has suggested in paragraph 17 (1% simple interest over the base rate) in respect of past underpayments.

Anthony Arter

Pensions Ombudsman
15 October 2020

Appendix A

Pensions Act 1995, section 54

Sections 51 to 53: supplementary

- (1) The first increase required by section 51 in the rate of a pension must take effect not later than the first anniversary of the date on which the pension is first paid; and subsequent increases must take effect at intervals of not more than twelve months.
- (2) Where the first such increase is to take effect on a date when the pension has been in payment for a period of less than twelve months, the increase must be of an amount at least equal to one twelfth of the amount of the increase so required (apart from this subsection) for each complete month in that period.
- (3) In sections 51 to 53 and this section—

“annual rate”, in relation to a pension, means the annual rate of the pension, as previously increased under the rules of the scheme or under section 51,

“the appointed day” means the day appointed under section 180 for the commencement of section 51,

“appropriate percentage”, in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the revaluation period the reference period for which ends with the last preceding 30th September before the increase is made (expressions used in this definition having the same meaning as in paragraph 2 of Schedule 3 to the Pension Schemes Act 1993 (methods of revaluing accrued pension benefits)),

“pension”, in relation to a scheme, means any pension in payment under the scheme and includes an annuity.

Appendix B

Pensions Act 1995, section 67

Restriction on powers to alter schemes

- (1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.
- (2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.
- (3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—
 - (a) the trustees have satisfied themselves that—
 - (i) the certification requirements, or
 - (ii) the requirements for consent,are met in respect of that member, and
 - (b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.
- (4) In subsection (3)—
 - (a) “the certification requirements” means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before the power is exercised, and
 - (b) “the consent requirements” means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies.
- (5) Subsection (2) does not apply to the exercise of a power in a prescribed manner.
- (6) Where a power to which this section applies may not (apart from this section) be exercised without the consent of any person, regulations may make provision for treating such consent as given in prescribed circumstances.

Appendix C

Trustee meeting minutes

12 June 1996:

“A draft Deed of Amendment in respect of the changes had been circulated to the Trustees for comment. The comments would be raised with [the solicitors]. The Deed of Amendment would then be circulated for signature.”

18 September 1996:

“The Trustees were advised that discussions were still underway with [the solicitors] concerning the wording of the Deed of Amendment implementing the April 1996 changes.

The Trustees requested the Deed of Amendment be available for completion by the next Trustees meeting.”

5 September 1997:

“The Deed of Amendment incorporating the benefit changes implemented as at 1 April 1996 had been distributed to the Trustees.”

Appendix D

Contents of the May 1996 Letter

“Dear Member

WS Atkins Staff Retirement Benefits Plan

An actuarial valuation of the Plan was undertaken as at 1 April 1995. The results showed that member’s accrued rights continue to be fully funded.

Following consideration of the valuation the Trustees in consultation with the Company adopted the following changes:

1. Member contributions – these were suspended from April 1993 for an initial period of 3 years. These will remain suspended subject to periodic review.
2. Employer’s contributions – these were reduced from April 1993 for an initial period of 3 years. These will remain at the reduced level subject to periodic review.
3. Pension Increases – all current active, preserved and pensioner members will continue to be eligible for guaranteed 5% increases on pensions in payment in excess of the Guaranteed Minimum Pension (subject to Inland Revenue limits). The Guaranteed Minimum Pension (GMP) is the liability arising under the State Earnings Related Pension Scheme.

All members who join the Plan after 1 April 1996 will, when they retire, receive increases to pensions in payment above the GMP at the lesser of the change in the Retail Price Index or 5% per annum. This change has been made in the light of the recent level of inflation which it is considered may prevail for some years.

It was reaffirmed that it remains the Company’s intention to review pensions in payment annually with the objective of maintaining the purchasing power of the pension by changes in the Retail Price Index (RPI). Although the funding assumptions used in the actuarial valuation makes specific allowance for pension increases linked to the RPI the Company cannot guarantee to match changes in the RPI.

4. Life Assurance – with effect from 1 April 1996 the level of life assurance cover for pensionable members of staff who are in service and under the age of 60, will be increased from three to four times Gross Pensionable Salary.

Should you have any questions in connection with the above please contact [representative] or a member of the Pension Fund Advisory Committee.”

Appendix E

The power of amendment

Clause 3 of the May 1989 Consolidation states: "The Trustees may with the consent of the Company from time to time declare any modification alteration amendment or extension of the trusts powers and provisions of this deed and may with the like consent modify alter amend or extend the terms and provisions of the Rules. In the event of any such modification alteration amendment or extension the Trustees shall forthwith notify the Members affected thereby in writing either by letter handed to the Members personally or sent to them through the post in a prepaid letter addressed to them at their last known address or by a notice exhibited on the Employers' notice boards or in any of the Employers' offices.

Notwithstanding anything hereinbefore contained in this Clause to the contrary no exercise by the Trustees of their powers under this Clause shall:

- (i) in any way affect prejudicially any pension already being paid at the date of such exercise taking effect or benefits already accrued or secured up to the date on which such exercise takes effect
- (ii) vary the sole purpose of the Fund from that of providing relevant benefits (as defined by Section 612 of the Income and Corporation Taxes Act 1988) for and in respect of Members
- (iii) permit the payment or transfer of any money or other benefits from the Fund to any of the Employers
- (iv) for so long as a contracting-out certificate is in force in respect of the Fund affect any of the matters dealt with in Part III of the Pensions Act without the consent of the Occupational Pensions Board."