

Ombudsman's Determination

Applicant	Ms S
Scheme	Abbey Life Assurance Company Limited Staff Pension Scheme (the Scheme)
Respondents	Abbey Life Trust Securities Limited (the Trustee) Equiniti Limited (Equiniti)

Outcome

1. I do not uphold Ms S' complaint and no further action is required by the Trustee and Equiniti.

Complaint summary

2. Ms S' complaint concerns:
 - overpayment of a bridging pension that has been offset against arrears of long term (**Lifetime**) pension.
 - alleged mishandling of her subsequent enquiries and provision of conflicting information by Equiniti, the administrators of the Scheme.

Background information, including submissions from the parties

3. Under the Scheme's definitive deed and rules dated 20 June 1983 (the **June 1983 Rules**), normal retirement date (**NRD**) means the member's 65th birthday if male, or 60th birthday if female. The June 1983 Rules state that on reaching NRD, a member will be entitled to an immediate pension equal to "one seven-hundred-and-twentieth" of final pensionable earnings for each month of pensionable service.
4. The June 1983 Rules indicate that a member who remains in service and defers payment of pension beyond NRD, will receive an actuarial increase in respect of the period of deferment.
5. The Scheme's second definitive trust deed and rules dated 8 July 1999 (the **1999 Rules**), were intended to come into effect from 1 April 1988.

6. In the case of a male member, who on 1st April 1988 had reached his 62nd birthday, "Scheme Pension Age" under the 1999 Rules means his 65th birthday. Otherwise it is his 62nd birthday.
7. The 1999 Rules states that in respect of a female "Pre 1994 Executive Member" who withdrew from the Scheme before 1st April 1993, or "Staff Member" who left the Scheme before 1st April 1996, "Scheme Pension Age" is the member's 60th birthday. For other female members, it is the member's 62nd birthday.
8. Except where the member will accrue further pensionable service until retirement, the 1999 Rules indicates that the pension at "Scheme Pension Age" will increase until the member retires.
9. Rule 15 of the 1999 Rules provides that a female member who retires after 16th May 1990 but before her 65th birthday, will be entitled to a bridging pension until age 65. The bridging pension is broadly 1/40th of the "Basic State Pension" as at "Scheme Pension Age" for each year of pensionable service.
10. On or around March 1996, the Trustee issued a newsletter (the **Newsletter**). It outlined forthcoming changes to equalise pension ages for men and women.
11. It explained that, due to new legislation, the Scheme Rules were being amended to equalise normal pension age (**NPA**) at age 62 for men and women from 1 April 1996. The Newsletter indicated that a bridging pension would be payable to women from age 62 to age 65, on the same basis as men. It advised that the bridging pension would be equal to the "Basic State Pension" after 40 years' pensionable service.
12. Section 37 of the Pension Schemes Act 1993 (the **Act**), generally prevents alteration of pension scheme rules that affect contracting-out benefits. In broad terms, Section 67 of the Pensions Act 1995 precludes workplace pension schemes from amending scheme rules in a way that would or could affect the accrued entitlement or rights of any scheme member. Any amendments to scheme rules that do not comply with pension legislation may be invalid.
13. Ms S joined the Scheme after April 1996. She retired on her 61st birthday in October 2009. Ms S was paid a bridging pension, in addition to her Lifetime pension, until her 65th birthday in October 2013.
14. On 26 October 2017, a deed of augmentation was made between the Scheme's Principal Employer and the Trustee (the **2017 Deed**). It states:

"The Scheme is governed by Rules made on 30 June 2017 (the "Rules"). Rule 28 (changing the Rules) says that the Trustee may, with the consent of the Principal Employer, alter, modify or add to all or any of the provisions of the Rules at any time, subject to certain restrictions contained in Rule 28.

The Trustee and the Principal Employer have been advised that certain amendments made by the Second Definitive Deed of Amendment dated 8 July 1999 (the "**Second Definitive Deed**") and other amending documents are, or

may be, invalid as a result of breaching the Scheme's amendment power or as a result of breaches of section 37 of the Pension Schemes Act 1993 or section 67 of the Pensions Act 1995.

The Trustee and the Principal Employer wish to correct the benefits payable to or in respect of affected members such that those members receive the better of the benefits that it was intended to provide and the benefits to which members are or may be legally entitled."

15. Clause 10: "Correction of benefits", says that the Rules of the Scheme are amended to provide "Staff Members" at the date of the 2017 Deed with benefits equal to the greater of the member's "Intended Benefits" and their "Legal Benefits". It states that the Trustee shall determine a member's corrected benefits, after taking actuarial advice and consulting the Principal Employer.
16. Clause 11 says:

"a Member's Intended Benefits are the Member's benefits under the Scheme calculated in accordance with the table in Appendix 1 (Intended Benefits Table) to this deed..."
17. It describes a member's "Legal Benefits" as the greater of the member's benefits calculated in line with a table in "Appendix 2" to the 2017 Deed and those in "Appendix 3".
18. Clause 11 suggests that a possible "Section 37" issue was identified in respect of the "Legal Benefits".
19. "Appendix 1" indicates that, for female "Staff" members who joined the Scheme after 31 March 1996, the Lifetime pension is reduced, or increased where appropriate, based on a retirement age of 62. The notes in the appendix state that the bridging pension is reduced if paid before age 62, and "does not need to be equalised".
20. On 30 October 2017, the Trustee notified Ms S that it was completing work in respect of historical changes to the Scheme Rules (the **Phase 1 Letter**). The Trustee advised that this meant that some members "may need a small **upward** adjustment to their pension", going back to 1988 in some cases. The Phase 1 Letter stated that Ms S was one of the members impacted by this.
21. The Trustee stated that it would automatically make the upward adjustment to Ms S' pension, unless she completed and returned the form that had been enclosed with the letter. The Trustee emphasised that Ms S' pension had always been calculated in line with the amount Abbey Life said it would pay. The Phase 1 Letter said:

"However, some time ago it was found that a legal change to the Scheme's Rules might not have been documented properly. As a result, some members might be entitled to receive a small additional amount of pension. A lot of careful work, with the help of professional advisers, was needed to find out what had actually happened and how those members were affected.

...

Step 3

If you are already receiving your pension and the pension payments you have already received have been underpaid, the next letter will also explain:

- how the increase takes into account pension arrears and interest; and
- how and when your pension payments will change as a result."

22. On 17 January 2018, Ms S was sent an update (the **Phase 2 Letter**). Ms S was told that the adjustment to her pension would amount to £11.15 per month (gross). Her total pension would therefore be £378.49 per month. The Trustee reminded Ms S to inform the Trustee if she did not want the adjustment to be made.
23. On 20 January 2018, Ms S contacted Equiniti. She asked for details of the rule change that had triggered the review of her pension benefits. She also asked the date the "error" applied from and details of how the proposed enhancement was calculated.
24. Equiniti acknowledged this on 23 January 2018. Equiniti advised that it had referred Ms S' enquiry to the actuaries overseeing the project. Equiniti said that it would update Ms S once it had received their reply.
25. On 31 January 2018, following a draft response from the actuaries, Equiniti advised that the amendments were made in 1988 and then in 1996. Equiniti explained that the rules introduced the same retirement age of 62 for men and women "to comply with age discrimination legislation". However, the Scheme's Trust Deed and Rules were not strictly followed. Equiniti explained that this went unnoticed for some time. Equiniti stated that the position had now been corrected, "so that all members will receive the pension benefits they were promised in 1988 and 1996."
26. Regarding the enhancement to Ms S' pension, Equiniti stated that:

"The enhancement was determined by calculating the pension that each member should have received on retirement under the Trust Deed and Rules of the Scheme, and comparing this to the pension that the member actually received. Enhancements are payable to members where their pension under the Trust Deed and Rules is higher than the pension they received."
27. Equiniti explained that, in Ms S' case, she had been overpaid while receiving her bridging pension, which ceased after her 65th birthday. The Trustee had decided to write off the overpayment and correct her pension "as soon as possible", rather than delay the "uplift" to her pension until the overpayment had been recovered.
28. Ms S raised an additional query the same day. She asked for details of how the overpayment had arisen.
29. On 13 February 2018, following approval from the Trustee, Equiniti advised:

“In working out whether your pension needed to be adjusted, we compared your actual retirement benefits (ie those being paid, which included the benefit changes that were made/announced in 1988 and 1996, and which are the benefits intended by the Company) with the benefits that we have identified that you should have received under the Scheme Rules (which were not correctly amended to reflect the intended 1988 and 1996 changes). These latter Scheme Rules benefits [sic] include a larger lifetime pension than you received on retirement, but a smaller bridging pension. You were overpaid until age 65 because of the smaller bridging pension.

The adjustment that you will now receive is the larger lifetime pension. As noted previously, the Trustee could have reclaimed the past overpayments that you have received, but instead decided to write off the overpayments and pay the larger lifetime pension as soon as possible.”

30. Ms S contacted Equiniti the next day. Ms S stated that she was unhappy with the explanation that had been provided. It was unfair to offset the overpayment against the arrears given that her bridging pension had been miscalculated by Equiniti.
31. On 15 February 2018, Equiniti referred Ms S' enquiry to the Scheme actuaries. On 20 March 2018, following the Trustee's approval of Equiniti's proposed response that same day, Equiniti emailed Ms S and apologised for the delay in replying.

Equiniti explained that the Scheme was not claiming back past overpayments, or offsetting these against the increase to her “current” pension. Equiniti repeated that the Trustee was writing off the overpaid pension. The email said:

“All the changes that we are making relate to the discovery that, some time ago, a legal change to the Scheme's Rules might not have been documented properly. Your pension has always been calculated in line with the amount the Company said it would pay, and is now being further increased as a result of this change.”

32. On 10 May 2018, Ms S complained under the Scheme's internal dispute resolution procedure (**IDRP**). Ms S questioned why the uplift had only been applied from April 2018. She argued that “as soon as possible” should mean backdated to her 61st birthday.
33. Ms S asserted that Equiniti was using the miscalculated bridging pension to its advantage. Ms S continued that Equiniti had failed to fully address her concerns and treat her letter dated 14 February 2018 as a complaint.
34. Equiniti acknowledged Ms S' email the same day. Equiniti said that the complaint had been referred to the pension manager to address the issues Ms S had raised. Equiniti forwarded the complaint to the Trustee that same day.
35. On 10 July 2018, the Secretary to the Trustee issued a response under stage one of the IDRP. The Secretary to the Trustee advised that due to the “technicality” resulting

from the incorrect documentation, members had been “paid more than the pension under the applicable Scheme rules.” However, members had been paid at least the amount of pension that Abbey Life had intended to be paid to them. The letter stated that:

“due to the aggregate impact of the incorrect documentation (ie the ‘intended’ Scheme Rules), some Members have become entitled to a ‘windfall’ additional amount due to the documentation that now needs to be applied (ie the ‘applicable Scheme Rules).

36. The letter explained that, under the “applicable” Scheme Rules, Ms S was entitled to a Lifetime pension increased by a late retirement factor because Ms S had retired at age 61. However, Ms S was not entitled to a bridging pension. Since the pension had been paid under the “intended” Scheme Rules from October 2009 to February 2018, Ms S was paid a bridging pension until age 65. The Scheme Secretary advised that Ms S had “technically” been overpaid by £1,235 under the “applicable” Scheme Rules, which the Trustee had decided not to recover. The letter stated:

“Because the annual lifetime pension that you should have been paid under the ‘applicable’ Scheme Rules at 28 February 2018 is £4,541.88 pa, but the annual lifetime pension that you were actually being paid at 28 February 2018 under the ‘intended’ Scheme Rules was a lower amount of £4,408.08, the Trustee has increased your annual lifetime pension by £133.80 pa (or £11.15 per month) from the March 2018 payment (ie you are now benefitting from a ‘windfall’ additional amount).”

37. The letter advised that the “cumulative” overpaid pension had been written off. The overpayment had no bearing on payments Ms S had received, or payments Ms S would receive in future.
38. The Secretary to the Trustee enclosed a summary of the annual payments made to Ms S since October 2009 (the **Summary**). This also detailed what should have been paid under the “applicable” Scheme provisions.
39. The Summary shows a Lifetime pension and bridging pension of £3,589.23 and £533.13 per annum respectively under the “intended” Scheme Rules as at October 2009. It shows a Lifetime pension of £3,698.10 per annum as at the same date with no bridging pension.
40. The Summary displays a Lifetime pension of £4,408.08 and £4,541.88 per annum under the “intended” and “applicable” Scheme Rules respectively as at 31 March 2018.
41. The Summary indicates that Ms S was overpaid to 25 October 2013 and that Ms S was underpaid by £645.11 from 26 October 2013 to 31 March 2018.
42. Ms S complained under stage two of the IDRP on 14 September 2018. The complaint was acknowledged that same month. Ms S was informed that the Trustee would aim

to issue a response within two months. On 11 December 2018, Ms S was notified that the Trustee had not yet reached a decision.

43. On 23 January 2019, the Trustee issued its response and apologised for the delay. The Trustee stated that:

“...certain historical changes to the ‘intended benefits’ (for example, in respect of changes to Bridging Pensions applying to female Members) were not completed correctly in the Scheme Rules, so that the ‘intended benefits’ were not properly reflected in the legal documentation. Those ‘errors’ in the legal documentation have now been corrected, but there remained a period of time where the legal documentation did not reflect the intentions of Abbey Life.”

44. The Trustee indicated that members were therefore not legally entitled to those improvements although Abbey Life had agreed to provide them. The letter stated that Ms S was being paid a small ongoing “windfall” from March 2018, because of the error. The Trustee Chairman offered to meet with Ms S to explain the position.

45. Ms S’ position is summarised below.

- She was given a quotation before she took her benefits. It is reasonable to expect that the Trustee had fulfilled its obligations by quoting and paying the correct entitlement.
- Given the passage of time before the Trustee realised that the pension had been miscalculated, the Trustee should not offset the overpayment against the underpayment of pension. It should “draw a line” under the incorrect payments and calculate the Lifetime pension owed to her to date. The approach adopted by the Trustee is unfair in the circumstances.
- Equiniti provided conflicting information. Her request for details of the payments was not properly addressed.
- The responses she received to her enquiries were slow, lacking in detail concerning the overpaid pension and underpayments. They failed to directly address her concerns and were “dismissive” in tone.
- Payment of the full arrears of her Lifetime pension would resolve the issue.

46. Equiniti’s position is summarised below:

- The intention was to keep the communication clear and concise rather than to dismiss the concerns Ms S had raised.

- Equiniti issued a full response to Ms S within 10 working days in most cases. However, a full response to Ms S' email of 14 February 2018 was delayed while Equiniti was liaising with the actuaries and the Trustee.

47. The Trustee's position is summarised below:

- Following legal advice that certain past rule amendments had no legal effect, the Trustee carried out a rectification exercise during 2016 and 2017.
- In line with the Newsletter, it was intended that an NPA of 62 would apply with effect from 1 April 1996, with a bridging pension between the ages of 62 to 65.
- The Trustee compared actual payments against those that were strictly due under the Scheme provisions. The members were granted the higher of the intended benefits based on the Newsletter and the legal benefits under the applicable Scheme Rules.
- The Trustee considers that it acted lawfully and reasonably by taking into account the overpayment Ms S received before she reached age 65, even though she received less than her strict legal entitlement between age 65 and March 2018.
- The same approach was used for the other 13 members affected by the same issue.
- Under the equitable principle of recoupment, the Trustee could have taken the total net overpayment of £1,200 into account. Consequently, the Trustee could have deferred adjusting Ms S' pension in the meantime. It may have taken a further nine years to recoup the pension. This would not have been reasonable in the circumstances.
- Ms S cannot reasonably expect the past overpayments not to be taken into account when determining whether any arrears should be paid to her. Irrespective of the reason for the mistake, the Trustee's duty is to pay Ms S her correct entitlement. The Trustee is satisfied that this obligation has been met.
- The action taken to resolve the issue took time to implement across a large population of members. This was explained to Ms S. The Trustee issued its response as soon as it was able to do so.

48. The Trustee has referred to the High Court judgement in the case of *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch). It concerns equalisation of guaranteed minimum pension (**GMP**). The Trustee highlights that the principles of correcting pension benefits by taking into account past overpayment was ruled to be valid in that case.

Adjudicator's Opinion

49. Ms S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee and Equiniti. The Adjudicator's findings are summarised below: -

- The "change of position" argument is the most common defence against recovery of an overpayment. Broadly, the applicant must on the balance of probabilities show that because of the overpayment, which he received in good faith, he has detrimentally changed his position.
- The money must have been spent on something the applicant would not otherwise have bought; and the expenditure irreversible.
- There are other defences to the recovery of an overpayment. These arise less often in pension cases.
- The Adjudicator was satisfied that Ms S had met the good faith part of the change of position argument. However, the Adjudicator but was not convinced that the remaining criteria for a successful change of position defence had been satisfied.
- The Adjudicator considered that Ms S did not suffer any financial detriment as a result of the approach adopted by the Trustee. The overall position was that her pension increased by approximately £11 per month (gross) from April 2018. Ms S' pension had not been reduced to recoup the overpayment.
- Consequently, any possible change of position defence Ms S may otherwise have had against recovery of the overpayment falls way.
- The Adjudicator was unable to find any other possible defences that may be available to Ms S that would prevent the Trustee from offsetting the arrears against the overpaid bridging pension. There was no evidence of a clear unambiguous statement that Ms S would receive the arrears of payment. Or, an agreement expressly shared between Ms S and either the Trustee or Equiniti to that effect.
- The Adjudicator considered that a Pensions Ombudsman would likely consider that the approach adopted by the Trustee, to withhold the arrears of pension and offset them against the overpayment, reasonable in the circumstances.
- Had the Trustee paid the arrears of the Lifetime pension, it would have compounded the overpayment. This would run contrary to the general principle that a member cannot benefit from a mistake even if another party is responsible for the error.

- The Trustee could have recovered the overpayment against future payments of pension. This would have been less advantageous to Ms S than the method the Trustee used.
 - Regarding the handling of Ms S' enquiries and her subsequent complaint, the Adjudicator acknowledged that Equiniti did not provide the clarity and detail Ms S was looking for. Equiniti also indicated that past overpayments had been written off. This did not, in the Adjudicator's view, accurately reflect the position.
 - Part of the overpaid pension had in fact been offset against arrears of pension. This should have been made clear to Ms S.
 - The Adjudicator accepted that the matter had caused Ms S some inconvenience. However, the Adjudicator acknowledged that Ms S was given sufficiently detailed responses under the IDRPs and offered a face to face meeting to discuss the issue.
50. In response to the Opinion, Ms S asked the Adjudicator whether she would have been financially better off had she been in possession of all the correct information, and waited until age 62 to take her benefits. Ms S advised that she did not require the extra income at age 61, as she continued in employment until her eventual retirement in August 2015.
51. Ms S also enquired whether she could rely on the Limitation Act 1980 (the **Act**), as a possible defence against recovery of the overpayment.
52. The Adjudicator's further comments are summarised below: -
- The Adjudicator stated that it was impossible to form a view on whether Ms S would have benefitted financially had she delayed taking her Scheme pension. This would ultimately depend on the total pension that would otherwise have been payable over Ms S' lifetime, when compared with the total pension Ms S will receive from the Scheme.
 - A defence under the Act cannot apply in Ms S' case since the Trustee is recouping overpayments of the short term bridging pension by not remedying historic underpayments of Ms S' Lifetime pension. This is no different in principle to the recoupment of past overpayments of pension against future pension payments which would otherwise be payable but for the recoupment. Mr Justice Arnold confirmed in *Burgess v BIC* [2018] (040) (*Burgess v BIC*) that no limitation period applies in equitable recoupment by trustees of past overpayments.
53. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms S and the Trustee have provided their further comments, but these do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Ms S and the Trustee for completeness.

54. Regarding the Trustee's offer to meet with Ms S, Ms S has advised that it would have been both costly and inconvenient for her to attend a face to face meeting at [the Trustee's] offices.
55. Ms S has explained that her decision to take her pension benefits twelve months early, was based on all the figures [the Scheme] provided at the time. This included the Lifetime pension and the bridging pension at age 61. It also included the Lifetime pension and bridging pension at age 62.
56. Ms S says she would like to know whether she would have been better off had she waited until age 62 to take her benefits. She is therefore requesting that this Office carry out further investigation to establish the position.
57. The Trustee has highlighted that the net overpayment of £1,235, which the Trustee decided not to recover, is higher than any reasonable distress and inconvenience award that the Pensions Ombudsman may be asked to direct.

Ombudsman's decision

58. In Ms S' application to this Office, Ms S complained about the underpayment of pension from October 2009, since it appeared that her pension had been incorrectly calculated from the outset. Ms S acknowledged that her Lifetime pension was underpaid and accepted that the bridging pension was overpaid.
59. Ms S' complaint concerned the unfairness of the Trustee's decision to offset its "1st mistake with the 2nd to limit [its] liability," given the "timeline". Secondly, the alleged failure of Equiniti and the Trustee to directly address this in their correspondence.
60. The mistake in the calculation of Ms S' pension, resulted in a period of overpayment from October 2009 to October 2013. This was followed by a period of underpayment from October 2013 until the pension was corrected with effect from April 2018. However, the overall net effect of that administrative error was that Ms S was overpaid by £1,235.
61. I am satisfied that Ms S has not suffered any actual financial loss as a direct result of the Trustee's decision to recoup part of the overpayment against arrears of Lifetime pension and write off the amount of £1,235. It is therefore immaterial to the outcome of the complaint under consideration whether or not Ms S would have been better off postponing her retirement from the Scheme.
62. Applying the principles set out in *Burgess v BIC*, I am satisfied that there is no limitation defence to the actions taken by the Trustee.
63. Because of the nature of Ms S' complaint, I have also considered the provisions of section 91(6) Pensions Act 1995. Broadly, this provides that if a member disputes the amount of the recoupment, then the trustees cannot recoup the overpaid pension unless they have an order from a competent court.

To the extent that section 91(6) is relevant to Ms S' complaint because there was a dispute about the amount or the terms of recoupment by the Trustee, then the way that the Trustee has sought to adjust the historic over and under payments could be argued to amount to maladministration. However, I do not consider it necessary to make a finding about that, because I am satisfied that overall Ms S has benefited financially from the action already taken by the Trustee. I note that the Trustee has taken the decision not to recoup the remaining net overpayment of £1,235. Consequently, I do not consider that it would be appropriate in these circumstances for me to direct that the Trustee also make a distress and inconvenience award to Ms S.

64. Ms S was entitled to expect that she would receive retirement options that had been correctly calculated. I recognise that Ms S was not provided with correct figures at the time and that the error went unnoticed for several years. The mistake made in the calculation of Ms S' pension and the provision of incorrect retirement figures both amount to maladministration. However, in light of the net overpayment which has been written off, I make no direction against the Trustee in respect of any award for distress and inconvenience.
65. I do not uphold Ms S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
22 January 2020